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CONTENTS

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Penetration of Cultures, Penetration of Crimes: Who Do Borders Protect?

Abstract: The purpose of this paper is to highlight some implications of the creation of closed, culturally alien communities and the possible consequences of their functioning from a criminological and victimological perspective. Various processes emerging since about the second half of the 20th century, in Europe as well as in the United States of America, have caused cultural transformations leading to the emergence of cultural pluralism (polyculturalism, multiculturalism) in various forms. This represents one of the greatest challenges of the modern world on many levels, including prophylaxis and crime prevention. Of particular concern is the issue of assessing the behaviour of an offender belonging to a closed, culturally different group. variants of such a situation can be considered – when the perpetrator and the victim belong to culturally different communities or the same one, and depending on whether the perpetrator's behaviour constitutes an act judged negatively in the closed group to which they belong or whether it fulfils the characteristics of a crime in the legal system of the external community.
Keywords: borders, crime, multiculturalism

Introduction

The topics of this volume of the journal are primarily associated with cross-border crime, against or by refugees and/or migrants. I would like to propose looking at the border issue from a slightly different perspective. The world of the 21st century is, on the one hand, open and multicultural, and various measures are being taken, at least in some parts of it, to make borders the least possible restriction on the movement of people, goods and services. On the other hand, there are tendencies to divide societies into smaller groups, isolated from the others. The criteria for these divisions

are not necessarily related to race or ethnicity. In Poland, for example, it manifests itself, among other things, in the creation of closed housing estates. When a boundary demarcates a gated enclave, its role becomes particularly important, because it prevents what is inside from getting out (or at least helps control the process) and stops factors from the outside world penetrating inside. One may wonder whether it therefore plays a protective role and, if so, who it protects from whom: members of the community in the enclave or residents of the outside world. The subject of this study is not cultural (or multicultural) changes as such, but their consequences in a specific aspect of social life – committing crimes and bearing responsibility for them. The purpose of this paper is to highlight some of the implications of creating closed, culturally alien communities and the possible consequences of their functioning from a criminological and victimological perspective. One can be tempted to put forward a thesis, based on the observation of phenomena existing in society, that borders are increasingly being created to protect the community inside the enclave – its customs, culture, etc. –before those customs culture, etc. can be assimilated into the outside world. The 'owners' of the minority culture are interested in maintaining their own culture in an unchanged shape.

1. Borders in postmodern society

Borders in postmodern society are not just artificial lines drawn on maps according to agreements between the countries involved. In the past, they separated communities with different cultures, speaking different languages, having their own specific customs and a specific religious, moral and legal system. Paradoxically, however, despite this diversity, communities living on the European continent – due to remaining under the influence of similar values rooted in Christianity – had similar approaches to what acts should meet with a response in the form of punishment. The societies were homogeneous, but the rules of behaviour in force in them remained obvious to their members and, due to a fairly high degree of social control as well as the severity and inevitability of punishment for conduct inconsistent with them, were considered binding (even if some members of these societies violated them). This article does not have space to trace the social transformations that led to the situation observed today in detail; they are analysed in the sociological literature, to which I refer readers.[1] This text deals with the current state, so to speak, of the consequences of these changes.

1 E.g. R.K. Merton, Teoria, socjologia i struktura społeczna, Warsaw 2002, pp. 198–200; P. Sztompka, Socjologia. Analiza społeczeństwa, Cracow 2002, pp. 29–32. See also M. Budyn-Kulik, Aksjologiczne podstawy kryminalizacji w społeczeństwie ponowoczesnym, Lublin 2022 pp. 25–37 and the literature cited therein.

Various processes emerging since roughly the second half of the 20th century in Europe, as well as in the United States of America, have led to the deconstruction of hitherto functioning normative regulations and patterns of behaviour.[2] This trend has been reinforced by the rise of factors that weaken social control.[3] The traditional, homogeneous, place-bound society has been transformed into a postmodern (pluralistic)[4] society, characterized by apparent communality, fluidity of norms and values, internal differentiation and lack of attachment to one's own history, culture and territory.[5] In Poland, these changes appeared a little later – at the end of the 20th century, after the political breakthrough – and proceeded somewhat more slowly.[6] In Europe, these spontaneous 'bottom-up' movements, initiated by members of society, were accompanied by certain formal actions at the level of states and their governments. This is because some kind of unifying action had been taken, allowing the free movement of people and goods between countries. These led to the creation of the European Union, within which the role of borders was significantly reduced; they ceased to perform the function of actually separating states, becoming only formal markers of their territories.

These processes have also caused cultural transformations, leading to the emergence of cultural pluralism (polyculturalism, multiculturalism) in various

2 M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 31–33; H. Boutellier, Crime and Morality: The Significance of Criminal Justice in Post-Modern Culture, Dordrecht/Boston/London 2000, p. 5.

3 M. Budyn-Kulik, Aksjologiczne…, *op. cit*., p. 31; Z. Bokszański, O indywidualistach w społeczeństwie współczesnym, 'Studia Socjologiczne' 2009, no. 1, pp. 151–168; J. Mariański, Moralność w procesie przemian, Warsaw 1990, pp. 69–70; M. Jarosz, Problemy dezorganizacji rodziny, Warsaw 1979, pp. 22–39.

4 T. Paleczny, Stosunki międzykulturowe: modele pluralizmu w społeczeństwach 'ponowoczesnych', (in:) K. Golemo, T. Paleczny, E. Wiącek (eds.), Wzory wielokulturowości we współczesnym świecie, Cracow 2006, pp. 14–24.

5 J. Mariański, Moralność w procesie…, *op. cit*., pp. 33–75; I. Borowik, Pluralizm jako cecha przemian religijnych w kontekście transformacji w Polsce, (in:) I. Borowik, T. Doktór, Pluralizm religijny i moralny w Polsce, Cracow 2001, p. 25; Z. Bauman, Płynna nowoczesność, Cracow 2006, pp. 282–312; J. Oniszczuk, Ponowoczesność: państwo w ujęciu postnowoczesnym (kilka zagadnień szczegółowych), 'Kwartalnik Kolegium Ekonomiczno – Społeczne Studia i Prace' 2012, no. 1, pp. 11–40; P. Pieniążek, Transgresje nowoczesności, 'Kultura i Społeczeństwo' 2018, no. 2, p. 206; also see M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 38–48 and the literature cited therein.

6 W. Wrzesień, Współczesne oblicza anomii, 'Ruch Prawniczy Ekonomiczny i Społeczny' 2017, vol. 4, p. 292; J. Mariański, Postawy Polaków wobec norm moralności obywatelskiej i społecznej, 'Uniwersyteckie Czasopismo Socjologiczne' 2017, vol. 20, no. 3, p. 10; M. Leciak, Konflikty międzykulturowe w Polsce w ujęciu karnoprawnym – próba diagnozy problemu, 'Studia Iuridica Toruniensia' 2014, vol. 15, pp. 115–118; J. Warylewski, Wybrane zagadnienia problemów wymiaru sprawiedliwości karnej w Polsce wobec zróżnicowania kulturowego społeczeństwa, 'Studia Iuridica Toruniensia' 2014, vol. 15, p. 199; G. Dziamski, Hybrydyczna tożsamość Europy Środkowej po 1989 r., (in:) W. Kalaga (ed.), Dylematy wielokulturowości, Cracow 2004, pp. 163–176.

forms:[7] relativization, ethnic assimilation, the so-called melting pot of nations or cross-cultural approaches.[8] In Poland, a dualism is clearly marked. In part of the population, as a reaction to the emergence of other cultures, there has been a revival or an intensified sense of ties to one's own territory and a recourse to national identity.[9] In the remaining group, however, there have been tendencies to deny one's own social and/or national identity, accompanied by a questioning or even rejection of native cultural norms which were replaced by eagerly imitated incoming patterns.[10]

Opinions on the consequences of multiculturalism vary. The positives of learning about other cultures, drawing from them and possibly also incorporating immigrant elements into one's own culture, which could lead to the creation of a new quality in the form of original cultural patterns that meet the needs of new pluralistic societies, are emphasized.[11] But little by little, doubts have begun to arise.[12] It has turned out that cultural assimilation is difficult not only because of the possible lack of openness of societies to accepting people with different ethnic roots, but also because of the attitudes of these people. One might be tempted to say that at the time, when cultural differences were significant, cultural mixing did not occur. Incoming persons,[13] especially in large groups, formed their own rather hermetic enclaves within the established community. Typically, these people came from regions of the world that were ethnically attractive to Europeans, who were open to incorporating elements of the immigrant culture into their own, adopting certain

7 P. Sztompka, Socjologia, Warsaw 2009, p. 245; D. Bek, Obrona przez kulturę. Analiza na gruncie polskiego prawa karnego, Warsaw 2018, pp. 53–56; M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 48–49; A. Szahaj, Wielokulturowość: za i przeciw (kilka uwag), (in:) D. Pietrzyk-Reeves, M. Kułakowska (eds.), Studia nad wielokulturowością, Cracow 2010, pp. 25–30; P. Mazurkiewicz, Wielokulturowość a multikulturalizm, 'Chrześcijaństwo, Świat, Polityka: Zeszyty społecznej myśli Kościoła' 2020, no. 24, pp. 242–262; P. Chmiel-Antoniuk, M. Duda, M. Ickiewicz-Sawicka, Kultura a zbrodnia, Czeremcha 2018, pp. 14–28.

8 A. Giddens, P.W. Sutton, Socjologia, Warsaw 2012, pp. 643–646; P. Sztompka, Socjologia, *op. cit*., Warsaw, p. 245; P. Mazurkiewicz, Wielokulturowość…, *op. cit*., p. 246; M. Leciak, Konflikty…, *op. cit*., pp. 112–113; K. Krzysztofek, Pogranicza i multikulturalizm w rozszerzonej Unii, 'Studia Europejskie' 2003, no. 1, pp. 77–94.

9 M. Grzyb, Przestępstwa kulturowo. Aspekty kryminologiczne i prawnokarne, Warsaw 2016, pp. 23–24.

10 E. Wnuk-Lipiński, Świat międzyepoki. Globalizacja. Demokracja. Państwo narodowe, Cracow 2004, pp. 219–227; A. Pasieka, wielokulturowość po polsku o polityce wielokulturowości jako mechanizmie umacniania polskości, 'Kultura i Społeczeństwo' 2013, no. 3, pp. 129–154; J. Nikitorowicz, Tożsamościowe skutki wielokulturowości. Wielość kultur w jednym człowieku czy ekstremizm i separatyzm kulturowy? 'Lubelski Rocznik Pedagogiczny' 2017, vol. 36, no. 3, pp. 13–22.

11 A. Sadowski, Wielokulturowość jako czynnik zrównoważonego i inteligentnego rozwoju polski, 'Optimum: Studia Ekonomiczne' 2016, no. 4, pp. 69–82.

12 A. Szahaj, Wielokulturowość, *op. cit.*, pp. 25–30.

13 I purposely do not use the terms immigrants, refugees, etc., to avoid controversy; for the considerations presented in this study, the formal status of these people is irrelevant.

customs particularly of an external nature (clothing, music, art, food).[14] However, in many cases, it was the newcomers who were not open to assimilation and cultural mixing.[15] This phenomenon can be observed in France or Sweden, among others, and led to so-called ghettoization.[16] In contrast, when newcomers arrived in smaller groups and were culturally similar to the host society, they did not form closed communities, but blended into local life. This was the case in Poland with Ukrainian citizens, for example.[17]

2. The impact of trans-cultural diffusion on typification and crime

The legislature of a country decides what constitutes a crime. When a system of law (especially with regard to criminal law) is created, it is based on some system of values, referring to social axiology.[18] In traditional society, the axiological basis of criminal law was morality, having dimensions which are social (customs, traditions, philosophical systems) and individual (a certain philosophy of life).[19] The system of law, although autonomous, depends on external values, which, incorporated into it and processed by virtue of internal rules of rationality, provide it with meaning and fill it with content.[20] In the context of the present considerations, an external circumstance about which there is great controversy is custom (culture,[21]

14 M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 88–89; National Geographic, Polacy pokochali Festiwale Kolorów. Gdzie i kiedy odbędą się następne imprezy? https://www.national-geographic.pl/traveler/artykul/festiwal-kolorow-kiedy-i-gdzie-sie-odbywa-na-czym-polega-i-kto-pojawil-sie-do-tej-pory-na-scenie (18.09.2022).

15 E. Kużelewska, A. Piekutowska, The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, pp. 24–27.

16 Dziennik.pl, 'Szwecja szokuje raportem o przemocy. "Rząd skapitulował i oddał władzę", https://wiadomosci.dziennik.pl/swiat/artykuly/8173406,szwecja-przemoc-raport.html (19.09.2022); P. Mazurkiewicz, Wielokulturowość…, *op. cit*., p. 244.

17 The situation has changed somewhat and has become more complex after the outbreak of the war in Ukraine, but this is due to specific, extraordinary temporary circumstances (although its duration is, of course, difficult to determine). On the Polish approach to the issue of migrants, see M. Zdanowicz, Poland's Stance on the Refugee and Migration Crisis in the European Union, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, pp. 87–101.

18 A. Kalisz, Klauzula moralności (publicznej) w prawie polskim i europejskim jako przykład regulacyjnej, ochronnej oraz innowacyjnej funkcji prawa, 'Principia' 2013, no. 57–58, p. 197.

19 D. Bunikowski, Idea neutralności moralnej prawa we współczesnych systemach prawnych, (in:) S. Janeczek, A. Starościc (eds.), Etyka, cz. 2, Lublin 2016, p. 543; M.E. Stefaniuk, Skuteczność prawa i jej granice, 'Studia Iuridica Lublinensia' 2011, vol. 16, p. 65.

20 K. Pałecki, Zmiany w aksjologicznych podstawach prawa jako wskaźnik jego tranzycji, (in:) K. Pałecki (ed.), Dynamika wartości w prawie, Cracow 1997, pp. 27–28.

21 See for example J. Helios, W. Jedlecka, Kultura jako czynnik legitymizujący prawo europejskie, (in:) O. Nawrot, S. Sykuna, J. Zajadło (eds.), Konwergencja czy dywergencja kultur i systemów prawnych? Warsaw 2012, pp. 189–198.

customary law[22]), that is, the possibility of allowing the so-called 'cultural defence' in Polish law.[23]

In a traditional, cohesive society, it is possible to identify a system of values and moral norms that is accepted by the majority of its members; in a postmodern society, this is virtually impossible.[24] It is very difficult to find justification for the threat of punishment, especially for acts of a symbolic nature.[25] When new cultural influences blend seamlessly with the existing culture, society evolves, creating a new quality, and the legislator, observing social behaviour, may notice the need for modifications in the field of criminal law. Of course, it remains a matter of choosing a particular direction for criminal policy, whether the legislator views these perceived changes as beneficial and reinforces them, shaping criminal prohibitions and orders accordingly, or whether they consider them undesirable and seek to stamp them out, maintaining the status quo.[26] The protection of indigenous cultural patterns is achieved by preserving existing criminal laws or even tightening them.[27] This is so-called conservative multiculturalism.[28] It does not mean that finding justification for the criminalization of certain behaviours is simple. The choice of axiological basis will then involve a departure from the so-called traditional morality characteristic of a homogeneous society. Since a pluralistic society represents a new, peculiar quality, axiological bases have to be created from scratch. Arguably, they have to be minimalist, and

22 See for example A. Gutkowska, Prawo karne wobec wyzwań wielokulturowości. Przestępstwa kulturowe na przykładzie wymuszonego małżeństwa, (in:) M. Lubelski, R. Pawlik, A. Strzelec (eds.), Idee nowelizacji kodeksu karnego, Cracow 2014, pp. 239–270.

23 See for example J. Van Broeck, Cultural Defence and Culturally Motivated Crimes (Cultural Offences), 'European Journal of Crime, Criminal Law and Criminal Justice' 2001, vol. 9, no. 1, pp. 1–32; A. Kleczkowska, Rola *cultural defence* w wymiarze sprawiedliwości karnej, 'Ruch Prawniczy Ekonomiczny i Społeczny' 2012, vol. 2, pp. 71–83; O. Sitarz, *Culture defence* a polskie prawo karne, 'Archiwum Kryminologii' 2007–2008, vols. 29–30, pp. 643–652; P. Chmiel-Antoniuk, M. Duda, M. Ickiewicz-Sawicka, Kultura…, *op. cit*., pp. 32–35; M.M. Kania, Spory wokół obrony przez kulturę w kontekście debat na temat wielokulturowości, 'Polityka i Społeczeństwo' 2016, vol. 2, no. 14, pp. 151–161; D.C. Chiu, The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism, 'California Law Review' 1994, vol. 82, no. 4, pp. 1053–1125; J.M. Donovan, J.S. Garth, Delimiting the Culture Defense, 'Quinnipiac Law Review' 2007, vol. 26, no. 1, pp. 109–146; J. Bojarski, M. Leciak, Polskie interkulturowe prawo karne(?) – niektóre aspekty tzw. obrony przez kulturę, (in:) A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Lecia (eds.), Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara, Toruń 2012, pp. 75–96.

24 M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 169–179.

25 L. Gardocki, Zagadnienia teorii kryminalizacji, Warsaw 1990, pp. 54–76; M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 198–200.

26 J. Warylewski, Wybrane…, *op. cit.*, p. 197.

27 M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 191–192.

28 D. Bek, Przestępstwa motywowane kulturowo – kierunki możliwych ocen prawnokarnych, 'Chorzowskie Studia Polityczne' 2015, no. 10, p. 129.

criminal law has to be the *ultima ratio*.[29] This would undoubtedly have an impact on a decrease in crime, as criminal laws would include fewer types of criminal acts, contained in provisions that protect the most basic and universally recognized values, such as life. However, this would not translate into a level of social security. After all, behaviours that are currently perceived as socially harmful and punishable would not cease to be acts that cause actual harm to someone just because the legislature decided so.[30] In fact, therefore, it is likely that the number of behaviours actually causing harm would remain at a similar level as in the current situation, or even increase due to the lack of threatening sanctions. Such a situation would be detrimental to the existence and functioning of society, since it is likely that many of its members would be deprived of state protection. This could lead to social life becoming anarchic, with the emergence of frequent individual efforts to administer justice to the perpetrators of wrongdoing and a lack of obedience to the legal norm, since behaviour in accordance with it would not guarantee safety and security.

Paradoxically, a much more complicated situation is created when one can distinguish culturally different groups within a society; let us call them the local community and newcomers. Each of them uses different cultural codes, a different language, has different customs and a separate system of social norms, including moral and legal ones. This is a situation referred to as cultural conflict.[31] Even within traditional society there was some differentiation in language, culture and customs, but not in law. Meanwhile, in a situation where newcomers form a closed group within the established community, we are dealing with two systems: that of the local community – the 'legal' system, guarded by the state, – and that of the newcomers – an informal system, usually at least in some part inconsistent with (and contradictory to) the formally binding system. There is usually no flow of information between these groups. The newcomers often do not know the language of the local community. Usually, the state makes an effort to create opportunities for newcomers to familiarize themselves with the social and legal rules of their place of residence. However, newcomers are not always interested in learning and assimilating the local rules of conduct; they remain in a closed enclave, and so as long as they commit prohibited acts within it, the state in whose territory they remain does not activate the coercive apparatus.[32]

29 M. Budyn-Kulik, Aksjologiczne…, *op. cit*., pp. 174–175, 216.

30 Another question beyond the scope of this study is whether a cultural factor may be relevant in assessing the degree of social harm. See D. Bek, Znaczenie odmienności kulturowej sprawcy dla oceny stopnia społecznej szkodliwości czynu zabronionego, 'Studia Prawnicze. Rozprawy i Materiały' 2014, vol. 1, no. 14, pp. 109–122.

31 P. Chmiel-Antoniuk, M. Duda, M. Ickiewicz-Sawicka, Kultura…, *op. cit*., pp. 31–32; M. Grzyb, Przestępstwa…, *op. cit*., p. 64; also see D. Bek, Przestępstwa…, *op. cit*., pp. 119–131.

32 A. Kleczkowska, Rola…, *op. cit*., pp. 71–72.

3. Selected victimological and criminological aspects of crime in enclaves

Seemingly, such a situation (the existence of an isolated, enclosed community) benefits both the newcomers and the local community. The enclave border protects the newcomers from external crime. It is worth recalling that according to von Hentig, such an immigrant community is more vulnerable to victimization due to unfamiliarity with the language and local rules of conduct (the legal system). He singled it out as a separate general class in the classification of crime victims.[33] Lack of contact with the local community, or only limited contact, undoubtedly reduces the risk of external victimization. The issue of the level of internal victimization, on the other hand, is somewhat more complicated. On the one hand, the state (the local community) has no insight into what is happening inside the enclave, and thus cannot control the level of crime or influence the legal consciousness of local community members to form appropriate attitudes. The level of crime inside the enclave remains undisclosed. However, it must not exceed a certain level, as this could attract the interest of state authorities. This implies the need for the enclave to create its own alternative to the state legal system and the bodies that guard it. Among other things, their task is to ensure that information about criminal acts committed and the types of responses to them is maintained inside the (enclave) borders. From the perspective of the newcomer, the social rules in the enclave are no different from those they would have to respect in their own country. The level and risk of internal victimization should not be significantly higher than before they left their homeland.

However, maintaining such an enclave as a kind of 'exterritorial area' would not be appropriate for a number of reasons. Allowing the cultivation of customs that are completely foreign to the local community in the name of a misconceived openness to foreign cultures could lead to a number of negative social consequences.[34] One of these could be an increase in crime and a change in its structure. This is clearly seen when the various possible arrangements of perpetrator and victim are analysed: the perpetrator and the victim belong to the newcomer community; the perpetrator belongs to the newcomer community and the victim to the local community; the perpetrator belongs to the local community and the victim to the newcomer community; both perpetrator and victim belong to the local community. The last situation is beyond the scope of the subject of this paper. In the case where the perpetrator belongs to the local community and the victim does not, one can consider the commit-

33 H. von Hentig, The Criminal and His Victim: Studies in the Sociobiology of Crime, New York 1948, pp. 414–418.

34 M. Grzyb, Wymuszone małżeństwa – kryminalizować, czy nie kryminalizować? 'Biuletyn PTK' 2010/2011, no. 19, pp. 67–85; M. Dudek, Czy każda kultura zasługuje na obronę? Kilka wątpliwości dotyczących cultural defence i prawa karnego w dobie multikulturalizmu, 'Archiwum Filozofii Prawa i Filozofii Społecznej' 2011, no. 2, pp. 47–59.

ting of a so-called hate crime, which is also outside my scope.[35] The other two options will be discussed below.

3.1. Committing of a criminal act when the perpetrator and the victim belong to the same cultural circle

If both the perpetrator and the victim belong to the same cultural circle and are members of a closed community, the likelihood of disclosure of information about the committing of the criminal act is low. The contractual boundaries of the enclave determine the extent of the 'internal' jurisdiction of informal bodies. At the same time, they also provide a barrier, so that members of the local community remain relatively safe. From their point of view, covert, internal behaviour is indifferent. However, the question arises of whether the state should also remain indifferent.[36] A lack of interest in the internal functioning of the newcomer community means acceptance of possible behaviour that does not comply with national criminal norms and the emergence of an alternative legal system within the state. This is an unacceptable state of affairs from the perspective of the proper functioning of the state, which loses control over compliance with the law in its own territory. Depending on the assessment of the behaviour in question in the law of newcomers and that of the local community, the consequences of such a situation will vary somewhat.

If the perpetrator and the victim belong to the same cultural circle, the following options are possible: when the committed act is a crime under local law but not in the newcomer group; when the committed act is a crime under newcomer law but not under local law; and when it is a crime under both local and newcomer law. For obvious reasons, it is outside the scope of consideration when the act is not a crime in any of these communities.

The first state of affairs is that the perpetrator and the victim belong to the same cultural circle, and the act is a crime under local law but not in the group of newcomers. It is important to remember that even if a given behaviour is accepted in the community of newcomers and is not threatened with punishment, this does not mean that it is not perceived as inappropriate and the person against whom it is directed does not perceive it as a harm. In such a case, the victim is deprived of legal protection both inside and outside the enclave. It seems that, among other things, this was the situation that von Hentig had in mind when he created the general class of immigrants and minorities. The enclave's border restricts the aggrieved person from seek-

35 See for example M. Duda, Przestępstwa z nienawiści w świetle teorii i praktyki orzeczniczej, (in:) W. Pływaczewski, P. Lubiewski (eds.), Współczesne ekstremizmy. Geneza, przejawy, przeciwdziałanie, Olsztyn 2014, pp. 68–79; P. Chmiel-Antoniuk, M. Duda, M. Ickiewicz-Sawicka, Kultura…, *op. cit*., pp. 53–74; M. Leciak, Konflikty…, *op. cit*., pp. 119–120.

36 A. Śliz, M.S. Szczepański, Pożądane, dozwolone czy zakazane? Refleksje o granicach wielokulturowości, (in:) M. Biernacka, K. Krzysztofek, A. Sadowski (eds.), Społeczeństwo wielokulturowe – nowe wyzwania i zagrożenia, Białystok 2012, pp. 37–56.

ing help – not only because of the language barrier and lack of knowledge about the structure and functioning of the authorities obliged to provide assistance and about the rights to which they are entitled, but primarily because of the internal imperative of loyalty to one's own group. In this case, overstepping the mark in seeking help could entail serious consequences for the victim – from being thrown outside the community to loss of life.

The behaviour which is a crime outside the enclave can also be perceived in the community of newcomers as perfectly acceptable, unquestionable as to moral judgements, and not socially harmful. From an external, victimological point of view, we are dealing here (respectively) with a so-called victimless crime. Although for an objective observer a person is harmed, subjectively he/she does not perceive it that way, but rather he/she approves of (or condones) the perpetrator's behaviour.

The problem arises as to whether the local community (and the state) should interfere in such a situation. It seems that neither the fact of belonging to the same cultural group nor the fact that the person concerned has given consent to such behaviour against him/her should determine the legality of the behaviour in question. An example of this could be sexual intercourse with a minor under the age of 15.[37] The rationale for the relevance of consent to harm functioning in criminal law would have to be applied here, respectively. If the perpetrator's behaviour harmed things that cannot be freely disposed of under criminal law (such as life or health), the victim's consent would remain irrelevant. The situation would have to be evaluated similarly if other requirements, such as the age of the consenting party, were not met. Making a failure to hold the perpetrator criminally liable dependent on the customs of the group of newcomers would result in different treatment of residents of a given state, which would be incompatible with the standard of equal treatment and non-discrimination.[38] In Poland, this derives from Article 32 of the Constitution.

The circumstance that the victim gave consent, valid from the perspective of his/her own ethnic group but irrelevant under domestic criminal law, could in some cases be taken into account on general principles as a mitigating circumstance affecting the penalty. However, it should be borne in mind that, in the case of certain crimes, the state may be obliged to omit cultural justification by conventions to which it is a party. This is the case, for example, with violence against women.[39] In such a personal arrangement, the question of the applicability of the so-called culture defence becomes relevant .

The second situation is that the perpetrator and the victim belong to the same cultural circle, and the act is a crime under the law of the newcomers but not under

37 M. Leciak, Konflikty…, *op. cit*., p. 121.

38 M.M. Kania, Spory…, *op. cit*., pp. 153–155; O. Sitarz, *Culture*…, *op. cit*., pp. 647–649.

39 Art. 12 pkt 5, Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, sporządzona w Stambule dnia 11 maja 2011 r. (Dz.U. poz. 961).

local law. In this case, the perpetrator's behaviour itself is outside the interest of the state. On the other hand, possible acts of repression inflicted by the informal internal justice organs in the enclave, if they meet the criteria of a crime (e.g. deprivation of liberty, flogging, mutilation), should trigger state interference. If these internal sanctions do not fulfil the hallmarks of the type of criminal act, the fact of imposing some kind of sanctions on the perpetrator should be treated on a similar basis to disciplinary punishment within a professional corporation.

Another situational arrangement is that the perpetrator and victim belong to the same cultural circle and the act is a crime under both local and newcomer laws. If the perpetrator's behaviour fulfils the hallmarks of a crime, they should be punished under the rules of the local community (in the state), regardless of whether they have suffered any sanctions inside their own community, under its laws. What remains relevant is the question of whether representatives of the internal justice system should be held accountable if they violate the provisions of state criminal law.

3.2. Committing a criminal act when the perpetrator is a newcomer and the victim is a member of the local community

This group can also include cases where the perpetrators belong to the same enclosed community (or to two different enclosed communities), but the act is committed beyond the enclave – outside. This is a situation where the enclave boundary is not a barrier to internal crime. From the point of view of the local community, it is the least desirable and most dangerous situation.[40] The enclave boundary in this case

40 Sweden is currently struggling with this problem; see PolskieRadio24, 'W Sztokholmie działają 52 zorganizowane grupy przestępcze. Gangi są coraz brutalniejsze, https://polskieradio24.pl/5/1223/artykul/2842157,w-sztokholmie-dzialaja-52-zorganizowane-grupy-przestepcze-gangi-sa-coraz-brutalniejsze (19.09.2022); Szwecja.net, '"Zakazane dzielnice" w Szwecji', http://szwecja.net/NOW/fs-now/2017/Zakazane.html (19.09.2022); Nettavisen Nyheter, 'Oto cała prawda o szwedzkich strefach "no-go"', https://www.nettavisen.no/polsk/oto-ca-a-prawda-o-szwedzkich-strefach-no-go/s/12–95–3423368624 (19.09.2022); TVN24, 'Muzułmański problem Szwecji. Płonące przedmieścia Sztokholmu', https://tvn24.pl/swiat/muzulmanski-problem-szwecji-plonace-przedmiescia-sztokholmu-ra472381–3413500 (19.09.2022); TVP.info, 'Wzrost przestępczości w Szwecji. Szef policji podał przyczyny', https://www.tvp.info/57904971/szwecja-szef-policji-anders-thornberg-wzrost-przestepczosci-wynika-z-migracji-i-braku-integracji (19.09.2022); Forsal.pl, 'Rekordowa liczba strzelanin w Szwecji. "Potrzebujemy przełamać negatywny trend", https://forsal.pl/swiat/aktualnosci/artykuly/8082046,rekordowa-liczba-strzelanin-w-szwecji-potrzebujemy-przelamac-negatywny-trend.html (19.09.2022); M. Gębski, 'Szwecja na czele niechlubnego zestawienia… czas na zmianę?', https://www.forum-ekonomiczne.pl/szwecja-na-czele-niechlubnego-zestawieniaczas-na-zmiane/ (19.09.2022); Dziennik.pl, 'W Szwecji ginie najwięcej na million mieszkańców osób w strzelaninach w Europie', https://wiadomosci.dziennik.pl/swiat/artykuly/8240499,szwecja-przestepczosc.html (19.09.2022); Dziennik.pl, 'Szwecja szokuje…, *op. cit.* On Norway, see PolskieRadio24, '"To może się powtórzyć". Po ataku w Kongsbergu norweskie służby wskazują na problem "otwartego" społeczeństwa', https://polskieradio24.pl/5/1223/artykul/2833322,to-moze-sie-powtorzyc-po-ataku-w-kongsbergu-norweskie-sluzby-wskazuja-na-problemy-otwartego-spoleczenstwa (19.09.2022).

works to the advantage of the enclosed group, making it difficult or impossible to capture the perpetrator, helping them to avoid external justice.

When an act targets a member of the local community, the state usually tries to activate the criminal justice system. The committing of the act may or may not be related to cultural or ethnic differences. The perpetrator may commit a criminal act belonging to 'ordinary' crime, such as theft. In some cases, the newcomer's behaviour may result from a lack of knowledge of local customs or social norms and an inappropriate, culturally anchored, interpretation of, for example, body language. The perpetrator's conduct may then be viewed as an error, primarily in law. In such a situation, it seems that invoking the culture defence is not justified.

The most difficult situation arises when crime from the enclave 'comes out' in a wide area, for example, two organized crime groups formed within two different enclosed communities fight for influence and territory. Although, ostensibly, members of the local community are not the focus of the perpetrators, they may become accidental victims, and their quality of life and sense of security is reduced.

Conclusions

Multiculturalism and the diffusion of cultures represent some of the greatest challenges of the modern world, on many levels. One of them is crime prevention and prevention. None of the presented attitudes towards different cultures (assimilation, relativization, etc.) and none of the adopted models of multicultural society allow the avoidance of problems[41] or guarantee that existing differences in customs, beliefs and social rules will not generate situations leading to the committing of criminal acts. Openness to new cultural patterns must be balanced with the need to ensure security – both for newcomers and members of the local community.

The smooth interpenetration of cultures, when they are characterized by significant diversity in terms of adopted moral and legal systems, may be unfavourable from the perspective of building the legal awareness of society and shaping appropriate attitudes to the observance of the law. Finding an axiological compromise may turn out to be impossible or very difficult, which may lead to negative consequences in the form of disobedience to a law perceived as unjust.

The existence of a closed, isolated community within the state, different from the 'indigenous' inhabitants in terms of culture, customs and law, may lead to situations that are complicated in terms of victimology and criminology. The most problems arise when the perpetrator and the victim belong to two different groups, the enclave and the local inhabitants. Allowing a state to exist within the state, as an 'extraterritorial' group governed by its own laws and not recognizing local laws, is danger-

41 See more in D. Mikucka-Wójtowicz, R. Kopeć (eds.), Kwestie narodowościowe w świetle procesów integracyjnych w Europie, Cracow 2009.

ous in many respects. It can even lead to undermining the sovereignty of the state. It seems that the solution that potentially causes the fewest negative consequences is relatively conservative multiculturalism, consisting in introducing into the domestic legal order those solutions that are not obviously inconsistent with domestic regulations. This study is of a contributory nature; a thorough analysis of the presented issues would require a much more extensive monographic study.

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The New Pact on Migration and Asylum: Another Step in the EU Migration-Security Continuum or Preservation of the Status Quo?

Abstract: In 2020 the New Pact on Migration and Asylum was presented as a normalization of EU migration, asylum and border management policies in the EU, a much-needed reform which is supposed to strike a balance between security, solidarity and protection of human lives. The aim of this article is to investigate to what extent the proposed reform is changing the modes and trajectories of the securitization of migration in the EU. In doing so, it focuses on specific security logics promoted in the text, discussing how different iterations of security are strengthened and/or marginalized in the EU securitizing framework. Building on the approach of 'securitization as the work of framing', the article indicates that the pact has strengthened the risk-management and resilience-centred security logics while at the same time downplaying the role of humanitarianism. It also reveals a strong role for 'exceptionality' as a security logic, which has gained prominence especially in relation to crisis management and a wider application of militarized and robust measures.
Keywords: European Union, migration management, migration-security nexus, securitization

Introduction

The 'migration crisis' of 2015 generated significant momentum for the development of more securitizing policy frameworks, which have been pulling broadly understood EU migration policies deeper into the realms of security discourse and practice. Evidence of this trend can be observed in the examples of the (re)development of Frontex, an increase of military measures used in border control or the rise

of dataveillance activities.[1] Nevertheless, these increased security measures have been introduced under exceptional situations, in crisis mode and with the aim of regaining control over the EU migration, asylum and border protection systems rather than to set out long-term policies. The newest reform of EU migration policy, the so-called New Pact on Migration and Asylum, is supposed to represent a sustainable perspective and a step towards more resilient migration management framework. As Ursula von der Leyen underlined during the launch of the pact, 'the old system no longer works. The Commission's Package on Migration and Asylum, which we present today, offers a fresh start. Many legitimate interests have to be brought into balance. We want to live up to our values and at the same time face the challenges of a globalised world.'[2] In the view of the Commission, the reform is supposed to represent the new order and a much-needed consensus between responsibility, solidarity and security.

As the securitization practices related to the 2015 'migration crisis' have been well researched, the dynamic development of the EU approach to migration and border security requires further inquiry into the securitization practices produced on the EU level. That is why the aim of this article is to investigate to what extent the new reform, here understood as a securitizing move, attempts to change the modes and trajectories of securitization of migration in the EU. In doing so, the paper focuses on specific security logics promoted in the pact, discussing how different iterations of security are strengthened and/or marginalized in the EU securitizing framework. The analysis is based on the approach of 'securitization as the work of framing', which is tuned to the so-called tangled nature of the securitization process. This specific perspective is reflected in the intertwining of security logics, which to different degrees impact the way the EU forms its key responses and frameworks vis-à-vis increased migratory flows.[3]

The article is structured as follows: firstly, it focuses on a discussion of the securitization framework as an analytical approach, explaining both the traditional and the tangled perspectives on the securitization process. Further, the article provides an overview of the methods applied in the analysis. The third section briefly describes the migration-security nexus in the EU, including its key securitizing logics and characteristics. The fourth part is devoted to a securitization analysis of the New Pact on Migration and Asylum, offering a discussion of the impact of the document on the current relationship between migration and security in the EU. The paper ends with conclusions.

1 M. Stępka, Identifying Security Logics in the EU Policy Discourse: The 'Migration Crisis' and the EU, Cham 2022.

2 Press statement by President von der Leyen on the New Pact on Migration and Asylum, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1727 (20.03.2022).

3 M. Stępka, Identifying…, *op. cit.*

1. Securitization as an analytical framework

Securitization theory has become increasingly popular among students and researchers in migration and security studies.[4] The theory was introduced by academics associated with the so-called Copenhagen School, who promoted the idea of the discursive construction of security through speech acts – specific utterances of a performative nature which, when spoken by a powerful agent (i.e. a securitizing actor), bring security into being.[5] As explained by Fijałkowski and Jarzębski, securitization is a discursive process through which an intersubjective understanding is constructed within a political community to treat something as an existential threat to a valued referent object (i.e. an object that should be protected), and to enable mobilization of urgent and exceptional measures to deal with the threat.[6] However, according to many securitization researchers the production of securitizing speech acts is not enough. Powerful actors initially produce securitizing moves, which are supposed to issue a warning or invoke a sense of existential uncertainty and emergency. For securitization to be successful, these moves need to gain societal and political saliency and, more importantly, the approval of a relevant audience (e.g. society), which ultimately decides whether a proposition of a threat is acceptable and whether exceptional security measures (e.g. the military) should be mobilized in response to the perceived threat.[7]

This traditional approach has been widely contested and redeveloped for the specific purposes of studying the securitization process in different contexts. Many scholars have criticized the Copenhagen School for a too-elitist focus on securitizing actors;[8] for limiting the notion of security to the Schmittian idea of 'exception' as a way of breaking 'normal politics';[9] for limiting securitizing practices to speech acts, leaving other discursive forms and security practices outside the framework;[10] and

4 S. Baele, D. Jalea, Twenty-Five Years of Securitization Theory: A Corpus-based Review, 'Political Studies Review' 2022, online edition, https://doi.org/10.1177/14789299211069499 (17.11.2022), p. 6.

5 Ł. Fijałkowski, Teoria sekurytyzacji i konstruowanie bezpieczeństwa, 'Przegląd Strategiczny' 2012, vol. 1, no. 2, p. 159.

6 Ł. Fijałkowski, J. Jarząbek, Between Emergency and Routine – Securitisation of Military Security in Iran and Indonesia, 'Third World Quarterly' 2019, vol. 40, no. 9, p. 1671.

7 A. Côté, Agents without Agency: Assessing the Role of the Audience in Securitization Theory, 'Security Dialogue' 2016, vol. 47, no. 6.

8 J. Huysmans, What's in an Act? On Security Speech Acts and Little Security Nothings, 'Security Dialogue' 2011, vol. 42, no. 4/5.

9 O. Corry, Securitisation and 'Riskification': Second-Order Security and the Politics of Climate Change, 'Millennium – Journal of International Studies' 2012, vol. 40, no. 2, pp. 235–258.

10 A. Massari, Visual Securitization: Humanitarian Representations and Migration Governance, Cham 2021.

for neglecting the interpretative complexity of security and the variety of security logics that proliferate in the securitization process,[11] to name a few.

Building on the new wave of securitization literature, this article applies the approach of 'securitization as the work of framing'. Here, securitization is not driven by speech acts but by the process of framing. In other words, securitization is about the 'mobilization of security-related perceptions in the minds of targeted empowering agents and audiences, allowing incorporation of these perceptions into the common schemata of interpretation'.[12] It utilizes the notion of tangled security and argues that instead of fixating on a single iteration of security based on existential threats and exceptional security measures, securitization should embrace multiple logics and interpretations that intertwine and collide in the process of constructing security.[13] Here, security logics are understood as discursive pronouncements that produce a particular social order. They are the essence of specific theoretical assumptions about the meaning of security, reduced to 'an ensemble of rules of grammar that is immanent to security practice and that defines the practice in its specificity'.[14] Table 1 provides an overview of the security logics (i.e. 'exceptionalist' security, risk and resilience) which have been commonly applied in securitization research and which have been recognized as an important part of the EU migration-security nexus. They will be used for the purposes of further analysis.

Table 1. Security logics – an overview

<table>
<tr><th>Logic</th><th>'Exceptionalist' security</th><th>Risk management</th><th>Resilience</th></tr>
<tr><td rowspan="2">Representation of security problems</td><td rowspan="2">– unambiguous
– personal dimension
– external origin
– alien nature
– construed in terms of existential and 'brutal' threats</td><td colspan="2">– risk based on a friend–enemy continuum
– impersonal correlation of factors liable to produce uncertainty
– varying degree of concreteness and gravity
– ambiguous origin (emphasis on internal)
– interconnected</td></tr>
<tr><td>– construed in terms of manageable risks
– uncertain materialization of negative consequences</td><td>– construed in terms of shocks and disturbances
– certain materialization, inevitable nature</td></tr>
</table>

11 T. Balzacq (ed.), Contesting Security: Strategies and Logics, New York/London 2015.
12 M. Stępka, Identifying…, *op. cit.*, p. 54.
13 *Ibidem.*
14 J. Huysmans, The Politics of Insecurity: Fear, Migration and Asylum in the EU, New York/London 2006, p. 28.

Referent object	– state-related, unambiguous – passive nature,managed by other actors – often construed in relation to territoriality and sovereignty of referent objects	– different degrees of concreteness – networked and interdependent – passive nature, managed by other actors (e.g. security agencies)	– construed as active contributors to security – devolved
Security measure (nature, temporality)	– exceptional, militaristic – reactive nature – short-term – bypass normal political procedures – mobilize significant amounts of force and resources	– normal, institutionalized forms of governance based on broad cooperation within the security realm – conventional, long-term security actions – orientation to the future – orientation to the internal dimension – preventive measures – practices of control and surveillance – management of risks	– decentralized and devolved measures – maintenance, adaptation and transformation of the system
Objective	– eradication of existential threats in order to secure the collective survival of a socio-political order – status-quo orientation	– equilibrium and continuation of normal activities within acceptable risks – risk avoidance, mitigation of negative consequences	– building up ability to withstand shocks and disturbances – elimination of extreme vulnerabilities within the system

Source: M. Stępka, Identifying…, op. cit., pp. 42–43.

Methods 2

In order to investigate the securitization process and its supporting logics, this article utilizes the frame-narrative approach. As the securitization framework dictates a predominant focus on seminal and strategic discourse, the paper analyzes how the New Pact of Migration and Asylum produces securitizing moves by framing and narrating the relationship between migration and security, diagnosing, evaluating and prescribing remedial actions to migration-related security problems. Each of these analytical segments plays a specific role in the securitization process. As explained by Stępka, 'the diagnosis of the security problem concentrates on its root causes, initial referent objects and sources of threats; the evaluation focuses on the attribution of blame (naming the key actors, culprits responsible for the instigation of threats and the security problem), as well as parties responsible for dealing with the problem; lastly, the remedial actions segment is devoted to conceptualization of specific policy responses to defined threats'.[15] In reality, framing is a messy process and the above-mentioned segments often overlap and intertwine. Following Boräng et al., I utilize a computer-assisted qualitative text analysis to probe securitizing frame-narratives, which are indicative of the underlying logics of securitization.[16]

15 M. Stępka, Identifying…, *op. cit.*, p. 8.

16 F. Boräng et al., Identifying Frames: A Comparison of Research Methods, 'Interest Groups & Advocacy' 2014, vol. 3.

3. A brief insight into security logics and the migration-security continuum in the EU

As noted by van Munster, since the early beginnings of the Schengen cooperation the EU has been developing a specific securitizing continuum comprised of a series of consecutive and logically connected security discourses and practices, which unambiguously link the issues of immigration, asylum and visas to questions of security and border control as broadly understood.[17] The securitization literature indicates that the EU migration-security continuum has not been following just one traditional securitizing logic, centred on exceptional and extraordinary security means. Instead, the process has been reflected predominantly in a mixture of risk management, resilience coupled with elements of 'exceptionalism', and humanitarianism.[18]

Risk management and resilience are not typical securitizing logics, as they operate below the threshold of traditional national and 'exceptionalist' security.[19] The managerial- and resilience-centred approaches are oriented on the anticipation and control of populations of risky, uncertain, threatening and unidentified migrants on the one hand and a culture of preparedness and robustness of border and asylum systems on the other.[20] As a result of the 'migration crisis' of 2015, the EU has only strengthened these logics by investing in resilient and smart borders, dataveillance capabilities and interoperability.[21] 'Exceptionalist' security or humanitarianism have also been present in the continuum but mostly as supplementary logics, especially with respect to policy actions deployed on EU borders. After the 'migration crisis' these two logics appear to intertwine with the logics of risk management and resilience. This can be observed in the framing and application of Frontex-militarized border operations focused on saving lives as well as practices of the capture, identification, containment, return of irregular immigrants.[22] Similarly, humanitarianism and 'exceptionalism' come into play in relation to Common Security and Defence Policy (CSDP) border operations, which are supposed to save lives, defend and monitor EU borders, and dismantle transborder organized crime at the same time.

17 R. van Munster, Securitizing Immigration: The Politics of Risk in the EU, New York/London 2009.

18 M. Stępka, Identifying…, *op. cit.*

19 The concepts of risk and resilience have been embraced by securitization scholars' research as important logics influencing the process of constructing security. See P. Bourbeau, Resiliencism: Premises and Promises in Securitization Research, 'Resilience' 2013, vol. 1, no. 1; O. Corry, Securitisation…, *op. cit.*

20 M. Stępka, Identifying…, *op. cit.*

21 Interoperability is concerned with the ability of the EU internal security IT systems (e.g. Eurodac, Schengen Information System, Visa Information System) to exchange data and enable the sharing of information.

22 A. Niemann, N. Zaun, EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives, 'Journal of Common Market Studies' 2018, vol. 56, no. 1.

The intertwinement of different logics can also be observed in regard to practices increasing the resilience of the EU asylum system, which are often discursively linked to the robustness of external border protection.[23] Both systems are supposed to withstand shocks and disruptions caused by increased migratory inflows. In this vein, the EU migration-security discourse has been emphasizing the need to brace itself for the next waves of migration crisis, promoting the culture of preparedness. Here, 'exceptionalism' comes into play with regard to the externalization and militarization of EU migration management. The EU has committed its military and financial capabilities to expand the idea of 'Fortress Europe' onto its neighbourhood and beyond. With the help of military capacity-building missions (e.g. EUCAP Mali) and trust funds, the EU is supposed to increase the border and societal resilience of countries of origin and transit so that they are able to contain possible migratory movements within their borders.[24] The next section of this paper investigates how the New Pact on Migration and Asylum fits into this continuum and whether it brings any major changes in regard to securitizing practices deployed at the EU level.

4. The New Pact on Migration and Asylum – another step in the EU securitizing continuum?

The Commission frames the New Pact on Migration and Asylum as a comprehensive and common response to the growing complexity of migratory movements and a much-needed reform of EU asylum and border protection policies.[25] As the Agenda on Migration was introduced in response to a specific event and was driven by crisis politics, the pact is supposed to calmly diagnose and evaluate the post-crisis situation and 'build a system that manages and normalizes migration for the long term and that is fully grounded in European values and international law'.[26] In this spirit, the document ambitiously aims to improve the common approach to migration and border security by proposing a refreshed common European framework for migration and asylum management, a robust system for crisis preparedness, a strengthened approach to integrated border management, a reinforced approach to the fight against migrant smuggling, a better relationship with international partners and a new framework for attracting skills and talent to the EU.[27] Most of these ele-

23 R. Paul, C. Roos, Towards a New Ontology of Crisis? Resilience in EU Migration Governance, 'European Security' 2019, vol. 28, no. 4.

24 A. Niemann, N. Zaun, EU Refugee…, *op. cit.*

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the New Pact on Migration and Asylum, COM/2020/609 final, p. 3, https://eur-lex.europa.eu/legal-content/PL/ TXT/?uri=CELEX%3A52020DC0609&qid=1607428374739 (20.03.2022).

26 *Ibidem*, p. 1.

27 *Ibidem*.

ments feed on different securitizing logics and to different degrees weave migration as broadly understood, especially in its irregular form, deeper into the tapestry of the EU security discourse and practice.

The diagnosis of the post-migration crisis is the starting point for the framing process. It sets the tone for the securitization, defining the root causes of the problem, initial referent objects and threats. From the beginning, the pact mostly follows the EU migration-security continuum and diagnoses migration-related security issues predominantly using a mixture of resilience, risk management and also 'exceptionalist' security logics. At this point, it should be noted that the presented analysis does not explicitly elaborate on the logic of humanitarianism, as it has been visibly downplayed in the document and mostly referenced in relation to the EU involvement in search and rescue operations.

Risk management and resilience-driven securitization are reflected in the EU's approach to irregular migration, here framed as a disruption that requires management, as well as the development of capabilities that allow the mitigation of the negative consequences of potentially growing migratory flows. In this spirit, the document clearly differentiates between legal and desirable mobility and illegal, undesirable, irregular and potentially uncontrollable forms of border crossing.[28] The new pact, in line with risk and resilience thinking, suggests that the EU should be nurturing early-warning capabilities as well as a culture of preparedness. It is supposed to be able to withstand shocks stemming from increased irregular migration and bounce back to a situation where the Schengen zone and the mobility of EU citizens remain unharmed. As the document stresses, 'the EU must be ready to address situations of crisis and force majeure with resilience and flexibility – in the knowledge that different types of crises require varied responses'.[29] What is quite remarkable for the EU migration discourse is the acknowledgement that there are factors beyond its control, related to force majeure, and scenarios which may require mobilization of certain extraordinary policy solutions.[30] This particular type of diagnosis explicitly opens the framing process to a more robust application of 'exceptionalist' security logic, which will manifest itself in the later phases of the framing process.

The key referent objects, defined in the document, are the EU, the Schengen zone, freedom of movement and the integrity of the broadly understood common framework for migration management. Following the rhetoric of risk and resilience,

28 The New Pact on Migration and Asylum plans to support legal mobility with such programmes as the EU Talent Pool, the reformed EU Blue Card Directive, the revised Directive on Long-Term Residents, the revised Single Permit Directive and the revised Directive on Students and Researchers.

29 COM/2020/609 final, p. 11.

30 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020PC0613 (20.03.2022).

the document often refers to the need for a 'durable', 'robust', 'effective', 'swift' and 'comprehensive' migration and asylum management system that can provide certainty and clarity for EU citizens as well as for refugees arriving in Europe.[31] In doing so, the new EU approach must be able to address a wide catalogue of structural deficiencies which lead to 'divergent standards of protection, inefficient procedures and encourage the unauthorized movement of migrants across Europe in search of better reception conditions and residence prospects, thus having undesirable effects on the Schengen area' – one major achievement of European integration.[32] In this regard, the pact stresses the importance of an effective return policy, which did not work in 2015 and 2016 and which should be considered as one of the key priorities of the new migration management system.

Evaluation of security challenges shows a continued use of the rhetoric of risk and resilience, but also includes stronger traces of 'exceptionalist' security, driven by a more explicit definition of the enemy and a suggestion of mobilization of extraordinary means. In this sense, while attributing blame for uncontrolled migratory flows, the document stresses the destructive and dangerous impact of human smuggling. In line with the migration-security continuum, transborder human smuggling and other forms of transborder organized crime are defined as a clear and present danger to the EU migration and border management system as well as to irregular migrants. As stated in the document, smuggling 'involves the organized exploitation of migrants, showing scant respect for human life in the pursuit of profit. Therefore, this criminal activity damages both the humanitarian and the migration management objectives of the EU.'[33]

The new pact touches upon the issue of the facilitation of human smuggling and the criminalization of pro-migrant NGOs and private citizens providing help to migrants at sea. Here, the EU applies elements of humanitarian framing, referring to the universal responsibility to help migrants at sea and a need for more coordinated cooperation during search and rescue activities. While the Commission is satisfied with the effectiveness of the framework, it recognizes the need to 'bring clarity to the issue of criminalisation for private actors through guidance on the implementation of the counter-smuggling rules, and [to] make clear that carrying out the legal obligation to rescue people in distress at sea cannot be criminalized'.[34] A different tone is used in relation to illegal employment, which the pact recognizes as one of the 'pull' factors fuelling human smuggling and irregular migration into the EU. In light of the document, national authorities need to ensure the implementation of ex-

31 It should be noted that the document defines refugees as predominantly women and children.

32 A. Doliwa-Klepacka, The New Pact on Migration and Asylum as a Response to Current Migration Challenges: Selected Issues, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 17.

33 COM/2020/609 final, p. 16.

34 *Ibidem*, p. 17.

isting EU rules, especially the Employers Sanctions Directive, which is indispensable in deterring third-country nationals staying illegally.[35] As the EU takes a portion of responsibility for search and rescue and combating human smuggling, especially in regards to establishing legal and operational frameworks, it also points towards the need for more resilience-centred cooperation with third countries, which should allow more balanced responsibility-sharing. This includes increasing the resilience of third countries through support and 'capacity-building both in terms of law enforcement frameworks and operational capacity, encouraging effective action by police and judicial authorities'.[36]

One of the most pronounced threads in the discussion about the future of the common migration and asylum management framework is the attribution of responsibility, and more precisely the issue of solidarity within the EU. The pact proposes a revision of the concept of solidarity, suggesting a more flexible variant than the one discussed in 2015 and 2016. The core of the reform is supposed to revolve around yet another recast of the Dublin Regulation, entitled the Asylum and Migration Management Regulation.[37] The new solidarity mechanism is supposed to be adjusted to the dynamic nature of migratory movements, including mixed flows and the geographical location of the crisis.[38] It should also be universal, in the sense that EU members should take a share of the burden and responsibility for managing the crisis situation. Yet the element of solidarity is not driven by a rigid framework, but rather is envisaged as a choice open to Member States, especially those strongly opposing the mandatory relocation scheme.[39] The proposed solidarity mechanism introduces alternatives to relocation, primarily based on return sponsorship, 'capacity building, operational support, technical and operational expertise, as well as support on the external aspects of migration'.[40] The solidarity mechanism should be built on common trust and monitoring of the resilience and vulnerability of the national asylum and border protection systems.

The conceptualization of remedial actions usually constitutes the most extensive part of framing as it ultimately reflects the practices and direction of the securitization process. Regarding specific policy responses, the pact continues to build on logics of risk and resilience entwined with 'exceptionalism', placing emphasis on instruments that allow the swift, seamless and fair management of migratory flows and at the same time strengthening the EU's ability to withstand migration-related crises.

35 *Ibidem*.
36 *Ibidem*.
37 *Ibidem*, p. 6.
38 *Ibidem*, p. 5.
39 E. Kużelewska, A. Piekutowska, The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 34.
40 COM/2020/609 final, p. 17.

It expands these logics by strongly investing in 1) flexible crisis management, 2) a robust and integrated border management system, 3) pre-entry screening and swift returns, and 4) the externalization of border management.[41]

One of the most interesting developments with regard to the conceptualization of crisis management is the incorporation of two crisis modes, which are supposed to monitor and govern the EU's anticipatory and resilience activities. The first mode, envisaged in the so-called Migration Preparedness and Crisis Blueprint, presents a standardized risk-management profile, driven by early warning, EU-wide coordination and flexibility of specific crisis-response instruments.[42] The second crisis mode is a new development and is designed to address situations of crisis and force majeure in the field of migration and asylum. As explained in the pact, 'in situations of crisis that are of such a magnitude that they risk to overwhelm Member States' asylum and migration systems, the practical difficulties faced by Member States would be recognized through some limited margin to temporarily derogate from the normal procedures and timelines, while ensuring respect for fundamental rights and the principle of non-refoulement'.[43] With this mode of crisis management, the EU recognizes the scenario in which it loses control over its own systems and needs to step away from normal standards and procedures in order to protect the basic functionality of the EU migration system. This could be viewed as one of the most explicit examples of the application of 'exceptionalist' security logic in the EU migration-security continuum.

The EU's approach to border management is driven by the need to control unauthorized population movements within and beyond the EU's external borders. This is why it calls upon a multitude of instruments and policies to protect the Schengen zone and the EU itself. As the pact stresses, 'the integrity of external borders is a shared responsibility of all Member States and Schengen Associated Countries, and of the EU and its agencies'.[44] On the one hand, the document emphasizes the importance of the coordination of national border authorities and external actors, but on the other hand it underlines the role of Frontex, which has gained power and relevance in the wake of the 2015–2016 'migration crisis'. The key point is Frontex's responsibilities in regard to the coordination of joint operations, its monitoring and intelligence capabilities (e.g. risk analysis, border vulnerability analysis) and last but not least 'a standing corps with a capacity of 10,000 staff which remains essential for

41 *Ibidem*, p. 5.

42 Commission recommendation (C/2020/6469 final) on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint) https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_an_eu_ mechanism_for_preparedness_and_management_of_crises_related_to_migration_migration_ preparedness_and_crisis_blueprint_0.pdf (20.03.2022).

43 COM/2020/609 final, p. 12.

44 *Ibidem*.

the necessary capability to react quickly and sufficiently'.[45] Regarding operational involvement, the pact continues the 'exceptionalist' security logic known from the times of the 'migration crisis', putting emphasis on the role of militarized means in the service of border protection. The document clearly names the Common Security and Defence Policy as an important contribution to the fight against irregular migration and migrant smuggling.[46]

A significant part of the risk management-driven border management system is up-to-date and interoperable IT systems that gather data on new arrivals and movements across the EU.[47] This dataveillance and identification and the monitoring of risky, unwanted and irregular migrants has been gaining importance as the element of risk management, assisting in the assessment of structural vulnerabilities as well as 'helping the work of identifying cases of overstaying'.[48] The idea of interoperability is to fully integrate data on migration with security and justice databases and ensure communication between them. As indicated in the pact, the goal is that national authorities have complete, reliable and accurate information (including biometrics) while detecting and monitoring asylum applicants and returnees as well as unauthorized movements and migration-related criminal activities.[49]

Another important set of security practices deployed towards irregular migrants is pre-screening. As indicated in the pact, 'screening will include identification, health and security checks, fingerprinting and registration in the Eurodac database. It will act as a first step in the overall asylum and return system, increase transparency for the people concerned at an early stage and build trust in the system.'[50] The pre-screening is supposed to help quickly and swiftly differentiate between desirable and undesirable irregular migrants and quickly return the latter to the country of origin or the safe country of transit. In this regard, the rules on asylum and return border procedures are supposed to be regulated by one legislative document, making it a part of a seamless cycle of identification (pre-screening) and expulsion (return).[51] The idea is that 'for those whose claims have been rejected in the asylum border procedure, an EU return border procedure would apply immediately. This would eliminate the risks of unauthorized movements and send a clear signal to smugglers'.[52] The swift return

45 *Ibidem*, p. 13.
46 *Ibidem*, p. 17.
47 The systems participating in interoperability are the Entry/Exit System, the European Travel Information and Authorization System, the Visa Information System, the European Criminal Records Information System for third-country nationals, Eurodac and the Schengen Information System.
48 COM/2020/609 final, p. 13.
49 *Ibidem*, pp. 12–13.
50 *Ibidem*, p. 5.
51 *Ibidem*.
52 *Ibidem*.

operations are supposed to be strengthened by Frontex as well as by return sponsorship, which can be carried out by EU Member States who do not want to participate in the relocation mechanism. Under return sponsorship, the Member States 'would provide all necessary support to the Member State under pressure to swiftly return those who have no right to stay, with the supporting Member State taking full responsibility if return is not carried out within a set period'.[53]

Next to practices of capture, identification, containment, return, stronger and flexible solidarity, and robust legal frameworks governing migration, the pact explicitly promotes the need to include external actors in the promotion of migration-related resilience. It recognizes the need to act beyond the EU's external borders, employing both economic and security means. The documents highlight the need to better mobilize EU trust funds and External Investment Plans and target partner countries with a significant migration dimension. The aim is to strengthen the counties of origin and build 'resilient economies delivering growth and jobs for local people and at the same time reducing the pressure for irregular migration'.[54] Closer economic and political ties are supposed to secure swift return and the readmission and reintegration of irregular migrants. The externalization of migration management also includes elements of 'exceptionalist' logic, here reflected in extended border management and the EU capacity-building actions run by CSDP as well as by EU agencies such as Frontex. Capacity-building missions are supposed to strengthen the border security capabilities of the EU partner countries, 'including by reinforcing their search and rescue capacities at sea or on land, through well-functioning asylum and reception systems, or by facilitating voluntary returns to third countries or the integration of migrants'.[55]

Conclusion

The New Pact on Migration and Asylum as a securitizing move is strongly embedded within the migration-security continuum and existing security logics. It follows risk management and resilience, underlining the need to maintain control over the EU border and increased migratory movements. The document clearly emphasizes a need for more robust capture, identification, containment, return activities, either in reference to border procedures and pre-screenings or a more flexible solidarity mechanism and return sponsorship. What represents quite a change in regard to the continuum is an evident sidelining of humanitarianism and a more robust application of 'exceptionalism'. Besides explicit references to CSDP missions and EU security agencies as tools for migration management, the EU emphasizes one more

53 *Ibidem*, p. 6.
54 *Ibidem*, p. 19.
55 *Ibidem*, p. 21.

instrument. The extraordinary mode of crisis management in situations of migration crisis and force majeure explicitly indicates that the EU recognizes increased migratory flows as a power that can incapacitate the EU migration management system. That is why it requires the incorporation of extraordinary means and derogations that will allow the EU to maintain control over mobility through its borders. In this vein, the pact moves the migration-security continuum slightly towards 'exceptionalism', while still strongly investing in practices and technologies of risk management and resilience.

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Belarus' Violation of International Obligations in Connection with Artificial Migration Pressure on the Belarus–European Union Border

Abstract: This paper attempts to assess events related to the huge scale of the influx of migrants in the summer of 2021 at the Belarusian borders with Lithuania, Poland and Latvia. The involvement of the Belarusian government had a key impact on the nature of the events and led to Belarus' violation of its international obligations. In particular, Belarus has violated the Geneva Convention Relating to the Status of Refugees (1951), the 1967 additional Protocol Relating to the Status of Refugees, the 1966 UN International Covenant on Civil and Political Rights and the United Nations Convention against Transnational Organized Crime of 2000 and the Protocols Thereto (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Protocol against the Smuggling of Migrants by Land, Sea and Air). The illegal actions taken by Belarus were described as a hybrid attack aimed at destabilizing Europe. Minsk's creation of an engineered migration pressure on the border with the EU can be considered part of a hybrid strategy – one of the dominant methods in geopolitical confrontation and the struggle for influence in international relations. The present paper verifies the research hypothesis that Belarus has deliberately violated international law by inducing engineered migration at the border with the EU in order to paralyse the migration situation in the neighbouring EU Member States. The violation of international law has not resulted in any major international consequences.

Keywords: Belarus, coercive engineered migration, migration pressure, refugees, weaponizing migration, violation of international law

Introduction

After the recent presidential elections in Belarus in August 2020, President Alexander Lukashenko made no secret of his intention to use migration as a weapon in retaliation for the sanctions imposed by the EU against his government.[1] As early as May 2021, the Belarusian leader warned that Belarus would not enforce border controls with the EU: 'We stopped drugs and migrants. Now you will eat them and catch them yourselves.'[2] An analysis of the events that began in the summer of 2021 on the border between Belarus and Lithuania, and then Poland and Latvia, proves that this was a real threat. The involvement of the Belarusian government had a key impact on the nature of the events. The purpose of this paper is to demonstrate Belarus' violation of its international obligations. Particular attention has been paid to the provisions of the Geneva Convention Relating to the Status of Refugees (1951), the 1967 additional Protocol Relating to the Status of Refugees, the 1966 UN International Covenant on Civil and Political Rights, and the United Nations Convention against Transnational Organized Crime of 2000 and the Protocols Thereto (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Protocol against the Smuggling of Migrants by Land, Sea and Air). The present paper verifies the research hypothesis that Belarus has deliberately violated international law by inducing engineered migration at the border with the EU in order to paralyse the migration situation in the neighbouring EU Member States. The hypothesis was verified using the dogmatic method.

1. Migration crisis, artificial migration pressure or 'coercive engineered migration'?

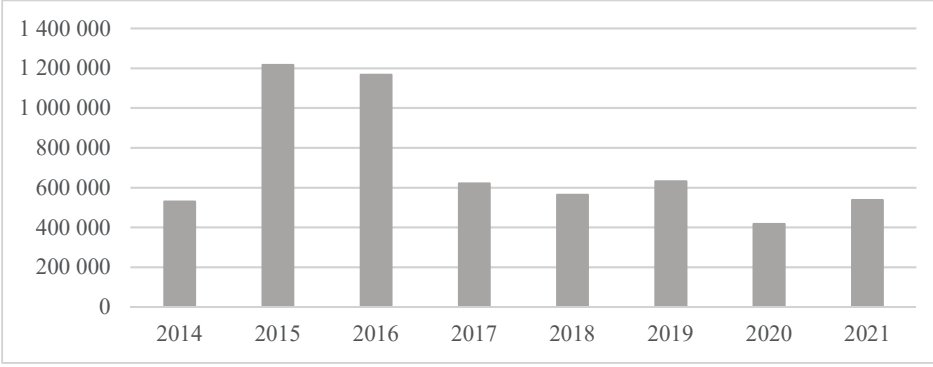
Events on the EU's border with Belarus should not be referred to as a migration crisis due to the fact that equating the word 'crisis' with the situation on the border

1 Y. Miadzvetskaya, Designing Sanctions: Lessons from EU Restrictive Measures against Belarus, 'The German Marshall Fund of the United States: Policy Paper' 2022, https://www.gmfus.org/sites/default/files/2022–06/Designing%20Sanctions%20Lessons%20from%20EU%20Restrictive%20Measures%20against%20Belarus.pdf (accessed 12.10.2022); A. Szabaciuk, The Crisis on the Polish–Belarusian Border in the Context of Rising Tensions in Eastern Europe (Part 2), 'Komentarze IEŚ' 2021, no. 471, https://ies.lublin.pl/wp-content/uploads/2021/12/ies-commentaries-471.pdf (15.10.2022).

2 M. Bennetts, Belarus and Lukashenko Face Consequences for Migrant Crisis, 'The Times' 12.11.2021, https://www.thetimes.co.uk/article/belarus-and-lukashenko-face-consequences-for-migrant-crisis-jmlfxzcpr (24.10.2022); Congressional Research Service, Migrant Crisis on the Belarus–Poland Border, https://crsreports.congress.gov/product/pdf/IF/IF11983 (24.10.2022).

could evoke associations with the 2015–2016 migration crisis.[3] At that time, millions of Arab and African migrants and refugees were trying to enter the EU after a war broke out in countries of the Middle East.[4] Nearly 2.5 million people applied for asylum in the EU.[5] In contrast, the events on the border with Belarus did lead to a crisis, but the scale of the problem in 2021 was incomparably smaller (Figure 1). Therefore, the use of the term 'migration crisis' is not justified.

Figure 1. Number of first-time asylum applicants (non-EU citizens) in all EU Member States between 2014 and 2021



Source: prepared by the author based on Eurostat, Asylum Applicants by Type of Applicant, Citizenship, Age and Sex – Annual Aggregated Data, https://ec.europa.eu/eurostat/databrowser/view/migr_asyappctza/default/table?lang=en (05.10.2022).

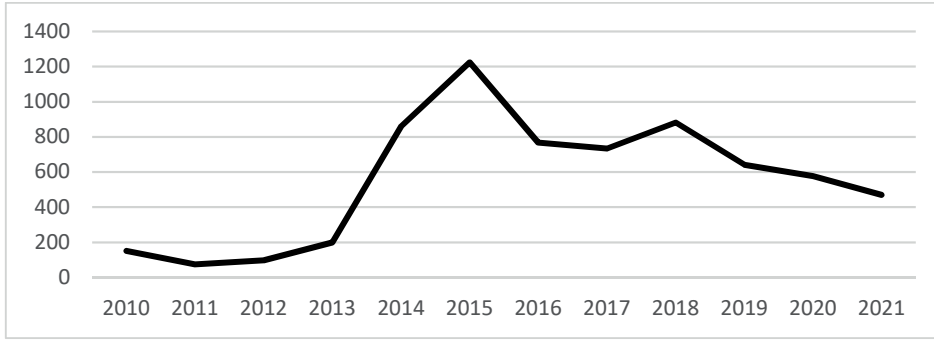
3 E. Braw, Stop Calling What's Happening with Belarus a Migration Crisis, 'Politico' 16.11.2021, https://www.politico.eu/article/belarus-border-migration-geopolitical-crisis-nato-eu/ (05.10.2022); R. Koulish, M. van der Woude, Introduction: The Problem of Migration, (in:) R. Koulish, M. van der Woude (eds.), Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders, New York 2020, p. 4.

4 E. Kużelewska, A. Weatherburn, D. Kloza (eds.), Irregular Migration as a Challenge for Democracy, Cambridge 2018; S. Spencer, A. Triandafyllidou, Irregular Migration, (in:) P. Scholten (ed.) Introduction to Migration Studies, Cham 2022, pp. 191–204; N. Hajiyeva. The Current Dynamics of International Migration in Europe: Problems and Perspectives, 'Eastern European Journal of Transnational Relations' 2018, vol. 2, no. 2, pp. 34–35; A. Doliwa-Klepacka, The New Pact on Migration and Asylum as a Response to Current Migration Challenges – Selected Issues, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, pp. 12–13; D. Vinci, Ufficio Tutele Metropolitano presso il Comune di Bologna, 'Miscellanea Historico-Iuridica' 2020, vol. 19, no. 1, pp. 355–356; K. Karski, Migration, (in:) A. Raisz (ed.) International Law from a Central European Perspective, Miskolc-Budapest 2022, pp. 219–238.

5 Pew Research Center, https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1–3-million-in-2015/ (24.10.2022).

However, from the point of view of EU Member States that have a border with Belarus (Poland, Lithuania and Latvia), the scale of the problem in 2021 was comparable to the situations in 2015 and 2016. For the three countries, the events at the border had the features of a crisis, given the humanitarian challenges, among other things.[6] What should also be taken into account is the fact that compared to Western European countries, countries of Eastern Europe have much less experience in receiving migrants, including refugees.[7] The issue is not only the lack of sufficient preparedness to manage this type of migration, but most importantly the fifteen-fold increase in the number of asylum applications in Lithuania in 2020 and 2021 (Figure 2).

Figure 2. Number of first-time asylum applicants (non-EU citizens) in Poland, Lithuania and Latvia between 2014 and 2021.



Source: prepared by the author based on Eurostat, Asylum Applicants by Type of Applicant, Citizenship, Age and Sex – Annual Aggregated Data, https://ec.europa.eu/eurostat/databrowser/view/migr_asyappctza/default/table?lang=en (05.10.2022).

From the point of view of the response to the events at the border between Belarus and the EU, the use of appropriate terminology was essential in creating a separate narrative about threats to EU security and, at the same time, was an effective weapon against disinformation from Minsk. The EU Commission president, Ursula von der Leyen, aptly described Belarus' actions as a hybrid attack aimed at destabi-

6 P. Partogi Nainggolan, Illegal Immigrant Crisis and Poland–Belarus Border Conflict, p. 9, https://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-XIII–23–I-P3DI-Desember-2021–160-EN.pdf, (10.02.2023); Editorial, Humanitarian Crisis at the Poland–Belarus Border: Politics is Putting Migrants at Risk, 'The Lancet Regional Health – Europe' 2021, vol. 11, https://www.thelancet.com/pdfs/journals/lanepe/PIIS2666–7762(21)00271–4.pdf (10.02.2023).

7 E. Kużelewska, A. Piekutowska, The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 27.

lizing Europe, and the EU's response to the Lukashenko regime's aggressive actions indicated the need for a holistic approach to the fight against hybrid threats and the mitigation of their potential impact on the security of the EU and its citizens.[8] Some observers felt that such migration phenomena were a part of a hybrid strategy, which is becoming one of the dominant methods in the geopolitical confrontation and the struggle for influence in international relations, including 'migration flow'.[9] The most appropriate description of the events on the border between Belarus and the EU in 2021 seems to be 'politically motivated artificial migration pressure', as this reflects the real nature of those events.[10] Belarus' strong political motives, which resulted in the importation of migrants and their use in political struggles on an international scale, cannot be ignored. The potential reasons for this struggle as identified by Konieczny include Minsk's retaliation for EU sanctions on Russia, which also affected the Belarusian economy, an attempt to punish Poland for supporting free elections and recognizing the elections held in Belarus as fraudulent, and an effort to force EU countries to recognize Lukashenko's government in Belarus and hold peace talks.[11] It should be emphasized that migratory pressure against the EU is not a new phenomenon, but this is the first time that the determination of migrants to find a way to enter the territory of the EU was exploited in such a cynical manner.

The role of the Belarusian government is important to the assessment of the events. While initial media reports suggested that Belarusian authorities encouraged but were not necessarily involved in organizing crossing of the EU border by migrants, later reports disclosed documents that indicated the involvement of Belarusian state-owned companies in the coordination of the migrants' travel to the EU border. When evidence emerged that indicated that the influx of migrants from Belarus was not only tolerated but actively facilitated by the government in Minsk,[12] both

8 S. Kaufman, M. Plachta, Migration Enforcement, 'International Enforcement Law Reporter' 2021, vol. 37, p. 475.

9 M. Frotveit, International Migration as an Instrument of Hybrid Aggression, 'Modern Historical and Political Issues: Journal in Historical & Political Sciences' 2022, vol. 45, pp. 128–139; J. Bornio, Crisis on the Polish–Belarusian Border – What Strategy for Warsaw? 'Eurasia Daily Monitor' 2021, vol. 18, no. 172; W. Repetowicz, Broń 'D' jako zagrożenie asymetryczne, 'Wiedza Obronna' 2018, nos. 1–2, pp. 118–119.

10 B. Fraszka, Sytuacja na granicy polsko-białoruskiej: przyczyny, aspekt geopolityczny, narracje [The situation on the Polish–Belarusian border, the geopolitical aspect, the narrations], https://warsawinstitute.org/pl/sytuacja-na-granicy-polsko-bialoruskiej-przyczyny-aspekt-geopolityczny-narracje/ (06.10.2022).

11 M. Konieczny, Border Crime in the Aspect of the Hybrid War between Belarus and Poland, 'Studia Prawnoustrojowe' 2022, vol. 57, p. 323.

12 S. Nowacka, Migration from Arab States and the Crisis on the Border with Belarus, 'Polski Instytut Spraw Miedzynarodowych' 2021, https://pism.pl/publications/migration-from-arab-states-and-the-crisis-on-the-border-with-belarus (25.10.2022); O. Babakova, K. Fiałkowska, M. Kindler, L. Zessin-Jurek, Who is a 'True' Refugee? On the Limits of Polish Hospitality, https://www.migracje.uw.edu.pl/wp-content/uploads/2022/06/Spotlight-JUNE-2022–1–2.pdf (25.10.2022).

the EU and NATO, as well as individual governments, accused Belarus not only of orchestrating this crisis but also of violating international law.[13]

Due to the migration pressure deliberately created by the Belarusian authorities, the events at the EU–Belarusian border were referred to as 'coercive engineered migration', a term similar to 'politically motivated artificial migration pressure'. This is defined by Kelly M. Greenhill as cross-border population movements created intentionally or manipulated to elicit political, military and/or economic concessions from the target state or states.[14] Greenhill gives numerous examples of the instrumentalization of migration to achieve specific benefits. In 1956, the Cuban president Fidel Castro demonstrated how easily he could disrupt the immigration policy of the United States by opening the border to all Cubans wishing to live there. The US administration was not prepared for the influx of migrants, which resulted in secret negotiations between President Johnson and Castro. Another example is the events of 1991, when many Albanians tried to leave their country for Italy. This mass exodus was initially viewed with some sympathy by the Italian people, but as time passed, it resulted in discontent. Rome struck a deal with Tirana, which promised to introduce a stricter border policy in exchange for Italian food and financial aid packages. Another example of coercive engineered migration is Turkey's handling of the influx of Syrian refugees into the EU.[15]

Janko Bekić, recognizing the events on the border between Belarus and Poland as a classic example of coercive engineered migration, points to Lukashenko's two objectives: (1) to force the EU, particularly Poland and Lithuania, to abandon support for the pro-democratic movement in Belarus; and (2) to force the EU to lift sanctions imposed on the Minsk regime in the wake of the August 2020 presidential elections. In addition, the Russian Foreign Minister Sergei Lavrov suggested that the EU should fund the Belarusian efforts to stop illegal migration (as it did with Turkey in 2016), thus exposing the initiators of this operation.[16] There is evidence of the involvement of the Belarusian authorities in events at the border with the three EU Member States,

13 A. Sari, B. Hudson, Stirring Trouble at the Border: Is Belarus in Violation of International Law – Part 1, https://www.justsecurity.org/79222/stirring-trouble-at-the-border-is-belarus-in-violation-of-international-law/ (25.10.2022).

14 K.M. Greenhill, Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy, Ithaca, NY 2010, pp. 7–86.

15 For more information, see N. Ela Gokalp-Aras, Coercive Engineered Syrian Mass Migration in the EU–Turkey Relations: A Case Analysis for Future Reference, 'International Migration' 2019, vol. 57, no. 1.

16 J. Bekić, Coercive Engineered Migrations as a Tool of Hybrid Warfare: A Binary Comparison of Two Cases on the External EU Border, 'Croatian Political Science Review' 2022, vol. 59, no. 2, p. 160; see also K. Karski, P. Mielniczek, The Notion of Hybrid Warfare in International Law and Its Importance for NATO, 'NATO Legal Gazette' 2019, Issue 39, pp. 67–80.

which is important for the determination of whether Belarus has violated international law.[17]

2. The actions of Belarus and the fulfilment of its obligations under the Geneva Convention

Since 2001, Belarus has been a party to both the Geneva Convention and the New York Protocol, which has resulted in the requirement to fulfil its international obligations related to the protection of refugees.[18] The Belarusian government is required to protect everyone's right to seek asylum, to provide protection against forced return for all those in need of international protection, and to respect the rights of refugees as enshrined in the Convention. Some of the migrants at the Belarus–EU border were refugees, so it is reasonable to ask whether Belarus complied with its international obligations.

In order to provide a constructive answer to such a question, it is first necessary to determine whether the migrants at the Belarusian border should be considered refugees. In an interview with CNN, President Lukashenko expressly called them refugees.[19] Article 1(A)2 of the Refugee Convention, as amended by the 1967 Protocol thereto, defines a refugee as someone who (1) is outside the country of his or her nationality, and (2) is unable or unwilling to avail him- or herself of the protection of that country; these characteristics conform to those migrants who arrived in Belarus. On the other hand, fulfilment of the requirement of a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' can be established as part of the procedure for the determination of refugee status.[20] The 1951 Convention does not indicate what procedure should be adopted to determine refugee status; states that are parties to the Convention are free to establish the procedure they deem most appropriate in the context of their constitutional and administrative structure. As a rule, refugee status is determined on a case-by-case basis. However, it is possible that entire groups become migrants in situations that indicate that they could be determined to be

17 Grupa Analityczna, Granica dyktatora. Polska i Białoruś wobec kryzysu granicznego, 2021, https://studium.uw.edu.pl/wp-content/uploads/2022/01/Raport_Bialorus_2021_4PL.pdf (25.10.2022).

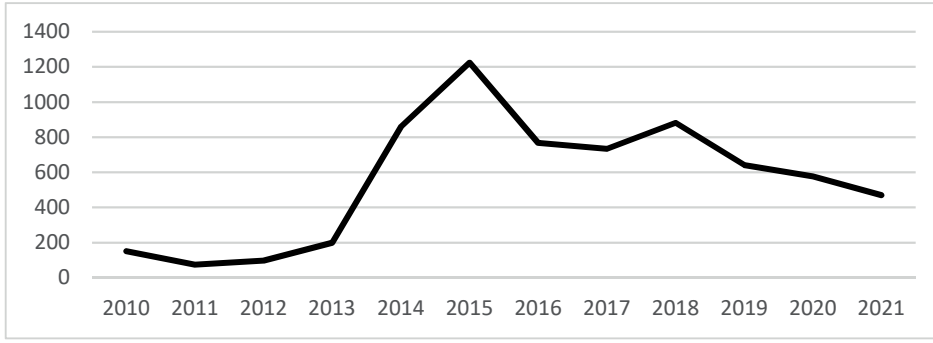
18 Law of the Republic of Belarus No. 10-Z of 2001 on the Accession of the Republic of Belarus to the Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugees [Belarus], 4 May 2001, https://www.refworld.org/docid/420a11f44.html (08.10.2022).

19 CNN interview with Belarus leader Alexander Lukashenko (transcript), published 2:16 AM EDT, 2 October 2021, https://edition.cnn.com/2021/10/02/europe/belarus-lukashenko-interview-transcript/index.html (08.10.2022).

20 Convention Relating to the Status of Refugees, https://www.unhcr.org/3b66c2aa10 (accessed 09.10.2022).

refugees in case-by-case procedures. In such cases, the need for assistance is often urgent, and for purely practical reasons, it may not be possible to carry out case-by-case procedures. A 'group assessment' of refugee status is then carried out, where each member of the group is recognized as a refugee prima facie (i.e. in the absence of evidence to the contrary).[21] Given that most of the migrants at the EU–Belarus border came from Iraq, but some also from Syria, Afghanistan and other countries in the Middle East and Africa,[22] it could be assumed that at least some of them comply with the definition of a refugee given in the Geneva Convention, with prima facie grounds for filing a successful asylum application as defined by the Convention. However, the statistics on asylum applications in Belarus show no upward trend in 2021 (Figure 3).

Figure 3. Number of asylum applicants in Belarus as a country of asylum between 2010 and 2021.



Source: prepared by the author based on UNHCR, Refugee Data Finder, https://www.unhcr.org/refugee-statistics/download/?url=iC0R3a (10.10.2022).

In 2021, 471 people applied for asylum in Belarus. As a side note, it should be mentioned that Belarus is not among the major refugee-receiving countries and it was only in 2015 when the number of people seeking protection there exceeded 1,200. In 2021, refugee status was granted in Belarus to only 4% of applicants, and temporary protection was granted to 55% of them (Figure 4).

According to Article 41 of the Law of the Republic of Belarus of 23 June 2008 no. 354-Z on Granting Foreign Citizens and Persons without Citizenship the Status of Refugee, Additional Protection, Asylum and Temporal Protection in the Republic of

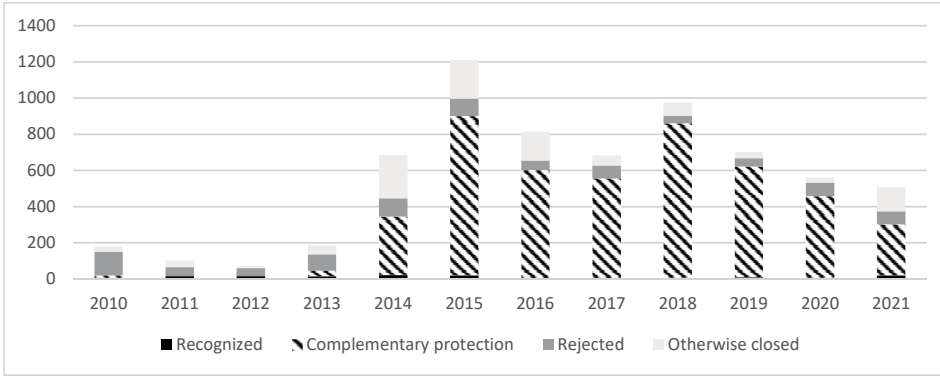
21 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Geneva 2019, p. 20.

22 Congressional Research Service, Migrant Crisis…, *op. cit*.

Belarus,[23] in the procedure for determining refugee status, interviews are conducted for the purpose of registering the applications; at a later stage of the procedure, interviews are not mandatory if the decision-making body considers them unnecessary. In addition, according to paragraph 2 of the article, the registering authority may register applications without holding any interviews if it concludes that the decision to grant refugee status can only be made on the basis of written documents. As a result, there is a very high probability that in Belarus, the decision to grant refugee status can be made without conducting individual interviews with those who apply for protection.[24]

Thus not all migrants were granted refugee status, but at the same time, the course of events at the Belarusian border with Poland, Lithuania and Latvia did not allow observers to clearly identify who has refugee status, who is applying and who is migrating for purposes other than those provided for in the Geneva Convention.

Figure 4. Number and type of first-instance asylum decisions in Belarus as a country of asylum between 2010 and 2021.



Source: prepared by the author based on UNHCR, Refugee Data Finder, https://www.unhcr.org/refugee-statistics/download/?url=iC0R3a (10.10.2022).

As Mieczysława Zdanowicz rightly points out, recognition of refugee status does not make someone a refugee, but only confirms the fact that he or she is one.[25] How-

23 http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=106686&p_country=BLR&p_count=448&p_classification=17&p_classcount=25 (23.10.2022).

24 T. Kruessmann, A.A. Soltanowich, Refugee Status as a Bar to Extradition? A Comparative Perspective on Russian and Belarusian Law, 'Journal of the Belarusian State University Law' 2019, vol. 2, pp. 38–45.

25 M. Zdanowicz, Poland's Stance on the Refugee and Migration Crisis in the European Union, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 92; see also E. Karska, Kilka uwag o uchodźstwie jako zagadnieniu prawnym, (in:) E. Karska (ed.), Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego, Warsaw 2020, pp. 9–21; B. Mikołajczyk, Pacta

ever, referring to the words of the president of Belarus himself, who used the term 'refugees', and having further regard to their country of origin, it is necessary to draw attention to the following articles of the Geneva Convention. According to Article 32, a state that is a party to the Convention may not expel a refugee who is staying lawfully in its territory for reasons other than national security or public order. As Article 32 of the Convention applies to refugees, this means that the measures taken and implemented by the Belarusian state agencies to expel persons present at the country's borders were most likely in violation of the provisions of that article. At the same time, Article 33 of the Geneva Convention does not apply: the non-refoulement principle specified therein does not apply to the EU, whose Member States are considered safe for asylum.[26] It is difficult to assess whether this escaped the attention of the Belarusian authorities or was cynically used against the EU, but when recognizing the principle of non-refoulement as inapplicable to the actions taken by Belarus, it is worth noting that over the years, the principle has evolved into a customary norm of international law.[27]

3. The actions of Belarus and the fulfilment of its obligations under the International Covenant on Civil and Political Rights and the United Nations Convention against Transnational Organized Crime

Since 1973, Belarus has been a party to the International Covenant on Civil and Political Rights (ICCPR).[28] According to Article 13 of the Covenant:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Since Article 13 entitles each foreigner to individual consideration of his or her case, the collective expulsion of migrants from Belarus violates that article.

sunt servanda pod presją migracyjną. Uwagi na temat kryzysu na polsko-białoruskiej granicy, (in:) A. Kozłowski (ed.), Rządy prawa jako wartość uniwersalna. Księga jubileuszowa Profesora Krzysztofa Wójtowicza, Wrocław 2022, pp. 471–484.

26 A. Sari, B. Hudson, Stirring Trouble…, *op. cit*.

27 A. Chodorowska, A. Trylińska, The Concept of the Principle of Non-Refoulement in Refugee Law, 'Dyskurs Prawniczy i Administracyjny' 2021, vol. 2, pp. 7–23.

28 https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (3.10.2022).

LeJune rightly points out in his analysis the clear violation of the treaty in question. Although Belarus is legally bound by its ratification of the Covenant, enforcement mechanisms pose an additional obstacle to keeping its commitments. When a state ratifies a treaty, it commits to respecting and ensuring the rights of every person in its jurisdiction. However, treaties 'mandate the state to define and implement measures' in a manner that the state deems appropriate given the state's sovereignty. Thus state sovereignty has become the 'Achilles heel' of the human rights system and hinders the enforcement of treaties. Despite the binding nature of the ICCPR, there are no effective sanctions for failure to comply with the obligations of the states that are parties to it. The Human Rights Committee, established pursuant to Article 28 of the Covenant, may mention in its annual report the failure of a state party to the Covenant to submit mandatory reports, but such a reprimand is not considered significant, let alone severe, by such states. Since the ICCPR does not provide for penalties against non-complying states, Belarus has repeatedly violated its obligations under the Covenant with impunity.[29]

In August 2022, the Belarusian Council of Ministers initiated a law on the withdrawal from the First Optional Protocol of the ICCPR, which Belarus joined in September 1992. The Protocol allows the Human Rights Committee to receive and consider human rights complaints from individuals. The withdrawal means that it is not possible to seek justice in cases of violations of human rights under the ICCPR.[30]

Belarus is also a party to the United Nations Convention against Transnational Organized Crime, including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and its Protocol against the Smuggling of Migrants by Land, Sea and Air. As a party to these legal documents, it is obliged to take steps to prevent and combat human trafficking and migrant smuggling, in particular through cooperation with other state parties. According to the First Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children), human trafficking is narrowly defined as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

It should be emphasized that exploitation 'shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced

29 S. LeJune, 'Europe's Last Dictator': Police Brutality and Human Rights Violations in Belarus, 'North Carolina Journal of International Law' 2021, vol. 47, no. 591, pp. 603–607.

30 Human Rights House Foundation, Statement: Belarusian Authorities Must Not Withdraw Belarus from First Optional Protocol of the ICCPR, https://humanrightshouse.org/statements/belarusian-authorities-must-not-withdraw-belarus-from-first-optional-protocol-of-the-iccpr/ (19.10.2022).

labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.[31] Although the media described the actions of the Belarusian authorities as 'human trafficking', there is no evidence that the definition has been fulfilled in connection with the (overall) situation of the migrants in the territory of Belarus.

At the same time, LeJune points out that a significant number of migrants may fulfil the definition of 'smuggling of migrants' in the meaning of the Second Protocol (Protocol against the Smuggling of Migrants by Land, Sea and Air), as there are strong reasons to believe that Belarus not only failed to meet its obligations under that instrument, but also that the Belarusian authorities were directly involved in the prohibited activities.[32] In fact, according to the Protocol, smuggling of migrants means organizing the illegal entry of a person into a state party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit. The adoption of the term 'financial or other material benefit' in the definition of migrant smuggling was a debated issue during the negotiations of the Protocol. In the end, a broad definition was adopted, and this benefit should be understood as broadly and comprehensively as possible.[33]

According to the Protocol, Belarus is not only obliged to criminalize the smuggling of migrants (Article 6), but also to take a number of other measures to prevent the use of means of transportation owned by carriers to commit this crime (Article 11).[34] Article 11 ('Border measures') is directly related to immigration control: states are required to adopt legislative and other measures to prevent the use of means of transportation to smuggle immigrants. In this regard, the Belarusian state-owned airline has vehemently denied any involvement in human trafficking. This position was presented in response to initial reports in July 2021, when Lithuanian officials said they had found documents relating to detained Iraqi migrants that included visa applications through two Belarusian travel agencies and four boarding passes for a Belavia flight from Istanbul to Minsk.[35] In September 2021, Deutsche Welle published

31 United Nations, General Assembly Resolution 55/25 of 15 November 2000, United Nations Convention against Transnational Organized Crime, Annex II: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf (20.10.2022).

32 S. LeJune, 'Europe's Last Dictator'…, *op. cit.*, pp. 603–607.

33 A. Schloenhardt, J.E. Dale, Twelve Years on: Revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, 'Zeitschrift für öffentliches Recht' 2012, vol. 67, no. 1, p. 136.

34 UN General Assembly Resolution 55/25 of 15 November 2000, United Nations Convention against Transnational Organized Crime, Annex III: Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf (21.10.2022).

35 L. O'Carroll, A. Roth, Belarus State Airline Denies It Is Involved in Trafficking Migrants, 'The Guardian' 10.11.2021, https://www.theguardian.com/world/2021/nov/10/ireland-briefs-air-

an article about having obtained information from a Baghdad travel agent about sending people to Istanbul or Dubai, from where they could take a Belavia flight to Minsk.[36] Most importantly, while Article 11 does not oblige carriers to issue opinions or assess the validity of travel documents, this responsibility lies with the state parties to the Protocol.[37]

While a state has the right to manage border security and policies, it is obligated to abide by international law, including respect for human rights and the right to seek asylum. Belarus is a state party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The UN High Commissioner for Refugees and the International Organization for Migration have jointly asserted that 'Belarus must uphold its obligations under international law and guarantee the safety, dignity, and protection of the rights of people stranded at the border'.[38]

Conclusion

The events at the borders between Belarus and Lithuania, Poland and Latvia in 2021 are undeniably a humanitarian crisis for many migrants and their families. Human rights organizations explicitly stated that Belarus was guilty of the most serious violations of these rights.[39] Migrants have been cordoned off by the Belarusian Border Guard, which made them unable to return to Belarus.[40]

Who bears responsibility for these tragic events? The final list of culprits may be long (including middlemen and those using illegal push-backs), but this paper focuses on Belarus. Minsk's involvement made a key impact on the nature of the events. Lukashenko's revealed goals, manipulation and instrumentalization of migration lead one to adopt, with reference to the events in question, the term 'coercive engineered migration' proposed over a decade ago by Greenhill. Nevertheless, adoption of the right terminology does nothing to redress the tragedy that occurred at the

craft-leasing-firms-on-possible-belarus-sanctions (21.10.2022).

36 R. Mudge, From Iraq to Belarus – How Migrants Get to Europe, 'Deutsche Welle' 11.09.2021, https://www.dw.com/en/the-route-from-iraq-to-belarus-how-are-migrants-getting-to-europe/a-59636629 (21.10.2022).

37 T. Obokata, The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air, (in:) B. Ryan, V. Mitsilegas (eds.), Extraterritorial Immigration Control, Leiden 2010, p. 155; on the state's responsibility, see A.T. Gallagher, F. David (eds.), The International Law of Migrant Smuggling, Cambridge 2014.

38 Congressional Research Service, Migrant Crisis…, *op. cit*.

39 Helsinki Foundation for Human Rights, Sytuacja na granicy polsko-białoruskiej: 'to jest kryzys humanitarny' [Situation on the Polish–Belarusian border: 'This is a humanitarian crisis'], https://www.hfhr.pl/na-granicy-pl-by/ (25.10.2022).

40 M. Górczyńska, J. Białas, D. Witko, Legal Analysis of the Situation on the Polish–Belarusian Border. Situation on: 9 September 2021, https://www.hfhr.pl/wp-content/uploads/2021/09/Legal-analysis-ENG.pdf (25.10.2022).

gates of the EU. However, this is a starting point for further analysis of the emerging legitimate questions of legal liability.

The purpose of this paper was to demonstrate the violation of international law by Belarus by its provoking an artificial migration pressure. The paper positively verified the research hypothesis, according to which, first, Belarus violated acts of international law; second, this violation of international law did not entail any serious international consequences; and third, the situation on the Belarus–EU border is an example of an artificial migration pressure deliberately caused by Belarus.

There is no doubt that key acts of international law were violated: Articles 32 and 33 of the Geneva Convention, Article 13 of the International Covenant on Civil and Political Rights and Articles 6 and 13 of the Protocol against the Smuggling of Migrants by Land, Sea and Air of the United Nations Convention against Transnational Organized Crime. This latter Protocol may be of particular importance in assessing the responsibility of Belarus. This is due to the broad definition of the smuggling of migrants adopted in the Protocol, the term 'financial or other material benefit' uncompromisingly adopted at the Protocol's negotiation stage, and the indication of the responsibility of the state parties to the Protocol with regard to immigration control. On the other hand, those acts of international law whose implementation has been required of the state parties may be ineffective in accordance with the principle of sovereignty. This can happen in particular when the *superanus* does not come from democratic elections – as exemplified by the events described on the borders between Belarus and the three Member States of the EU.

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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–Terespol 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 Vladmir 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 wywózek 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-refoulment 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 Białystok[33] and Warsaw[34] 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–Belarussian 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 niedowierzanie! 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-niedowierzanie-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 znieważyła 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 znieważyć 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 (OJ 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-Intrnational-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 States[73] 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 (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, 'Bialostockie 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. Kużelewska, A. Piekutowska, The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum, 'Bialostockie 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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The State of Emergency in Poland as the Key to Curbing Unregulated Migration

Abstract: The purpose of this article is to analyse the Polish legislature's activity during the state of emergency in the field of curbing illegal migration. The thesis of the article states that the introduction of the state of emergency on the Polish–Belarusian border facilitated the legal changes aimed at reducing the scale of illegal migration on the border and their implementation. The proposed changes brought about new solutions that provided, for example, for the obligation to immediately leave the territory of Poland, issuance of a decision obliging a foreigner to return when he/she crossed or attempted to cross the border illegally, or construction of a wall on the Polish–Belarusian border.
Keywords: foreigners, illegal migration, Polish–Belarusian border, state of emergency in Poland

Introduction

Since 2015, migratory pressure to EU countries has been subject to considerable fluctuations.[1] Poland is also a participant in the changes in the global movement of people, and since 2016 has become a country with a positive net migration rate.[2] In addition to legal immigration (mostly economic), it is also experiencing illegal immigration, especially through the eastern border of Poland, which is also the external border of the EU. This type of immigration is the least desirable, and to counteract it,

1 E. Kużelewska, A. Piekutowska, 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. 28–31.

2 A. Adamczyk, (Nie)intencjonalna polityka migracyjna Polski, Poznań 2021, p. 209.

a number of legal actions have been taken.[3] Apart from the signed agreements, a state of emergency, which according to Hans Kelsen's concept of law belongs to the dynamic normative tools, has become a way to stop illegal migration.[4]

The purpose of this article is to analyse the legislature's activity during the state of emergency in the field of inhibiting illegal immigration. The article argues that introducing a state of emergency on the Polish–Belarusian border facilitated the introduction and implementation of legal changes aimed at reducing the scale of illegal immigration at the border. The proposed changes were introduced within a short period in violation of current national and international law. Given this thesis, it seems justified to pose several research questions: what was the scale of the phenomenon of illegal immigration at the section of the border with Belarus? What were the reasons for introducing the state of emergency in Poland? What are the sources of emergency powers in the state of emergency (models)? What legal solutions were introduced to secure the border and reduce illegal immigration? The interdisciplinary approach to the studied phenomenon has enforced the use of research methods characteristic for legal sciences (the dogmatic method) and political science (the decision-making and comparative method).

1. The state of emergency and legal models of emergency powers

A state of emergency is one of the states distinguished in the Constitution of the Republic of Poland of 1997.[5] The features constituting a state of emergency include dangerous crises which 1) are real and unpredictable, 2) are urgent, making the standard mode of decision-making impossible, 3) are temporary, 4) threaten the territorial integrity of the state, security of citizens (their lives) and the proper functioning of state institutions, 5) require the use of exceptional legal measures because ordinary ones are insufficient, 6) affect the temporary suspension or restriction of civil rights and freedoms, 7) change the powers of authorities towards increasing the

3 Prevention of illegal migration is the subject of Polish–Belarusian agreements (Agreement between the Republic of Poland and the Republic of Belarus on Good Neighbourhood and Friendly Cooperation, signed in Warsaw on 23 June 1992 (Journal of Laws 1993, No. 118, item 527); Agreement between the Government of the Republic of Poland and the Government of the Republic of Belarus on Cooperation in Combating Crime, signed in Minsk on 8 December 2003 (Journal of Laws 2005, No. 125, item 1044)); and the Agreement between the European Union and the Republic of Belarus on the Readmission of Persons Residing without Authorisation (Dz.U. UE L. 2020.181.3). More on legal definitions of irregular migration in the EU in M. Trojanowska-Strzęboszewska, Nielegalna czy nieregularna imigracji? Analiza wyzwań definicyjnych ze szczególnym uwzględnieniem polityki imigracyjnej UE, 'Studia Europejskie' 2020, no. 3, pp. 145–164.

4 A. Greene, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis, Oxford 2018, pp. 68–69.

5 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483).

powers of the executive, 8) force measures to restore the normal state as soon as possible and 9) are territorially localized – on the territory of the whole state or part of it.

Emergency powers can have their source in the constitution as well as in laws and subordinate acts; we then call them the constitutional/legal model of emergency powers. The most common source of emergency powers in this model is the constitution. It is in the constitution where the circumstances of the introduction of this state, the types, duration and institutions responsible for their proclamation and the possibility of the suspension of civil rights and freedoms are specified. In the legal model, which also takes the form of the legislative model, the executive is equipped with special powers granted to it by ordinary legislation. This model provides for the modification or supplementation of ordinary legislation.[6] In addition, in view of a crisis, ordinary legislation may also be supplemented by other acts issued in that instance. Their adoption is dictated by the fact that existing law cannot cope with the emergency; therefore, emergency legislation is created, which may become a part of emergency acts or ordinary legislation.[7] Compared to the constitutional model, this model is flexible (it is easier to amend ordinary legislation than the constitution with regard to a state of emergency). However, it has certain disadvantages which are related, for example, to the possibility of a loss of control of the executive by the legislature and the danger that legislation adopted during the state of emergency will become a part of the standard legal system, thus perpetuating the changes adopted under the influence of the state of emergency and contributing to the institutionalization of a permanent state of emergency.[8] In the legal model, an interpretative model can also be distinguished. In this model, no new law is created, nor is existing law modified; an ad hoc interpretation of existing law in the context of the emergency is still made.[9] Apart from the legal model, we can also distinguish the non-legal model, which is based on the activities of unconstitutional authorities which go beyond the law to protect the state and citizens. This activity must be publicly known, and after the cessation of the state of emergency, society evaluates the decisions made.[10]

Of the above-mentioned models, the one applied in Poland is the legislative model, which involves the expansion of legal norms in a state of emergency. The basic acts referring to the state of emergency are the Constitution of the Republic of Po-

6 O. Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 'The Yale Law Journal' 2003, vol. 112, no. 5, p. 1064.

7 *Ibidem*, p. 1065.

8 J. Ferejohn, P. Pasquino, The Law of the Exception: A Typology of Emergency Powers, 'International Journal of Constitutional Law' 2004, vol. 2, no. 2, p. 220.

9 O. Gross, Chaos…, *op. cit.*, p. 1059.

10 O. Gross, F. Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice, Cambridge 2006, p. 112.

land and the Act on the State of Emergency.[11] Among the reasons for the introduction of this state, these acts mention a threat to the constitutional system of the state and the safety of citizens or public order, caused by acts of a terrorist nature or actions in cyberspace which cannot be removed by ordinary constitutional measures.[12] The above-mentioned legal acts became the basis for the president of the Republic of Poland issuing a decree on introducing a state of emergency on the territory of a part of the Podlaskie and Lubelskie voivodeships in 2021. Paragraph 1.1 stated that the state of emergency is caused by 'a particular threat to the security of citizens and public order' in connection with the situation on the Polish–Belarusian border.[13] The justification of the request for the imposition of the state of emergency was cited as follows: 1) an increase in attempts to illegally cross the border, 2) actions taken by the authorities of the Republic of Belarus to destabilize the situation on the border with Poland, 3) a violation of the sense of security of people living in border areas, 4) more effective protection of the border and 5) the need to use extraordinary measures, as ordinary ones were not effective in the situation.[14]

The state of emergency was introduced on 2 September 2021, for 30 days and then extended for another 60 days.[15] During the state of emergency, during a session of the Polish Parliament (9 November 2021), Mariusz Kamiński informed the Parliament that there were approximately 2,000–4,000 illegal immigrants in the Belarusian border area, and 15,000 in Belarus. In connection with this, he stated that 'we will not allow Poland to become a helpless country […] which will be a route

11 Constitution of the Republic…, *op. cit.*, Arts. 228, 230, 231, 233; Act of 21 June 2002 on the State of Emergency, Journal of Laws 2017, item 1928.

12 K. Prokop, Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997r., Białystok 2005, pp. 76–90.

13 Ordinance of the President of the Republic of Poland of 2 September 2021 on the Introduction of a State of Emergency in the Area of a Part of Podlaskie Province and a Part of Lubelskie Province (Journal of Laws 2021, item 1612). The justification was publicly criticized by deputies representing the Civic Coalition, Left and Poland 2050 factions. A. Szczesniak, Stan wyjątkowy zostaje. Morawiecki: 'Wprowadzamy go, żeby zapewniać wolność', Oko Press, 06.09.2021, https://oko.press/stan-wyjatkowy-zostaje-morawiecki-wprowadzamy-go-zeby-zapewniac-wolnosc/ (05.12.2021). According to the Helsinki Foundation for Human Rights' (HFHR) position on the issue, the application of the state of emergency was disproportionate to the nature of the threat. Of concern was the restriction of rights, including the public's right to objective information. Stanowisko HFPC w sprawie wprowadzenia stanu wyjątkowego, 2.09.2021, https://www.hfhr.pl/stanowisko-hfpc-w-sprawie-wprowadzenia-stanu-wyjatkowego/ (22.01.2022).

14 Justification of the Request to Introduce a State of Emergency in the Area of Part of the Podlaskie Province and Part of the Lubelskie Province, Warsaw, 2 September 2021, p. 1, https://orka.sejm.gov.pl/Druki9ka.nsf/0/A3F1521EA5A80277C1258744004D7B0B/%24File/1512.pdf (22.01.2022).

15 Ordinance of the President of the Republic of Poland of 1 October 2021 on the Extension of the State of Emergency Introduced in the Area of a Part of Podlaskie Province and a Part of Lubelskie Province, Journal of Laws 2021, item 1788.

for smugglers, organized crime groups, enemies of our country [and] a route for illegal immigration'.[16]

2. Illegal border crossing

Due to the introduction of the state of emergency, access to parts of the Podlaskie and Lubelskie voivodeships was restricted. Thus, knowledge about the situation of foreigners on the border and the number of attempts to illegally cross it was limited. It was based only on information provided by the Border Guard Service (BGS), according to which there were 39,697 attempts to cross the border with Belarus illegally in 2021. This number was 300 times higher than in the previous year. Most attempts were recorded in October 2021 (17,447).[17] At the same time, it should be noted that the number of attempts cannot be equated with the number of persons, as the same immigrants may have made multiple attempts to cross the border. The BGS statistics also state that at the external EU border in 2021, the total number of apprehended foreigners amounted to 7,463 persons and was over 200% higher than in the previous year. On the border with Belarus, 38.5% of the total number (2,877) was apprehended, and this was an increase of 1.070% compared to 2020. (For comparison, the number of detainees on the border with Ukraine amounted to 3,712.).[18] The majority of those apprehended on the Polish–Belarusian border were citizens of Iraq (1,557), Afghanistan (447) and Syria (272), who crossed the border outside the crossing points.[19] It is worth noting that there was also an increase in the number of apprehensions on an internal EU border, which shows that some immigrants crossed the external EU border and were apprehended for illegally crossing or attempting to cross an internal border. In this case, the biggest numbers of apprehensions occurred at the border with Germany (1,134 third-country citizens), with citizens of Iraq (453), Ukraine (191) and Syria (135) apprehended.[20] On the other hand, German data shows that in 2021, the Federal Police detected 11,228 foreigners who illegally crossed the German border from Belarus via Poland.[21]

16 Stenographic Report of the 41st Meeting of the Sejm of the Republic of Poland on 9 November 2021, https://orka2.sejm.gov.pl/StenoInter9.nsf/0/E759260C92FA55C5C125878900001D34/%24File/41_a_ksiazka_bis.pdf (22.01.2022), p. 9.

17 E. Szczepańska, Nielegalne przekroczenia granicy z Białorusią w 2021 r., https://www.strazgraniczna.pl/pl/aktualnosci/9689,Nielegalne-przekroczenia-granicy-z-Bialorusia-w-2021-r.html, 12.01.2022 (30.01.2022).

18 Informacja statystyczna za 2021 r., Straż Graniczna, Warszawa styczeń 2022 r., s. 12, https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html (04.02.2022).

19 *Ibidem*, p. 17.

20 *Ibidem*, p. 15.

21 Bundespolizei, Illegale Migration aus Belarus über Polen nach Deutschland: 11.228 Feststellungen durch die Bundespolizei im Jahr 2021, 17.01.2022, https://www.bundespolizei.de/Web/DE/04Aktuelles/01Meldungen/2021/10/pm_1_22_file.pdf?__blob=publicationFile&v=2 (04.02.2022).

The high rate of attempted illegal border crossings was one of the major reasons for the legal changes regarding migration in the second half of 2021. The adoption of stricter legal solutions supported the introduction of the state of emergency. One of the proposed changes was an amendment to the regulation on temporary suspension or restriction of border traffic at certain border crossing points.[22] It entered into force on 21 August 2021, i.e. ten days before the Council of Ministers submitted a proposal to the president on the introduction of a state of emergency. The amendment of this act, by adding paragraphs 2a and 2b to § 3, gave the basis to the admonition on the obligation of persons who do not belong to the category of persons authorized to cross the border, under § 3.2 of the Act, and who have appeared at a border crossing point where border traffic has been suspended or restricted and outside the territorial range of the border crossing point (§ 3.2b) to immediately leave Poland and go back to the state border. Although this regulation does not *expressis verbis* refer to persons seeking international protection, it still prevents them from crossing the Polish border with Russia, Belarus and Ukraine. In addition, foreigners who illegally cross the border will not be able to apply for protection. The amendment, in the opinion of Ombudsman Marcin Wiącek, is contrary to international law and violates the Refugee Convention (Article 33), the EU Charter of Fundamental Rights (Article 18) and Directive 2013/32/EU of the European Parliament and the Council. It is also incompatible with the Constitution of the Republic of Poland (Article 56(2)).[23] The amendment of the above regulation was issued *ex post* to legalize the denial of entry to the territory of the Republic of Poland for foreigners and their applications for international protection. This concerned, inter alia, a group of immigrants camping in the area of Usnarz Górny and Grzybowszczyzna.

The next step in legalizing taking back foreigners who illegally crossed the border was an amendment to the Act on Foreigners and granting protection to foreigners within the territory of the Republic of Poland. The President of Poland signed the Act on 21 October 2021.[24] The justification for the amendments to the Acts states that they are aimed at adapting the law to the current migration situation at the EU external border. Attention was drawn to the need to streamline the proceedings on ille-

22 Ordinance of the Minister of Internal Affairs and Administration of 20 August 2021, amending the Ordinance on Temporary Suspension or Restriction of Border Traffic at Certain Border Crossings, Journal of Laws 2021, item 1536. More on the legality of push-back in G. Baranowska, Legalność i dopuszczalność procedury push-back (wywózek) i ocena rób ich legalizacji w Polsce, (in:) W. Klaus (ed.), Poza prawem. prawna ocena działań państwa polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej, Warsaw 2022, pp. 10–12.

23 Letter from RPO Marcin Wiącek to Mariusz Kamiński, Minister of Internal Affairs and Administration, Warsaw 25.08.2021, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20RPO%20do%20MSWiA%2025.08.2021.pdf (20.12.2021).

24 Act of 14 October 2021 Amending the Act on Foreigners and Certain Other Acts (Journal of Laws 2021, item 1918).

gal border crossings and ensure the internal security of the country in the face of the abuse of refugee procedures by economic migrants who intend to continue their illegal migration.[25] The amendment of the Act on Foreigners concerned extending the circumstances for issuing a decision on obliging a foreigner to return in an instance when the immigrant crossed or attempted to cross the border illegally. Circumstances in which they were apprehended immediately after crossing the external EU border in violation of the law (Article 303(1)(9)(a)) were to be an exception. In this case, the commanding officer of the Border Guard with jurisdiction over the place where the border was crossed draws up a report on the border crossing and issues a decision on leaving Poland, which may be appealed against to the Commander-in-Chief of the Border Guard (Article 303(b)(1)). The decision includes the obligation to leave the Republic of Poland and the prohibition on re-entry into the territory of Poland and other Schengen states, and specifies the period of its validity (from six months to three years (Article 303(b)(3)). The above-mentioned decision may be appealed against, but this does not suspend its execution (Article 303(b)(1)). The amendments to the Act on Foreigners introduced during the state of emergency also concerned the prerequisites for entering and keeping in the register the data of a foreigner whose stay in Poland is undesirable. These were supplemented by an instance in which a foreigner can be issued a decision on crossing the border illegally with a ruling prohibiting re-entry into the territory of Poland and other Schengen states (Article 435(1)(1)). This decision is a new institution introduced by the Act. It also results in data being sent to the Schengen Information System (Article 443(1)(1)(a)).

Apart from the Act on Foreigners, the Act on Granting Protection to Foreigners within the territory of the Republic of Poland was also amended. It consisted in adding a new circumstance under which an application for granting international protection shall be left without examination (Article 33(1)(a)). Apart from legal issues (e.g. the lack of the applicant's first and last name or country of origin), a situation in which the application was submitted by a foreigner apprehended immediately after crossing the border in violation of the law was mentioned. This does not concern a foreigner who meets the following conditions: 1) he/she came directly from a territory where his/her life or freedom was threatened by the danger of persecution or the risk of serious harm, 2) he/she presented credible reasons for illegal entry into Poland or 3) he/she applied for international protection immediately after crossing the border (Article 33(1)(a)).

The above amendments were evaluated for compliance with international and domestic law. Opinions were expressed by the ombudsman, the Office of the United Nations High Commissioner for Refugees in Poland, the Office for Democratic In-

25 Explanatory Memorandum to the Law on Amending the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland, Print No. 1507, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1507 (20.12.2021).

stitutions and Human Rights of the Organization for Security and Cooperation in Europe, the Centre for Research, Studies and Legislation of the National Council of Legal Advisers and representatives of non-governmental organizations.[26] In their opinion, the proposed amendments violate the rights of foreigners to apply for international and national protection. They stand in contradiction to the Geneva Convention (Articles 31, 32(2) and 33), the Universal Declaration of Human Rights (Article 14(1)), the Charter of Fundamental Rights of the European Union (Articles 18 and 19(2)), the Treaty on the Functioning of the EU (Article 78), EU directives,[27] Regulation (EC) No. 1987/2006 (Article 24) and the Constitution of the Republic of Poland (Article 56(2)). It is also worth noting that in the assessment made by Marek Jaśkowiak and Bartosz Pawłowski from the Bureau of Sejm Analyses of the Chancellery of the Sejm of the Republic of Poland of 7 September 2021, some of the proposed legal changes also raised concerns about their compatibility with international and domestic law.[28]

3. Protection of the state border against illegal migration

Reducing illegal migration and increasing the internal security of the country and its citizens were also the reasons for amending the Law on State Border Protection, according to those in power. The need for modification was also dictated by the ending of the period of the state of emergency and, thus, the extension of re-

26 Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw 03.10.2021, https://bip.brpo.gov.pl/sites/default/files/2021–10/Opinia_RPO_cudzoziemcy_3.10.2021.pdf (15.10.2021); Opinion of the Centre for Research, Studies and Legislation of the National Council of Legal Advisors to the Draft Law on Amendments to the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland (Print No. 1507), Warsaw, 13 September 2021, http://obsil.kirp.pl/wp-content/uploads/2021/09/Opinia-z-13.09.2021-ustawa-o-cudzoziemcach.pdf (22.12.2021); UNHCR Comments to the Draft Law on Amendments to the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland, 13 September 2021, https://www.unhcr.org/pl/wp-content/uploads/sites/22/2021/10/Uwagi-UNHCR-do-projektu-ustawy_PL.pdf (22.12.2021).

27 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Dz.U. UE L 2013.180.6); 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 (Dz.U. UE L 2008.348.98).

28 M. Jaśkowiak, B. Pawłowski, Opinion on the Compatibility with International Law and European Union Law of the Governmental Bill on Amending the Act on Foreigners and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland (Print No. 1507), Warsaw, 7 September 2021, https://www.sejm.gov.pl/sejm9.nsf/opinieBAS.xsp?nr=1507 (15.12.2021).

lated restrictions in Poland.[29] The importance of this issue is demonstrated by the fact that on 17 November 2021, the Polish Parliament passed a resolution of solidarity for the protection of Polish borders.[30] This act expressed gratitude to the Border Guard, the Police, the soldiers of the Polish Army, the Territorial Defence Forces and representatives of other units for their dedicated service in protecting territorial integrity. Gratitude was also expressed to the local community for their support of the above-mentioned services and their humanitarian assistance to the 'victims of the crisis'. Following the resolution, President Andrzej Duda signed the bill amending the Act on the Protection of the State Border and Some Other Acts.[31] In the justification of the bill, the legislator, referring to the high number of attempts to illegally cross the border, incidents provoked by the Belarusian border services, considered it necessary to increase the effectiveness of BGS actions. To this end, he introduced restrictions on staying in the area adjacent to the state border. The decision in this matter was entrusted to the minister in charge of internal affairs (after consultation with the Commander-in-Chief of the Border Guard), who, based on an ordinance, determines the area and duration of the ban (Article 12(a)(1,2)). The act provides for a number of exceptions for the categories of persons listed in Article 12(b). In addition, persons who are not listed in Article 12(b) and who are present in the prohibited area may face arrest or a fine (Article 18(d)).

The Act of 17 November 2021 also amended the Act on Border Guards. New legal solutions extended the catalogue of direct coercive measures at the disposal of Border Guard officers to include the spraying of incapacitating substances (Article 23(1)). Access to such a measure is supposed to increase 'the safety of the Border Guard officer in confrontation with an aggressive person who does not obey orders issued on the basis of the law and enables their incapacitation'.[32] In the opinion of the Legislative Bureau of the Senate, the discussed amendments to the Act should be deemed unconstitutional due to the defective mode of their enactment (lack of compliance with Article 123(1) of the Constitution of the Republic of Poland). Moreover, Article 12(a)(1,2) of the Act on the Protection of the State Border (contrary to Article 52(1) in connection with Articles 31(3), 52(3) and Article 92 of the Polish Constitution) and Article 18(d) of the Act (contrary to Article 42(1) in connection with

29 M. Nowicki, President of the Board of the Helsinki Foundation for Human Rights, Warsaw, 22 November 2021, https://www.hfhr.pl/wp-content/uploads/2021/11/nowelizacja-ustawy-o-ochronie-granicy.pdf (18.12.2021).

30 Resolution of the Sejm of the Republic of Poland on 17 November 2021 on Solidarity in the Protection of Polish Borders (Polish Monitor 2021, item 1129).

31 Act of 17 November 2021 Amending the Act on State Border Protection and Some Other Acts (Journal of Laws 2021, item 2191).

32 Justification of the Government's Draft Law on Amending the Law on State Border Security and Some Other Laws (Print no. 1754), p. 3, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1754 (22.01.2022).

Article 31(3) of the Polish Constitution) were deemed unconstitutional.[33] The ombudsman and the Helsinki Foundation for Human Rights have also raised objections to the amendment of the Act.[34]

Counteracting illegal immigration on the Polish–Belarusian border was also supported by non-legal actions aimed at sealing the border. For this purpose, at the beginning of July 2021, the construction of a temporary fence with entanglements in the form of a spiral fence began. An additional 123,891 metres of fence was placed in the border strip in September.[35] Joint patrols of BGS officers and Polish Army soldiers started to take place at the border. The Territorial Defence Forces were also involved in border protection. These efforts, however, proved ineffective, and therefore it was decided to build a wall on the border, which in Mariusz Kamiński's opinion is to be a symbol of 'the determination of the Polish state to limit mass illegal migration into our country'.[36]

The announcement of changes in the protection of Poland's eastern border was made by Minister of Interior and Administration Mariusz Kamiński at a meeting of the Polish Parliament on 30 September 2021. In November 2021, the president of Poland signed the relevant law.[37] Its purpose is to define the principles of preparation and implementation of border security construction. It is also intended to ensure the speed and efficiency of the planned investment. According to Article 4(1) of the Act, the investor of this project is the Commander-in-Chief of the Border Guard, who cooperates in this regard with the Team for the Preparation and Implementation of Border Security and the Plenipotentiary for the Preparation and Implementation of State Border Security. The team was given two tasks, namely to support the Commander-in-Chief of the Border Guard and to monitor and evaluate the implementation of the investment at the border (Article 5(1)). These were further detailed in § 2 of Regulation No. 256 of the prime minister.[38]

33 P. Magda, Opinion on the Law on Amendments to the Law on State Border Protection and Some Other Laws (Print No. 569), Legislative Bureau of the Chancellery of the Senate of the Republic of Poland, Warsaw, 22 November 2021, https://www.senat.gov.pl/gfx/senat/pl/senateksper-tyzy/6124/plik/569o.pdf (30.12.2021).

34 M. Nowicki, President of the Board…, *op. cit.*; Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw, 22.11.2021, https://bip.brpo.gov.pl/sites/default/files/2021–11/Do_Senatu_granica_panstwowa_22.11.2021.pdf (22.12.2021).

35 Justification of the Draft Law on the Construction of State Border Security (Print No. 1657), p. 2, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1657 (22.12.2021).

36 Minister Mariusz Kamiński Presented Details of the Construction of a Dam on the Border with Belarus, 04.11.2021, https://www.gov.pl/web/mswia/minister-mariusz-kaminski-przedstawil-szczegoly-dotyczace-budowy-zapory-na-granicy-z-bialorusia (22.12.2021).

37 Act of 29 October 2021 on the Construction of State Border Security (Journal of Laws 2021, item 1992).

38 Order No. 256 of the Prime Minister dated 9 November 2021 on the Team for Preparation and Implementation of State Border Security (Polish Monitor 2021, item 1042).

The team consisted of six ministers (or their authorized secretaries or undersecretaries of state) responsible for internal affairs, construction, budget, the environment, rural development and national defence. Apart from them, the BGS[39] and other institutions[40] have their own representatives. The Podlaskie and Lublin voivodes (or authorized deputies), the Plenipotentiary for the Preparation and Implementation of State Border Security and other persons invited by the team chairman were also appointed to the team (Article 5(2)). In addition to the above team, the institution of a Plenipotentiary for the Preparation and Implementation of State Border Security was created by law. The Commander-in-Chief of the Border Guard appoints them with the consent of the minister in charge of internal affairs. The plenipotentiary is entitled to undertake the tasks assigned to them (Article 4(3)) on behalf of the Commander-in-Chief. Within the scope of his/her activity, he/she can cooperate with public authorities, legal persons with State Treasury shareholding, state legal persons, non-governmental organisations and other entities (Article 4(5)).

In order to facilitate the planned investment, exemptions have been made from certain provisions,[41] including the Public Procurement Law (Article 9(1)), and the issue of the expropriation of property has been regulated (Article 11). The legislator, guided by the needs of the investment, has also provided for the possibility of 1) imposing a ban on staying in a specific area no wider than 200 m from the state borderline and 2) issuing a permit for a temporary stay in that area in particularly justified situations. In the first case, the decision is made by the voivode in charge of the location of the investment, at the request of or after consultation with the chief of the BGS unit in charge of the location (Article 8(1)). Only owners or holders of real estate located in the area are excluded from this if they use it in accordance with its intended purpose (Article 8(2)). In the second case, the decision belongs to the commander of the BGS branch competent for the location of the investment (Article 8(3)). The solutions proposed in the act raised doubts in the ombudsman, who is concerned about the means of its implementation.[42]

39 They include the Deputy Commander-in-Chief of the Border Guard and the Commander of the Podlaskie and Nadbużański Branch of the Border Guard or their deputies.

40 Among them are the President of the General Prosecutor's Office of the Republic of Poland or a deputy authorized by them, the General Director of Environmental Protection, the Chief Geodesist of the Country and the Head of the Central Anti-Corruption Bureau or deputies authorized by them.

41 Including the Construction Law, the Water Law, the Environmental Protection Law and the regulations on providing access to information about the environment, the Geodetic and Cartographic Law, the regulations on spatial planning and development, the regulations on the protection of agricultural and forest land and the environment, the regulations on railroad transport and the regulations on special principles of preparing and implementing investments in the field of public roads (Article 6(1)).

42 Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw 20.10.2021, https://bip.brpo.gov.pl/sites/default/files/2021–10/Do_Marszalka_

As a result of the above law, on 4 January 2022 agreements on the construction of security facilities on the Polish–Belarusian border were signed. The total amount for the investment has been estimated at PLN 1,233,000,000[43] (the justification to the Act reports PLN 1,615,000,000 coming from the state budget).[44] The planned investment was to be completed within 180 days, i.e. by the end of the first half of 2022.

Conclusions

The introduction of a state of emergency on the Polish–Belarusian border was triggered, among other things, by an increase in the number of attempts to illegally cross the border, which was related to the implementation of the constitutional obligation of those in power to protect the security of the state. The declaration of this state in some parts of the country resulted in adopting new legal solutions which aim at driving out immigrants who illegally crossed the border from Poland. In addition, the background of the changes was to strengthen border security. The above objectives were achieved by introducing new solutions, which provided, for example, 1) an instruction on the obligation to immediately leave the territory of Poland, 2) issuing a decision obliging a foreigner to return when he/she crossed or attempted to cross the border illegally, 3) issuing a decision on leaving Poland, 4) extending the scope of grounds under which an application for international protection is left without examination, 5) the possibility of introducing restrictions on staying in the area adjacent to the state border, 6) extending the scope of means of direct coercion at the disposal of BGS officers and 7) building a wall on the Polish–Belarusian border. It should be noted that the proposed legal solutions are not temporary, as is the case in exceptional situations. They have become a permanent element of the Polish legal system. Therefore one may wonder whether they were introduced to restore the normal situation as soon as possible and whether the state of emergency has become a tool for tightening the rights of foreigners, especially those crossing the border illegally.

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43 Straż Graniczna podpisała umowy dotyczące budowy zapory na granicy polsko-białoruskiej, 04.01.2022, https://www.gov.pl/web/mswia/straz-graniczna-podpisala-umowy-dotyczace-budowy-zapory-na-granicy-polsko-bialoruskiej (16.01.2022).

44 Regulatory Impact Assessment, Justification to the Bill, Warsaw, 12 October 2021, p. 6, https://orka.sejm.gov.pl/Druki9ka.nsf/0/87A320926EF10C1DC125876C006DCA9E/%24File/1657.pdf (16.01.2022).

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The Migration Crisis on the Polish–Belarusian Border

Abstract: The crisis on the Polish–Belarusian border resulting in the unregulated migration of foreigners into the territory of Poland was inspired and supported by the Belarusian regime and was aimed at destabilizing the situation in the region. Poland was therefore forced to take action to protect the national border, which is also the external border of the European Union. However, some of the legal solutions that were adopted raise questions about their legality.
Keywords: migration crisis, migrant, Polish–Belarusian border, push-back, restriction of freedom of movement

Introduction

The migration of populations is a phenomenon known on all continents and taking place in all periods of history. Migration is triggered by economic and political crises, armed conflicts, and natural or other disasters. Migration can take place in a smooth manner, with a country welcoming migrants by creating conditions for residence or even assimilation and admitting foreigners to the labour market. However, there are situations where there are attempts to illegally cross a border, often on a mass scale. Such phenomena lead to migration crises. In modern Europe, the largest such crisis occurred in 2015, when more than 2 million third-country nationals were reported to have entered EU Member States illegally.[1] The people who came to

1 420,540 in 2011, 394,060 in 2012, 394,855 in 2013, 606,850 in 2014, 2,085,465 in 2015, 924,033 in 2016, 563,825 in 2017, 572,195 in 2018, 627,900 in 2019, and 557,455 in 2020. Data according to Eurostat, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eipre&lang=en

Europe were mainly from Syria, Afghanistan, Iran, and other Middle Eastern and African countries. The reasons for the increased migration were unstable political and economic situations and warfare. The migration crisis of 2015 also had its consequences in Poland and contributed to Poland's violation of the principles of the Common European Asylum Policy by not fulfilling the country's relocation obligations.[2] The migration crisis that hit Poland in 2021 took a slightly different form.

The purpose of this paper is to present selected aspects of the migration crisis on the Polish–Belarusian border. The paper indicates the actions taken by Poland to address the problem and presents an assessment of the legal measures taken, mainly in the context of the *push-back* practice and the restrictions on freedom of movement that were imposed. The author will focus on the issue of assessing the legality of the adopted solutions. The study mainly uses the dogmatic and legal method and the descriptive method, in particular the sources of law existing in this area and the scholarly publications on this problem, which are few due to it having occurred recently.

1. The actions taken by Poland to solve the migration crisis on the Polish–Belarusian border

In 2015, Jaroszewicz and Kindler indicated that unregulated migration from Ukraine and Belarus could pose a serious challenge for EU Member States that share national borders with those countries.[3] This is what happened on the Polish border with Belarus, as well as on the borders of Lithuania and Latvia with that country. Until April 2021, the number of people trying to enter the European Union via the so-called Eastern Borders Route, which includes Lithuania, Latvia, and Poland, was about 100 per month. In July 2021, the number exceeded 3,000.[4] This event was surprising because the main migration routes existing at the time did not run from Belarus to Poland.[5] Lukashenko's regime artificially created migratory pressure on the Polish–Belarusian border, which is also the external border of the EU, in response

(02.03.2022). For more on migration, see E. Karska, Kilka uwag o uchodźstwie jako zagadnieniu prawnym, (in:) E. Karska (ed.), Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego, Warsaw 2020, pp. 9–21; E. Karska, Słowo wstępne, (in:) E. Karska (ed.), Uchodźcy. Aktualne zagadnienia prawa i praktyki, Warsaw 2017, pp. 7–10.

2 M. Zdanowicz, Poland's Stance on the Refugee and Migration Crisis in the European Union, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 85ff.

3 M. Jaroszewicz, M. Kindler, Irregular Migration from Ukraine and Belarus to the EU: A Risk Analysis Study, CMR Working Paper 80/138, April 2015, p. 30.

4 Grupa Granica, Kryzys humanitarny na pograniczu polsko-białoruskim, p. 5, https://www.grupagranica.pl/files/Raport-GG-Kryzys-humanitarny-napograniczu-polsko-bialoruskim.pdf (02.03.2022).

5 For more, see https://pl.wikipedia.org/wiki/Kryzys_migracyjny_w_Europie (accessed 22 August 2022).

to the sanctions imposed on Belarus in connection with the rigged presidential elections and mass persecution of the opposition.[6] At the same time, this crisis part of a hybrid operation conducted by the Belarusian secret services, was to be a test of the condition and defense readiness of NATO's eastern flank and was intended to weaken the EU's international authority. Lukashenko brought migrants, for a fee, via the so-called 'tourist offices'. The economic gains from this precedent were important, albeit secondary to the political intention.[7] As early as 5 July 2020, the European Council president, Charles Michel, condemned the Belarusian authorities for all attempts to instrumentalize illegal migration in order to put pressure on EU Member States.[8] According to the Ministry of the Interior and Administration, 2,100 people attempted to illegally cross the Polish–Belarusian border in August. Out of this number, the Border Guard prevented 1,342 attempted border crossings, and 758 foreigners were detained and placed in closed refugee centres run by the Border Guard. From the start of July until 17 August 2021, 380 foreigners were transferred from the territory of Poland (including to their countries of origin).[9] In that period, the NGO Grupa Granica reported that on 8 August a group of Afghans was trapped on the Polish–Belarusian border in Usnarz Górny and then, on 20 August, was pushed by Polish Border Guard officers to the Belarusian side of the border.[10] There were many more such incidents during this crisis.

On 20 August, the Minister of the Interior and Administration issued a regulation, on the basis of which persons not authorized to enter the territory of the Republic of Poland would be instructed to immediately leave the territory of the Republic of Poland and would be returned to the national border (§ 1 of the regulation).[11] Then on 2 September, the president of Poland issued a regulation on the basis of which a state of emergency was introduced in parts of the Podlaskie and Lubelskie prov-

6 Rozporządzenie wykonawcze Rady (UE) 2021/997 z dnia 21 czerwca 2021 r. w sprawie wykonania art. 8a ust. 1 rozporządzenia (WE) nr 765/2006 dotyczącego środków ograniczających wobec Białorusi, OJ L 219I, 21.06.2021, pp. 3–44.

7 B. Fraszka: Sytuacja na granicy polsko-białoruskiej: przyczyny, aspekt geopolityczny, narracje, https://warsawinstitute.org/pl/sytuacja-na-granicy-polsko-bialoruskiej-przyczyny-aspekt-geopolityczny-narracje/ (22.08.2022).

8 Remarks by President Charles Michel on his arrival in Vilnius, https://www.consilium.europa.eu/pl/press/press-releases/2021/07/05/remarks-by-president-charles-michel-upon-his-arrival-to-vilnius/ (02.03.2022).

9 https://www.gov.pl/web/mswia/dzialania-polskich-sluzb-na-granicy-polsko-bialoruskiej (03.03.2022).

10 Grupa Granica, Kryzys humanitarny… *op. cit.*, p. 5. Grupa Granica is a social movement formed in connection with the events that took place in the Polish–Belarusian borderland.

11 Regulation of the Minister of the Interior and Administration of 20 August 2021 amending the regulation on temporary suspension or limitation of the border traffic at certain border crossings (Journal of Laws of 2021, item 1536).

inces for 30 days (§ 1 of the regulation).[12] The regulation introduced restrictions on human and civil liberties and rights, including suspension of the freedom of assembly and the freedom of mass events, prohibition from staying in the area covered by the state of emergency for a specified period of time, and restriction of access to public information concerning activities carried out in the area covered by the state of emergency (§ 2 of the regulation). On 2 October, the state of emergency was extended for another 60 days.[13]

On 17 November 2021, the Parliament adopted a law on the basis of which a temporary ban on staying in a certain area in the border zone adjacent to the state border could be imposed (Article 1(1)).[14] Based on the amended law, the Minister of the Interior and Administration issued a regulation on 30 November 2021 on the imposition of a temporary ban on staying in a specific area in the border zone adjacent to the national border with the Republic of Belarus.[15] A temporary ban on staying in a specified area in this border zone was imposed for the period from 1 December 2021 to 1 March 2022 (§ 1(1) of the regulation). The area referred to in the regulation included the precincts specified in the list set out in an annex to the regulation, which included 115 localities in the Podlaskie province and 68 in the Lubelskie province. The restrictions in this area were extended pursuant to the Regulation of the Minister of Interior and Administration of 28 February 2022 on the imposition of a temporary ban on staying in a specified area in the border zone adjacent to the national border with the Republic of Belarus for the period from 2 March 2022 to 30 June 2022 (§ 1(1) of the regulation).[16]

It was obvious from the beginning that the Belarusian government was using migrants to destabilize the situation in the region. The European Council, at its meeting on 16 October 2021, strongly condemned the instrumental treatment of migrants and refugees by the Belarusian regime and the resulting humanitarian crisis. The European Council called in particular for effective protection of the EU's external

12 Regulation of the President of the Republic of Poland of 2 September 2021 on the imposition of a state of emergency in the area of a part of the Podlaskie province and a part of the Lubelskie province (Journal of Laws of 2021, item 1612).

13 Regulation of the President of the Republic of Poland of 1 October 2021 on the extension of a state of emergency imposed in the area of a part of the Podlaskie province and a part of the Lubelskie province (Journal of Laws of 2021, item 1788).

14 Act of 17 November 2021, Amending the Act on the Protection of the National Border and Certain Other Acts (Journal of Laws of 2021, item 2191).

15 Regulation of the Minister of the Interior and Administration of 30 November 2021 on the imposition of a temporary ban on staying in a specific area in the border zone adjacent to the national border with the Republic of Belarus (Journal of Laws of 2021, item 2193).

16 Regulation of the Minister of Interior and Administration of 28 February 2022 on the imposition of a temporary ban on staying in a specific area in the border zone adjacent to the national border with the Republic of Belarus (Journal of Laws of 2022, item 488).

borders, combating smuggling and trafficking in human beings, and supporting the return of migrants from Belarus (item 21 of the conclusions).[17]

Also, in its resolution of 7 October 2021, the European Parliament expressed strong solidarity with Lithuania, Poland, and Latvia, as well as other EU Member States targeted by the Belarusian regime, and strongly condemned the Lukashenko regime for using people instrumentally for political purposes. In addition, the Parliament stressed that the Belarusian state's support for illegal crossing of the EU's external border, combined with a disinformation campaign, was a form of hybrid war to intimidate and destabilize the EU.[18]

2. An attempt to legalize the push-back practice

The first adopted act that provided the basis for the implementation of the push-back practice in Poland was the Regulation of the Minister of the Interior and Administration.[19] It provided the possibility to return persons not authorized to enter the territory of the Republic of Poland to the national border (§ 1 of the Regulation). In addition, the Act of 14 October 2021, commonly referred to as the 'Deportation Act', gave the commanding officer of the Border Guard the power to issue a decision on the departure from the territory of the Republic of Poland of an alien who has illegally crossed the border (Article 1(3)).[20] This in turn results in returning foreigners to the territory of Belarus.

The adoption of these acts and the actions taken by the Border Guard to turn back aliens raise questions about the legality of the push-back practice. According to Baranowska, 'the term *push-back* is used to describe the unlawful international practice of actually sending people back to the country from the territory of which they crossed the border (usually illegally) without giving them an opportunity to apply for refugee status and without initiating other administrative procedures against them, including return procedures'.[21]

In their published report, the Helsinki Foundation for Human Rights emphasizes that the regulation should be considered inconsistent with both international and EU law. The Schengen Borders Code states that in the event of the disclosure

17 European Council Meeting (16 December 2021) – Conclusions, Brussels, 16 December 2021, EUCO 22/21, item 21.

18 European Parliament resolution of 7 October 2021 on the situation in Belarus after one year of protests and their violent repression (2021/2881(RSP)), item 16.

19 Regulation of the Minister of the Interior, 20 August 2021, *op. cit*.

20 Act of 14 October 2021, Amending the Act on Aliens and Certain Other Laws (Journal of Laws of 2021, item 1918).

21 K. Baranowska, Legalność i dopuszczalność procedury push-back (wywózek) i ocena prób ich legalizowania w Polsce, (in:) W. Klaus (ed.), Poza prawem. Prawna ocena działań państwa polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej, Warsaw 2021, p. 10.

of an illegal crossing of the border by a foreigner outside the border crossing point, appropriate administrative proceedings should be implemented against him or her, aimed at obliging him or her to return in accordance with the guarantees provided for in Directive 2008/115/EC. In this case, the foreigner has the option of submitting an application for international protection, which should result in suspension, discontinuation or withdrawal from the proceedings initiated, or acceptance of the application from the foreigner and allowing them to enter Poland to participate in the refugee procedure.[22]

The Convention Relating to the Status of Refugees, in Article 33, contains the principle of non-refoulement, according to which a country may not expel or return refugees to territories where their lives or freedoms would be threatened.[23] Individuals were usually turned around at night, at low temperatures, in difficult terrain conditions, often in forests. This procedure was followed despite the fact that Belarusian officials did not allow foreigners to move back into the country from the border, so that they could seek a safe return to their country of origin; foreigners were forced to make further attempts to cross the border. Violence or threats of death have been used on many occasions. The Border Guard returns persons without an analysis of the individual situations of the aliens, which violates the aforementioned principle. In addition, the aliens do not have the option to apply for international protection.

Hungary followed a similar practice during the 2015 migration crisis. The Court of Justice ruled that Hungary had failed in its obligation to ensure effective access to the international protection procedure because third-country nationals seeking to use the international protection procedure at the Serbian–Hungarian border were faced with an almost total impossibility to apply.[24]

The European Court of Human Rights, in similar situations, also found Poland to have violated the European Convention on Human Rights when people arriving from Belarus were not allowed to apply for international protection.[25] The Polish Commissioner for Human Rights also emphasized that any person who, while staying at the border of the Republic of Poland, notifies a Border Guard officer carrying out any official activities against him or her of his or her intention to cross the border in order to apply for international protection in Poland should be admitted to Poland,

22 K. Czarnota, M. Górczyńska, Gdzie prawo nie sięga. Raport Helsińskiej Fundacji Praw Człowieka z monitoringu sytuacji na polsko-białoruskiej granicy, https://www.hfhr.pl/wp-content/uploads/2022/06/Raport_Gdzie_Prawo_Nie_Siega-HFPC-30062022.pdf, str. 33 (22.08.2022).

23 Convention relating to the status of refugees, made at Geneva on 28 July 1951 (Journal of Laws of 1991, no. 119, item 515).

24 Judgment of the Court (Grand Chamber) of 17 December 2020 on the case of European Commission v. Hungary, C 808/18.

25 Judgment of ECtHR of 23 July 2020, on the case of M.K. and others v. Poland, application nos. 40503/17, 42902/17, and 43643/17; Also Case of D.A. and others v. Poland, application no. 51246/17 Judgment of 8 July 2021.

and the Border Guard officer is obliged to accept an appropriate application from that person.[26]

A group of foreigners who were returned to the Polish–Belarusian border in the summer of 2021 submitted a complaint to the European Court of Human Rights, which decided to apply interim measures in the cases of Amiri and others v. Poland (application no. 42120/21) and Ahmed and others v. Latvia (application no. 42165/21). The Court called on the Polish and Latvian authorities to provide all the applicants with food, water, clothing, adequate medical care, and, if possible, temporary shelter.[27]

Baranowska points out that the push-back practice is also a violation of EU law, in particular the so-called Procedural Directive (2013/32/EU). According to its provisions, applicants for international protection must be allowed to remain in an EU Member State for the entire duration of the proceedings in their case. This directive provides for a simplified and expedited procedure but does not allow the application to be left unprocessed in any situation.[28] Półtorak also stresses that according to international law, EU law, and national law that is binding to Poland, an application for international protection cannot be refused. This means that any person who, while staying at the border of the Republic of Poland, notifies a Border Guard officer carrying out any official activities against him or her of his or her intention to cross the border in order to apply for international protection in Poland, should be admitted to Poland, and the Border Guard officer is obliged to accept an appropriate application from that person.[29]

3. Restrictions on freedom of movement

Actions taken by the Polish government, which are reasonable from the point of view of protection of its national border and the country's security, may raise questions about the legality of certain restrictions, including those concerning the freedom of movement. The president of the Republic of Poland, in § 2(4) of the Regulation of 2 September 2021, introduces "a prohibition on staying at specified times in designated places, structures, and areas located in the area covered by the state of emergency". This restriction was extended by legislation adopted later. In imposing a state of emergency, the president of the Republic of Poland invoked Ar-

26 https://bip.brpo.gov.pl/pl/content/rpo-nieprzyjmowanie-wnioskow-o-ochrone-miedzynarodowa-w-strefie-przygranicznej-naruszenie (12.30. 2022). See also Amnesty International, Sytuacja w Usnarzu Górnym. Raport z wizyty w dniu 24.08.2021.

27 ECHR 244 (2021), 25.08.2021; Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland.

28 K. Baranowska, Legalność…, *op. cit.*, p. 10.

29 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. 5.

ticle 230(1) of the Constitution and Article 3 of the Act of 21 June 2002 on the State of Emergency.[30]

According to Article 230(1) of the Constitution, the imposition of a state of emergency is allowed only in the event of a threat to the constitutional system of the state, the security of its citizens or to law and order. In addition, the imposition of a state of emergency is only permissible in situations of special danger if ordinary constitutional measures are insufficient (Article 228(1)). Both of these circumstances must occur together. According to Article 230(1 and 2) of the Constitution, a state of emergency may be imposed once for a period not exceeding 90 days and then extended only once for a period of 60 days. On the other hand, the Minister of the Interior and Administration, when introducing a temporary ban on staying in a specified area in the border zone adjacent to the national border with the Republic of Belarus, invoked Article 12a(2) of the Act of 12 October 1990 on the Protection of the National Border.

The introduction of restrictions on rights and freedoms has raised far-reaching concerns about the legality of such laws. In a cassation procedure to the Supreme Court, the Ombudsman has appealed against the lower court's verdict convincing journalists for violating the ban on staying in the area covered by the state of emergency. In the grounds of the judgment, the Supreme Court emphasized that the president, in the Regulation of 2 September 2021 which introduced the state of emergency, also introduced restrictions on rights and freedoms, including "the prohibition against staying at specified times in designated places, structures, and areas located in the area covered by the state of emergency". Therefore, there was an authorization to identify the specific circumstances in which the restriction of the freedom to stay in specific places was to occur.[31]

According to Article 92 of the Polish Constitution, regulations are issued by the authorities indicated in the Constitution on the basis of a specific authorization contained in the law and for the purpose of its implementation. The authorization should specify the authority competent to issue the regulation, as well as the scope of the matters delegated to be regulated and the guidelines for the content of the regulation, and the authority authorized to issue the regulation may not delegate its powers to another authority. A regulation is therefore required to 1) be based on a clear, detailed, and not presumptive authorization; 2) be within the scope of the authorization and within the limits of the authorization granted by the legislator and intended to implement the law as to the object and content of the normalized relations; and 3) have content that is not contradictory to the norms of the Constitution and to the

30 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483, as amended); Act of 21 June 2002 on the State of Emergency (Journal of Laws of 2002, no. 117, item 985).

31 Judgment of the Supreme Court of 18 January 2022, Ref. I KK 171/21, p. 10.

law on the basis of which it was issued, as well as of all applicable laws that directly or indirectly regulate the matter subject to the regulation. Violation of even one of these conditions renders the regulation inconsistent with the Act and thus cannot be the source of obligation to the citizens, and consequently cannot constitute the basis fo punishment for failure to comply with that obligation.[32]

The Council of Ministers, in the Regulation of 2 September 2021, defined the scope of the restrictions by, among other things, prohibiting people from staying in the area covered by a state of emergency, effective 24 hours a day, in the area where the state of emergency has been imposed (§ 1(1)(4) and § 1(2) of the Regulation of the Council of Ministers).[33] In the grounds of its judgment, the Supreme Court emphasized that the restrictions imposed by the Regulation of the Council of Ministers are of a general nature (with some exceptions) and are applicable at all times and in the entire area where the state of emergency is in force. The Court agreed with the opinion of the Commissioner for Human Rights that there is no justification for imposing a ban that is blanket and complete in terms of time on the exercise of the freedom of movement in the area covered by, and during, the state of emergency. Accordingly, in the opinion of the Supreme Court, the Regulation of the Council of Ministers of 2 September 2021, to the extent that it imposes a prohibition, unlimited as to area and time, on staying in the area covered by the state of emergency, as well as to the extent that it does not allow journalists to stay in the area in connection with their professional activities, clearly exceeds the scope of the statutory delegation on which the Regulation was based and fails to pass the proportionality test set out in Article 228(5) of the Polish Constitution, Article 15(1) of the European Convention on Human Rights, and Article 4 of the International Covenant on Civil and Political Rights.[34]

Górski points out that the Regulation of the President of 2 September 2021 did not specify in its § 2(4) either the 'designated places, structures, and areas' to which the 'prohibition to stay' would apply or the 'specified times' to which the ban would apply. Thus, in the author's opinion, the Regulation of the President is contrary to Article 18(2)(1) of the Act on the State of Emergency in connection with Article 228(3) of the Polish Constitution. At the same time, Górski explains that it is not about the duration of the state of emergency, because this is determined on the basis of Article 230 of the Constitution and Article 3(2) of the Act on the State of Emergency and not on the basis of Article 18 of the Act on the State of Emergency. It is also not about the area in which the state of emergency is in force, because this too is determined by Ar-

32 *Ibidem*, p. 9.

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

34 Judgment of the Supreme Court of 18 January 2022, *op. cit*., p. 22.

ticle 3 of the Act on the State of Emergency, not by its Article 18.According to Górski, 'the state's political authorities deliberately chose such an imprecise (thus unconstitutional) definition of the territorial and temporal scope of the prohibition to stay in order to achieve a chilling side effect'.[35]

What is also problematic is the extension of the restrictions, including those on the freedom of movement, beyond the periods provided for in Article 230(1 and 2) of the Constitution.[36] The rapidly adopted legislation that imposed restrictions on areas near the Polish–Belarusian border also raised a number of concerns regarding the possibility of providing humanitarian assistance to migrants crossing the border. In the opinion of Grzebyk, humanitarian organizations (including the Polish Red Cross), in accordance with international law, could offer humanitarian assistance in areas covered by the state of emergency, but they could only provide this assistance with the consent of the country affected by the humanitarian crisis. However, the Polish authorities could not arbitrarily deny humanitarian organizations access to people affected by the crisis. According to Grzebyk, with respect to the Polish Red Cross, it can be presumed that its employees had the right to provide humanitarian assistance in the area covered by the state of emergency, and only an explicit exemption in the state of emergency law could rebut such a presumption. However, she points out the contradiction between the provisions of the Act on the Polish Red Cross that grant the organization a special status and the provisions of the Act on the State of Emergency, which in Article 15 provides, among other things, that restrictions on human rights apply to any legal entity in its registered office or carrying out activities in an area covered by a state of emergency.[37] Also, Klaus is of the opinion that the actions of individuals providing free humanitarian aid to forced migrants present at the border do not constitute crimes such as assistance, an undocumented stay, or the organization of illegal border crossing. Activities such as providing food, clothing, medicine, or other products to facilitate survival in the forest are, in Klaus's opinion, perfectly legal.[38]

35 M. Górski, Legalność wprowadzenia stanu wyjątkowego i ograniczeń praw obywatelskich nim nałożonych, w tym dotyczących przemieszczania się, (in:) W. Klaus (ed.), Poza prawem…, *op. cit*., p. 20.

36 More information can be found in M. Górski, Legalność…, *op. cit.*, p. 21.

37 P. Grzebyk, Czy organizacje humanitarne, np. Polski Czerwony Krzyż, mają prawo działać w strefie stanu wyjątkowego?, (in:) W. Klaus (ed.), Poza prawem…, *op. cit.*, p. 24.

38 W. Klaus, Karanie za pomoc, czyli czy można pociągnąć do odpowiedzialności karnej osoby pomagające przymusowym migrantom i migrantkom na pograniczu, (in:) W. Klaus (ed.), Poza prawem…, *op. cit.*, pp. 31–32.

Conclusion

It is indisputable that the crisis on the Polish–Belarusian border resulting in the unregulated migration of foreigners into the territory of Poland was inspired and supported by the Belarusian regime and was aimed at destabilizing the situation in the region. Poland was therefore forced to take action to protect the national border, which is also the external border of the European Union. Poland imposed a state of emergency in parts of the Podlaskie and Lubelskie provinces, and after the end of the state of emergency, the restrictions were extended by the Regulation of the Minister of the Interior and Administration. However, some of the adopted solutions raise questions about their legality. The procedure of the Border Guard turning back persons, referred to as push-back, violates the fundamental principle of non-refoulement specified in the Convention Relating to the Status of Refugees. It is carried out without analysing the alien's individual situation. As a result of this practice, the aliens do not have the option to apply for international protection. Also, the imposition of restrictions on the freedom to stay in the area covered by the state of emergency fails to pass the proportionality test set out in Article 228(5) of the Polish Constitution, Article 15(1) of the European Convention on Human Rights, and Article 4 of the International Covenant on Civil and Political Rights. Moreover, it clearly exceeds the scope of the statutory delegation under which the regulation implementing the restriction was issued. In conclusion, Poland was forced by the actions of Belarus and the illegal influx of migrants to take steps to secure and protect its national border, which is the external border of the EU. However, not all instruments adopted are legal.

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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 times[5] (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 foreigners[8] (an extreme situation)[9] on 2 July 2021 as a result of irregular migration. Later, on 9 November 2021, the Seimas[10] 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 migrants[16] 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.

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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. Radziewicz, (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-ograniczen-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-uchodzcami-zatrzymala-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 Convention[52] and thus a breach of the elementary principle of international law *pacta sund 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. Słubik, 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 European[59] 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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Illegal Border Crossing and Associated Offences in the Light of the Criminal Code of the Republic of Belarus

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 Ю.А. Минакова, Уголовная ответственость за незаконное пересечение государственной границы по законодательству России и других стран СНГ (сравнительный аспект), https://cyberleninka.ru/article/n/ugolovnaya-otvetstvennost-za-nezakonnoe-peresechenie-gosudarstvennoy-granitsy-po-zakonodatelstvu-rossii-i-drugih-stran-sng/viewer (04.10.2022) [Y.A. Minakova, Ugolovnaya otvetstvenost' za nezakonnoye peresecheniye gosudarstvennoy granitsy po zakonodatel'stvu Rossii i drugikh stran SNG (sravnitel'nyy aspekt), https://cyberleninka.ru/article/n/ugolovnaya-otvetstvennost-za-nezakonnoe-peresechenie-gosudarstvennoy-granitsy-po-zakonodatelstvu-rossii-i-drugih-stran-sng/viewer (04.10.2022)].

9 В.А. Круглов, Е.И. Климова, Комментарий…, *op. cit.*, с. 803 [V.A. Kruglov, Y.I. Klimova, Kommentariy…, *op. cit.*, p. 803].

10 С.В. Ананич, Глава 18 (в:) Э.А. Мичулис (ред.), Уголовное право. Особенная часть, Минск 2012, с. 565 [S.V. Ananich, Glava 18, (in:) E.A. Michulis (ed.), Ugolovnoye pravo. Osobennaya chast', Minsk 2012, p. 565].

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

12 В.М. Хомич, Глава 32 (в:) А.В. Барков, В.М. Хомич (ред.), Научно-практический комментарий к Уголовному кодексу Республики Беларусь, Минск 2007, с. 802 [V.M. Khomich, Glava 32, (in:) A.V. Barkov, V.M. Khomich (eds.), Nauchno-prakticheskiy kommentariy k Ugolovnomu kodeksu Respubliki Belarus', Minsk 2007, p. 802].

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

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

On the basis of this provision, the following are criminally liable: a foreigner, i.e. a person who is not a citizen of Belarus and who has proof that he or she is a citizen of another state, and a stateless person, i.e. a person who is not a citizen of Belarus and has no proof that he or she is a citizen of another state. These people are deported, i.e. forcibly expelled beyond the borders of the republic, or expelled, i.e. sent out of the republic. Also criminally liable is a public official who uses his or her official powers for unlawful behaviour[16] involving the improper performance of control functions at the national border of Belarus, as well as other abuses of official powers, to allow others to illegally cross the border.[17]

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

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

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

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

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

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

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

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

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

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

2. Organization of illegal migration

Organization of illegal migration is regulated in Article 371[1] of the CCRB, in its Chapter XIII titled 'Crimes against the state and the order of the exercise of power and governance' in the section titled 'Crimes against the order of governance'. It was added to the Criminal Code in 2003.

On the basis of Article 371[1] par. 1 of the Criminal Code of the Republic of Belarus, 'organization, directing, and support for activities involving illegal entry into the territory of the Republic of Belarus, stays in the territory of the Republic of Belarus, transit through the territory of the Republic of Belarus, or departure from the Republic of Belarus of foreigners or stateless persons (organization of illegal migration)' are subject to a penalty. The perpetrator is punishable by detention or restriction of liberty for up to five years or imprisonment for up to five years. This is the basic type of this crime.

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

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

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

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

18 *Ibidem*, p. 860.

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

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

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

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

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

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

24 В.А. Круглов, Е.И. Климова, Комментарий…, *op. cit.*, с. 806; С.В. Ананич, Глава 18, *op. cit.*, с. 568 [V.A. Kruglov, Y.I. Klimova, Kommentariy…, *op. cit.*, p. 806; S.V. Ananich, Glava 18, *op. cit.*, p. 568].

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

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

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

28 А.В. Казхаков, Отдельные проблемы правового обеспечения борьбы с незаконной миграцией на внутренней границе союзного государства, 'Вестник полоцкого университета' 2017, no. 14, с. 157 [A.B. Kazkhakov, Otdel'nyye problemy pravovogo obespecheniya bor'by s nezakonnoy migratsiyey na vnutrenney granitse soyuznogo gosudarstva, 'Vestnik polotskogo universiteta' 2017, no. 14, p. 157].

29 А.В. Казхаков, Оперативно-розыскная характеристика незаконной миграции на государственной границе Республики Беларусь: уголовно-правовой аспект и механизм преступления, https://elib.amia.by/bitstream/docs/2455/1/358_2018_Minsk-krim_2.pdf (04.10.2022) [A.B. Kazkhakov, Operativno-rozysknaya kharakteristika nezakonnoy migratsii na gosudarstvennoy granitse Respubliki Belarus': ugolovno-pravovoy aspekt i mekhanizm prestupleniya, https://elib.amia.by/bitstream/docs/2455/1/358_2018_Minsk-krim_2.pdf (accessed 04.10.2022)].

30 О.И. Бахур, Организованные формы незаконной миграции в Республике Беларусь: проблемы уголовно-правововго противодействия, 'Вестник Академии МВД Республики Беларусь' 2008, no. 2, с. 67 [O.I. Bakhur, Normy ugolovnogo Kodeksa Respubliki Belarus', predusmatrivayushchiye otvetstvennost' za nezakonnuyu migratsiyu: stanovleniye razvitiye i dal'neysheye sovershenstvovanie, 'Zhurnal Belorusskogo gosudarstvennogo universiteta. Pravo' 2019, no. 3, p. 67].

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

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

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

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

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

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

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

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

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

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

its participants,[38] preparing the smuggling route,[39] purchasing tickets to the border zone,[40] hiding the organizers and participants of the crime[41] by providing premises,[42] receiving and accommodating them,[43] providing means of transportation,[44] mobile communications, and other property, arranging personal escort of illegal migrants through the territory of Belarus and to the state border, providing them with assistance in the crossing of the border,[45] transporting migrants to the territory of Belarus, directing the transit,[46] preparing shelters for illegal migrants in the border zone (belt), hiding or destroying objects (documents) left by illegal migrants, obliterating other traces of the crime, and carrying out instructions from the person directing illegal migration that are aimed at committing the crime.[47]

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

In general, the organization of illegal migration as the entire crime manifests itself 'in ordering activities aimed at creating conditions for the movement of foreigners, organizing their illegal stay in violation of the migration or transit procedure established in the Republic of Belarus, or directly organising the commission of the acts provided for in Article 371 par. 1^1 of the Criminal Code of the Republic of Belarus'.[49] In this regard, it should be noted that this crime is associated with the commission of separate crimes of bribery and falsification of documents.[50] As the nature of the crime is formal, the perpetrator's liability does not require the occurrence of any

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In light of Article 371[1] par. 2 of the CCRB, 'organization of illegal migration, carried out in a manner that endangers the life or health of foreigners or stateless persons, or involving treatment that is cruel or degrading to their dignity, or is carried out repeatedly, or by a group of persons with prior agreement, or by a public official using his official powers' is subject to a penalty. The perpetrator is subject to imprisonment for three to seven years and to an optional fine. This is an aggravated type of this crime.

The object of the analysed crime comprises:

- its perpetration in a manner that endangers the life or health of foreigners or stateless persons – creating a real danger to human life and health by transporting people in truck containers, car trunks, hiding places that impede their movement and nutrition,[52] in tanker trucks, or in unsanitary conditions;[53]
- its perpetration in a manner that involves treatment that is cruel or degrading to their dignity – with the violation of applicable norms of law, morality, and social relations[54] by deprivation of access to food, drink, and heat, or with beating, violence, ridicule, or insult;[55]
- its perpetration more than once – the repeated perpetration of two or more such crimes;[56]
- its perpetration by a group of persons after prior agreement, if they have previously agreed to jointly commit the crime in question (Article 17 of the CCRB);
- its perpetration by a public official using his or her official powers – the unlawful behaviour of a public official that was carried out taking advantage of his or her official status and position.[57]

The perpetrator of the crime identified in Article 371[1] of the CCRB is a sane individual who has reached the age of 16, and the perpetrator of the crime identified in Article 371[1] par. 2 of the CCRB is a public official. Intentional fault is a necessary cri-

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

52 *Ibidem,* p. 807.

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

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

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

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

57 *Ibidem,* p. 807.

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

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

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

Violation of the period of prohibition of entry into the territory of the Republic of Belarus is regulated in Article 371[2] of the CCRB, in its Chapter XIII titled 'Crimes against the state and the order of the exercise of power and governance' in the section titled 'Crimes against the order of governance'. It was added to the Criminal Code in 2003.

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

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

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

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

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

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

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

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

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

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

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

63 *Ibidem,* p. 808.

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

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

trator does not require the occurrence of any consequences.[66] The perpetrator of the crime under Article 371[2] of the CCRB is a sane individual who has reached the age of 16 and is a foreigner or a stateless person. Intentional fault is a necessary criterion for a person to be considered a perpetrator of this crime.

Conclusions

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

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

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

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

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The Migration of Ukrainians to Poland: The Context of Border Criminology

Abstract: The phenomenon of migration is common in modern times. People move around the world for touristic, financial, educational, social and other reasons. One of the destination countries is Poland, in which Ukrainians, the largest contingent of all foreigners, have arrived for a number of years. Currently, the war is in progress in Poland's neighbouring country. More than 3 million Ukrainian citizens have come to our country in search of temporary or long-term shelter. Considering the increased number of the Ukrainians, Polish people have posed the question as to whether greater delinquency where immigrants are perpetrators will constitute one of the negative outcomes. Accordingly, the decision was made to analyse the phenomenon of the migration of Ukrainians to Poland over the last few decades, as well as their engagement in delinquency, in the context of border criminology. It was also determined to review literature and statistical data concerning the phenomenon discussed. In view of the above, the prediction is made that in the immediate future, the rates in offences committed by these foreigners will increase proportionally to the number of Ukrainian immigrants.
Keywords: border criminology, delinquency, eastern border area, immigration

Introduction

People have always moved, looking for their own place in the world. However, they settled themselves in places where they felt safe. Nothing has changed in this regard to this day. Everyone looks for their own exceptional corner, being driven by the possibility of fulfilling their individual needs, among which a central position is taken by a sense of safety. The situation changes dramatically once a human starts to feel threatened. They are left with the choice to either remain in their place of resi-

dence or to look for a place that will guarantee them better living conditions. Thus, the migration of the population is not anything bizarre, as it is to a large extent conditioned by the social and economic situation in a country and in the world. History shows times when migration indicators increased and times when they decreased. Times of peace and currency stability favour permanent settlements, whereas crises, including war, intensify the process of movement. It is in such volatile times that the people of the world find themselves in right now, especially the citizens of countries that are either at war or bear its direct consequences. Among these countries are Ukraine and Poland. In Ukraine the war is in progress, and Poland, as one of its nearest neighbours, accepts millions of refugees, giving them safety. Nevertheless, the question arises of whether the humanitarian reaction of Poland may be related to negative consequences in the form of an increased number of offences with the involvement of Ukrainians in our country. As a result, it was resolved to analyse the phenomenon of the migration of Ukrainians to Poland over the last few decades, as well as their involvement in delinquency, which may, to a certain extent, portray this migration from the perspective of criminogenic factors. Despite the fact that it is untypical in criminology to provide the sources of delinquency based on statistical data, it is a prevalent practice in the analysis of criminological phenomena.[1]

1. Border criminology assumptions – a critical analysis

Researchers are greatly interested in the European Union's neighbourhood policy because the illegal migration of citizens from the countries bordering Europe in the south (e.g. Tunisia) and in the east (e.g. Ukraine) is highly likely.[2] In the globalized world, territorial borders assume special meaning, but the issues pertaining to them are still too rarely explored as part of criminology, the interest of which is in the commission of offences related to national borders. Criminologists investigate the activities of institutions and the enforcement practices of territorially limited state entities. Unfortunately, such an approach is inadequate in the light of the increased level of cross-border delinquency, in which technological innovations are more frequently used. On the other hand, it should be admitted that such technologies provide opportunities for more effective state control.[3]

> These measures produce an emerging class of the 'mobility poor' who seem destined, like the 'masterless men' and 'valiant beggars' of previous centuries, to shoulder the generalised anxieties of insecure and turbulent times. This network of

1 J. Błachut, Problemy związane z pomiarem przestępczości, Warsaw 2007, p. 81.

2 P. Green, State Crime Beyond Borders, (in:) S. Pickering, L. Weber (eds.), Borders, Mobility and Technologies of Control, Dordrecht 2006, p. 151.

3 S. Pickering, L. Weber, Borders, Mobility and Technologies of Control, (in:) S. Pickering, L. Weber, Borders, *op. cit.*, p. 1.

> selective controls designed to protect the secure and developed world from the incursions of the poor and insecure has been graphically described by A.H. Richmond (1994) as 'global apartheid'.[4]

In The Hague, the priorities of the European Union in the field of border policy were determined as follows: 'to prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border control capacity, enhance document security and tackle the problem of return'.[5] With justified assumptions, it must be acknowledged that partnership for the benefit of the policy's implementation does not concern refugee protection but immigration control. Fekete claims that the European Union takes the most care of both creating barriers for the movement of migrants and extending the area of its influence on border-control strategy.[6] Consequently, a problem arises with reference to the implementation of humanitarian obligations as imposed by the Geneva Convention, aimed at protecting those who flee from persecution from the states of their citizenship.

Stumpf draws our attention to the fact that in border control, the notion of 'non-members' is used, whereas Bosworth and Guild employ the term 'non-citizens';[7] yet Krasmann writes about 'enemies' so as to define foreigners who want to get into a given country (e.g. Poland). Even these terms foster repressive actions on the part of Poland, and constitute the basis for the social exclusion of foreigners.[8] Krasmann puts forward an even deeper interpretation: not just social exclusion, but extermination.[9]

Many criminologists debate whether lack of citizenship (in this case Polish citizenship) enables imprisonment or deportation.[10] The question is brought up if stigmatization of the citizens of a given country in the name of security is necessary Krasmann concedes that '[t]he enemy is the vector for the anticipatory rationale of security, as "a menace is always already there", justifying coercive action ahead of any "prospective attacks"'.[11] He reckons that sovereignty represents a priority for the target immigration country, and enemy penology pertains to the 'renaissance of sov-

4 *Ibidem*, p. 9.
5 P. Green, State…, *op. cit*., p. 152.
6 L. Fekete, From Refugee Protection to Managed Migration: The EU's Border Control Programme, 'European Race Bulletin' 2003, vol. 43, p. 3.
7 M. Bosworth, M. Guild, Governing Through Migration Control: Security and Citizenship in Britain, 'British Journal of Criminology' 2008, no. 48, pp. 703–719.
8 L. Weber, J. McCulloch, Penal Power and Border Control: Which Thesis? Sovereignty, Governmentality, or the Pre-Emptive State? 'Punishment and Society' 2019, vol. 21, no. 4, p. 26.
9 S. Krasmann, The Enemy on the Border: Critique of a Programme in Favour of a Preventive State, 'Punishment and Society' 2007, no. 9, p. 311.
10 J. Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 'American University Law Review' 2006, vol. 56, p. 377.
11 S. Krasmann, The Enemy…, *op. cit*., p. 308.

ereign power in the name of population management'.[12] Dauvergne approves of this viewpoint, saying that migration law is 'the new last bastion of sovereignty' in the sphere of controlling those who enter the territory of a given country.[13]

The manner of the contemporary management of migration policy is based on coercion inasmuch as it imposes power over the will of others, their autonomy, the free movement of people and their self-determination. Penal measures are used in the process of making the decision about who is and is not a member of a given country. The control of such delinquency is a method of ensuring social safety, which means safety in social relations and social bonds, with reference to a specific community. Therefore, migration policy can be recognized as criminal, because it deprives people of liberty and inflicts harm on them. The penalties provided for are something other than justice.[14] Barker perceives here even a threat to fundamental principles of justice.[15] Garland applies the notion of 'criminology of others', but with positive intentions towards migrating foreigners.[16] According to him, nowadays the focus of governments is on a policy of risk management and reaping the political benefits from depreciating immigrants' values, not providing help for them.[17]

In light of the aforementioned arguments, Weber and Pickering propose changes to border criminology.[18] They propose abandoning repressive strategies in favour of pre-emptive strategies, aimed at identifying threats and undertaking intervention prior to borders being crossed by foreigners. '"Illegalities" are constituted and regimented by the law […] with a considerable degree of calculated deliberation.'[19] Without any doubt, border control cannot be restricted to the identification of enemies – foreigners – by way of profiling them by considering their future and past misdemeanours and offences, their affiliation to certain groups distinguished on the grounds of sex, race, sexual preferences, etc., as this is a direct path towards selective inclusion and simultaneously exclusion from the society of a given country.[20]

12 *Ibidem*, p. 301.
13 C. Dauvergne, Sovereignty, Migration and the Rule of Law in Global Times, 'The Modern Law Review' 2004, vol. 67, no. 4, p. 588.
14 V. Barker, Penal Power at the Border: Realigning State and Nation, 'Theoretical Criminology' 2017, vol. 21, no. 4, p. 444.
15 *Ibidem*, p. 449.
16 D. Garland, Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society, 'British Journal of Criminology' 1996, vol. 36, no. 4, pp. 445–471.
17 S. Krasmann, The Enemy…, *op. cit*., p. 306.
18 L. Weber, S. Pickering, Constructing Voluntarism, Technologies of 'Intent Management' in Australian Border Controls, (in:) H. Schwenken, S. Russ-Sattar (eds.), New Border and Citizenship Politics, Basingstoke 2014, p. 18.
19 N.P. de Genova, Migrant 'Illegality' and Deportability in Everyday Life, 'Annual Review of Anthropology' 2002, vol. 31, p. 424.
20 L. Weber, J. McCulloch, Penal…, *op. cit*., p. 26.

Barker elucidates the present direction of border-control policy through combining two processes.[21] On the one hand, globalization induces subordination to transnational requirements of international law, exceeding state borders, customs and norms, but on the other hand, a given state wants to remain sovereign as well as socially and culturally independent. This presents an enormous challenge for state authorities, in particular in the situation of intensified migration that citizens are dissatisfied with. It is difficult to adhere to the international nature of the migration process when the protection of national interests and the maintenance of high living standards are demanded at the same time. Hence it seems that the priority consists in the discussion about the way of implementing the concept of balance in border criminology policy, yet mitigating migration restrictions as a condition necessary for preserving a stable world order.[22]

2. Ukrainians in Poland: statistical tendencies

A significant event that influenced the increase in the number of immigrants in Poland was the accession to the European Union in 2004. At that time, improved accessibility to means of transportation and new technologies, thanks to EU funds, was also not without importance. Foreigners were taking up diverse activities: profit-making, settlement-oriented, educational.[23] Their stay was most frequently short-term, but the number of refugees settling in our country increased.

As of 21 December 2007, upon the implementation of the Schengen acquis by Poland, the eastern border of the European Union with Russia, Ukraine and Belarus, as well as the internal border with Lithuania, is in Poland. In 2010 the number of immigrants exceeded 17,000 persons. In the majority of cases, these were Polish people returning from emigration who had checked out of their permanent residence, along with their children who had been born abroad. The reasons for such a phenomenon can be found, among others, in the world economic crisis.

In 2011 the number of Ukrainians amounted to 38,797 persons (in contrast to 2002 data -27,172).[24] Most of the persons registered for permanent residence were from Ukraine (2,200 thou.) and Kazakhstan. Most frequently they settled in Mazowieckie province, especially in big cities, and most rarely in Warmińsko-Mazurskie and Lubuskie provinces.[25] Among the foreigners, women prevailed decisively, though

21 V. Barker, Penal…, *op. cit*., pp. 442–443.

22 S. Pickering, L. Weber, Borders…, *op. cit*., p. 11.

23 Główny Urząd Statystyczny Statistics Poland, Sytuacja demograficzna Polski do 2019 r. Migracje zagraniczne ludności w latach 2000–2019, Warsaw 2020, p. 65.

24 Mniejszości Narodowe i Etniczne, Charakterystyka mniejszości narodowych i etnicznych w Polsce, http://mniejszosci.narodowe.mswia.gov.pl/mne/mniejszosci/charakterystyka-mniejs/6480,Charakterystyka-mniejszosci-narodowych-i-etnicznych-w-Polsce.html (15.07.2022).

25 Główny Urząd Statystyczny Statistics Poland, Sytuacja…, *op. cit*., p. 119.

the greater part of the persons applying for a work permit was represented by men.[26] In the Population Census of 2011, a national and ethnic identity other than Polish was most frequently declared by Ukrainians (51,000 thou.), out of all immigrants,[27] while a declaration of a dual national identification was submitted by 20,800 thousand persons.[28] Fifty seven per cent were married; the remaining individuals did not have a permanent partner. Twenty-six per cent had a higher education, and 31% a secondary education; the rest had lower than secondary education. Children and young people represented 5,618 persons (14% of all Ukrainians), while 9,706 persons (23%) were over 60 years old, which means that 37% were aged between 19 and 59 years,[29] i.e. they were at the age when people are educationally and professionally the most active. A year later, 2,757 pupils in 169 institutions were learning the Ukrainian language as a mother tongue.[30] Working individuals constituted 41% of all the arrived Ukrainians.[31] 'The constant increase of the share of permits issued to Ukrainian citizens in the total number of these documents is characteristic of the whole reference period: from the level of 30–45% in 2008–2011 to 50–60% in the subsequent three years.'[32] In the years 2011–2013, a slight decrease occurred in the number of all the foreigners in our country,[33] but a substantial increase in immigrants from Ukraine took place in 2013, which was related to the escalation of the conflict with Russia and a deterioration of the economic situation in their country. The Ukrainians could improve their social situation by arriving in the nearest country, which was Poland.[34]

> Looking at the statistical data in the area of migratory movements in the EU countries, it is clear that we still have an increased influx of migrants in this direction, although far fewer than in the peak year of 2015. Undoubtedly, this was influenced by the Covid-19 pandemic in 2020. However, the trend of the increase, which is still high, calls for a revision of the current approach to shaping a common policy on migration and asylum.[35]

Among 288,700 thousand the Pole cards granted in Polish consular offices in the ten years to 2019, the institutions in the Republic of Belarus and in Ukraine pre-

26 *Ibidem*, p. 122.

27 Główny Urząd Statystyczny, Struktura narodowo-etniczna, językowa i wyznaniowa ludności Polski. Narodowy Spis Powszechny Ludności i Mieszkań 2011, Warsaw 2015, pp. 30–31.

28 *Ibidem*, p. 38.

29 Lubelski Urząd Wojewódzki, Dane statystyczne dotyczące mniejszości narodowych i etnicznych według Narodowego Spisu Powszechnego Ludności i Mieszkań z 2011 r., https://www.lublin.uw.gov.pl/wsoic/dane-statystyczne-dotycz%C4%85ce-mniejszo%C5%9Bci-narodowych-i-etnicznych-wed%C5%82ug-narodowego-spisu (15.07.2022).

30 Mniejszości Narodowe i Etniczne, Charakterystyka…, *op. cit*.

31 Lubelski Urząd Wojewódzki, Dane statystyczne…, *op. cit*.

32 Główny Urząd Statystyczny Statistics Poland, Sytuacja…, *op. cit*., p. 143.

33 *Ibidem*, pp. 112–113.

34 *Ibidem*, pp. 74–75.

35 A. Doliwa-Klepacka, The New Pact on Migration and Asylum as a Response to Current Migration Challenges: Selected Issues, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 10.

vailed (91.4% of all the Pole cards).[36] According to the Office for Foreigners, in recent years a considerable increase in the number of newly arrived foreigners has occurred, and in 2019 the largest number was again produced by Ukrainians (214,700 thou.). This means that the Polish labour market is attractive for citizens from the eastern border countries. Working Ukrainians arrive on the basis of a work permit, a seasonal worker permit or an employer's declaration. The number of documents issued surged the most in the years 2015–2019. In 2000–2019, Polish citizenship was conferred upon 62,900 thou. foreigners, the majority of whom were Ukrainians (24,500 thou.). As of 2014, the number of foreigners studying has expanded, especially those from Ukraine.[37] Among the students with Polish citizenship in the academic year 2018/2019, students from this country prevailed (3,600 thou.).[38]

This data allows us to formulate several conclusions:

> Poland is transforming from a typically emigrating country into an emigrating and immigrating country […] the balance of migration for permanent residence starting from 2016 has been positive, which means that the number of immigrants exceeded the number of emigrants; in recent years an increase in the number of foreigners living in or arriving in Poland has been observed. In particular, the number of economic immigrants has been growing, especially of Ukrainian citizens interested in undertaking temporary work in Poland. The increase in the number of foreigners interested in continuing their studies at Polish universities can also be noticed.[39]

The observed tendencies reflect the outcome of important events: the commencement of the Russian and Ukrainian conflict in 2013, the introduction of the Act on Foreigners of 2013, the refugee crisis in Europe in 2015, the amended Act on the Pole's Card of 2016, visa-free movement between the European Union and Ukraine, the conclusion of the agreement on the readmission of the Union with Ukraine, among others, in 2017. The last few years are characterized by Ukrainization.

Within the territory of our country, the Ukrainians have their own associations and societies, e.g. the Association of Ukrainians in Poland or the Society of Ukraine, periodicals, e.g. *Our Voice*, and cultural events are organized by them, e.g. the Ukrainian Cultural Festival and Ukrainian trade fairs, which are helpful for foreigners in nurturing Ukrainian customs.[40] The Russian–Ukrainian war, which broke out in 2022, has probably changed the image of a Ukrainian foreigner in Poland for many years, though only the future will disclose the number of Ukrainians willing to

36 Główny Urząd Statystyczny Statistics Poland, Sytuacja…, *op. cit*., p. 195.
37 *Ibidem*, p. 65.
38 *Ibidem*, p. 157.
39 *Ibidem*, p. 166.
40 Mniejszości Narodowe i Etniczne, Charakterystyka…, *op. cit*.

return to their country and those who will stay permanently in our country.[41] Nevertheless, it can be assumed with 100% certainty that plenty of persons will elect to settle in our country.

3. The eastern border area

Unquestionably, 'border area' refers to the area located near a border with other countries, though '[b]order land should be perceived from a broader perspective – as a zone under the simultaneous influence of both general economic (or social) mechanisms and the processes occurring beyond the national borders'.[42] When defining the term, not only regional location near a national border is taken into account, but also the impact of the border on these areas in the following dimensions: the economic dimension of export–import, the conduct of economic entities that link their activity to this location, the supply of services and goods abroad and within the country, formal and informal connections on both sides of the border, and equipment in cross-border infrastructure, including roads.[43] This means that the inhabitants of the localities situated near the eastern border with Ukraine reap certain benefits and incur some losses.

Extensive research pertaining to this issue was conducted at the end of the 20th century. In the opinion of 262 borderland communes, the impact of a location in the eastern belt was average.[44] In the eastern part of our country, foreigners were arriving less frequently for touristic purposes in comparison to the western part, which can be explained by the Russian crisis in the middle of 1998' as Szul asserts.[45] The movement of parts of production processes – the assembly of parts – towards Ukraine in particular meant strengthening regular commercial collaboration, which simultaneously diminished the role of borderland markets, the places of exchange between Polish manufacturers and Ukrainian customers. As a result of fluctuations in the rates of the currencies exchanged at the eastern borders, the citizens of these countries were more often coming to sell their goods and purchase our goods.[46]

41 W. Kozłowski, Przestępczość graniczna, celna i dewizowa na zachodnim odcinku granicy państwowej w latach 1990–1997, 'Studia Zachodnie' 2000, no. 5, p. 136.

42 A. Gałązka, A. Mync, Zmiany społeczno-gospodarcze i infrastrukturalne na obszarach przygranicznych w warunkach otwierających się granic, Warsaw 1999, p. 44.

43 *Ibidem*, p. 44.

44 B. Jałowiecki, Oddziaływanie granicy na gminy województw przygranicznych. Wyniki badań ankietowych, (in:) A. Mync, R. Szul (eds.) Rola granicy i współpracy transgranicznej w rozwoju regionalnym i lokalnym, Warsaw 1999, p. 26.

45 R. Szul, Transformacja a rozwój obszarów przygranicznych, (in:) A. Mync, R. Szul (eds.) Rola granicy i współpracy transgranicznej w rozwoju regionalnym i lokalnym, Warsaw 1999, p. 17.

46 B. Jałowiecki, Oddziaływanie…, *op. cit*., p. 27.

Gałązka and Mync prove that the development of contacts between Poland and Ukraine was slower than with neighbours on the western border.[47] They perceived fewer financial benefits compared to the inhabitants of communes in the west of Poland.[48] The inhabitants of these communes complained the most about the burden of living near the eastern border. They pointed out the traffic and the substantial increase in delinquency.[49] Moreover, obstructions in the road traffic, i.e. frequent blockades at border crossing points, are inconvenient for them.[50]

In the period of transformation in the east, the opening of the border entailed a minimization of disadvantages and the occasional occurrence of weak effects from mutual influences. However, from 1998 the disadvantages related to dwelling near border areas took precedence over the advantages.[51] Szul believes that therefore, the Polish borderland was at that period between a wave of coexistence and one of collaboration.[52] In the neighbouring countries, restrictions on the export of currencies and the import of goods were implemented, which contributed to the cessation of individual trade carried out by inhabitants of border areas.[53] It is, however, worth highlighting the tremendous instability in the movement of goods and money, which is dependent on social and political conditions behind the eastern border.[54]

In the implementation of actions relating to foreign policy, the attitude of Polish citizens towards foreigners who, when choosing a destination country, take into consideration the kindness of a given nationality, among other things, should be established. Research findings from the Centre for Public Opinion Research in 2015 prove that the surveyed Poles observed advantages from immigration in the form of an enrichment of cultural diversity, which was conducive to a general alteration of attitudes towards greater openness and tolerance for others. More than 80% of them declared that they would accept a foreigner as a neighbour, collaborator, or as a person rendering professional services. These opinions were greatly affected by positive experience in their contact with foreigners.[55] According to Łodzinski, still in 2016,

47 *Ibidem*, p. 59.
48 *Ibidem*, p. 30.
49 *Ibidem*, p. 31.
50 R. Szul, Transformacja…, *op. cit*., p. 21.
51 R. Szul, Rola granicy w gospodarce – próba ujęcia teoretycznego, (in:) A. Mync, R. Szul (eds.) Rola granicy i współpracy transgranicznej w rozwoju regionalnym i lokalnym, Warsaw 1999, p. 228.
52 *Ibidem*, p. 230.
53 R. Szul, Transformacja…, *op. cit*., p. 18; Ustawa z dnia 25 czerwca 1997 r. o cudzoziemcach (Dz.U. Nr 14, poz. 739); Rozporządzenie z dn. 23 grudnia 1997 r. w sprawie szczegółowych zasad, trybu postępowania oraz wzorów dokumentów w sprawach cudzoziemców (Dz.U. z 1998 r. poz. 1)
54 R. Szul, Transformacja…, *op. cit*., p. 23.
55 J. Włodarczyk-Madejska, M. Kopeć, G. Goździk, O przestępczości cudzoziemców i przestępczości wobec cudzoziemców w Polsce na podstawie statystyki policyjnej, 'Archiwum krymi-

Polish people were in the majority of cases opposed to accepting foreigners, treating them as 'suspect society', i.e. threatening safety and cultural stability.[56] Research from 2000 disclosed that most of the inhabitants had a positive attitude towards Ukrainians, although older people, who took part in the war, had different experiences and, consequently, assessed them more negatively.[57]

Kurczewska and Bojar carried out studies with the participation of inhabitants from border areas with Ukraine. They determined that the tightening of the eastern border, in compliance with EU recommendations, after 2004 was linked to plenty of disadvantages for the inhabitants. The opening of the border in the west fostered much more investment in our country.[58] In addition, in 2008 Radek revealed that in the first years of the accession of Poland to the European Union, the communes located in the eastern borderland could benefit the most from the possibility of obtaining European aid funds, from social and economic development thanks to the formation of cross-border cooperation, and from the extension of commune infrastructure. The number of cultural and sports events as well as commercial cross-border trade soared. Interpersonal relationships strengthened, along with relations between institutions. On the other hand, a favourable period for smuggling, delinquency and misdemeanours started.[59]

4. Delinquency with the involvement of Ukrainians

Every increase in border traffic implies an increase in negative social phenomena. Border delinquency related to the illegal crossing of the border and transport of goods is on the rise. Common delinquency is rising as well, i.e. the rate of thefts, frauds, mugging and offences against decency, e.g. prostitution.[60] Research findings indicate that one of the effects of an increased number of immigrants is an escalation of delinquency.[61]

nologii' 2021, vol. 43, no. 2, p. 273.

56 *Ibidem*, p. 275.

57 M. Sobczyński, Percepcja współpracy transgranicznej Polski z sąsiadami pośród mieszkańców pogranicza, (in:) M. Malikowski, D. Wojakowski (eds.) Granice i pogranicza nowej Unii Europejskiej. Z badań regionalnych, etnicznych i lokalnych, Kraków 2005, p. 72.

58 J. Kurczewska, H. Bojar, Konsekwencje wprowadzenia układu z Schengen – wyniki badań społeczności pogranicza wschodniego, Warsaw 2002, p. 5ff.

59 R. Radek, Współpraca transgraniczna jako narzędzie przełamywania uprzedzeń i stereotypów na polskich pograniczach (wybrane problemy), 2012, p. 59ff., https://dspace.uni.lodz.pl/bitstream/handle/11089/31114/55–88_Wspolpraca%20transgraniczna.pdf?sequence=1&isAllowed=y (15.07.2022).

60 R. Szul, Transformacja…, *op. cit*., p. 21.

61 B. Jałowiecki, Oddziaływanie…, *op. cit*., p. 31; R. Radek, Współpraca…, *op. cit*., p. 81.

According to the Border Guard, illegal mass migration to Poland began in 1991. The Ukrainians, similarly to the citizens of other countries of the former USSR, Asia and Africa, started to willingly cross the border of our country. The number of detentions for border offences tripled between 1990 and 1991 and between 1991 and 1992. In 1992, there were 743 Ukrainians detained on account of attempting to illegally cross the border at its western section (they represented the third position in the ranking, after Romanians and Bulgarians). In 1993, there were 1,446 Ukrainians detained, most of them at the western border.[62] Organised smuggling channels appeared. Human smuggling was undertaken primarily by organized criminal groups for financial purposes, but their centres were situated behind the eastern border, which hampered combating such a type of delinquency. This practice was accompanied by other offences, e.g. forgery of documents. Polish citizens were engaged in smuggling, even children, who were assigned the task of keeping an eye on the movements of the Border Guard.[63] In 1995, 347 citizens of our country were detained.[64]

Data available from the police confirms the larger participation of Poles in offences committed in our country, rather than foreigners. This coefficient amounted to 5–6 in the years of 2009–2012, which means that per 100,000 inhabitants of Poland, there was exactly this number of foreigners suspected of an offence, but in 2013–2016 this coefficient increased to 10–12. In the subsequent two years, it exceeded 20.[65] Foreigners were most frequently suspected of offences against security in communication (with the overwhelming dominance of the offences of driving under the influence of alcohol or in a state of intoxication (Article 178a of the Polish penal code)) and offences against property. Five per cent of foreigners were suspected of offences against life and health.[66]

According to Border Guard data, in the first quarter of 2021 the territory of the Republic of Poland was entered by 861,159 Ukrainians and a year later by 3,180,897 Ukrainians, which stemmed from the war raging in Ukraine. In the first quarter of 2022, a threat to public order, internal security, public health or international relations of one or more EU Member States, as well as a lack of appropriate documentation justifying the aim and conditions of a stay, was referred to 3,312 persons from Ukraine. Permits for the entry of Ukrainians into the EU borders in the last quarter were not granted to 8,347 persons (5,970 persons in 2021). At the border with Ukraine, there were 821 persons detained or found by the Border Guard

62 W. Kozłowski, Przestępczość…, *op. cit.*, p. 136.
63 *Ibidem*, p. 138.
64 *Ibidem*, pp. 136–137.
65 J. Włodarczyk-Madejska, M. Kopeć, G. Goździk, O przestępczości…, *op. cit.*, p. 284.
66 *Ibidem*, p. 285.

(1,322 persons in the first quarter of 2021), including 882 Ukrainians (1,379 persons in the first quarter of 2021), for crossing or attempting to cross the state border against regulations. Six hundred and thirty-nine citizens of Ukraine used forged documents authorizing them to cross the border or stay in the territory of Poland (1,110 people in the first quarter of 2021). Five hundred and eight citizens of Ukraine were detained or found while illegally staying in Poland (829 persons in the first quarter of 2021). More than three thousand (3486 persons; 1,498 persons in the first quarter of 2021) were found while illegally performing work, entrusting work to others or conducting business activity. The Border Guard, together with other services, seized the following goods at the border with Ukraine from offenders in the first quarter of 2022: vehicles to the value of PLN 1,677,000 (PLN 879,000 in the first quarter of 2021), alcohol to the value of PLN 2,324 (PLN 1,802 in the first quarter of 2021), cigarettes to the value of PLN 431,259 (PLN 1,316,488 in the first quarter of 2021), tobacco to the value of PLN 173,713 (PLN 2,104 in the first quarter of 2021), and other goods to the total value of PLN 304,592 (PLN 2,027,939 in the first quarter of 2021).[67]

In the years 2004–2019, more than 37% of all the foreigners registered in police statistics were represented by the Ukrainians.[68] In 2019 Ukrainians prevailed as suspects for bribery, theft (over 37%), burglary (approximately 50%), and driving under the influence of alcohol or in a state of intoxication (nearly three-quarters of all foreigners). In 2013, among those suspected of committing murder, there were two citizens of Ukraine, whereas in 2019, it was 17 out of 24 of all the offences in this category.[69]

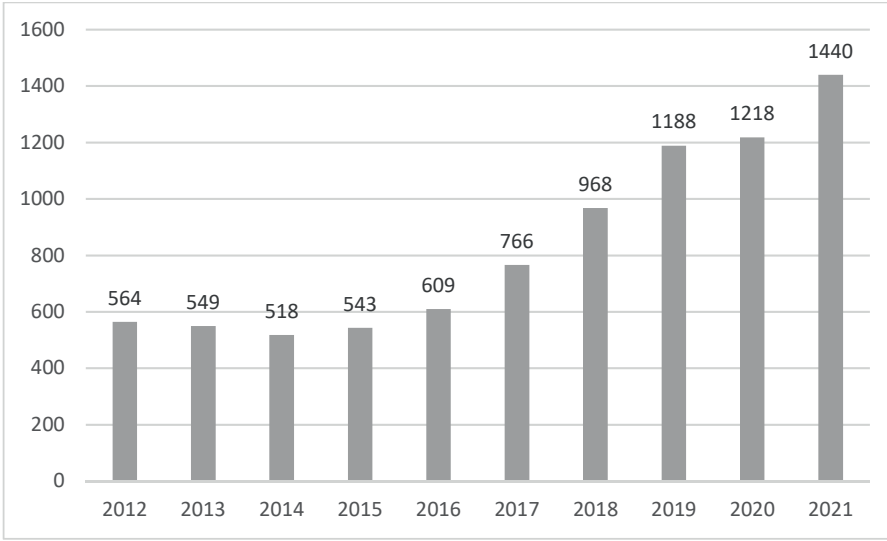
On the basis of the statistical data of the Central Board of the Prison Service, a graphical representation of the number of convicts in the last decade with Ukrainian citizenship was made (see Figure 1).

67 Straż Graniczna, Statystyki SG, https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html, pp. 2–35 (15.07.2022).

68 J. Włodarczyk-Madejska, M. Kopeć, G. Goździk, O przestępczości…, *op. cit*., pp. 287–288.

69 *Ibidem*, pp. 290–301, 303.

Figure 1. Number of convicts with Ukrainian citizenship in the years 2012–2021.[70]



In the years 2012–2015 in Polish penal institutions, the penalty of the deprivation of liberty was served by more than 500 Ukrainians. In 2016 the number exceeded 600 individuals, and a year later was 760 individuals. An increase of 200 occurred in both 2018 and 2019. In 2020 there were 1,218 persons who were put into confinement, while in 2021, there were 1440. Based on this, it can be stated that only in 2013 and 2014 was there a slight and statistically insignificant decline in the number of convicts with Ukrainian citizenship. Apart from that, a constant increase in the number of convicts from the neighbouring country is observed, which is indirectly related to the increase of citizens from Ukraine.

Conclusions

In domestic and international literature, the conduct of border criminology policy is currently widely criticized. Attention is drawn to the restrictiveness of law in

70 Ministerstwo Sprawiedliwości Centralny Zarząd Służby Więziennej, Roczna Informacja Statystyczna, https://www.sw.gov.pl/assets/19/51/61/a542f3464c6b93a4771c38eac7813b2b3aaee79c.pdf; https://www.sw.gov.pl/assets/95/70/75/c1cee7d03200820a03cdaa2c6afe897c482422ca.pdf; https://www.sw.gov.pl/assets/07/04/98/5aef7bb45347469a8fec566a1c8277cd60048432.pdf https://www.sw.gov.pl/assets/12/29/79/ce6663c30cb8ea38fcce716bb9b9fd250d4a341f.pdf; https://www.sw.gov.pl/uploads/5846c007_9380_4602_b12e_213cc0a80015_rok_2013.pdf; https://www.sw.gov.pl/uploads/5846c00d_ab44_4d17_9588_213cc0a80015_rok_2011.pdf (15.07.2022).

this regard and the infringement of fundamental humanitarian principles towards immigrants. A change of border-control strategy towards an anticipatory one is postulated, in which the principles of equality and fairness are respected. The debates on this issue are of paramount importance, as migration of humans in the world is inevitable. They move for different reasons, according to their individual needs, but in the case of refugees, because of their need for physical and mental safety. It seems that the inevitability of this phenomenon should be accepted, though one should be aware of its repercussions. To illustrate this point, Szul indicates a plethora of benefits stemming from neighbouring another country (especially a location in border area).[71] He perceives the effect of synergy in the form of access to the resources of neighbouring countries, the differentiation of sources of supply, and the effect of the direction of sale on prices on both sides of the border, plus the form of cultural exchange.

People have been moving from place to place since time immemorial. While some relocate in search of a better job, education, economic benefits, or family reunion, others are forced to flee from conflict, terrorism, or human rights violations. The number of those who are being removed from their places as a result of the effects of climate change, natural disasters, or other environmental factors is growing.[72]

The border may also be a neutral factor if it does not constitute a barrier and economic conditions are the same or similar in neighbouring countries. Unfortunately, it may also be the source of many threats. It appears that with Ukraine as a neighbour, the last decades may be called a period of synergy. Nonetheless, the border is becoming a negative factor inasmuch as the war in Ukraine has contributed to a deterioration of balance in respect of a broadly understood exchange. Three types of relationship can be distinguished, based on analysis of the nature of the relationship between the neighbouring countries: neighbouring equivalence, asymmetry in which the country with lower costs of production takes a better position, and asymmetry in which the richer party indicates a cross-border division of work for its own benefit.[73] In the near future it will be shown which type of asymmetry applies to the relationship between Poland and Ukraine, the key relationship in the context of border control.

The overview of literature and statistical data unequivocally shows that among immigrants, the Ukrainians have dominated for at least 30 years. Within this period of time, several breakthrough events have occurred that have contributed to the increase in the number of Ukrainians in our country. Nevertheless, the last several months (starting from March 2022) are a time when the eastern border has been crossed by several million of our neighbours. The war is in progress. It is unknown

71 R. Szul, Rola…, *op. cit*., p. 228.

72 N.D. Hetmantseva, O.V. Kiriiak, I.G. Kozub, The Phenomenon of Labor Migration as a Determining Factor of Global Problems, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 1, p. 65.

73 R. Szul, Rola…, *op. cit*., p. 229.

when it will be finished and what extremely negative effects will be incurred by the Ukrainians in their country. Therefore, it is hard to say for how long they will want to or will be forced to stay in Poland. It may be assumed, however, that they will more often be the perpetrators of offences (including convicts in the prison population). It has been observed that together with the increase in the number of immigrants from Ukraine, the number of perpetrators of offences with their involvement increases on a pro rata basis in our country. It may seem that out of over 200,000 citizens of Ukraine staying in Poland in 2019, only 2.5% were suspected of committing an offence, though in numerical data this means that approximately 5.500 thou. Ukrainians were offenders.[74] Police data shows that between 2009 and 2019, more than 54,000 foreigners from more than 160 countries were victims of crime. Among them, 29% are citizens of Ukraine. It is worth emphasizing that out of all the foreigners in Poland, Ukrainian citizens most frequently become the victims of offences – in 40% of thefts, and in nearly 50% of burglaries. Comparing the data on the victimization of Ukrainians and the crimes they commit, it can be concluded that in 2019 they were as often victims of crime as they were suspected of committing it. It is reasonable to assume that many of the factors behind their victimization are not due to immigration or foreign origin, but are rather related to general knowledge about the causes of crime against certain people or people in a certain situation.[75] Klaus and Woźniakowska-Fajst say that the reason for the different approach to representatives of minority groups may be prejudice, and it results in various forms of discrimination, the most egregious manifestation of which are crimes caused by prejudice.[76] It is optimistic that:

Although as many Poles sympathize with Ukrainians as dislike them, it is with respect to them that we have seen the greatest improvement in attitudes over the past several dozen years or so. Compared to 1993, the percentage of respondents expressing sympathy for Ukrainians has almost tripled, while those declaring dislike has decreased by more than half.[77]

This means that the change in attitudes toward them will result in a decrease in the rate of victimization of them.' Thus, in accordance with the principles of anticipatory prevention, various activities of a criminological nature, including the victimological one, should be undertaken right now for the benefit of immigrants from Ukraine.

74 J. Włodarczyk-Madejska, M. Kopeć, G. Goździk, O przestępczości…, *op. cit*., p. 308.

75 *Ibidem*, pp. 291–295.

76 W. Klaus, D. Woźniakowska-Fajst, Związki między wiktymizacją oraz ubóstwem i wykluczeniem społecznym, 'Archiwum Kryminologii' 2012, vol. 34, p. 63.

77 M. Omyła-Rudzka, Stosunek Polaków do innych narodów, Centrum Badania Opinii Społecznej, http://cbos.pl/SPISKOM.POL/2012/K_022_12.PDF (13.01.2023).

Weber and Pickering say that the transnational movement of peoples fleeing conflict, persecution and poverty is a global responsibility, requiring nation states to collaborate for humanitarian resolutions embedded in human rights.[78] The authors emphasize the human cost of inhumane and populist government immigration and border-entry policies underpinned by ideologies of retribution, suspicion and demonization. According to them, we can observe 'the legal and political power of those who define who is to be included and who excluded at the border' and acknowledge 'the political and legal discourse that invariably defines representations of legal and illegal actors'.[79] Security comes to define the modern territorial state, as the territorial state defines the nature and parameters of security. Concomitantly, the border features in the security narrative as a fixed cartographic and physical characteristic, inscribed with clear social, cultural, political and legal legitimacy.[80]

Faced with the inevitable changes associated with globalization, wealthy countries should embrace a more mobile and inclusive world and attempt to manage population movements through structural reforms to create 'decent work'. Criminal activity and other security threats will continue to emerge at borders and to challenge any utopian vision of migration, but simply loosening border controls would virtually eliminate one category of cross-border crime by removing the market for human smuggling.[81]

It seems that for the duration of Russia's war with Ukraine, the policy of the Polish government has radically changed towards Ukrainians crossing our border. For the moment, at least, people seeking refuge have become more important than political gain. The safety of Ukrainian citizens has become as important as the safety of Polish citizens. Questions remain open about whether the war will permanently modify political attitudes toward migrants and whether the concept of borders will be redefined.

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78 E. Rowe, R. Walters, M. Grewcock, Essay: Leanne Weber and Sharon Pickering (2011): 'Globalization and Borders: Death at the Global Frontier', 'International Journal for Crime, Justice and Social Democracy' 2013, vol. 2, no. 3, p. 136.

79 L. Weber, S. Pickering, Globalization and Borders: Death at the Global Frontier, Basingstoke 2011, p. 4.

80 S. Pickering, Border Narratives, (in:) S. Pickering, L. Weber (eds.), Borders, Mobility and Technologies of Control, Dordrecht 2006, p. 51.

81 S. Pickering, L. Weber, State…, *op. cit*., p. 8, 12.

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Chinese Immigrants' Perceptions of Community Justice in the USA: An Exploratory Study[1]

Abstract: An increasing body of research has highlighted the significance of collaboration between criminal justice practitioners and residents to enhance the quality of life in communities. As an innovative practice model, this collaborative concept maximizes the effectiveness of three core factors of community justice (community policing, community courts, and community corrections) by maintaining community order and enhancing neighbourhood quality of life. However, as many cities and municipalities have invested time and resources into developing positive relationships with immigrants, little research has been focused on the nexus between immigrant communities within the community justice movement model. Using data collected from Chinese immigrants in the US, the current study is the first pilot investigation on perceptions of the new pattern of Chinese immigrants toward their communities and their collaboration with the criminal justice system. This study suggests positive attitudes of immigrants toward community justice, but criminal justice agencies must tailor their interaction to the unique characteristics of each immigrant community. What constitutes good community justice practices in one community may not be effective in another.
Keywords: Chinese immigrants, community relations, police

Introduction

Community justice, a 'meditation' between a community's ecosystem to counter crime and related issues, has rapidly developed in the past three decades in the

1 Revised version of a poster presented at the Annual Meeting of the American Society of Criminology, Chicago, November 2021.

US. Both practitioners and scholars have explored community issues by coordinating the efforts of the community, community policing, community courts, and community corrections.[2] Although definitions vary, the core of the community justice model includes three elements: (a) community policing, (b) community courts, and (c) community corrections. A growing body of research has been conducted to explore and examine the effectiveness of this model of community crime prevention and crime control. Some researchers have suggested that community justice as innovative criminal processes or sanctions can combine many forms of community crime prevention efforts, such as (a) residential treatment programmes, (b) Neighbourhood Watch, (c) Weed and Seed,[3] (d) intensive probation, (e) fines, and (f) community service.[4] The strengths of community justice have been tested in reducing crime and fear directly and in increasing social interaction and control indirectly, relying on collective participation in crime prevention and neighbourhood revitalization efforts.[5] Similarly, community mediation programmes in the United States that have advanced the concepts of community justice have been instituted.[6]

Conversely, additional and more difficult problems arise in the process of implementation. Although community justice might create positive effects through shared community participation, empowerment, and development,[7] community justice may not be a realistic intervention because developing this relationship is a challenge. First, no consensus exists among the public on the role of the community, which causes low participation in community affairs.[8] Second, obvious and dramatic geographical distribution differences in establishing public joint crime prevention programmes persist. Scholars have reported that the lower the crime rate, the higher the enthusiasm of residents to participate in the fight against crime. In communities

2 G.P. Alpert, A. Piquero, Community Policing: Contemporary Readings (2nd ed.), Long Grove 1998; R. Trojanowicz, V. Kappeler, L. Gaines, B. Bucqueroux, R. Sluder, Community Policing: A Contemporary Perspective (2nd ed.), Cincinnati 1998.

3 Weed and Seed is a crime prevention program by the US Department of Justice that is designed to "weed out" criminals and "seed" neighbourhood revitalization services in their place.

4 E. Barajas, Moving toward Community Justice, (in:) Community Justice: Striving for Safe, Secure, and Just Communities, Washington, DC 1997; T. Clear, D. Karp, The Community Justice Ideal: Preventing Crime and Achieving Justice, Boulder, CO 1999; P.H. Hahn, Emerging Criminal Justice: Three Pillars for a Proactive Justice System, Thousand Oaks, CA 1998.

5 L. Kurki, Restorative and Community Justice in the United States, 'Crime and Justice' 2000, vol. 27, pp. 235–303.

6 C. B. Harrington, S. E. Merry, Ideological Production: The Making of Community Mediation, (in:) C. Menkel-Meadow (ed.), Mediation Theory, Policy, and Practice, London 2018, pp. 709–735.

7 L. Kurki, Restorative…, *op. cit.*

8 M. E. Buerger, A Tale of Two Targets: Limitations of Community Anticrime Actions, 'Crime & Delinquency' 1994, vol. 40, no. 3, pp. 411–436; D. Masiloane, C. Marais, Community Involvement in the Criminal Justice System, 'South African Journal of Criminal Justice' 2009, vol. 22, no. 3, pp. 391–402.

with high crime rates, residents' enthusiasm to participate tends to be low.[9] Hence researchers have indicated that community justice is a concept for business owners and wealthy residents.[10] Moreover, some scholars have stated that community justice efforts weaken community bonds and social capacity in inner-city neighbourhoods because of aggressive law enforcement.[11] Most community policing and prosecution efforts use community members as 'eyes and ears', symbolic supporters, or providers of funds.[12] Today, the problems of public participation and the unity of the police and communities are unresolved.

Furthermore, the issue of community *justice* versus community *policing* is prevalent. The relative success of community justice principles derives primarily from the success of community policing, a heritage that is recognized by justice professionals such as former Attorney General Janet Reno.[13] As McCold says, 'the goal of community justice is to strengthen neighborhoods and their moral order to prevent crime, seeking not just to handle cases, but also to create a collective experience of justice'.[14]

The current project aims to investigate the Chinese immigrant community and community justice from a community policing perspective. Although controversy in academic circles about the role of community justice in community safety exists, researchers from both sides pay little attention to immigrant minorities. Throughout the history of American criminal justice and criminology scholarship, immigrant groups, populations, and communities have been popular research subjects of crime control instead of crime prevention. As early as the 1930s, American researchers developed and used criminology theories to examine the causes of immigrant neighbourhoods in the United States suffering from high crime rates. Criminological theories, such as social control theory, social disorganization theory, and cultural conflict theory, collectively point to disorder, cultural conflict, and low social control

9 A. Crawford, Crime Prevention and Community Safety: Politics, Policies, and Practices, London 1998; W. Skogan, Policing Immigrant Communities in the United States, 'Sociology of Crime, Law and Deviance' 2009, vol. 13, pp. 189–203.

10 B. Boland, How Portland Does It. Final report submitted to US Department of Justice, National Institute of Justice, Washington, DC 1996; B. Boland, Community Prosecution: Portland's Experience, (in:) D.R. Karp (ed.), Community Justice: An Emerging Field, Lanham, MD 1998, pp. 253–278. D. Parent, B. Snyder, Police-Corrections Partnerships, US Department of Justice, National Institute of Justice, Washington, DC 1999; A. Lanni, The Future of Community Justice, 'Harvard Civil Rights–Civil Liberties Law Review' 2005, vol. 40, no. 2, pp. 359–406.

11 S. Guarino-Ghezzi, A. Klein, Protecting Community: The Public Safety Role in a Restorative Juvenile Justice, (in:) G. Bazemore, L. Walgrave (eds.), Restorative Juvenile Justice: Repairing the Harm of Youth Crime, Washington, DC 1999, pp. 196–211.

12 M. E. Buerger, A Tale…, *op. cit.*; L. Kurki, Restorative…, *op. cit.*

13 E. Beck, Transforming Communities: Restorative Justice as a Community Building Strategy, 'Journal of Community Practice' 2012, vol. 20, no. 4, pp. 380–401.

14 P. McCold, Paradigm Muddle: The Threat to Restorative Justice Posed by Its Merger with Community Justice, 'Contemporary Justice Review' 2004, vol. 7, no. 1, p. 16.

as explanations for immigrant communities being susceptible to criminal behaviour. Consequently, immigrant communities have been ignored by criminologists in explaining crime prevention and quality-of-life enhancement efforts. According to Wu and associates, 'scholars have long scrutinized relations between the police and minority and immigrant groups in the US, often documenting tensions, discrimination, and different treatment at the hands of local police'.[15]

In current American society, some immigrant communities enjoy low crime rates.[16] Some recently settled immigrants live in neighbourhoods with a high proportion of immigrants. Their neighbourhoods have provided emotional, social, and cultural support and social capital, which can help them adapt to the new environment. For example, Asian American communities have been recognized as the 'model minority' for having seemingly achieved socioeconomic success and being free of problems because they are known as hardworking, successful, and law-abiding ethnic minorities.[17] Research, though limited, has stated that immigrants' previous contact with the police, higher educational attainment, lower fear of crime, and little to no experience of victimization highly increase their engagement in working with criminal justice agencies.[18] Immigrants who display these features are more likely to think of the police and criminal justice practices as effective. Moreover, issues such as immigrants' assimilation into American society, their language proficiency, and their length of stay in the US have been tested as key factors that result in a better understanding of the operations and functions of the US criminal justice system, confidence when interacting with the police, responsiveness to neighbourhood problems, and a positive sense of collective efficacy.[19] Previous researchers have reflected that unlike the stereotypes of immigrants being troublemakers or reluctant to cooperate with the criminal justice system, law-abiding immigrants' perceptions of working with the criminal justice system may also vary. So how does the community justice model work in immigrant communities? What are the perceptions of immigrants toward community justice as a whole? Would a community justice partnership be more or less challenging to set up in an immigrant community in the US? What would be

15 Y. Wu, I. Sun, B. Smith, Race, Immigration, and Policing: Chinese Immigrants' Satisfaction with Police, 'Justice Quarterly' 2011, vol. 28, no. 5, p. 746.

16 C. Kubrin, H. Ishizawa, Why Some Immigrant Neighborhoods Are Safer Than Others: Divergent Findings from Los Angeles and Chicago, 'The Annals of the American Academy of Political and Social Science' 2012, vol. 641, no. 1, pp. 148–173; W. McCann, F. Boateng, An Examination of American Perceptions of the Immigrant–Crime Relationship, 'American Journal of Criminal Justice' 2020, vol. 45, no. 6, pp. 973–1002.

17 K. Shih, T. Chang, S. Chen, Impacts of the Model Minority Myth on Asian American Individuals and Families: Social Justice and Critical Race Feminist Perspectives, 'Journal of Family Theory & Review' 2019, vol. 11, no. 3, pp. 412–428.

18 D. Chu, J. Song, J. Dombrink, Chinese Immigrants' Perceptions of the Police in New York City, 'International Criminal Justice Review' 2005, vol. 15, no. 2, pp. 101–114.

19 Y. Wu, I. Sun, B. Smith, Race, Immigration…, *op. cit.*

the main barrier? Until recently, research exploring immigrants' perceptions of community justice has been insufficient, especially compared to their roles in US social life. Looking at immigrants and their perceptions of community justice may help us further explore the effectiveness of that approach.

As the US is a country of diverse immigrants, their engagement with and perceptions of community justice should be a focus of concern. Proponents of community justice argue that criminal justice agencies must tailor their interaction to the unique characteristics of 'communities' and community groups. What constitutes good police practices with one 'community' or community group may not be relevant with another 'community' or community group.[20] The purpose of this article is to examine the perceptions of New Chinese Immigrants (*xinyimin* in Chinese) in the US. *Xinyimin* refers to educated, upper-socioeconomic Chinese individuals who emigrated from mainland China after the official launching of new political reform mandates in 1978. Hooper and Batalova have stated that 'unlike the 19th-century immigrants, post-1965 Chinese immigrants are predominantly skilled: China is now the principal source of foreign students in US higher education, and the second-largest recipient of employer-sponsored temporary work visas, after India'.[21]

Our research goal is to partially fill the empirical void in research on community justice, focusing on Asian ethnic communities and especially Chinese communities. In this study, we focus on Chinese people and communities because this work is part of a larger research project that examines police officers' perceptions of Chinese migrants in China and the United States, as well as the perceptions of the police by migrants in the two countries. In a future project, we hope to expand our inquiries to other Asian migrant groups.

1. Chinese immigrants and the relevance of 'Chinatowns'

The initial history of Chinatowns cannot be separated from the gold rush in the 19th century in the US. The construction of the railway and the gold rush brought many Chinese workers. However, with the fading of the gold rush and competition for jobs and resources, excluded Chinese workers had to move to the East Coast to survive. Most of them gathered in New York City (NYC), which became the location of the first Chinatown. The original purpose of the Chinese settlement in NYC was to prevent the impact of the Chinese Exclusion Act; with the abolition of this act, Chinatown became an 'enclave [that] provided a site for mobilization of social

20 J. Gerber, D. Jia, Community Policing and Community Justice: Studying a Marginalized Population Segment in the People's Republic of China, (in:) E. W. Plywaczewski, E. M. Guzik-Makaruk (eds.), Current Problems of Penal Law and Criminology (8th ed.), Bialystok 2019, pp. 451–461.

21 K. Hooper, J. Batalova, Chinese Immigrants in the United States, 'Migration Policy Institute' 2015, vol. 28, pp. 1–13.

capital for immigrants in terms of connecting existing social networks, enabling the exchange of information and [financial] resources, and supporting the processes of legalization'.[22] After 100 years of development, there are currently nine Chinese areas in NYC. Among them, the three largest are Manhattan Chinatown, Flushing Chinatown, and Sunset Park Chinatown; Manhattan Chinatown has the largest population of Chinese immigrants, at about 60,000. In addition to Chinese immigrants, there are also more and more other Asian immigrants, such as Vietnamese and Thai people, owning and operating businesses. Chinatowns in NYC are more than residential concentrations of Chinese immigrants; these enclaves include business districts for prosperous business communities and world tourists.

Compared with NYC, the history of Houston Chinatown New Town is much shorter; it was built in 1983, and has a total area of 6.1 km^2 (2.37 sq mi) and a total population of 29,993. It is located 12 miles from downtown Houston, and includes immigrants from China, Vietnam, and other Asian countries. Unlike Chinatown in New York, which was originally the residence of Chinese immigrants, it has been more like a business district since its completion, and includes a dozen banks, a mall, supermarkets, shopping centres, restaurants, and bakeries. Compared with the older, uniformly Chinese, pedestrian-oriented Chinatowns in NYC, Chinatown's immigrant businesses in Houston are not clustered together by an ethnic group but are more diversified as an 'Asia Town' and includes two police departments.[23]

Denver's Chinatown began in the 1870s, with the gold rush in the western United States. The number of Chinese immigrants in Denver increased from four to 238 in just a few years after Chinese workers first landed on the West Coast. They were concentrated in the Denver LoDo (Lower Downtown) area, the central area of the city, and gradually formed Chinatown. However, with an outbreak of anti-Chinese sentiments in Denver, many immigrants were killed in the notorious 1880 tragedy, the 'Bloody Riot'. Although this incident caused the United States to pay attention to discrimination and violence against Chinese immigrants, Chinatown ceased to exist in Denver. In the last few decades a large number of Chinese immigrants have relocated to the city; however, most of them have been integrated into the local communities instead of forming a concentrated Chinatown.[24]

In the next section, we examine the relationship between Chinese culture, crime, and crime prevention. We follow this discussion with the methodology employed in this exploratory study, followed by a discussion of findings and implications.

22 A. Yong, Informality, Illegality, and Improvisation: Theological Reflections on Money, Migration, and Ministry in Chinatown, NYC, and Beyond, 'Journal of Race, Ethnicity, and Religion' 2012, vol. 3, no. 2, pp. 1–29.

23 Chinatown, Houston, Wikipedia, https://en.wikipedia.org/wiki/Chinatown,_Houston (31.01.2023).

24 N. Allyn, The Rise and Fall of Denver's Chinatown, 'History Colarado', https://www.historycolorado.org/story/colorado-voices/2019/04/11/rise-and-fall-denvers-chinatown (30.01.2023).

2. Chinese culture, crime, and crime prevention

Theories created and used to explain the causal crime mechanism in immigrant communities include those that explore cultural elements. Traditionally, scholars have focused on the negative impact of immigrants' original culture when they immigrated to a new country, and have believed that cultural conflicts might occur among immigrant communities, explaining their higher crime rates.[25] Sutherland maintained that 'a person whose associations were dominated by relationships with those in a less law-abiding segment of society would tend to learn criminal techniques and develop criminal orientations'. Sellin argued that the conflict relevant for criminological research is the dash between conduct norms brought about as by products of a cultural growth process and the migration of conduct norms from one culture complex or area to another. However produced, they are sometimes studied as mental conflicts and sometimes as the clash of cultural codes.[26] According to this explanation, cultural conflict includes the criminal tendencies of the immigrants' original culture and the antisocial behaviour caused by cultural differences. Therefore, when living in a new country with a different cultural orientation, immigrants may suffer from culture shock, which may lead to them being more involved in crime than the native population. Cultural conflict theory leads to the conclusion that because of the challenge of cultural conflict and the exclusions associated with living in a new country, immigrant neighbourhoods develop more criminological causal factors than prevention factors.

However, at the beginning of the new millennium, an increasing number of researchers concluded that high levels of crime do not characterize immigrant communities. Martinez and Lee showed that immigrant communities 'may simply be differentially organized and function in a manner that reduces the incidence of crime'.[27] Empirical evidence on immigrants and crime indicated that immigrant

25 K. Aoki, 'Foreign-ness' and Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 'Asian Pacific American Law Journal' 1996, vol. 4, pp. 18–34; H. J. Albrecht, Ethnic Minorities, Culture Conflicts and Crime, 'Crime, Law and Social Change' 1995, vol. 24, no. 1, pp. 19–36; K. Chin, T. Lai, M. Rouse, Social Adjustment and Alcoholism Among Chinese Immigrants in New York City, 'Substance Use and Misuse' 1991, vol. 25, no. 5, pp. 709–730; S. H. Decker, F. Van Gemert, D. C. Pyrooz, Gangs, Migration, and Crime: The Changing Landscape in Europe and the USA, 'Journal of International Migration and Integration/Revue de l'integration et de la migration international' 2009, vol. 10, no. 4, pp. 393–408; S. Shoham, The Application of the Culture-Conflict Hypothesis to the Criminality of Immigrants in Israel, 'Journal of Criminal Law, Criminology, and Police Science' 1962, vol. 53, no. 2, pp. 207–214.

26 T. Sellin, Culture Conflict and Crime, 'American Journal of Sociology' 1938, vol. 44, no. 1, pp. 97–103.

27 R. Martinez, M. Lee, On Immigration and Crime, 'Criminal Justice' 2000, vol. 1, no. 1, pp. 485–524.

neighbourhoods have characteristics that reduce the level of crime, but these characteristics are often overlooked. Utilizing empirical analysis, Ramakrishnan and Espenshade suggested that a theory focusing on the opportunity structure of immigrants, immigrant subcultures, and social disorganization is 'at least partially inaccurate'.[28] Sampson argued that 'if immigration leads to the penetration into America of diverse and formerly external cultures, then this diffusion may contribute to less crime if these cultures don't carry the same meanings with respect to violence and crime'.[29] Wortley and Thomas have both concurred, reporting that culture as a sociological concept may have a 'parallel' impact on immigrant communities.[30] Culture may not only induce crime in immigrant communities but also prevent and reduce crime. Wortley and Thomas have called for more research in the future to explore the positive role of culture in crime prevention and community management. The trend explored since the start of the 21st century adds conflict to traditional culture-conflict theory. It is reasonable to assume that the culture of crime prevention or the legal norms immigrants bring to new countries should be effective in preventing crime in immigrant neighbourhoods.

To address this assumption, we examine in this study Chinese immigrants and their cultural beliefs and practices. In a review of previous literature, we postulate that three Chinese values may shed light on why Chinese immigrant neighbourhoods have lower crime rates than other districts. These values are important because they are shared with individuals who are embedded in networks of social relationships with family, friends, and neighbours.

Chinese conceptions of law and criminal justice originate from a culture that has existed for over 5,000 years and is based on the philosopher Confucius. Three concepts in Chinese culture are crucial in understanding how it limits crime: (a) *ren* (benevolence), (b) *mianzi* (face), and (c) *renqing* (human sympathy). *Ren* is the most significant feature of Chinese culture that has been identified; it emphasizes collectivism, a harmonious society, and the appropriate arrangement of interpersonal relationships. It originates in the dominant Chinese religious and philosophical traditions – Confucianism, Taoism, and Buddhism.[31] As the main element of Chinese collectivist culture, *ren* is achieved through controlling feelings, appearing humble,

28 S. Ramakrishnan, T. Espenshade, Immigrant Incorporation and Political Participation in the United States, 'International Migration Review' 2001, vol. 35, no. 3, p. 872.

29 R. Sampson, Rethinking Crime and Immigration, 'Contexts' 2008, vol. 7, no. 1, p. 33.

30 S. Wortley, Introduction. The Immigration–Crime Connection: Competing Theoretical Perspectives, 'Journal of International Migration and Integration/Revue de l'integration et de la migration international' 2009, vol. 10, no. 4, pp. 349–358; P. Thomas, Theoretical Articulation on Immigration and Crime, 'Homicide Studies' 2011, vol. 15, no. 4, pp. 382–403.

31 R. Westwood, Harmony and Patriarchy: The Cultural Basis for Paternalistic Headship among the Overseas Chinese, 'Organization Studies' 1997, vol. 18, no. 3, pp. 445–480.

avoiding conflict, and hiding a competitive spirit.[32] Berthel states that the concept of *ren* coincides with community engagement and community diversity, which are respected in western social values.[33] Advocating benevolence and community engagement has been the cultural basis for China to prevent crime and maintain community stability for thousands of years.[34] According to Rozi, *ren* is also the basis of self-cultivation that contributes to diversity and creates a positive relationship with family and society.[35] According to an old Chinese saying, 'Distant relatives are not as good as close neighbours', which means that community residents with *ren* have a stronger sense of responsibility, are active participants in public affairs, are tolerant of each other, and live in harmony. In Chinese culture a saying of the utmost importance is: In "neighbourhoods, benevolence is the most beautiful. How can the person be considered wise who, when he has the choice, does not settle in benevolence?'[36]

Mianzi (face) is another important cultural value for Chinese people.[37] Hu introduces the concept as follows: 'face stands for the kind of prestige that is emphasized in this country: a reputation that is achieved through getting on in life, through success and ostentation'.[38] In terms of law and social justice, *mianzi* accounts for the respect of the group for an individual who has good moral standards, who is law-abiding, and who engages in public affairs, indicating the confidence and trust of society in the integrity of the person's moral character.[39] Ho believes that *mianzi* relates to social relationship factors, maintaining that it 'ties together a number of separate sociological concepts, such as status, authority, prestige, and standards of behavior'.[40] In China, owing to the police's role and authority and the public's trust in the police, cooperat-

32 C. Fang, Z.Wang, H. Liu, Beautiful China Initiative: Human–Nature Harmony Theory, Evaluation Index System and Application, 'Journal of Geographical Sciences' 2020, vol. 30, no. 5, pp. 691–704.

33 K. Berthel, Creating Harmony from Diversity: What Confucianism Reveals about the True Value of Liberal Education for the 21st Century, 'ASIA Network Exchange: A Journal for Asian Studies in the Liberal Arts' 2017, vol. 24, no. 2, pp. 6–26.

34 D. Lau, The Analects, London 1979.

35 F. Rozi, Confucian Concept of Self-Cultivation and Social Harmony, 'International Journal of Language and Linguistics' 2020, vol. 7, no. 2, pp. 129–136.

36 Berthel, Creating Harmony…, *op. cit.*

37 A. Smith, Chinese Characteristics, Ada, MI 1894; Y. Luo, Analysis of Culture and Buyer Behavior in Chinese Market, 'Asian Culture and History' 2009, vol. 1, no. 1, pp. 25–30.

38 H.C. Hu, The Chinese Concepts of 'Face', 'American Anthropologist' 1944, vol. 46, no. 1, pp. 45–64.

39 P.J. Buckley, J. Clegg, H. Tan, Cultural Awareness in Knowledge Transfer to China – The Role of *Guanxi* and *Mianzi*, 'Foreign Direct Investment, China and the World Economy' 2010, pp. 165–191; H.C. Hu, Chinese Concepts…, *op. cit.*; W. Jia, Facework as a Chinese Conflict-Preventive Mechanism: A Cultural/Discourse Analysis, 'Intercultural Communication Studies' 1998, vol. 7, no. 1, pp. 43–62.

40 D. Ho, On the Concept of Face, 'American Journal of Sociology' 1976, vol. 81, no. 4, pp. 867–884.

ing with the police or having a family member or friend who is a police officer is seen as maintaining *mianzi*.

Studying data from 34,039 episodes of live Chinese radio broadcasts and TV programmes from 2008 to 2013, Zhou and Zhang suggested that individuals should 'choose not to argue with one's neighbour' (integrity) and to 'conceal one's negative or abnormal conduct' (harmony), two sensitive factors involved in *mianzi* representations.[41] In China, good neighbourliness, friendship, mutual understanding, and assistance between neighbours have always been regarded as fine traditions of Chinese values. Living in a harmonious neighbourhood and being involved in the community are manifestations of personal culture and are considered as showing decent behaviour. If a person enthusiastically participates in neighbourhood affairs and is recognized by the neighbours, they are demonstrating *mianzi*- or face-saving behaviours. On the contrary, if a person is indifferent to the community, the neighbourhood is tense, and if they cannot get respect and support from the neighbourhood, they will be considered as 'losing *mianzi*'.

Moreover, a loss of *mianzi* results if any of the following issues occur: a person (a) breaks the law, (b) is exposed in a crime, (c) displays meanness or poor judgement, (d) tells lies for their own profit, (e) displays unfaithfulness while in office, (f) breaks a promise, or (g) cheats a customer. Any of these conditions results in a loss of *mianzi* and makes it impossible for the person to function properly within the community.[42]

In China, where individuals' prestige is admired, losing *mianzi* sometimes has the same impact on the individual as a legal punishment. Moreover, a person does not simply 'lose his own face', but losing face also 'damages' the reputation of the family.[43] In this sense, the culture of maintaining face among community acquaintances is a factor in restricting the motivation for crime and deviant behaviour in Chinese communities and in enhancing community engagement and cooperation with law enforcement.

Lastly, *renqing* (social sympathy/connections) is a cultural element whose counterpart can be explored in the US. In America, criminologists have considered the effects of social connections on crime. According to social control theory, people commit less crime and delinquency if they have strong social bonds with family, school, and social networks.[44] Collective efficacy theory predicts that neighbourhoods have lower crime rates if they have generated high levels of social capital or

41 L. Zhou, S. Zhang, How Face as a System of Value-Constructs Operates Through the Interplay of *Mianzi* and *Lian* in Chinese: A Corpus-Based Study, 'Language Sciences' 2017, vol. 64, pp. 152–166.

42 L. Lin, Cultural and Organizational Antecedents of *Guanxi*: The Chinese Cases, 'Journal of Business Ethics' 2011, vol. 99, no. 3, pp. 441–451.

43 L. Zhou, S. Zhang, How Face…, *op cit.*

44 T. Hirschi, Causes of Delinquency, Oakland, CA 1969.

social cohesion.[45] Like these findings in American criminological theories, Chinese culture not only addresses attachments to the family, school, and society, but also the collectivism in social networks and neighbourhoods. These cultural norms also focus on individuals' social bonds to family, school, and neighbourhood, which contribute to the creation of social capital. In Chinese society, when an individual either enjoys happy occasions or faces difficulties, all acquaintances are supposed to offer a gift or render some assistance. Ordinarily, an individual should keep in contact with acquaintances in their social network, exchanging gifts, greetings, or visits with them. When a member of a social network experiences difficulties, someone should sympathize, offer help, and 'do a *renqing*' for that person. Fang et al. have argued that 'maintaining relationships is an integral part of Chinese communication and the primary functions of (Chinese) communication are to maintain existing relationships among individuals, reinforce the status difference, and to preserve harmony within the group'.[46] Family bonds, social bonds, and school/education bonds are the three most important social relationships that are emphasized in Chinese traditional culture and maintained through doing *renqing*.[47]

The extent to which Chinese culture still influences the behaviour of Chinese immigrants in the United States is an empirical question. Although Westwood has suggested that harmony, along with other Chinese cultural norms including human-heartedness, mutual dependence, and *mianzi* is prevalent among overseas Chinese communities, little literature is available about whether these cultural concepts still exist among the immigrants.[48] To fill this void and further examine the impact on immigrants' neighbourhood crime rates, researchers should measure the Chinese culture that immigrants display and then explore their association with neighbourhood engagement and one of the community justice components – the police and policing programmes in crime prevention.

3. Methods

To explore immigrants' perception of community justice, develop a methodology, and provide a tentative answer to the research questions, we implemented an exploratory study in three US cities: New York, Houston, and Denver. These cities were selected because they have a disproportionate number of Chinese immigrants that are economically successful. Data from 11 interviewees were collected through struc-

45 R. Sampson, Raudenbush, S., Earls, F. Neighborhoods and violent crime: A multilevel study of collective efficacy, 'Science' 1997, vol. 277, issue 5328, pp. 918–924.

46 T. Fang, & G.O. Faure, Chinese communication characteristics: A Yin Yang perspective, 'International Journal of Intercultural Relations' 2011, vol. 35, no. 3, 2011, p. 322.

47 C. Fang, Z. Wang, H. Liu, Beautiful China Initiative…, *op cit.*

48 R. Westwood, Harmony and Patriarchy…, *op cit.*

tured interviews, either online or in person. As part of a larger project, we developed a list of discussion topics that guided our interview procedures.[49] We included four areas of questions:

1) Perceptions of the Chinese immigrants of themselves
2) Perceptions of Chinese immigrants of the police
3) Police programmes for and about Chinese immigrants
4) Other issues not previously covered

Examples of questions included, among many others, (1) what is the Chinese immigrant community in the United States? (2) Do you believe that you are treated fairly by the police? (3) Are there any police programmes directed toward Chinese immigrants that you are aware of? (4) Are there any issues that we did not address that are important in understanding the relationship between the police and Chinese immigrants? To contribute to future studies in community justice, we targeted the immigrants' perception of community justice. However, we were more interested in exploring the immigrants' attitudes towards the essential elements that highly impact the community justice model in the neighbourhood, such as their perceptions of an immigrant community, neighbourhood interaction, community policing, and victimization. We presume that the culture of immigrants taken to the new country will positively affect neighbourhood crime prevention. For instance, cultural conflict theory aims to explore the cause of crime based on cultural conflicts. In this case, we want to explore the possibility that the immigrants' culture may be an asset in explaining low crime rates. These two kinds of arguments are unified by emphasizing the influence of the original culture on immigrants' criminal behaviour.

The sample consists of 11 Chinese immigrants who are economically successful. Interviews were conducted in September and October 2021; six interviews were conducted face to face and five interviews were conducted remotely. The duration of each interview was 45 to 60 minutes. A few of the interviews were conducted in Mandarin Chinese, with one of the researchers serving as a translator, but most of the interviews were conducted in English. One interview yielded little useful information and was eliminated, limiting our final sample to ten participants. We are aware that ten interviews cannot provide a representative sample of an entire generation of immigrants; however, we made a concerted effort to have some diversity in our sample (age, education, and economic well-being). We know this study can only provide tentative conclusions and answers; for more definite results, future research should be conducted with a larger sample.

49 J. Gerber, D. Jia, Perceptions of Police Officers on the Floating Population: A Pilot Study of Community Justice Initiatives in China, (in:) J. Eterno, B. Stickle, D. Peterson, D. Das (eds.), Police Behavior, Hiring, and Crime Fighting, New York 2022, pp. 56–65.

The sample was a non-probability sample that was purposive. We selected participants that were (1) Chinese immigrants, (2) economically successful (seven of them have earned master's or terminal degrees in the US), and (3) could be interviewed either in person or remotely. Findings can therefore not be generalized to all Chinese immigrants in the US, but we believe they are typical of the segment of immigrants that we were interested in – i.e. economically successful Chinese immigrants with most of them having earned advanced degrees in the US, reflecting the demographical changes of the Chinese immigrant population in the new century. The research was approved by the Institutional Review Board of the university of one of the authors.

Using principles of grounded theory, we analysed our data in an inductive manner.[50] We began with themes suggested by the four areas of questions included in the questionnaire (open coding): (a) perceptions of the Chinese immigrants of themselves, (b) perceptions of Chinese immigrants of the police, (c) police programmes for and about Chinese immigrants, and (d) other issues not previously covered. In a second round of coding (axial coding), we developed themes that were suggested by the first-round themes. We will discuss our findings using this second set of themes or axial codes.

4. Findings

Our analysis of the data generated five axial codes: (1) Chinatown as a symbol for Chinese immigrants, (2) the existence of a Chinatown as a facilitator between the police and the Chinese Immigrant Community (CIC), (3) Chinese immigrants and their routine interactions with the police, (4) previous interaction with the police affecting immigrants' attitudes, and (5) Covid-19 and hate crime as challenges for Chinese immigrants.

5. Chinatown as a symbol for Chinese immigrants

Traditionally, the areas in American cities known as Chinatowns served as ideal settlements for Chinese immigrants in the US. However, this tradition has been reported to change recently as more Chinese immigrants choose to leave a Chinatown to work and live outside of it.[51] According to our interviews, heterogeneity exists

50 B. Glaser, A. Strauss, The Discovery of Grounded Theory: Strategies for Qualitative Research, Aldine 1967.

51 Y. Wu, J. Wen, Fear of Crime among Chinese Immigrants in Metro-Detroit, 'Crime, Law and Social Change' 2014, vol. 61, no. 5, pp. 495–515; J. Liu, The Roots of Restorative Justice: Universal Process or from the West to the East, 'Acta Crimologiae et Medicinae Legalis Japonica' 2015, vol. 81, no. 2, pp. 1–14; H.-S. Chen, Chinatown No More: Taiwan Immigrants in Contemporary New

in the three cities with respect to this issue. The Houston and New York City interviewees stated that Chinatown areas still have a significant concentration of Chinese immigrants. However, the interviewees in Denver reflected that the Chinese community was not a geographic concept to them because they all chose to work and live outside of an identifiable Chinatown. According to these interviewees, because there is no Chinatown in Denver, the Chinese community has become a virtual social community to them, the impact of which is limited in terms of inclusion and integration.

Of the interviewees in Denver, Interviewee 3 stated she was not very involved in the CIC. Interviewee 4 reflected that she was unfamiliar with the term CIC and stated that the city did not have any identifiable Chinese community. Interviewee 5 said she participates in WeChat discussion groups in China; however, these groups are not based on geographic residency in the US but on being from the same school/university or the same area of China. Interviewee 6 said that there were no CICs in Denver, and she spent more time with American associates than Chinese immigrants.

6. The existence of Chinatown as a facilitator between the police and the CIC

Previous research has concluded that Chinese immigrants were more likely to have negative perceptions of law enforcement and were reluctant to report to or seek help from the police, as was the case with other Asian communities.[52] However, our respondents stated that American police officers treat Chinese immigrants fairly. The immigrants concurred that police officers see them as law-abiding. They attributed good treatment by American police to the Chinese cultural tradition of cooperating with the police. For example, Interviewee 1 (in NYC) indicated that members of the CIC are treated fairly by the police for two main reasons: Chinese immigrants are unlikely to break the law, and the Chinese have a cultural tradition of cooperating with the police. This tradition of public cooperation in policing can be traced back to the Baojia system in the Song dynasty.[53] The Chinese cultural tradition of cooperating with the police in the maintenance of social order is suggested by the public security committees created to maintain public order; the earliest of such committees was set up by the public on their own initiative in 1949.[54] Over a million such organizations have been established all over China, and they collaborate with local police departments to educate the public on matters of public security and the legal system and

York, Ithaca, NY 2018; M. Zhou, Chinatown: The Socioeconomic Potential of an Urban Enclave, Philadelphia 1992.

52 R. Weitzer, S. Tuch, Race and Policing in America: Conflict and Reform, Cambridge 2006.

53 L. Lin, Cultural and Organizational…, *op. cit*.

54 L. Y. Zhong, Community Policing in China: Old Wine in New Bottles, 'Police Practice and Research: An International Journal' 2009, vol. 10, no. 2, pp. 157–169.

organizations. In addition, these committees guard their own districts and patrol the streets to prevent crimes. The tradition of community cooperation with the police relies fully on the public in their work of maintaining public order. Also, making full use of the traditional culture of police–civil society cooperation has become an important way for the Chinese police department to solve policing staffing issues, which has plagued the world's police community. In Beijing, the capital of China, the community public security joint defence team (治安联防队) and community volunteers are effective complements to community policing. They are organized by communities spontaneously to assist the police with public security patrols, legal publicity, dispute mediation, and other community policing issues. For example, 1.1 million people directly participated in community security work during the Beijing Olympic Games in 2008.[55] These organizations and volunteers effectively alleviate the problem of insufficient police forces and further strengthen the relationship between the police and the community to ensure the historical and cultural tradition of public participation in community crime prevention.

Interviewee 2 (in Houston) stated that, in his experience, Chinese immigrants are treated well in the city because most immigrants obey the law and are willing to cooperate with police officers. Interviewee 5 (in Denver) stated she would not hesitate to call the police if she had problems. She has applied for a firearms concealed carrying permit, and had good interaction with the police on that occasion.

Meanwhile, the perceptions of police programmes in the CIC revealed patterns of heterogeneity among the interviewees in NYC, Houston, and Denver. The interviewees in both NYC and Houston reflected that police programmes related to community justice are offered mainly in Chinatown. The police routinely ask about CIC concerns and requests and introduce them to the main security issues in their areas and how to protect themselves. Police in NYC have regular meetings (every 3–4 months) with CIC community groups to exchange information, which helps increase neighbourhood satisfaction and reduce fear of crime. The police participated in cultural festivals in Houston's Chinatown before Covid-19.

In Denver, however, interviewees were unaware of any police programme focusing on Chinese immigrants or the Chinese community. Interviewees who live in diverse neighbourhoods with Whites, Blacks, and Hispanics lacked any information on police programmes focusing on crime prevention. These facts implied that without a centralized Chinatown as a platform and facilitator, the local police department may have less interaction with Chinese immigrants. Immigrants living in neighbourhoods with multiple cultures have limited chances to involve themselves in community policing or justice programmes. Interviewee 11, a resident of Denver, said he felt

55 L. N. Yu, Community Security Management Strategy from the Perspective of Beijing Olympic Security, 从北京奥运安保看社区治安管理方略, 'Legal System and Society' 2010, vol. 2, pp. 195–196.

disconnected from the news of the day. He tried to engage in steps to mitigate the consequences of this fact, but it was made clear to us that he perceived the absence of an identifiable Chinese community as an obstacle in that quest.

7. Chinese immigrants and their routine interactions with police

Scholars have suggested that as immigrant groups, CICs are expected to have fewer positive attitudes toward social control institutions, including the police, than members of dominant groups.[56] In our study, we found this suggestion might be a stereotype that needs more examination; in general, our interviewees' evaluations of the police are positive. They commonly reported that their past contacts with the police were satisfactory, and reflected that they had been treated fairly in the past. They understood that the police are also ordinary people and concurred that the police are professional in their work. All interviewees stated that English was not an obstacle to communicating with the police or affecting law enforcement. Chinese-speaking police officers are integral members of police departments in New York and Houston. Although no respondents had ever met police officers in Denver who could speak Chinese, their personal English proficiency was sufficient to communicate. Alternatively, they could find friends and neighbours who can speak English to help. Interviewee 2 said that, according to his experience, in Houston they are not treated differently (by the police) from other residents. Interviewee 3 stated that she sees police officers near the university she works and that she likes the police presence in this location and in neighbourhoods generally. She stated that the police prevent crimes and support the community. Interviewee 8 reflected that she had received a traffic ticket, but she stated that race had not had an impact; she felt she was treated fairly by the police. Three interviewees pointed out that the quality of interaction varies (by individual officers).

8. Previous interactions with the police affect Chinese immigrants' engagement in community justice programmes

We explored the idea that Chinese immigrants are more willing to participate in community activities if the police give them the impression of treating them fairly. For example, Interviewee 3 received a speeding ticket, but she stated that she was not treated unfairly because the police explained the reasons professionally and politely. The experience did not change her positive perception of the police. She said that police programmes such as crime prevention programmes would be good for the community. Even if police work is not performed perfectly, police officers' demeanour of

56 R. Weitzer, S. Tuch, Race and Policing…, *op cit.*

politeness will result in a positive perception of police programmes amongst Chinese immigrants. When Interviewee 4's house was burgled, she had good interaction with the police; she stated that the police work was routine but that the investigation process included what should have been included, although the police did not explain things clearly. She perceived a social distance between the police and citizens – partly caused by lack of contact. She was willing to participate in some activities, such as the police open house, to fill this gap.[57] Interviewee 11 interacted with the police when he was stopped for speeding and failing to turn his lights on. He stated that race did not matter in all his interactions with the police. Although the immigrant perceived himself to be an outsider, his positive experience with the police allowed him to have the incentive to communicate with police officers at gun ranges and shops, based on common interests.

Although the ten Chinese immigrants reflected limited experiences of being involved in any community justice programme, they to some degree acknowledged the importance of community justice. None of the participants expressed unwillingness for community engagement. The responses of the immigrants, in addition to the traditional culture of collaborating with the police and English fluency, indicated that the respect, politeness, and professional conduct of the police are significant factors that influence immigrants' willingness to be involved in community justice. Interviewees who spoke positively of police communication expressed their desire to join community policing programmes if needed.

9. Covid-19 and hate crime as challenges for Chinese immigrants

Although interviewees primarily reported positive interactions with the police, they expressed deep concern about rising hate crimes against Asians. Our respondents stated that a potential for anti-Chinese and anti-Asian hate crimes became an issue partly because of Covid-19. It remains to be seen if this perception continues to be of relevance, if or when concern about Covid-19 lessens. Nevertheless, our respondents stated that in addition to the influence of the original Chinese culture of crime prevention and victimization, American life has increased their knowledge and experience of self-protection. However, in view of the current situation, participants continue to worry about possible risks and sincerely hope to get more police help and community support. Interviewee 7 stated that social coherence is most important in the US to reduce crime, followed by individual responsibility, with police help being least important, whereas in China the rank is social coherence, followed by police help, and lastly individual responsibility. Interviewee 10 stated that the police play an

57 Police departments sometimes invite the public to visit police stations during so-called open house. The objective is to inform citizens of police services in a non-confrontational setting and therefore to reduce the social distance between the police and community members.

important role in society – order and justice are important for the well-being of society: 'We still need them [the police] to protect us and maintain the social order and generally, they are good. We can't imagine a society without police. Law and order are the foundation of a country, and police is a power to get it.'

10. Discussion

This article is part of a larger project that focused on the reciprocal relationships of Chinese migrants in China and the Chinese police, and the corresponding relationships between Chinese immigrants in the US and American police.[58] We began this stage of our research with the vague notion that the traditional theoretical models of the relationships between immigrant communities and crime are at least dated, if not outright wrong, in at least some instances. Consider, for instance, the social disorganization theory of the Chicago School. Theorists such as Shaw and McKay saw immigrants as uneducated and having lower socioeconomic status, possessing limited English-language skills and few occupational skills.[59] They were forced to live in Zone 2 of the concentric circles of the City of Chicago, the Zone of Transition between the business sector and the more desirable residential areas. It was only the second generation of immigrant groups who were able to leave the immigrant slums behind because of their cultural transformation from being immigrants to becoming Americans. For many of the immigrants who arrived in America early in the 20th century, this model may have been correct; they arrived by boat at Ellis Island and were subsequently absorbed into American society at its margins.

Chinese immigrants who arrived in the 19th century fit this pattern as well. They were primarily manual labourers who worked in railway construction, mining, and agriculture.[60] Unlike the Europeans who immigrated on the East Coast, the Chinese immigrated on the West Coast. Furthermore, while the Europeans could blend in racially with the dominant group, Chinese immigrants were racially different and had to deal with racial stereotypes, prejudices**,** and legal forms of discrimination. However, the experiences of European and Chinese immigrants in the US were essentially similar up to the middle of the 20th century.[61] Because of economic limitations

58 J. Gerber, D. Jia, Community policing…, *op. cit.*

59 C. Shaw, H. McKay, Juvenile Delinquency and Urban Areas (rev. ed.), Chicago 1972.

60 N. Aarim-Heriot, Chinese Immigrants, African Americans, and Racial Anxiety in the United States, Urbana, IL 2003; P. Cloud, D. W. Galenson, Chinese Immigration and Contract Labor in the Late Nineteenth Century, 'Explorations in Economic History', vol. 24, no. 1, 1987, pp. 22–42.

61 One of the reviewers for this journal pointed out that there was an important legal difference between European and Chinese immigrants to the US: the Chinese Exclusion Act of 1882. While this act mandated legal discrimination, in a form not experienced by European immigrants, it does not change the fact that European and Chinese immigrants up to about the middle of the 20th century were mostly relatively uneducated members of the working class. As we discuss be-

combined with ethnic and racial prejudices from the dominant majority, immigrants were isolated in ethnically homogeneous districts. For the Chinese, these situations meant the creation of Chinatowns. Immigrants flocked to these communities because they contained the comforts of the homeland, but they impeded their Americanization. It was theoretically possible to spend most of one's life in Chinatown and not become a member of the larger society in any meaningful way.

However, such a portrayal is not accurate for some Chinese immigrants and only true to a limited extent for others. The respondents that participated in our research are representative of a new segment of Chinese immigrants. They are well educated, have many occupational skills, and possess advanced English-language skills. In other words, they have a socioeconomic background that is fundamentally different from that of their immigrant predecessors and thus have economic and social options that are equally different. While the earlier immigrants arrived by boat in America, the new generation of Chinese immigrants arrived by plane. A difference manifests itself with other ethnic immigrants as well.

All the Chinese immigrant respondents are more integrated into American society than the traditional theoretical models would predict. As a result, they have more positive views of the police, and the criminal justice system in general, than what might be expected. Furthermore, racial stereotyping works to their advantage, as Asians are seen as law-abiding by the police and the public alike. They have had very few adverse experiences with the police or any other criminal justice agencies.

There was a difference in the answers of respondents from Houston and New York City versus Denver; both the former two cities have vibrant Chinatowns while the latter does not. Respondents from New York City and Houston perceived the existence of Chinatowns as positive in general, and with respect to police–community relations in particular. For instance, none of the Denver interviewees could name a police activity or programme that catered to the Chinese Immigrant Community (or had ever encountered Chinese-speaking police officers), while several of the respondents from Houston and New York City were able to name at least one activity. Furthermore, respondents credited the fact of cities having a Chinatown with increased awareness of the police by Chinese immigrants. Alternatively, the absence of a Chinatown in Denver forced respondents to live in racially and ethnically heterogeneous neighbourhoods, a fact that sped up American enculturation. It seems, therefore, that the presence of a Chinatown is not as crucial as in earlier times but is still beneficial to Chinese immigrants and their understanding of, participation in, and collaborations with community justice in the US. Reviewing both the literature on Chinese culture and the findings from the current study suggests that the immigrant culture contains positive factors of crime prevention, community service, and

low, these trends changed for Chinese immigrants late in the 20th century, and these changes had important ramifications for more recent Chinese immigrants.

police–people cooperation. Work and education in the new country will promote them to more actively study and integrate into the country's social life and to have the enthusiasm to fulfil their social responsibilities, participate in community services, maintain community safety, and improve the quality of community life.

The design of police programmes for developing police–immigrant relations and improving community crime prevention and quality of life may pay equal attention to understanding and using a positive perspective of immigrants' culture. For example, the mayors and police chiefs in Houston and New York City actively took advantage of Chinatown as a cultural centre to strengthen cooperation between the police and the people, using the situation for publicity against crime. Their positive experiences with community outreach suggest offering Chinese immigrants more opportunities to learn about the police and participate in police programmes, which won our interviewees' unanimous support and praise.

11. Limitations

As we only interviewed 11 Chinese immigrants (and used the answers of ten respondents), we can only suggest partial answers. In fact, the nature of grounded theory is that we can reach tentative conclusions that can be developed into hypotheses for quantitative research:

H1: Chinese immigrants who live in cities with Chinatowns see these areas as more symbolic than Chinese immigrants who live in cities without Chinatowns.

H2: The existence of Chinatowns leads to more police programmes catering to Chinese immigrants in those cities than in cities without them.

H3: Recent Chinese immigrants, regardless of where they live, have a positive image of the police and the criminal justice system.

H4: Chinese immigrants who have a positive experience with the police are more likely to be involved in community justice programmes.

H5: The existence of Covid-19 may have an adverse effect on the relations between the police and the Chinese immigrant community.

Concluding remarks

We have provided qualitative research for a reexamination of the relationship between Chinese immigrants, police and criminal justice officials, and crime in the US. To establish whether we are correct in our hypotheses, two lines of research should be pursued: (a) a quantitative replication of our study using a representative sample of Chinese immigrants, and (b) research on immigrants from other ethnicities should be conducted to see if our findings are specific to Chinese immigrants or have transferability to other groups. For instance, Chicago was the focus of research

on immigrants in the early 20th century; it would be interesting to examine if more recent immigrants follow the patterns predicted by the Chicago School or if they follow the patterns suggested here. Our guess (hypothesis) is that recent Polish and Italian immigrants, for instance, display patterns like the Chinese immigrants that we observed rather than the patterns observed by their ethnic ancestors 100 years ago. However, this is an empirical question and will need to be answered empirically in the future.

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Criminal Prosecution and Punishment of Migrants in Spain: A Border Criminology Perspective[1]

Abstract: The exceptional use of criminal law to achieve migration policy objectives has been a reality in Spain since the first Aliens Law was passed in 1985. Since then, academia has warned about the discriminatory and exclusionary effects of this confluence. This paper critically analyses a series of exceptional Spanish criminal and migration policy measures aimed at criminalising certain population movements. The aim is to show the mechanisms used by criminal justice in Spain to manage human mobility from the perspective of border criminology. Among other things, I will analyse (1) 'hot returns' and (2) racial profiling in police stops, both as police reactions. I will also study (3) the expulsion of convicted foreigners and (4) criminal records as a migration control strategy and, finally, the deprivation of liberty for migration control purposes, such as (5) detention centres for migrants and (6) prison release strategies. The aim is to show that Spanish penal policy, taken in a broad sense as all eminently criminal measures and those where criminal law and immigration law converge, has as its main objective to socially render harmless (innocuousation) foreign suspects, convicts and ex-convicts in Spain with different and exceptional measures that push them to the margins of society.
Keywords: border criminology, expulsion, migrants, prison, social exclusion

Introduction

The reaction of countries of destination to migration is currently characterised by the branding of migrants as dangerous,[2] the inclusion of migration policies within

1 Project on Young Foreigners Held in Prisons in Andalusia (P20–00381-R). Financed with funds from the Junta de Andalucía in the competitive call Retos 2021–2023.

2 K.F. Aas, Crimmigrant Bodies and Bona Fide Travelers: Surveillance, Citizenship, and Global Governance, 'Theoretical Criminology' 2011, vol. 15, no. 3, pp. 331–346.

a security context and the use of coercive means for its repression.[3] Hence the importance for criminology to pay attention to the different mechanisms and public institutions that are responsible for the control of immigration.[4] From the outset, the EU has had as a priority the maximum control of its external borders against the threat of terrorism and irregular immigration, unifying national migration policies based on the tenets of the Maastricht Treaty and the Schengen Convention. Since then, the EU has been creating a body of legislation that is still evolving, harmonising sanctions against certain behaviours related to illegal immigration and against the entry, circulation and stay of illegal migrants.[5]

As a result, Member States have been arming themselves with diverse strategies to control their external borders, as well as using different dynamics to prevent the movement and stay of migrants in an irregular situation within their borders.[6] Thus, public policy on immigration seems to be full of mechanisms for the protection of external borders (rejection at borders and returns) and internal controls (police stops of ethnically profiled individuals, deprivation of liberty at administrative detention centres, administrative expulsions and deportations as a penal substitute).[7] Other elements of public policies of interest, such as those aimed at the integration of the migrant population, have not received as much attention.

In political speeches, the media and the public at large, it is common to refer to migrants as one of two extremes: regular or irregular. This duality allows the discourse to be divided into regular migrants – the good ones – and irregular foreigners – the bad and dangerous ones – which serves as an excuse to justify reactionary, discriminatory, exceptional, and exclusionary public policies.[8]

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3 B.J. Muller, Unsafe at Any Speed? Borders, Mobility and Safe Citizenship, 'Citizenship Studies' 2010, vol. 14, pp. 75–88; P.E. Villegas, Moments of Humiliation, Intimidation, and Implied 'Illegality': Encounters with Immigration Officials at the Border and the Performance of Sovereignty, 'Journal of Ethnic and Migration Studies' 2015, vol. 41, pp. 2357–2375.

4 M. Bosworth, Border Criminology and the Changing Nature of Penal Power, (in:) A. Liebling, S. Maruna, & L. McAra (eds.), The Oxford Handbook of Criminology, Oxford 2017, pp. 373–390.

5 C. Villacampa, Normativa europea y regulación del tráfico de personas en el Código penal español, (in:)

L.R. Ruiz Rodríguez & M.J. Rodríguez Mesa, Inmigración y sistema penal, Valencia 2006, pp. 69–108.

6 J. Brouwer, M. Woude, J. Leun, Border Policing, Procedural Justice and Belonging: Legitimacy of (Cr)immigration Controls in Border Areas, 'The British Journal of Criminology' 2018, vol. 58, no. 3, pp. 624–643.

7 D. Moffette, La regulación de la inmigración a través de la libertad vigilada: El desplazamiento del trabajo fronterizo y la valoración de la deseabilidad en España, 'Diálogo de Seguridad' 2014, vol. 45, no. 3, pp. 262–278; G. Fabinni, Managing Illegality at the Internal Border: Governing Through 'Differential Inclusion' in Italy, 'European Journal of Criminology' 2017, vol. 14, no. 1, pp. 46–62.

8 K.F. Aas, Crimmigrant…, *op. cit*.; B. Caldwell, The Demonization of Criminal Aliens, http://crimmigration.com/2016/10/25/the-demonization-of-criminal-aliens/ (02.11.22).

The exceptional use of criminal law to achieve the aims of migration policy[9] has been a reality in Spain since the approval of its first Immigration Law in 1985. Since then, warnings have been issued about the discriminatory and exclusionary effects of the intersection between criminal law and migration control. This paper includes an analysis, with a critical approach, of a series of exceptional criminal and migration policy measures which aim to criminalise certain population movements.[10] The aim is to show the mechanisms used by the Spanish criminal justice system to manage human mobility from a border criminology perspective.[11]

1. Police reactions in migration control

The police, as an element of criminal control, play a crucial role in the control of external and internal borders. Regarding the former, the police practice of 'hot returns' in the border perimeter of southern Spain avoids judicial intervention that would allow for the defence and protection of migrants attempting to cross the fence, while at the same time making them visible as socially dangerous. Once inside the borders, people with African or South American features are subject to greater police control and are therefore more susceptible to being absorbed by the criminal justice system.

1.1. Hot returns

Melilla and Ceuta are Spanish cities located on the African continent, specifically off the Costa del Sol, and are the legacy of the Spanish protectorate in Morocco. The two cities are the first land border that can be reached by people who need to apply for asylum because they are fleeing war. The border between these Spanish cities and Morocco, a total of 18 km (8 km in Ceuta and 10 km in Melilla), was delimited in 1971 by small barbed-wire fences. From the 1990s onwards, these fences have been raised and made more complex until they have turned into a triple-fence barrier in order to try to prevent jumps from the Moroccan side of the border.

'Hot returns' (*devoluciones en caliente*) are the actions carried out by the Civil Guard – Spanish border control agents – at the border perimeter of the cities of Ceuta and Melilla, consisting of containing people who try to enter the national territory by circumventing the fences, then handing them over in a coercive manner to the Moroccan auxiliary forces without any type of procedure, identification of the person,

9 J. Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 'American University Law Review' 2006, vol. 56, no. 2, pp. 367–419.

10 N.A. Wonders, Sitting on The Fence – Spain's Delicate Balance: Bordering, Multiscalar Challenges, and Crimmigration, 'European Journal of Criminology' 2017, vol. 14, no. 1, pp. 7–26.

11 M. Bosworth, A. Liebling, S. Maruna, Border…, *op. cit*.

granting the interested party a hearing, legal assistance or the possibility of judicial control over such action.[12]

This practice, which was not legal until 2015, is characterised by the absence of individualisation of the person on whom the act falls, due to a lack of minimum guarantees typical of any procedure and to violation of the principle that prohibits public authorities from acting arbitrarily. In addition, fundamental principles of international law – such as international protection (i.e. asylum, among others) and the prohibition of collective deportations – are violated.

The practice of hot returns means that it is impossible to detect whether the person being returned with such immediacy is a victim fleeing from traffickers, a minor in need of protection or a person whose circumstances would qualify for international protection. It is not possible to know who is being deported or under what circumstances, since there is no procedure in place to ensure that they are heard and assisted by a lawyer. Moreover, certain inappropriate actions of the Civil Guard could go unnoticed, as they are not subject to judicial control.

However, this practice was legalised by a reform of the Immigration Law in 2015, which set forth a special regime for the cities of Ceuta and Melilla. Thus, the immediate or hot returns of foreigners who enter by circumventing the fences have legal support since then. The tenth additional provision of the Immigration Law, regulating these pushbacks, establishes in section 3 that 'applications for international protection shall be formalised in the places set up for this purpose at border crossings and shall be processed in accordance with the provisions of the regulations on international protection'. This provision was intended to counter the voices that criticise hot returns for not respecting internationally accepted standards on human rights. The curious thing is that the places authorised to request international protection referred to in the precept are located on the Spanish side of the fence. Therefore, in order to apply for international protection, there is no other choice but to try to reach it, the only means being to jump the fence.

Martinez Escamilla considers the decision of the European Court of Human Rights, in its judgment of 13 February 2020 (on the case of N. D. and N. T. v. Spain), to be a step backwards in the protection of human rights at the border. In it, the High Court considered that the two summary expulsions to which the plaintiffs were subjected after jumping the fences separating Melilla and Morocco do not violate the prohibition of collective refoulement, nor the right to an effective remedy enshrined in Art. 13 of the European Convention on Human Rights and Art. 4 of Protocol No. 4. The arguments supporting the practice of hot returns at Spain's southern border

12 M. Martínez-Escamilla, J.M. Sánchez-Tomás, La vulneración de derechos en la frontera sur: De las devoluciones en caliente al rechazo en frontera, 'Revista Crítica Penal y Poder' 2019, no. 18, pp. 1–7.

are open to criticism and leave the people at the border defenceless.[13] Hot returns are an example of how, as regards irregular immigration from sub-Saharan Africa, arbitrary public policies are justified and exceptions to the basic principles of human rights protection are normalised and accepted in Spain.

1.2. Ethnically biased police stops

If hot returns are an example of external border protection, police stops with ethnic biases in Spain are a clear example of border protection within the territory. In Spain's migration policy, the National Police becomes an agent of immigration control. Organic Law 2/1986 on the National Police Force (NPF) establishes that the NPF has exclusive competence throughout the national territory in matters of foreigners, refuge and asylum, extradition, expulsion, emigration and immigration. In the exercise of this task of internal border control, the need to identify foreign offenders arises. Foreigners are often identified as being those who have distinct ethnic traits. This motivates the police to be guided by the ethnic profile of the individual.[14] In Spain, it is common for NPF agents to carry out a migration control measure by requesting people on the street with a foreign appearance to identify themselves. This type of action has been supported by the Constitutional Court (CC) on the Williams ruling (a black Spanish woman). Williams sued a police officer for his racist behaviour because he had stopped her and asked her to identify herself based only on the colour of her skin. The lawsuit was dismissed by the Constitutional Court in judgment 13/2001 of 29 January 2001. The main argument put forward was that the use of the statistical criterion that determines that black people in Spain are more likely to be foreigners is more than reasonable in the field of immigration control. However, years later, the United Nations Committee for Human Rights ruled in favour of Williams, arguing that although it is legitimate to carry out identity checks to control irregular immigration, the mere physical or ethnic features of a person should not be taken as indications of a possible situation of administrative irregularity.

It was not until Law 4/2015 of 30 March 2015, on the protection of citizen's security, that the prohibition of police stops with ethnic profiling was included for the first time in Spain in a regulation with the status of law, expressly included in the last paragraph of Art. 16.1.[15] The lack of official data on this matter makes it impossible to empirically assess both the extent of this practice and the effects of the law. The om-

13 M. Martínez Escamilla, Las 'devoluciones en caliente' en el asunto N. D. y N. T. contra España (sentencia de la gran sala TEDH de 13 de febrero de 2020), 'Revista Española de Derecho Europeo' 2021, vols. 78–79, pp. 309–338.

14 D. Boza-Martínez, La expulsión de personas extranjeras condenadas penalmente: el nuevo artículo 89 CP, Navarra 2016.

15 E. García-España, L. Arenas García, J. Miller, Identificaciones policiales y discriminación racial en España, Valencia 2016.

budsman urged this legal provision because of repeated complaints he had received about such discriminatory police practices.

But beyond the actions of the police as immigration control agents, actions are also detected where stereotypes and prejudices, and even institutional racism, interfere.[16] These are cases where the police act with racial biases related to the alleged greater involvement of migrants in administrative and/or criminal offences. Research carried out in Spain, using different methodologies and interest groups, always has the same result: the existence of police actions guided by ethnic bias. Stereotypes and prejudices in this regard are shared socially, so it is not surprising to find such biases in police and legal operators. The evaluation of programmes that have been implemented in several police forces in Spanish municipalities aimed at helping to review police criteria in their street identification actions also demonstrates the lack of effectiveness of this racist criterion in finding irregular migrants.[17]

We can therefore say that with this type of police action, we are witnessing one of the practices of public-space control as a technique of social exclusion referred to by Díez- Ripollés.[18] With this type of control, the city ceases to be a privileged space for social interaction and cooperation to the extent that a group of suspects – such as migrants – is stigmatised because they are not 'standardised'. In other words, we are experiencing a reorganisation of the city through greater control of citizens with distinct features as suspects, due to their appearance or low economic capacity, which leads to an obvious increase in their social exclusion.[19]

2. Exceptional legal consequences for non-EU foreigners

2.1. Expulsion as a substitute for prison sentences of more than one year

The Spanish Criminal Code (SCC) establishes expulsion as almost the only penalty for foreign offenders. Art. 89 SCC provides for the possibility of expulsion replacing, fully or partially, a prison sentence that has been imposed. This article was substantially reformed in 2015; with this reform, expulsion as a penal substitute is no longer applied only to migrants in an irregular situation but to all foreign citizens. However, this provision makes a distinction between EU and non-EU foreigners. For the latter, expulsion as a substitute for imprisonment is the general rule, albeit subject

16 J. Williams, Redefining Institutional Racism, 'Ethnic and Racial Studies' 2010, vol. 8, no. 3, pp. 323–348; M. Tonry, Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy, Cullompton 2012; A. Suohami, Institutional Racism and Police Reform: An Empirical Critique, 'Policing and Society' 2014, vol. 24, no. 1, pp. 1–21.

17 E. García-España, L. Arenas García, J. Miller, Identificaciones…, *op. cit*.

18 J.L. Díez-Ripollés, El control de espacios públicos como técnicas de exclusión social. Algunos contrastes regionales, 'Revista Española de Investigación Criminológica' 2014, vol. 12, pp. 1–28.

19 *Ibidem*.

to exceptions such as the fact that the subject has roots in the country or if there are circumstances of general or special prevention. Nevertheless, for foreigners from EU countries, expulsion is an exceptional measure that will only be carried out in cases of serious crimes related to certain legal assets. This shows a clearly discriminatory response, because it reacts differently towards nationals and non-EU foreigners, and this response has nothing to do with differences in the content of the offence. Furthermore, the principle of *non bis in idem*,[20] referring to the prohibition of being punished twice for the same act, continues to be violated, to the extent that the migrant is expected to serve the prison sentence and will then be expelled, as the last part of the sentence.

A reintegration purpose is also not detected in expulsions as a substitute for imprisonment, where it seems that the policies for border control clearly prevail over the constituent principles of criminal law.[21] In any case, expulsion has not been widely used; the number of expulsions actually carried out has barely reached 5–6% of the prison sentences applied to non-EU migrants.[22] Moreover, the benefits of the reform of Art. 89 of the SCC, which establishes the migrant's roots in Spain as an impediment to expulsion, may have reduced both the number of expulsions decreed and those carried out in the criminal sphere. However, although criminal expulsion is little used, it has not lost relevance, as Boza-Martínez argues, to the extent that expulsion continues to be the main response to foreign criminals.[23]

2.2. Criminal record at border control

According to the Spanish Immigration Law, a criminal record is an insurmountable obstacle to the granting of visas and initial residence permits to migrants, which act as a filter to administratively select the entry of citizens from non-EU countries. I share the opinion of Larrauri when he argues that although the requirement of an absence of a criminal record to enter the country or to apply for an initial residence permit is understandable, it is entirely open to criticism that the mere fact of having a criminal record entails an automatic denial of such authorisations, without the se-

20 M.M. González Gascón, La cuarta reforma del artículo 89 del CP relativo a la expulsión del extranjero condenado a pena de prisión, 'Estudios Penales y Criminológicos' 2016, vol. 36, pp. 131–197.

21 J.A. Brandariz García, La globalización en crisis. Gubernamentalidad, control y política de movimiento, Malaga 2009.

J.A. Brandariz García, The Control of Irregular Migrants and the Criminal Law of the Enemy, (in:) M.J. Guia, M. van der Woude, J. van der Leun (eds.), Social Control and Justice: Crimmigration in the Age of Fear, The Hague 2013, pp. 255–266.

22 *Ibidem*.

23 D. Boza-Martínez, Expulsiones. Cifras y su interpretación, 'Revista Crítica Penal y Poder' 2019, no. 18, pp. 309–318.

riousness of the crime or how long it has been since the sentence was passed being taken into account.[24]

A criminal record is also an obstacle to a foreigner staying in Spain when he or she has 'been convicted, inside or outside Spain, for wilful misconduct that in our country constitutes an offence punishable by deprivation of liberty of more than one year'.[25] In this case, not all foreigners who commit crimes in Spain are in the same circumstances as regards the seriousness of their offence, their length of residence and their ties with the community. Foreign nationals who are released from prison after serving their sentence of more than one year and who meet the requirements of this cause for expulsion have at least two profiles:

1. Those where the judge, after assessing the circumstances of the act and the personal circumstances of the perpetrator, especially their roots in the country (Art. 89 SCC), considers that expulsion should not be applied as a substitute for imprisonment and therefore the perpetrator will serve the prison sentence imposed.
2. Those where the judge, after assessing the circumstances of the act and the personal circumstances of the perpetrator, including their roots, considers that the prison sentence should be replaced by the expulsion set forth in Art. 89 SCC, but the execution of such expulsion never takes place, as we saw earlier.

Expulsion after serving the sentence is automatically applied to both profiles of prisoners, with very few exceptions (Art. 57.5 of the Immigration Law), which is contrary to the criteria of the European Court of Human Rights, which establish the need to assess the individual circumstances of the prisoner's roots at the time of the decision in order to determine whether expulsion is a proportionate measure in each specific case.[26] Moreover, such a measure is applied once the foreigner has settled his or her debt with the justice system and is supposed to be in a process of social rehabilitation.[27] The number of expulsions of foreign offenders with criminal records who could be considered threats to public safety has increased, accounting for 70% of the expulsions performed in 2010.[28] As Brandariz García emphasises, criminal expulsions have been highly selective, which works to create the appearance of enforcement while minimising the risks associated with 'dramatically reducing migratory

24 E. Larrauri, Antecedentes penales y expulsión de personas inmigrante, 'InDret, Revista para el Análisis del Derecho' 2016, no. 2, pp. 1–29.

25 Art. 57.2 of the Immigration Law.

26 E. Larrauri, Antecedentes…, *op. cit*.

27 E. García-España, Extranjeros en prisión y reinserción: Un reto del siglo XXI, (in:) A. Cerezo Domínguez & E. García-España, La prisión en España: Una perspectiva criminológica, Granada 2007.

28 J.A. Brandariz García, The Control…, *op. cit.*, pp. 258.

flows which have been performing economic and social functions of extraordinary prominence'.[29]

Notwithstanding the above, a significant number of foreigners who leave prison after having served their time will remain non-removable and, despite having completed their sentence in Spain, cannot be expelled but also cannot regularise their situation because they have a criminal record in force.[30] They have to wait for the cancellation of their criminal record, i.e. 3 years for sentences of 1 to 3 years of imprisonment; 5 years for sentences of 3 to 5 years; and 10 years for sentences of more than 5 years (Art. 136 SCC), so that they can initiate a process of regularisation of their stay in the country.

This administrative sanction (expulsion for having a criminal record) and its problems of execution (inexpellability) are examples of what in criminal policy are called 'additional sanctions', i.e., collateral consequences that affect the civil, political and social rights of foreigners, which are not related to the type of crime committed, which are imposed outside criminal law and which entail a great capacity for exclusion. They have a very intense, distressing content, but do not enjoy the system of guarantees from which criminal sanctions benefit. This type of additional sanction usually promotes the social exclusion of socially disadvantaged groups, not because they have been in contact with the criminal justice system, but because they belong to a certain group, as happens with migrants in this case.[31]

One might think that the aims pursued by the public policies based on the expulsion of foreigner ex-offenders are inefficient because they do not meet their objectives, given the difficulties in carrying out expulsions. On the contrary, some authors suggest that this regulation has a perverse objective, which is to maintain a criminalised reserve army, with pending expulsion orders and relegated to working in the underground economy, within the framework of a public policy that clearly criminalises this group.[32]

3. Deprivation of liberty for migration policy purposes

Deprivation of liberty is considered in Western democracies as the most serious criminal sanction imposed by the legal system for the most harmful behaviours to

29 *Ibidem*, p. 261.

30 J. Galparsoro, P. Bárcena, Los antecedentes penales y sus consecuencias en materia de extranjería, asilo y nacionalidad, Bilbao 2014.

31 J.L. Díez-Ripollés, Sanciones adicionales a delincuentes y exdelincuentes. Contrastes entre Estados Unidos de América y países nórdicos europeos, 'InDret, Revista para el Análisis del Derecho' 2014, no. 4, pp. 1–37.

32 K. Calavita, Un 'ejército de reserva de delincuentes'. La criminalización y el castigo económico de los inmigrantes en España, 'Revista Española de Investigación Criminológica' 2004, vol. 2, pp. 1–15.

the most essential legal interests. Deprivation of liberty, in addition to affecting freedom of movement, entails *indirect costs* that have to do with the reduction of social relations and life opportunities, with the trauma of confinement, and with the stigma attached to the deprivation of liberty itself. However, border control policy uses deprivation of liberty for its purposes in an exceptional manner in terms of the circumstances and extent of the deprivation, as shown below.

3.1. Administrative detention centres (ADCs)

If the deprivation of liberty is considered as defined above, it is difficult to understand how it can be used for people forcibly displaced from their countries or seeking a better life. It is also not understood that deprivation of liberty is used as a means of attempting to proceed with an expulsion which, according to official data, is not carried out in most cases. In fact, it is disproportionate to accept the deprivation of a person's freedom as a measure to try to achieve an end that is unlikely to be successful.[33]

More than 30 years ago, the Constitutional Court, in its ruling 115/1987 of 7 July 1987, set conditions for considering that the deprivation of liberty in administrative detention centres (ADCs) was constitutional, despite Art. 25.3 of the Constitution, which establishes that 'the Civil Administration may not impose sanctions which, directly or subsidiarily, imply deprivation of liberty'. The CC argued that we are not facing a sanction but a precautionary measure consisting of the extension of police detention beyond the 72 hours allowed and imposed as conditions for this internment that it be (1) exceptional, (2) in facilities that are not penitentiary in nature, (3) with a prior reasoned court decision, and (4) that the loss of liberty is subject to judicial control. These conditions have not been met, as explained below, and it could therefore be said that their use is unconstitutional.

On the one hand, internment in ADCs has not been exceptional; on the contrary, its use has been quite frequent and ineffective. It is estimated that in the last decade, approximately 40% of the persons deprived of their liberty in a ADC were not ultimately expelled.[34] On the other hand, the conditions under which deprivation of liberty takes place in ADCs do not meet the minimum requirements set out in penitentiary legislation for prisons. The ADCs are guarded by the national police, and it was not until 2014 that their operating regulations and internal regime were approved. This has led to such centres being configured as closed contexts, unseen from the outside world and with questionable living conditions. In these places, many situations of vulnerability and risk have been detected that have escaped judicial control. Unaccompanied minors, victims of trafficking for sexual exploitation

33 E. García-España (ed.), Razones para el cierre de los CIE: Del reformismo a la abolición, Malaga 2017.

34 C. Fernández-Bessa, Los centros de internamiento de extranjeros (CIE). Una introducción desde las Ciencias penales, Madrid 2020.

and applicants for international protection are frequently found in ADCs.[35] This reality is admitted by the state authorities and denounced by civil organisations. They are persons subject to special protection who should not be kept in an ADC, either because it is prohibited by law (minors) or because expulsion is not possible and detention is supposed to be merely instrumental (victims of trafficking, applicants for international protection, victims of gender-based violence, etc.).

It is therefore possible to say that ADCs are just another cog in the wheel of European migration policy to fight against irregular immigration that is used according to the need to control a population perceived as dangerous,[36] either for their deportation from the country or for their social exclusion if they cannot be deported.[37]

3.2. Prison release strategies

The border control policies not only condition the penal response when the offender is a migrant, but also influence the response in the penitentiary environment.[38] Prison intervention with non-EU foreign prisoners must deal with two different scenarios.[39] The first scenario has to do with the reintegration into Spain of all those foreigners with a regularised administrative situation or with sufficient roots in the country. In this case, the prison administration takes two types of actions: on the one hand, those aimed at proving the administrative situation prior to admission and keeping it updated based on objective data; and on the other, trying to regularise the situation of those inmates who meet the objective conditions required by the legislation in force.

The second scenario is to return to their country of origin all those foreigners who have been sentenced to expulsion as an alternative to imprisonment, or when it is considered that serving their sentence or parole in their country of origin is appropriate for their rehabilitation (Art. 197 of the Prison Regulations). It is convenient to speed up the procedures in these cases, where resocialisation involves trying to avoid the desocialisation that a longer than necessary time in prison may cause in the subject, and to reinforce their roots with their country of origin. Unfortunately,

35 J.M. Sánchez Tomás, Situaciones de especial vulnerabilidad en los CIE: menores, víctimas de trata y protección internacional, 'Razones para el cierre de los CIE: Del reformismo a la abolición', IAIC 2017, pp. 33–38.

36 A. Aliverti, Patrolling the 'Thin Blue Line' in a World in Motion: An Exploration of the Crime-Migration Nexus in UK Policing, 'Theorical Criminology' 2020, vol. 24, no. 1, pp. 8–27.

37 K.F. Aas, M. Bosworth (eds.), The Borders of Punishment: Migration, Citizenship, and Social Exclusion, Oxford 2013.

38 F. Pakes, K. Holt, Crimmigration and the Prison: Comparing Trends in Prison Policy and Practice in England and Wales and Norway, 'European Journal of Criminology' 2017, vol. 14, no. 1, pp. 63–77.

39 J. Nistal Burón, Los fines de la política criminal y su vinculación con la política de extranjería en la reforma proyectada del Código penal: su incidencia en el ámbito penitenciario, 'Diario La Ley' 2013, no. 8144.

in the case of foreign prisoners, the length of time they spend in prison, conditioned by the execution of the expulsion order, does not seem to be a judicial or penitentiary decision, but rather depends, quite often, on the real possibilities of the police to materialise it. On the other hand, if we look at the data of penitentiary institutions, the number of expulsions that are carried out annually is low. Only 15% of all releases of foreign prisoners are explained by an expulsion.[40] Despite these low numbers, the symbolic role of expulsion and the uncertainty about how it is carried out conditions the treatment and prison regime of these persons. Moreover, the majority of those who are released from prison in Spain after completing their sentence – their final discharge – fully serve the prison sentence in second degree (an ordinary regime) without benefiting from exit permits, third degree (an open regime) or parole. This makes the time spent in prison more burdensome for foreigners than for nationals.

However, most foreigners are released from prison in Spain on provisional release, parole or unconditional release (around 75% of all foreign inmates). These data point to the existence of a considerable number of foreign nationals who cannot be expelled, which brings us to a third scenario.[41] These are the cases where foreigners do not meet the objective requirements to be regularised in Spain, cannot be expelled for legal or material reasons,[42] or who do not want to be transferred to their country of origin to serve their sentence or parole (Art. 197 of the Prison Regulations). Art. 89.8 of the SCC establishes that in cases where the agreed expulsion cannot be carried out, the originally imposed sentence or the remaining time must be served, or even suspended if the requirements for this are met. Thus, the CC's doctrine applies in this regard, establishing that if the expulsion cannot be carried out, the remainder of the sentence and its possible suspension will be considered under the same conditions as for convicted persons who are legally resident nationals and foreigners.[43] This is also included in Instruction 3/2019 of Penitentiary Authorities on the 'Comprehensive Intervention Programme with Foreign Inmates', which includes the need to intervene with foreigners who cannot be expelled as 'in the case of any national inmate, for the purpose of preparing their eventual reintegration into Spanish territory'.

40 Prison Service, Secretary General of the State, Ministry of the Interior. https://www.institucionpenitenciaria.es/es/web/home (02.11.22).

41 E. García-España, El arraigo de los presos extranjeros. Más allá de un criterio limitador de la expulsión, 'Revista Migraciones' 2018, no. 44, pp. 119–144.

42 The factual assumptions thanks to which the expulsion, criminal or administrative, cannot be executed have to do with the roots declared in a conviction or subsequently proven (Art. 89 SCC); with the condition of stateless persons, asylum seekers, refugees and internationally protected persons, as long as they maintain such status; those whose life or health is put at risk by the expulsion, either by the personal circumstances of the subject or by the situation of the country; for being undocumented; those who are not recognised or accepted by their country of origin; those whose nationality is not known; and those who rebel and prevent the expulsion from being carried out.

43 ATC no. 132/2006 of 4 April 2006.

This 2019 Instruction may produce a considerable change in interventions with the foreign population that cannot be expelled, since previously, the fact of having a cause for expulsion and therefore being in an irregular situation in the country was sufficient reason to deny exit permits and third-degree regimes granting of parole. In fact, according to the study by Rovira, Larrauri and Alarcón carried out prior to the above-mentioned instruction, only 20% of migrant prisoners obtained an exit permit during their entire sentence, compared to 74% of the total prison population.[44] The explanation for such a low number of exit permits granted to foreigners was to be found in the interpretation that their irregular situation in the country was an impediment. Thus, the objectives of immigration policy hindered the treatment and social rehabilitation purposes of penitentiary policy.

As of the 2019 Instruction, the 'irregular situation' of the non-expellable foreigner can no longer be considered an element of uprooting that serves to deny exit permits or serving in an open environment (third-degree regime), as the Provincial Court of Barcelona warned in Order No. 1275/2015 of 14 August 2015. We must still wait for some time to see whether this change of procedure has really taken place in the prison environment.

Conclusions

As explained at the beginning, the aim of this paper is to show the mechanisms used by the criminal justice system in Spain to manage human mobility, from a border criminology perspective. These mechanisms are many and varied. Among others, police actions consisting of hot returns or ethnically profiled police stops are evidence of arbitrary public policies that are currently normalised and accepted.

The committing of a crime by a migrant seems to be the perfect excuse to banish him or her from the country. Hence, expulsion as a substitute for imprisonment is the main sanction for foreign offenders. In this way, the migrant-criminal label triggers a response of exclusion, as they are regarded as dangerous. This detracts from their dignity and reifies them as a threatening object which the public needs to be protected from. For these reasons their expulsion is 'justified', and sometimes goes as far as to break basic principles of the legal system. On occasion, the label of migrant-criminal is even extended long after they have served their sentence and have taken root in Spain. Citizens with distinct facial features are even haunted by such label, and they are sometimes suspected of having committed crimes they have nothing to do with.

44 M. Rovira, E. Larrauri, P. Alarcón, La concesión de permisos penitenciarios. Una aproximación criminológica a distintas fuentes de variación, 'Revista Electrónica de Ciencia Penal y Criminología' 2018, vol. 20, no. 2, pp. 1–26.

On the other hand, the deprivation of liberty in administrative detention centres is excessive and disproportionate, as discussed above. In any case, the failure to carry out both criminal and administrative expulsions result in the social exclusion of migrants who, after being deprived of their liberty, are not expelled but thrown to the margins of society.

Thus, it is proved that Spanish criminal policy, broadly defined as all penal strategies, as well as those where criminal law and immigration law converge, primarily aims to socially render harmless (innocuousation) foreigners who are suspects, convicts and ex-convicts in Spain with distinct and exceptional measures that push them to the margins of society.

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From Gastarbeitersystem to Integration: Legal Aspects of Austrian Migration Policy

Abstract: The purpose of this article is to present the most important legal regulations in the field of Austrian migration policy, taking into account the changes in this field, the nature of these changes and their conditions. The research question is whether the successive legal regulations were the result of clearly defined goals (and if so, whether these goals were achieved) or rather a result of passive adaptation to changing conditions. In the context of the slogan of integration advocated in recent years, it also seems essential to ask whether the legal solutions adopted in Austria strengthen integration or constitute an assimilationist tool. The article discusses such issues as the development of the system for the recruitment of foreign workers, changes in the perception of the phenomenon of migration and the reform of legislation in the field of migration policy in Austria. Moreover, attention is drawn to the most important determinants underlying this reform.
Keywords: Austria, *Gastarbeiter*, integration, migration, migration policy

Introduction

Over the last few decades in Austria, there have been dynamic demographic changes that can be observed. One of the reasons for this situation is the phenomenon of immigration. Since the 1960s there has been a steady influx of immigrants, and this trend is increasing. A date which may be regarded as symbolic is 1961; it was then that the first agreement on the recruitment of foreign workers was concluded, which gave rise to the system referred to as the *Gastarbeitersystem*. Since then, economic, political and social conditions have changed, and these have had a significant impact on the shape of Austrian legislation.

The purpose of this article is to present the most important legal regulations in the field of Austrian migration policy, taking into account the changes in this field, the nature of these changes and their conditions. The research question is whether the successive legal regulations were the result of clearly defined goals (and if so, whether these goals were achieved) or rather a result of passive adaptation to the changing conditions. A hypothesis was formulated that the legal regulations in Austria in the field of migration policy were for a long time the effect of passive adaptation to changing conditions, not system solutions. In the context of the slogan of integration advocated in recent years, it also seems essential to ask whether the legal solutions adopted in Austria strengthen integration or constitute an assimilationist tool.

The article discusses such issues as the development of the system for the recruitment of foreign workers, changes in the perception of the phenomenon of migration and the reform of legislation in the field of migration policy in Austria. Moreover, attention is drawn to the most important determinants underlying this reform. The institutional and legal methods, as well as the decision-making method, have mainly been used. The first two of these were particularly useful when analysing legal norms in Austria. For this reason, these methods were used primarily in the first subsection and partly also in the second. Thanks to the decision-making method, it was possible to indicate the main conditions, causes and effects of legislative processes, as well as to show changes in Austria's immigration policy.

1. The beginnings of the temporary agency worker recruitment system

After World War II, the influx of people into Austrian territory was largely affected by economic factors. The main tool for migration processes at the time was labour-market regulation. The Foreign Workers Ordinance of 1933 (*Deutsche Reichsverordnung* über *ausländische Arbeitnehmer*) was reinstated; it had already been adopted by the German authorities. Subsequently, in 1941 – a few years after the incorporation of Austria into the German Reich – it was incorporated into the Austrian legal system, replacing the Inland Workers Protection Act (*Inlandarbeiterschutzgesetz*). What is interesting is that it remained in force until 1975.[1] The Passport Act (*Passgesetz*) of 1945 introduced visa requirements for travellers and applicants for residence in Austria.[2]

The subsequent regulations were the result of a dynamically changing situation on the labour market in the late 1950s and early 1960s. Unsatisfied demand for labour increased pressure for liberalisation of labour law towards greater freedom for recruiting foreigners. In 1961, the crucial Raab–Olah Agreement (*Raab–Olah–Ab-*

1 A. Gächter, Von Inlandarbeiterschutzgesetz bis EURODAC-Abkommen, (in:) H. Gürses, C. Kogoj, S. Mattl (eds.), Gastarbejteri. 40 Jahre Arbeitsmigration, Vienna 2004, pp. 31–32.

2 *Ibidem*, p. 32; Gesetz vom 12. September 1945, betreffend das Passwesen, StGBl. No. 180/1945.

kommen) was concluded.[3] Its main provision was to define and specify the number of jobs for foreign workers that were necessary to meet market demand. Initially, it was decided to accept 47,000 foreigners. The most important thing, however, was that the foreigners were to be temporary workers, employed on a rotational basis for a period of 12 months. They could be sent back to their home countries in the event of an economic downturn.[4] The agreement made it possible to conclude contracts on the recruitment of temporary workers; the first was signed with Spain in 1962. However, it did not have the desired effect, since in the first year of recruitment only 25% of the planned immigration limit was used. This was due to better pay conditions in other recruiting countries, such as Germany, Switzerland and the Benelux countries. Only the agreements signed in the following years with Turkey and Yugoslavia enjoyed greater interest. The former was concluded in 1964 and was accompanied by the opening of a recruitment office in Istanbul. In 1966, an agreement was signed with Yugoslavia; in this case it was also decided to set up a special institution whose officials were responsible for the recruitment process. Its main office was in Belgrade.[5]

In the 1960s, the administrative practice played a huge role. The authorities tried to meet the expectations of employers and support grassroots initiatives, and the measures taken were adjusted solely to the needs of the market. The social partners had a strong position, and legal regulations in the field of migration policy remained scarce. This was largely due to the basic assumption of the temporary nature of the phenomenon taking place. The system of employee recruitment assumed rotation and short-term activity in the Austrian labour market. Permanent immigration was not taken into consideration, nor was the need to integrate foreigners. The system of recruiting foreign workers survived in a slightly modified form until 1975, and every year the employment limits were raised. Nevertheless, in many periods it was not possible to fill all the vacancies, and the whole system turned out to be inefficient. This fact had a large impact on the practice of informal recruitment.

Of the few legal regulations from this period, the 1968 Asylum Act (*Asylgesetz*) is worth mentioning.[6] However, its enactment was not a consequence of economic conditions but political ones. It should be noted that the system of recruiting foreign workers was accompanied by an influx of refugees from the Communist countries. The Hungarian crisis of 1956 and then the events in Czechoslovakia in 1968 contributed to the massive influx. The 1968 Act was an attempt to adjust and clarify proce-

3 The agreement is named after the then chancellor Julius Raab and the president of the Austrian Trade Union Federation Franz Olah.

4 H. Fassmann, U. Reeger, From Guest Worker Migration to a Country of Immigration, Vienna 2008, p. 23.

5 A. Gächter, Von Inlandarbeiterschutzgesetz…, *op. cit*., pp. 34–35; E. Godlewska, Polityka etniczna Republiki Austrii, Lublin 2021, pp. 238–239.

6 Bundesgesetz vom 7. März 1968 über die Aufenthaltsberechtigung von Flüchtlingen im Sinne der Konvention über die Rechtsstellung der Flüchtlinge, BGBl. No. 126/1968.

dures in compliance with the UN Convention relating to the status of refugees of 28 July 1951. A new passport law (*Passgesetz*) also came into force in 1969.[7] Under its provisions, however, no significant changes were made to the previous regulations of 1945.

In the 1960s and early 1970s, the main stress was put on two areas. The first was the phenomenon of political refugees, and the second the system of employing foreigners as a workforce. It is worth noting that the law of that time referred exclusively to the former. The second area was based on administrative activities and the activities of social partners (trade unions, chambers of commerce, employers' organisations, etc.). During that period, a clear distinction was made between the concepts of refugees and economic migrants. In subsequent years – with further legal regulations – this distinction was blurred.

2. Changes in the perception of immigration in Austria – new legal regulations

In the second decade of the 1970s, there was a re-evaluation in Austria regarding migration. The determinants included the economic crisis and the resulting lower demand for labour, the ineffectiveness of the quota system, the increase in the proportion of foreigners, the diversification of countries of origin and the change in the nature of public debate and public attitudes. All these phenomena forced the authorities to change their previous practice. Administrative decisions were becoming ineffective. Detailed legal regulations were to become a part of managing migration processes. In response to the phenomena taking place, the legislators' intention was to limit the inflow of foreigners and put even more emphasis on the 'economic usefulness' of immigrants.

The first legal changes were the enactment of the Aliens Employment Act of 1975 (*Ausländerbeschäftigungsgesetz* 1975) and the amendment of the Citizenship Act of 1983 (*Staatsbürgerschaftsgesetz-Novelle* 1983).[8] The 1975 Act strengthened the role of the Federal Ministry of Social Affairs (*Bundesministerium für Soziales*). Pursuant to § 1(4), the minister (having learnt the opinion of the Aliens Commission) was empowered by the decree to regulate in detail the provisions of the Act. According to the definition adopted by the Act, any persons without Austrian citizenship were considered to be foreigners. However, certain categories of foreigners were not covered by the Act; it excluded refugees subject to the Geneva Conventions, persons employed

7 Bundesgesetz vom 22. Oktober 1969, betreffend das Passwesen, BGBl. No. 422/1969.

8 Bundesgesetz vom 20. März 1975, mit dem die Beschäftigung von Ausländern geregelt wird (Ausländerbeschäftigungsgesetz – AuslBG) – BGBl. No. 218/1975; Bundesgesetz vom 3. März 1983, mit dem das Staatsbürgerschaftsgesetz 1965 (Staatsbürgerschaftsgesetz-Novelle 1983) und das Gebührengesetz 1957 geändert werden, BGBl. No. 170/1983.

(e.g. in scientific institutions) on the basis of interstate cultural cooperation agreements, persons employed in the diplomatic service and clergy in legally recognised churches and religious communities. On the grounds of the Act, the rules relating to the establishment of an employment relationship with a foreigner were clearly defined. An employer could only offer employment if the candidate had an official permit to take up work on the Austrian territory. Trainees or volunteers could conduct such an activity legally only for three months. The legislators also imposed an obligation on the employer to notify the competent employment office of the employment of a foreign worker. Work permits for foreigners depended primarily on the situation in the labour market and the employment rate. The legislators also introduced the criterion of 'important public and economic interest'. At the same time, a number of conditions were stipulated that had to be fulfilled in order for a work permit to be issued. The Act further regulated the issue of job quotas for foreigners: only the competent minister could grant permission for employment beyond the stipulated quota. However, there had to be important reasons for doing so, e.g. the need to increase employment in failing enterprises (in order to protect workplaces). Such decisions could be taken by the minister individually for particular occupational groups and only in exceptional cases. According to the provisions of the Act, a work permit was issued for a specific employer; if a foreigner changed their place of employment, it was necessary to go through the procedure again. This only did not apply in the case of a short-term change not exceeding a week. Consent was granted for one year, or if employment was to be taken up in enterprises operating seasonally, the permit was issued only for the duration of such work. It was possible to apply for an extension of the permit on condition that an application was made no later than four weeks before the expiry of the previous contract. After eight years of employment in Austria, a foreigner was exempt from the obligation to renew the work permit each time; such a person then obtained a so-called security certificate.[9] The aforementioned amendment to the Citizenship Act, was, in turn, a response to the increasingly common family reunification processes. In this case, it was primarily a matter of extending the provisions of the Act also to family members of immigrants.

The above-mentioned legal regulations, including above all the Act of 1975, were the first attempts to introduce more comprehensive measures towards immigrants. Nevertheless, they were limited only to the control of access to the labour market. No other mechanisms were introduced. In the long term, this strategy proved to be a failure. The influx of new immigrants was not stopped and the claim that immigration was temporary became unfounded.

In the last two decades of the 20th century, some dynamic demographic changes occurred in Austria. This was influenced by a further influx of economic migrants, political refugees and family reunification policies. However, the dynamism of the

9 E. Godlewska, Polityka etniczna…, *op. cit*., pp. 242–244.

1980s and 1990s should not only be seen in quantitative but also in qualitative terms. This is because deficiencies in attempts to integrate foreigners became clearly visible. It should be recalled that no legislative work has been undertaken in this field so far. The conviction that immigration is a temporary phenomenon was still strong and popular. The reform of Austria's immigration policy, initiated at the end of the 20th century, was a somewhat delayed response to the changes.

The legislative work of this period was based on several new principles – comprehensiveness, coordination and shifting the focus to government entities at the expense of the social partners. Albert Kraler describes those activities as a period of seeking coherence.[10] The first principle implied actions taken on many levels; regulating and 'sealing' the labour market was not enough. With the increase in the number of foreigners and the failure of the basic principle of temporary labour immigration, it became necessary to introduce integration measures. According to the authorities, it also became necessary to introduce greater control over migration processes, which consequently meant strengthening government entities.

In the background of the reform were changes on the Austrian political scene associated with the strengthening of the position of the populist Freedom Party of Austria (*Freiheitliche Partei Österreichs*), whose programme principles were largely based on anti-immigrant slogans. This was fertile ground, as there was already a clear tendency for public opinion to change. Until then, immigrants had enjoyed a relative degree of acceptance and were viewed positively by Austrian employers. Political refugees from behind the Iron Curtain were also looked upon with understanding. However, the situation was to change after the fall of Communism. The abuse of the right to asylum was one of the reasons for the emergence of a trend towards securitisation of immigration phenomena. This mainly concerned economic immigration; however, it was possible to observe that the negative views were transferred to other persons seeking protection.[11]

The legislative work proceeded in several stages. In 1991, a project of the so-called Foreigners Package (*Fremdenpaket*) was announced. It put great emphasis on asylum policy, which the immigration policy of those times started to be associated with. The first law was the new Asylum Act (*Asylgesetz*) passed in 1991.[12] The law established the Federal Asylum Office (*Bundesasylamt*), which was directly subordinate to the Federal Ministry of the Interior. The minister could also appoint a refugee consultant (*Flüchtlingsberater*). For those who were granted asylum in Austria, the state

10 A. Kraler, The Case of Austria, (in:) G. Zincone, R. Penninx, M. Borkert (eds.), Migration Policymaking in Europe: The Dynamics of Actors and Contexts in Past and Present, Amsterdam 2011, p. 30.

11 A. Kraler, K. Sohler, Austria, (in:) R. Gropas, A. Triandafyllidou (eds.), European Immigration: A Sourcebook, Basingstoke 2007, pp. 20, 28.

12 Bundesgesetz über die Gewährung von Asyl (Asylgesetz 1991), BGBl. No. 8/1992.

could organise assistance in the form of various courses, including language courses. On the other hand, the law clarified the notion of a safe third country and a safe country of origin. Furthermore, the principle of annually fixed quotas of residence permits for different categories of immigrants was introduced. A possibility of taking fingerprints from asylum seekers was one of the procedural changes introduced. The intention of the legislators was to speed up procedures in clearly unfounded cases and to limit the number of asylum seekers. Detailed procedural issues were specified in the Act on the Residence of Foreigners and the Aliens Act.[13]

The next stage of the reform took place in the second half of the 1990s. The new Aliens Act came into force in 1998 and merged the laws previously adopted as part of the Foreigners Package into a single legal act.[14] Many of the existing solutions were retained, but a greater emphasis was put on the need for integration. The Act regulated issues related to the granting of entry permits and residence permits, including work permits, and procedural measures in the event of deportation and expulsion.

The Act was adopted due to the fact that Austria joined the European Communities on 1 January 1995 and in connection with the need to adapt internal law to EU asylum regulations. Over the next few years, EU regulations would have an impact on Austrian legislation. It should be emphasised, however, that thinking about migration policy as a Community problem was then a relatively new phenomenon for the European Union. For many years, it remained in the sphere of intergovernmental decisions left to sovereign states. It began to take on a Community character only after the signing of the Schengen Agreement in 1985 on the abolition of controls at the internal borders of the Benelux countries, Germany and France and the tightening of controls at external borders.[15] In 1995, Austria joined the Schengen area. The Schengen rules were then incorporated into the Community legal order under the Amsterdam Treaty.

When the law came into force, the increasingly popular slogan 'integration instead of new immigration' (*Integration anstelle von neuer Zuwanderung*) really became meaningful. In reality, it meant a mobilisation of forces to create better and more effective adaptation opportunities for previously settled immigrants and their descendants, while at the same time trying to limit the influx of newcomers. By virtue of the Act of 1998, the federal government, by agreement with the National Council and after consultation with the social partners, was empowered to set annual quotas relating to the number of residence permits for newly arrived immigrants. The gov-

13 Bundesgesetz, mit dem der Aufenthalt von Fremden in Österreich geregelt wird (Aufenthaltsgesetz), BGBl. No. 466/1992; Bundesgesetz: Erlassung des Fremdengesetzes und Änderung des Asylgesetzes 1991 sowie des Aufenthaltsgesetzes, BGBl. No. 838/1992.

14 Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden (Fremdengesetz 1997), BGBl. I No. 75/1997.

15 M. Pacek, M. Bonikowska, Unijna droga do wspólnej polityki migracyjnej w kontekście debaty o przyszłości Wspólnot, 'Studia Europejskie' 2007, no. 1, p. 50.

ernment did this through a special regulation (*Niederlassungsverordnung*). The quota system also covered the process of family reunification.

The quota system, although restrictive, was not perfect. The employees of foreign news media, among others, were excluded from the quota obligation, provided that their income was covered by the income they received as employees of these media and they did not engage in other paid employment in Austria. A similar situation applied to persons excluded from the material scope of the Aliens Employment Act (so-called key personnel), as well as their spouses and minor children (provided, however, that they did not engage in any paid employment).

In the field of integration policy, the offer of courses for immigrants was expanded once again. Apart from basic language courses and courses on Austrian history and culture, the offer also included courses on democratic principles and integration in Europe. Moreover, in 1998, the Citizenship Act was amended.[16] It made the issues related to naturalisation more precise, and what is more, for the first time, immigration policy was linked to this process. The law introduced the principle which proclaimed the motto 'integration before citizenship' (*Integration vor Staatsbürgerschaft*). Granting of citizenship was thus to be the culmination of the integration process. For this purpose, the applicant had to prove that he or she had 'personally and professionally' submitted to the integration process.[17]

The so-called integration agreement, introduced in 2002, was a new solution to the situation. All those who arrived in Austria after 1998 from any third countries were required to sign a special agreement. The document imposed several key obligations on the immigrants. First of all, they were obliged to attend language courses. Compulsory reading and writing courses were introduced for illiterate immigrants. A refusal to attend courses intended for immigrants could result in a refusal to issue or renew the relevant documents authorising their residence in the country. Some changes were also introduced that led to the full harmonisation of immigration and employment policies. After five years of residence, an immigrant received a special certificate which, on the one hand, constituted a 'certificate of residence' and, on the other, entitled him or her to unrestricted access to the Austrian labour market.[18]

Another act, customarily referred to as the Aliens Police Act, was adopted in 2005.[19] However, the Act regulated not only the powers of the titular units, but also issues related to entry and residence permits for foreigners. The Aliens Police were in fact state administrative units, subordinate to the Federal Ministry of the Interior,

16 Bundesgesetz, mit dem das Staatsbürgerschaftsgesetz 1985 geändert wird (Staatsbürgerschaftsgesetznovelle 1998), BGBl. I, No. 124/1998.

17 A. Kraler, The Case of…, *op. cit*., p. 45.

18 *Ibidem*, pp. 35–36, A. Kraler, K. Sohler, Austria…, *op. cit*., p. 21.

19 Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel (Fremdenpolizeigesetz 2005), BGBl. I No. 100/2005.

responsible for preventing illegal border crossings, monitoring the stay of foreigners on Austrian territory, supervising deportation procedures and preventing crime. The passing of the law was a confirmation that immigration processes were more and more often perceived in terms of threats to state security. The law was also a reflection of the growing pressure to increase control over these processes. In 2005, an amendment to the Law on Citizenship was also passed.[20] The conditions for obtaining citizenship were defined very precisely and in detail. They included, among others, employment, no criminal record, a high level of language skills and knowledge of Austrian history, geography and the political system.

In recent years, the so-called migration crisis in Europe has been a factor that has largely determined the immigration policy of Austria. From the very beginning of the crisis, the Austrian authorities were interested in solving it as quickly as possible. The territory of the state became one of the main transit routes for refugees and immigrants to Germany. The Austrian government responded positively to the proposal to create a system of forced relocation of migrants in the European Commission communication of 13 May 2015, the Council Decision of 14 September 2015 and the Council Decision of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.[21] All Member States (except Denmark, Ireland and the United Kingdom), including Austria, made a commitment to relocate migrants. Soon, however, Austria joined the group of countries known as the so-called 'reluctant coalition'. The common denominator of the coalition partners was the perception of the migration crisis primarily in terms of threats and the lack of acceptance of the solutions proposed by the European Commission.

The increasingly tense atmosphere around the proposals for solving the migration crisis in Europe became the background for another legislative initiative in Austria. On 8 June 2017, a new law on integration was passed[22]. The solutions it encompassed reflected some characteristic trends in Austria's immigration policy in recent years. The Act was intended to facilitate the integration into society of persons without Austrian citizenship and was addressed to legally residing persons using asylum, subsidiary protection and third-country nationals subject to the Residence of

20 Bundesgesetz, mit dem das Staatsbürgerschaftsgesetz 1985, das Tilgungsgesetz 1972 und das Gebührengesetz 1957 geändert werden (Staatsbürgerschaftsrechts-Novelle 2005), BGBl. I No. 37/2006.

21 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration (2015a) (COM (2015) 240 final, 13.05.2015); Council Decision 2015/1523 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 2015 (O.J. L 239 146, 15.09.2015); Council Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 2015 (O.J. L 248 80, 24.09.2015).

22 Bundesgesetz zur Integration rechtmäßig in Österreich aufhältiger Personen ohne österreichische Staatsbürgerschaft, IntG, BGBl. I Nr. 68/2017.

Foreigners Act. The legislators emphasised the promotion of integration on the one hand and its mandatory nature on the other.

The law regulated the scope of courses, which were obligatory for every foreigner over 15 years of age. Supervision of their implementation was entrusted to the Federal Ministry for Europe, Integration and Foreign Affairs. A monitoring centre for integration processes was also established within the structures of the Ministry. The information collected and processed by the centre was to concern, for instance, such issues as the number of asylum applications, the number of positively verified and rejected asylum applications, the number of residence permits issued, the number of immigrant children attending compulsory education, the number of persons attending compulsory integration courses and the number of (registered) persons working and looking for a job. The law also set out a system of penalties for failure to comply with legal obligations (fines and imprisonment).

Conclusions

Presently in Austria there is extensive legislation in the field of migration policy. This article points out the most important legal regulations in this area. It is worth noting that the key period was the 1990s. The legislative work was then carried out at an unprecedented speed and, more importantly, concerned areas that had previously been mostly ignored. Since the 1960s, a system for the recruitment of temporary workers had been applied in Austria, and administrative decisions on the labour market were the primary tool for regulating the movement of people. Initially, such measures were sufficient, and there was no pressure to take initiatives in other areas. Moreover, it was assumed that immigration was temporary, which in the authorities' opinion justified the lack of activity with respect to the integration of foreigners. This approach proved to be a mistake. A further constant influx of immigrants meant increased efforts to limit the arrival of people while at the same time rejecting the definition of Austria in terms of an immigrant state. In the first phase, the main tool was even more restrictive labour market regulation; later it became asylum policy, with asylum restrictions generally being a consequence of the inability to stop labour immigration. As a result of the measures taken, the number of foreign workers, mainly people from the former Yugoslavia, decreased significantly. It was, however, significant that the decline was much smaller than expected. The increasing number of asylum seekers was also a challenge. These phenomena gave rise to an extensive legal reform. The turn of the 21st century brought a new way of managing the migratory phenomenon; the most characteristic feature was the introduction of even greater restrictions in order to limit the influx of people. The reforms of this period also increased the powers of the state bodies.

On the grounds of the solutions adopted in Austria, it is possible to indicate a model of residual (assimilationist) immigration policy. Its main assumption is that a residence permit depends on certain essential conditions. These mainly concern the assessment of immigrants' suitability for the Austrian labour market, but also their ability to adapt to the norms applicable in society. States using this model represent the doctrine of limiting immigration, particularly from regions that differ significantly in terms of cultural and social norms. At the same time, they reserve the right to deport immigrants who fail to fulfil their commitments. Such a model is in fact intended to contribute to the assimilation of the newcomers.[23]

It should be noted that, with the exception of the first years of the *Gastarbeitersystem*, a noticeable feature has been the consistent effort to limit the influx of immigrants. At the same time, some changes in the perception of the migratory phenomenon can be observed. The notion of immigration evolved towards integration and the 'foreigners package' towards an integration package. With the acceptance of immigration as a permanent phenomenon, more emphasis has been put on the need to integrate foreigners. Austrian legislation assumed a more coordinated and comprehensive nature. On the other hand, with reference to one of the questions posed in the introduction, it should be noted that in the last few years some assimilationist pressures could also be observed. The former 'integration offer' has been replaced by an 'integration obligation', and the law has instead become a tool for increased surveillance of migrants. The distinction between integration and assimilation has become blurred. In the time of the so-called migration crisis in Europe, the Austrian authorities increasingly emphasise the enforced nature of integration, the need for greater control over immigration processes and the introduction of elements of forced solutions (e.g. in deportation procedures) and greater restrictions for non-compliance with the law.

The changing attitude towards the influx of immigrants has resulted in an evolution towards an increasingly closed state. This can be illustrated by Austria's activities within the European Union. At the beginning of the migration crisis, the Austrian authorities were optimistic about the EU's plans for the forced solidarity-based relocation of migrants, while criticising the states that opposed these proposals. As the crisis escalated, Austria's position evolved. Finally it joined the so-called reluctant coalition. This attitude was clearly shown when it abandoned the EU forced relocation programme during Austria's presidency of the EU Council in the second half of 2018. The efforts made by the Austrian government in this direction were a confirmation of its scepticism about the possibility of resolving the crisis in the European forum.

The most important determinants of the legal reform in the field of migration policy include the economic situation, the failure of assumptions about the tempo-

23 P. Kaczmarczyk, M. Okólski (eds.), Polityka migracyjna jako instrument promocji zatrudnienia i ograniczania bezrobocia, Warsaw 2008, p. 16.

rary nature of the migration phenomenon, the further influx of foreigners and related demographic changes, but also the radicalisation of the Austrian political scene. In recent years, however, the migration crisis in Europe and the disputes surrounding the EU's migrant relocation programme have remained the main determining factors. The Austrian government has called for a fight against illegal immigration and the smuggling of people to Europe, guaranteeing the safety of EU citizens and increasing support for countries at the external borders.

What remains characteristic for the legal solutions in Austria is the correlation between the asylum policy and actions towards economic migrants. This mostly results from the broad connotations of the term 'immigrant'. In the simplest terms, it can refer to groups other than recognised national minorities. In Austria, the term 'population with a migrant background' (*Bevölkerung mit Migrationshintergrund*) is also used in this context. It refers to persons whose parents were born outside of Austria; therefore it is a very broad concept. It applies to economic migrants but also to refugees and asylum seekers. It should also be mentioned that the separation between the terms 'asylum seeker' and 'refugee' is hardly used in Austria. The former term is rather used in the context of 'asylum seekers' (*Asylwerberinnen / Asylwerber*) meaning persons seeking admission and protection from persecution whose asylum procedure has not yet been completed.[24] Once the procedure has been successfully completed, they are recognised as refugees (*anerkannter Flüchtling*, or the explicit term *Asylberechtigter* is used). Thus the other term refers to the legal status the individual has obtained.[25]

Referring to the hypothesis and research questions posed, it seems reasonable to state that the legal regulations in the field of migration policy in Austria were for a long time the result of passive adaptation to changing conditions. If any purposefulness of actions could be taken into account, it was only the restriction on the influx of new immigrants. However, the effects in particular periods were far from expectations. The lack of clearly defined objectives for migration policy and the failure to take any action with respect to integration resulted from the denial of immigration as a permanent phenomenon. A change of attitude was visible only at the turn of the 21st century. This process was initiated by a large-scale legal reform. On the grounds of the analysis of Austria's contemporary migration policy, it may be concluded that the authorities are now choosing an attitude of active participants rather than passive observers.

24 Such an interpretation is consistent with § 2(14) of the Asylum Act. Comp. Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005), BGBl. I No. 100/2005.

25 Migration und Integration. Zahlen, Daten, Indikatoren 2018, Vienna 2018, pp. 116–117; Österreichischer Integrationsfonds / Flüchtlingshochkommissariat der Vereinten Nationen, Flüchtlinge und Integration. Begriffe einfach erklärt, Vienna 2016, p. 22.

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Occupation: Petty Smuggler. On the Effectiveness of Carrying Out Selected Non-Custodial Penalties against Smugglers[1]

Abstract: This article presents the results of a study on the effectiveness of carrying out community service (a penalty for committing a crime or misdemeanour which entails performing work for social purposes) and social work (where a fine can be converted into such work if the obligated person cannot pay it) by perpetrators of criminal acts related to the smuggling of goods. For the purposes of the current study, punishments consisting of work were defined as effective when they remained unchanged and were carried out as community service. The study found that if punishment in the form of work was applied to them, perpetrators of smuggling-related crimes or offences performed such work far more often than perpetrators of other criminal acts who were subjected to the same punishment (93.8% v. 65.1%). Moreover, it was established that criminal acts related to the smuggling of goods are committed equally often by women and by men (in this category of criminal acts, women comprised 46.2% of perpetrators, with the mean for all criminal acts and petty offences taken into account in the current study being 15%). The article concludes that the present results may suggest that perpetrators of such criminal acts or petty offences treat them as a way to gain additional income. This is evidenced, for example, by the fact that many people had more than one sentence to serve for committing a criminal act related to smuggling.

Keywords: community service, fines, national borders, non-custodial penalties, penalty effectiveness, smuggling

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Introduction

The border between two countries is not only a division of space in the administrative sense, but also an area where two regions, often with different legal, tax, social, and economic conditions, are joined. These differences are frequently so significant as to become a motivating factor for some criminal acts or punishable offences which do not occur in other regions of these countries, such as smuggling (of goods or people) or illegal border crossings. In Europe, this phenomenon mostly takes place around the external borders of the EU. In Poland, this means the borders with Russia, Belarus, and Ukraine.

Due to the above conditions, increased attention is being devoted in the literature to crimes involving national borders. Since the existence of a state border causes the occurrence of various negative phenomena, so this issue has also been addressed by criminology: primarily border criminology or criminology of mobility.[2] However, the border is also where petty smuggling of goods traditionally takes place. It chiefly involves goods whose price significantly differs between the two sides of the border; this makes such acts financially attractive. Thus far, the phenomenon of smuggling has been frequently discussed in the literature (e.g. its determinants, development, and consequences). However, the issue of the effectiveness of penalties against the perpetrators of criminal acts or petty offences related to the smuggling of goods has not yet been studied. Of particular interest is the question of whether differences exist between the perpetrators of these criminal acts or petty offences and those of other punishable acts. Additionally, if they exist, what are the determinants of these differences? The current article examines the outcomes of cases where the perpetrators of criminal acts or petty offences were sentenced to community service or social work (hereafter referred to by the abbreviation CSSW) in place of an unpaid fine.

2 M. Bosworth, Border Criminology and the Changing Nature of Penal Power, (in:) A. Liebling, S. Maruna, L. McAra (eds.), The Oxford Handbook of Criminology, Oxford 2017, pp. 373–390; S. Pickering, M. Bosworth, K. Franko, The Criminology of Mobility, (in:) S. Pickering, J. Ham (eds.), The Routledge Handbook on Crime and International Migration, Abingdon 2015, pp. 382–390; J.A. Brandariz, Criminalization or Instrumentalism? New Trends in the Field of Border Criminology, 'Theoretical Criminology' 2022, vol. 26, no. 2, p. 285 (05.01.2023); V. Barker, Penal Power at the Border: Realigning State and Nation, 'Theoretical Criminology' 2017, vol. 21, no. 4, pp. 441–457, https://doi.org/10.1177/1362480617724827 (05.01.2023); M. Bosworth, K. Franko, S. Pickering, Punishment, Globalization and Migration Control: 'Get Them the Hell Out of Here', 'Punishment & Society' 2018, vol. 20, no. 1, pp. 34–53, https://doi.org/10.1177/1462474517738984 (05.01.2023).

1. The legal and theoretical framework on smuggling petty crimes

For the purposes of the current article, Pitt's definition of smuggling as occurring when 'traded goods are misweighted, misgraded, misinvoiced or not invoiced at all with or without the cooperation of customs authorities' was adopted.[3] Referring to Polish legal regulations, this is covered mainly by Chapter 7 of the Penal and Fiscal Code, which concerns criminal acts and petty offences against customs obligations and rules of foreign trade and services (particularly Articles 86 and 91).[4] As smuggling is not always detected, the current article also took into account criminal acts and offences related to the illegal transfer of, dealing in, and improper marking of excise goods and falsifying excise stamps (Articles 63, 65, 66, and 67, contained in Chapter 6 of the Penal and Fiscal Code).[5] These are punishable offences related to the selling of goods which were illegally brought into Poland or which were brought legally but entered economic traffic illegally (without an appropriate excise stamp).[6]

The causes and consequences of goods smuggling are complex and not always clear. Smuggling impacts the national revenue from tariffs and taxes. However, this does not imply that it must have negative consequences. In the context of societal wellbeing, smuggling was initially considered to be beneficial, as it allowed for the price of some goods on the market to be lowered.[7] Thus it made them more widely available. Later, it was noticed that smuggling leads to numerous negative social consequences since it coexists with legal trade in the form of unfair competition.[8] This belief changed as a result of Pitt's studies, who concluded that the social consequences of smuggling are ambiguous and have both positive and negative aspects.[9]

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3 M.M. Pitt, Smuggling and Price Disparity, 'Journal of International Economics' 1981, vol. 11, no. 4, pp. 447–458, https://doi.org/10.1016/0022–1996(81)90026–X (20.07.2022).

4 Act of 10 September 1999 on the Penal and Fiscal Code (consolidated text, Journal of Laws 2022, Item 859 as amended).

5 See also L. Valentová, B. Mazur, Odpowiedzialność z tytułu wykroczeń i przestępstw celnych, 'Kultura Bezpieczeństwa. Nauka-Praktyka-Refleksje' 2014, no. 15, pp. 281–283.

6 This is also commonly referred to as smuggling: K. Piech, Przemyt jako czynność faktyczna, (in:) E. W. Pływaczewski, E. Kowalewska-Borys, Nielegalne wprowadzenie towarów akcyzowych na obszar Unii Europejskiej, Warsaw 2015, p. 97.

7 A. Buehn, M. R. Farzanegan, Smuggling Around the World: Evidence from a Structural Equation Model, 'Applied Economics' 2012, vol. 44, no. 23, p. 3049, https://doi.org/10.1080/00036846.2011.570715 (05.01.2023).

8 I. N. Bhagwati, B. Hansen, A Theoretical Analysis of Smuggling, 'The Quarterly Journal of Economics' 1973, vol. 87, pp. 172–187.

9 M.M. Pitt, Smuggling…, *op. cit*.

Existing studies show that factors which increase the scale of smuggling include high tariffs and more extensive trade limitations,[10] high corruption levels,[11] and the country's general level of development, as smuggling occurs on a greater scale in developing countries.[12] On the other hand, the scale of smuggling is limited by more effective law enforcement and the related effective functioning of institutions responsible for detecting smuggling.[13] From the national perspective, smuggling and the related introduction of smuggled goods into the economic traffic is a negative phenomenon, as it decreases national revenue and thus limits the country's ability to finance its needs. Thus governments undertake various efforts to limit smuggling.[14]

2. Community service as a penalty for criminal acts or petty offences related to smuggling

Studies have shown that smuggling cases most often concern criminal acts or petty offences provided for in Article 63 (illegal import of excise goods, including both import of goods as well as their transfer within the country),[15] Article 65 (dealing in excise goods),[16] Article 86 (customs smuggling),[17] and Article 91 (dealing in

10 R.T. Wacziarg, K. H. Welch, Trade Liberalization and Growth: New Evidence, 'The World Bank Economic Review' 2008, vol. 22, no. 2, pp. 187–231, https://doi.org/10.1093/wber/lhn007 (05.01.2023).

11 D. Kaufmann, A. Kraay, M. Mastruzzi, Governance Matters IV: Governance Indicators for 1996–2004, World Bank Policy Research Working Paper Series no. 3630, 2005, https://ssrn.com/abstract=718081 (05.01.2023); A. Buehn, M. R. Farzanegan, Smuggling…, *op. cit.*, p. 3053.

12 A. Buehn, M. R. Farzanegan, Smuggling…, *op. cit.*, p. 3058.

13 A. Buehn, M. R. Farzanegan, Smuggling…, *op. cit.*, p. 3052; E. Gwardzińska, Efektywność polskiej Służby Celnej a zwalczanie przemytu celnego towarów naruszających prawa własności przemysłowej, (in:) E.W. Pływaczewski, E. Kowalewska-Borys, Nielegalne…, *op. cit.*, p. 109 and note; W. Czyżowicz, Polityczno-prawne podstawy oraz struktury instytucjonalno-organizacyjne i mechanizmy zwalczania przemytu w Unii Europejskiej, (in:) E.W. Pływaczewski, E. Kowalewska-Borys, Nielegalne…, *op. cit.*, p. 27 and note.

14 D. Ćwikowski, Prawnokarne konsekwencje przemytu – wybrane zagadnienia, (in:) E.W. Pływaczewski, E. Kowalewska-Borys, Nielegalne…, *op. cit.*, p. 198 and note; D. Ćwikowski, Wpływ gospodarki nieoficjalnej na bezpieczeństwo ekonomiczne państwa, Szczytno 2014, p. 123 and note.

15 L. Wilk, J. Zagrodnik, Kodeks karny skarbowy: Komentarz, Warsaw 2021, p. 358; G. Skowronek, Kodeks karny skarbowy: Komentarz, Warsaw 2020, p. 190.

16 See also I. Zgoliński, Kodeks karny skarbowy: Komentarz, Warsaw 2021, p. 540 and note; L. Wilk, J. Zagrodnik, Kodeks karny skarbowy…, *op. cit.*, p. 365 and note; G. Skowronek, Kodeks karny skarbowy…, *op. cit.*, p. 197 and note.

17 See also T. Oczkowski, Commentary to Article 86, (in:) I. Zgoliński, Kodeks karny skarbowy…, *op. cit.*, pp. 675–676; L. Wilk, J. Zagrodnik, Kodeks karny skarbowy…, *op. cit.*, p. 478 and note; G. Skowronek, Kodeks karny skarbowy…, *op. cit.*, p. 289 and note.

goods subject to customs)[18] of the Penal and Fiscal Code. Together, these four articles covered 53 out of the 65 cases studied related to smuggling (81.5%).

When analysing these criminal acts in the context of their corresponding penalties, it can be seen that fines are the dominant form of punishment (perpetrators of each of the above criminal acts or petty offences can be sentenced to a fine). Imprisonment (often together with a fine) is also possible in the case of criminal acts. However, non-custodial penalties are not possible in the case of the punishable acts enumerated above. If the court ruling involves a fine, in accordance with Article 45, Paragraph 1 of the Executive Penal Code, it is possible for it to be commuted to social work. In this case, a rule applies stating that 10 day-fine units correspond to one month of social work[19]. The fine can be converted into social work if it is not more than 120 day-fines. The manner in which such a ruling was enforced differed little from the enforcement of cases in which a sentence of community service was imposed.[20] Acts related to organizing and controlling the carrying out of CSSW are performed by court-appointed probation officers, as per Article 55, Paragraph 2 and Article 45, Paragraphs 1 and 2 of the Executive Penal Code.[21] The probation officer's scope of responsibility in such cases is set out chiefly in Articles 53 to 66 of the Executive Penal Code and the executive acts.[22]

The way in which the CSSW ends depends on a number of factors. They can be divided into two basic groups: those within the responsibility of the organs of executive proceedings (mainly the probation officer) and those within the responsibility of the perpetrator of a criminal act. The first group includes the probation officer's work

18 See also T. Oczkowski, Commentary…, *op. cit*., p. 687 and note; L. Wilk, J. Zagrodnik, Kodeks karny skarbowy…, *op. cit.*, p. 488 and note; G. Skowronek, Kodeks karny skarbowy…, *op. cit.*, p. 304 and note.

19 In Poland, a fine is often imposed according to daily rates. It can be imposed between 10 and 540 daily rates. The court also sets the value of one rate at between 10 and 2,000 PLN. Sometimes, if it follows from the law, the fine is imposed by amount.

20 J. Zagórski, Orzekanie i wykonywanie kary ograniczenia wolności oraz pracy społeczne użytecznej w Polsce w świetle analizy przepisów i wyników badań, Warsaw 2003, p. 98 and note.

21 Act of 6 June 1997 on the Executive Penal Code (consolidated text, Journal of Laws 2021, Item 53 as amended).

22 Regulation of the Minister of Justice of 13 June 2016 on the mode and procedure of carrying out acts by court-appointed probation officers in executive penal cases (Journal of Laws, Item 969), §§ 24–32. More on the custodian's responsibilities in K. Stasiak Kontrolno-organizacyjna funkcja kuratora w wykonywaniu kary ograniczenia wolności i prac społecznie użytecznych, (in:) K. Stasiak (ed.), Zarys metodyki pracy kuratora sądowego, Warsaw 2018, p. 441 and note; K. Stasiak, Kurator sądowy organem postępowania wykonawczego, (in:) K. Stasiak, Kuratela sądowa w Polsce. Analiza systemu. Księga pamiątkowa dedykowana doktorowi Tadeuszowi Jedynakowi, Torun 2018, p. 141 and note; K. Stasiak, Ustawa o kuratorach sądowych: Komentarz, Warsaw 2021, pp. 121–142; R. Giętkowski, Rola sądowego kuratora zawodowego i zakładu pracy w wykonywaniu kary ograniczenia wolności, 'Gdańskie Studia Prawnicze' 2017, vol. 38, pp. 69–78.

conditions, their professional competence and engagement, the opportunities available to them in the community (access to various institutions),[23] as well as the quality of legal regulations which determine how they should carry out specific acts.[24] Currently, due to the increasing number of foreigners in Poland, the probation officers' cross-cultural competence has an increasing impact on their effectiveness in carrying out punishments.[25] On the other hand, the second group of factors influencing the conclusion of the carrying out of CSSW includes the perpetrator of a criminal act's motivation, their personality (criminals and antisocial individuals score high on neuroticism, extraversion, and psychoticism),[26] and the intensity of conditions which impede the carrying out of the sentence, e.g. strongly dysfunctional environmental influence.

3. Methodology

The results of the study presented here concerned the effectiveness of CSSW. For the purposes of the current study, CSSW were defined as 'effective' when they remained unchanged. This means that CSSW were considered to be carried out effectively when the convicted (punished) individual carried out community service for a number of hours specified by the court, when the number of hours was lower but the perpetrator of a criminal act was conditionally released from serving the rest of the sentence (Article 83 of the Penal Code),[27] or when, on the basis of Article 64 of the Executive Penal Code, the punishment was considered as served due to having met its goals. Social work in place of an unpaid fine was considered as carried out

23 R. Opora, Efektywność oddziaływań resocjalizacyjnych, Warsaw 2015, p. 138 and note; T. Jedynak, Efektywność kuratorskiej służby sądowej w Polsce a standardy dotyczące sankcji i środków alternatywnych, (in:) Polski system probacji, stan i kierunki rozwoju w kontekście standardów europejskich, Warsaw 2010, pp. 445–448.

24 K. Stasiak, Czy potrzebna jest nam reforma kurateli sądowej? 'Gdańskie Studia Prawnicze' 2020, vol. 47, no. 3, pp. 110–111, https://doi.org/10.26881/gsp.2020.3.07 (20.07.2022).

25 A. Babicka-Wirkus, Ł. Wirkus, Nowe wyzwania Kuratorskiej Służby Sądowej. Przygotowanie kulturowe kuratorów sądowych do pracy z obcokrajowcami, 'Gdańskie Studia Prawnicze' 2020, no. 3(47), pp. 154–161, https://doi.org/10.26881/gsp.2020.3.09 (20.07.2022). Statistics do not collect data on the number of foreigners dealt with by probation officers. However, foreigners make up an increasing percentage of those serving prison sentences (in 2016 there were 609 foreigners in prisons on average, while in 2021 there are already 1440), so it should also be considered that in the case of probation officers, the number of cases in which they deal with foreigners has increased; Ministerstwo Sprawiedliwości Centralny Zarząd Służby Więziennej Roczna Informacja Statystyczna (for 2016 and for 2021), p. 35, https://www.sw.gov.pl/strona/statystyka-roczna (27.12.2022).

26 D. Cervone, L.A. Pervin, Personality: Theory and Research, New York 2008, 10th Edition. Polish Edition: Osobowość. Teoria i badania, trans. by B. Majczyna, M. Majczyna, K. Sikora, K. Krzyżewski, Kraków 2011, p. 307.

27 Act of 6 June 1997 on the Penal Code (consolidated text, Journal of Laws 2022, Item 1138).

effectively when the perpetrator of a criminal act carried out community service for a number of hours specified by the court or when they were released due to having paid the fine.

The study involved analysing probation officers' case files on executive proceedings. To this end, a questionnaire was designed which was filled out separately for each case. Prior to data collection, consent was obtained from the president of each law court included in the study. Access to files of 100 cases of CSSW was requested (although not every court granted access to this many case files). The study also included courts whose jurisdictions covered large border crossings with Belarus (Bruzgi-Kuźnica (district court in Sokółka) and Bierastavica-Bobrowniki (district court in Białystok)) and with Ukraine (Korczowa-Krakowiec (district court in Jarosław) and Medyka (district court in Przemyśl)).[28]

The study comprised a total of 1,068 cases in 14 district courts in Poland. This included 707 community service and 361 social work sentences issued in place of unpaid fines. For all cases, executive proceedings were concluded in 2018. According to statistical data, proceedings of a total of 171,980 cases of this type were concluded in Poland in 2018.[29] Thus the current study comprised 0.62% of these cases. Such a large sample allowed for drawing generalized conclusions. After data collection, statistical analysis was carried out using the IBM SPSS Statistics 25.0 software.

4. Research and results

During the analysis of the collected data, it was examined whether a relationship exists between the type of criminal act or petty offence and the conclusion of a case. For the purposes of the analysis, criminal acts and petty offences which occurred at least 20 times in the data were distinguished as separate types. Cases below that frequency were grouped in the 'Other' category. Detailed results of the analysis are shown in Table 1.

28 Regulation of the Minister of Justice of 28 December 2018 on the establishment of seats and jurisdictions of appellate courts, district courts, and regional courts (consolidated text, Journal of Laws 2021, Item 1269 as amended).

29 Statistical data from the MS-S-40r (2018) form, 27.05.2021.

Table 1. Number of cases concluded due to the carrying out of a non-custodial penalty or community service in place of an unpaid fine.

Type of punishable act	Number of cases	Concluded due to carrying out of the sentence	% of cases carried out
Against life and health	26	19	73.1
Against safety in traffic	122	85	69.7
Against the institution of family and guardianship	85	47	55.3
Against the activities of state institutions	60	39	65.0
Against the administration of justice	24	17	70.8
Against property	162	75	46.3
Against public order (petty offence)	79	54	68.4
Against state institutions (petty offence)	25	17	68.0
Against property (petty offence)	144	92	63.9
Against public morals (petty offence)	28	13	46.4
Against the Act on Combating Alcoholism	28	20	71.4
Against the Act on Combating Drug Addiction	38	28	73.7
Smuggling and related activities (Penal and Fiscal Code)	65	61	93.8
Other	182	128	70.3
Total	1068	695	65.1

Based on the results presented above, it can be concluded that there exists a relationship between the type of criminal act or petty offence and the conclusion of carrying out CSSW. In this sense, the highest effectiveness is achieved for carrying out punishments for smuggling of goods, at 93%. On the other hand, the lowest effectiveness is achieved for punishments for criminal acts against property (Articles 278–295 of the Penal Code) and for petty offences against public morals (Articles 140–142 of

the Code of Petty Offences).[30] In both cases, effectiveness did not significantly exceed 46%, with a mean of around 65% for all criminal acts and petty offences. Moreover, non-custodial penalties for criminal acts against the institution of family and guardianship (Articles 206–211a of the Penal Code) also achieved lower effectiveness, at slightly above 55%.

It must be admitted that it is somewhat surprising to see such a high efficiency of carrying out of the analysed penalties for smuggling offences. Accordingly, the research hypothesis that this may be related to the treatment of smuggling goods as a form of work (occupation: smuggler) was verified. To this end, it was examined how many individuals were involved in more than one case of this type. Seven individuals fulfilled this criterion; out of those, one individual was sentenced six times, serving the sentence each time. Considering the fact that the current study only involved cases which concluded in 2018, this result is impressive. It allowed for the positive verification of the hypothesis formulated above and the conclusion that many individual perpetrators of criminal acts or petty offences related to smuggling treat it as a source of income. They consider the detection of smuggling as a kind of occupational risk. If they become punished in court (typically with a fine), they ask for it to be commuted to social work, which they reliably carry out. However, this does not change their attitude towards smuggling. The above-mentioned six-time offender was revealed to be a single mother raising two children, who was not officially employed.

It was also decided to analyse whether sex is related to the type of criminal act or petty offence committed. As the current article concerns criminal acts and petty offences related to smuggling, results in this category were compared to the mean result for all cases included in the study. The results are presented in Table 2.

Table 2. Sex distribution in the cases examined in the current study.

Type of case	Men		Women		Total
	Number	%	Number	%	
Total	908	85.0	160	15.0	1068
Smuggling and related activities (Penal and Fiscal Code)	35	53.8	30	46.2	65

The presented data shows that women comprised 46.2% of perpetrators of criminal acts or petty offences related to smuggling. This result is very surprising, as for this type of punishable act, women were the perpetrators three times as often as the mean for all criminal acts and petty offences (15%). When attempting to explain these results, it is worth noting that in the cases included in the current study, the criminal

30 Act of 20 May 1971 on the Code of Petty Offences (consolidated text, Journal of Laws 2021, Item 2008 as amended).

acts and petty offences involved small items (most frequently cigarettes and alcohol). Thus committing them did not require significant physical strength. It could also be the case that women are more 'reliable' as smugglers, and so they more frequently engage in this type of 'work'. In addition, they often treat the income they receive in this way as a supplement to the household budget. It seems that the fact that punishable acts related to smuggling are generally not harshly judged in public opinion could also be a factor. A 2011 study by the Centre for Public Opinion Research (Centrum Badania Opinii Społecznej, CBOS) showed that although 90% of the respondents considered smuggling to be unfair, only 66% agreed that smugglers should be punished. Moreover, in cases of smuggling of goods for one's own use, the percentage of respondents agreeing that smugglers should be punished fell to 30%. This means that 70% of the respondents accepted such activities while simultaneously recognizing that it is unfair (47%).[31]

Considering that social work can be commuted by paying a fine, how many cases ended this way was also examined. Out of a total of 361 cases in which fines were commuted to social work, in 64 (17.7%) the perpetrators decided to pay the fine. In cases related to smuggling, only 6.2% of the perpetrators (4 cases out of 65) decided to pay the fine. Thus, in this instance, community service was the dominant means of concluding cases.

Since the study covered two regions of Poland, the north-eastern and the south-eastern, it was therefore also analysed whether there were differences between them in terms of adjudicated penalties for smuggling goods. It turned out that there were no significant differences in this regard. In both regions, the courts mainly adjudicate fines for smuggling small goods; this is the case even when the court rules on the same person more than once. It can be assumed that this has to do with the belief that this kind of criminal act is not considered very harmful to society, which can be evidenced by the aforementioned survey research conducted by CBOS.

Conclusions

The study presented here analysed the conclusions of CSSW. Community service can be sentenced in two forms: as community service or as a deduction of wages. The latter occurred in only 29 out of 707 cases of community service included in the current study (4.1%). Thus community service was the dominant form of punishment.

Compared to other punishments (imprisonment or fines), the cases included in the current study differed in terms of how they were carried out, as they generally require more activity and regularity (attending the indicated workplace to carry out

31 Centrum Badania Opinii Społecznej, Komunikat z badań: Opinie o przemycie, podróbkach i pracy celników, Warsaw 2011, https://www.cbos.pl/SPISKOM.POL/2011/K_136_11.PDF, p. 6 (20.07.2022).

community service). The literature points to the educational benefits of community service (education through work).[32] However, these benefits are not always achieved, as they are highly dependent on the means of carrying out this punishment. Moreover, studies show that it fares worse than other non-custodial penalties in terms of repeat offending.[33]

The current study concluded that punishable acts involving smuggling are perpetrated equally frequently by women and men. They differ in this respect from other types of criminal act or petty offence, which are generally more frequently perpetrated by men. This issue requires further study to more accurately examine its determinants. The current study also shows that many of the perpetrators sentenced for punishable acts involving smuggling treat it as regular work. This should encourage lawmakers to introduce appropriate changes in order to limit smuggling. In particular, they could involve the opportunity to commute fines to social work (so as to make paying the fines more attractive). It would also be pertinent to examine the causes of punishable acts involving smuggling; undoubtedly, they are significantly influenced by material concerns. Thus to limit this phenomenon, social support, for example in finding employment, should be expanded for people living in border zones.

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32 A. Janus-Dębska, Czynniki utrudniające efektywne wykonywanie kary ograniczenia wolności, (in:) A. Kwieciński, Teoretyczne i praktyczne aspekty wykonywania kary ograniczenia wolności, Wroclaw 2016, pp. 37–55; K. Stasiak, Wymiar kary ograniczenia wolności i jego wpływ na efektywne wykonywanie tej kary – na podstawie badań empirycznych, (in:) A. Kwieciński, Teoretyczne i praktyczne aspekty wykonywania kary ograniczenia wolności, Wroclaw 2016, pp. 169–180.

33 Powrotność do przestępstwa w latach 2009–2015. Ministry of Justice, Warsaw 2017, p. 3. On repeat offending, see also T. Szymanowski, Recydywa w Polsce. Zagadnienia prawa karnego, kryminologii i polityki karnej, Warsaw 2010.

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The Rationale for Economic Migration in Selected Countries of Eurasia with Particular Reference to the Taxation of Individuals (Self-Employed and Non-Business) with Income Tax: An Overview Approach

Abstract: The analysis undertaken in this article is of the migration of natural persons, self-employed and not self-employed, for economic (including tax) reasons, which has been recorded among the citizens of Belarus, Ukraine, Poland, and Vietnam. Tax migration, which is a type of economic migration of individuals, including those engaged in business, is one of the forms of reaction to taxes and tax reforms

introduced in a country and the shape of the system of tax preferences. This study aims to examine the conditions of income taxation of individuals in the countries studied (Poland, Belarus, Ukraine, and Vietnam). The shape of the tax system has been or could be a premise for the migration of individuals from Poland to other countries, as well as from the countries studied to Poland. The reason for choosing these countries for the analysis of this phenomenon was the well-established scholarly cooperation of the Polish authors with authors representing public universities in Vietnam, Ukraine, and Belarus, as well as the available statistical data confirming the fact that residents of these countries account for the largest number of permanent and temporary residence permits given in Poland. It was considered that a comparison of legal solutions to the income taxation of taxpayers in the indicated countries, given the significant level of migration to Poland, can lead to exciting conclusions due to the differences in their legal systems, economic development, and tax systems.
Keywords: economic migration, income tax, taxation, tax competition, tax system

Introduction

Migration is one of the significant global problems in the contemporary world due to its multidimensional and transnational nature.[1] Accordingly, tax migration is a variant of economic migration, which is considered in the context of tax competition.[2] The migration of individuals with regard to the taxation of their income is the subject of the considerations undertaken in this study. The survey covered the migration of individuals for economic reasons (in Belarus, Ukraine, Poland, and Vietnam). This study aims to examine the conditions of taxation in the countries studied and then indicate whether the shape of the tax system was or could have been one of the reasons for the migration of individuals from Poland to other countries and from the countries studied to Poland. The reason for choosing these countries and for taking up the subject of economic migration is primarily due to the authors' long-standing and well-established scientific contacts between Poland and public universities in Ukraine, Belarus, and Vietnam. The choice of countries was determined by available statistical data on foreigners coming to Poland. Residents of Ukraine, Belarus, and Vietnam account for the most significant number of people who have received permanent and temporary residence permits in Poland.[3]

It was considered that the comparison of legal solutions within the scope of income taxation of taxpayers in the indicated countries, due to a significant level of migration from these countries to Poland, may lead to interesting conclusions. This may result from the differences in their legal systems (in the case of Vietnam), economic development, and tax systems, especially comparing Poland with other countries. The

1 J.D. Sachs, Towards Systemic Regulation of International Migration, 'National Economy' 2016, vol. 6, no. 286, pp. 147–154.

2 L. Michalczyk, Ekonomiczne i społeczne aspekty konkurencji podatkowej w Unii Europejskiej, Ruch Prawniczy, Ekonomiczny i Socjologiczny, vol. 1, Poznań 1976–2014.

3 Rocznik Demograficzny, GUS 2021, https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-demograficzny-2021,3,15.html (05.03.2022).

authors used the formal-dogmatic method, the comparative-legal method, and statistical data analysis to show the scale of the migration phenomenon. However, it should be stipulated that, following the authors' intention, the article has the nature of an overview, capturing the studied problem from a 'bird's-eye view', and its purpose is not a detailed comparative legal analysis of the laws regulating the taxation of personal income in the various countries studied, but only an examination of whether 'the shape of income tax and its stability' may have had an impact on so-called tax migration considered in a broader context – economic migration[4], tax competition, and the problem of international tax law[5] - as well as modern economies and globalization processes.[6]

1. On migration and its causes in general

Migration, understood as the movement of people for permanent relocation, is essential for shaping monetary policy, international relations, and global economic growth. It is a phenomenon resulting from human nature and has been known for a long time in the development of civilization.[7] Migration is not limited to one country but concerns all countries in Europe and the world,[8] being one of the most critical global problems and a challenge on an international scale.[9]

4 For more extensive discussion of economic migration, see M. Szypniewski, Ochrona interesu pracownika delegowanego w ramach świadczenia usług w Unii Europejskiej, Wolters Kluwer, Warszawa 2019; R. Orłowska, Uwarunkowania i skutki rozwoju migracji ekonomicznych w Unii Europejskiej w świetle wybranych teorii migracji międzynarodowych, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2013; A.I. Dontsov, O.Y. Zotova, Reasons for Migration Decision Making and Migrants Security Notions, 'Procedia – Social and Behavioral Sciences' 2013, vol. 86, pp. 76–81.

5 D. Mączyński, Międzynarodowe prawo podatkowe, Wolters Kluwer, Warszawa 2015; R. Lipniewicz, Jurysdykcja podatkowa w cyberprzestrzeni, Wolters Kluwer, Warszawa 2018; H. Litwińczuk, Międzynarodowe prawo podatkowe, Wolters Kluwer, Warszawa 2020.

6 Cf. H. Kleven, Taxation and Migration: Evidence and Policy Implications, 'Journal of Economic Perspectives' 2020, vol. 34, no. 2, pp. 119–142; A. Razin, E. Sadaka, Tax Competition and Migration: The Race-to-the-Bottom Hypothesis Revisited, 'CESifo Economic Studies' 2012, vol. 58, no. 1, pp. 164–180; R. Moussawi, K. Shen and R. Velthuis, ETF Heartbeat Trades, Tax Efficiencies, and Clienteles: The Role of Taxes in the Flow Migration from Active Mutual Funds to ETFs, 'SSRN' 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744519 (02.12.2022); G.H. Hanson, The Economic Consequences of the International Migration of Labor, 'Annual Review of Economics' 2009, vol. 1, no. 1, California, USA, pp. 79–208; E. Tuora-Schwierskott, Migration and Migration Policies: European Union Law against the Background of Selected National Experiences, Regensburg 2016.

7 P. Gieorgica, Polskie migracje w świetle procesów globalnych, Presscom, Wroclaw, 2018, p. 18.

8 Cf. A. Górny, P. Kaczmarczyk, Uwarunkowania i mechanizmy migracji zarobkowych w świetle wybranych koncepcji teoretycznych, Seria: Prace Migracyjne, nr 49, Instytut Studiów Społecznych, Uniwersytet Warszawski, Warszawa, 2003, pp. 2–83.

9 P. Koryś, M. Okólski, Czas globalnych migracji. Mobilność międzynarodowa w perspektywie globalizacji, Seria: Prace Migracyjne, nr 55, Instytut Studiów Społecznych, Uniwersytet Warszawski,

Migration is also a basis for economic, social, and psychological development.[10] Barriers imposed by individual sovereign states preclude international migration. Globalization processes are conducive to the release of obstacles to the movement of goods and services and the free movement of people,[11] which is the rule within the EU. Citizens of different countries decide to change their place of residence because of the economic and political conditions in their country of origin or in search of a better life.[12] People choose countries that offer better economic opportunities while giving a higher return (in financial benefits) to migrants. Expected earnings in the destination country are higher than those in the land of residence.[13] In the past, the directions of these movements varied, but now countries such as Poland and the Czech Republic are becoming destination countries for migrants from the East Asia.

Migration processes are present in many countries. It is worth looking at figures that illustrate the differences between emigration and immigration in the form of so-called net migration. Figures 1 to 3 below show the differences concerning net migration for European countries. An illustration is presented for these three figures for the example countries that will be further considered in this paper. Figure 1 shows the evolution of net migration in Europe by country in 2021. The information in this figure shows that in 2021 Russia had the highest net migration figures in Europe, at 320,617 people, while Turkey had the lowest, with a negative net migration figure of 69,729. Other countries, such as Germany and Spain, also stood out in this respect. In contrast, in other countries, such as Poland, Latvia, Lithuania, and Greece, the balance between emigration and immigration was negative. This means that in these countries, more people were leaving than arriving.

Warszawa, 2004, pp. 2–29.

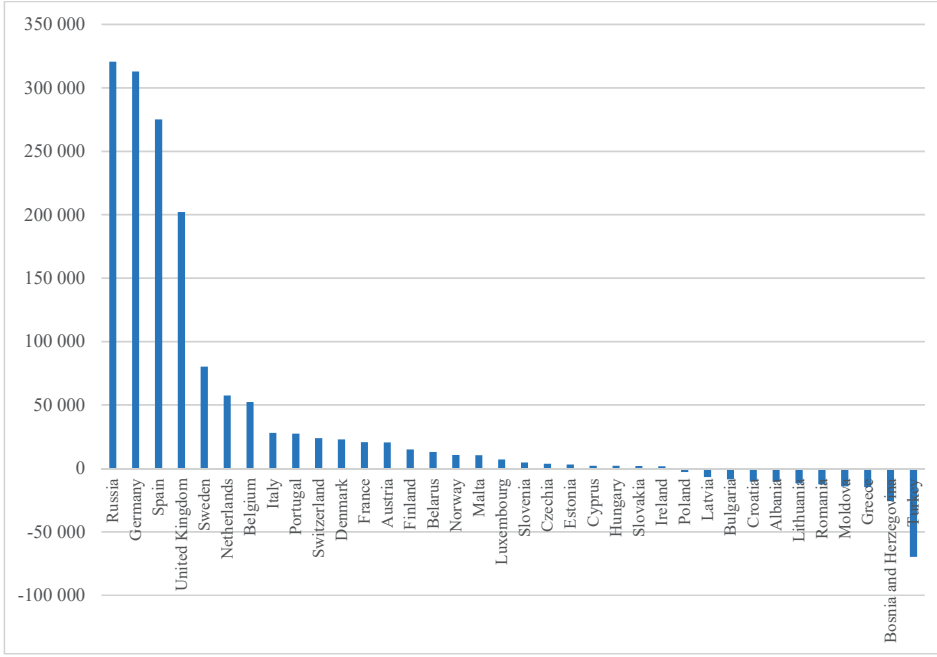
10 J. Valsiner, We Are All Migrants, 'Comparative Migration Studies' 2022, vol. 10, no. 2, https://doi.org/10.1186/s40878–021–00276–8 (13.02.2022).

11 A.R. Zolberg, International Migrations in Political Perspective, 'International Migration Review' 1981, vol. 15, no. 1_(suppl.), pp. 3–27, doi:10.1177/019791838101501s03 (04.03.2022).

12 E. Tendayi Achiume, Reimagining International Law for Global Migration: Migration as Decolonization? 'AJIL Unbound' 2017, vol. 111, pp. 142–146, https://www.jstor.org/stable/27003718 (14.03.2022).

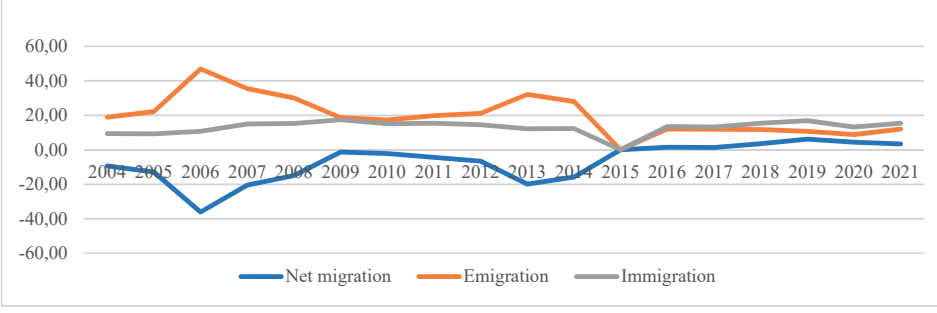
13 A. Bradford, Sharing the Risks and Rewards of Economic Migration, 'The University of Chicago Law Review' 2013, vol. 80, no. 1, pp. 29–57, http://www.jstor.org/stable/41825868 (14.03.2022).

Figure 1. Net migration in Europe by country in 2021



Source: World Population Prospects 2022. Based on Statista.

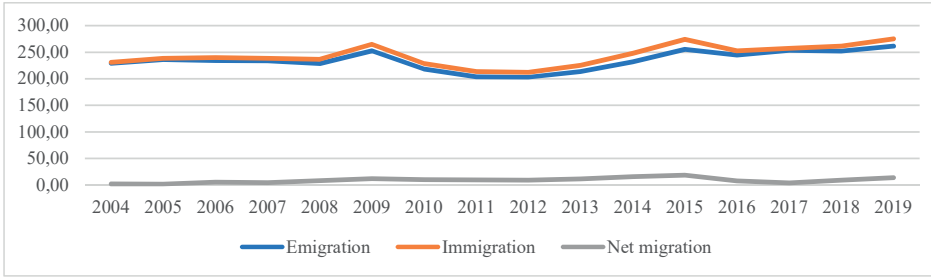
Figure 2. International migration in Poland 2004–2021 (in 1,000s)



Source: Central Statistical Office of Poland, Population. Size and structure and vital statistics in Poland by territorial division in 2021. As of 31 December, tab. I, 2022. Based on Statista.

Figure 2 shows the relationship between emigration and immigration levels in Poland. The information shows that between 2004 and 2015, the level of emigration decreased, and then from 2015 started to increase. The main directions of permanent emigration are Germany and the United Kingdom. The level of immigration has also been increasing since 2015. The number of economic immigrants is growing, especially Ukrainian citizens interested in temporary employment. The analysis of migration trends indicates that Poland is transforming from a typical emigration country into an emigration and immigration country. In contrast, Figure 3 illustrates similar figures for Belarus only.

Figure 3. International migration in Belarus 2004–2019 (in 1,000s)



Source: National Statistical of Committee of the Republic of Belarus, Total migration results 2021. Based on Statista.

Analyzing the information in Figure 3, one can see a different relationship between Belarus and Poland. From 2004 to 2021, Belarus's emigration and immigration levels followed very similar trends. Each year, the number of international immigrants exceeded that of emigrants in Belarus; consequently, the net migration was positive over the observed period.

With the ongoing war in Ukraine, the coming years will also be marked by the migration of the population of Ukraine to Western European countries. In addition to the armed conflict, which resulted in the influx of more than 1.33 million refugees as of 24 February 2022,[14] the COVID-19 pandemic, which caused numerous economic and social restrictions that favoured migration movements for financial reasons, was also a factor in the migration of people for economic purposes.[15] In 2020

14 SG: 1,33 mln uchodźców z Ukrainy przekroczyło polską granicę. 93 proc. to Ukraińcy, https://www.bankier.pl/wiadomosc/SG-1–33-mln-uchodzcow-z-Ukrainy-przekroczylo-polska-granice-93-proc-to-Ukraincy-8294437.html (09.03.2022).

15 COVID-19 Travel Restrictions Output – 4 October 2021, https://migration.iom.int/reports/covid-19-travel-restrictions-output-%E2%80%94–4-october-2021?close=true (13.03.2022).

and 2021, more than 100,000 restrictions on displacement were implemented globally, while 201 countries made exceptions to them while allowing migratory mobility (while the number of international migrants decreased by nearly 2 million, compared to 2019).[16]

According to statistics, 169 million people in 2019 belonged to the migrant worker group, while 24.2% of all economic migrants worked in Europe and 22.1% in North America.[17] The EU population, on the other hand, was 447.3 million (in 2020), while 23 million were non-EU citizens (5.1% of the EU population). Nearly 37 million were born outside the EU (8.3% of all EU residents).[18] Of this group, 17% were economic migrants.[19] Regardless of the sector in which they work, migrants have made a significant contribution to the fight against the pandemic, as they are most often employed in critical sectors.[20] The COVID-19 pandemic, or rather the economic crisis caused by it, lack of work, or poor living conditions are just some of the reasons people emigrate. Low wages and high public and legal burdens induce Poles to emigrate. In 2020, about 2.24 million tax residents were temporarily outside the country. According to UN statistics, Poland is one of three European countries with the most significant number of people born within it living outside its borders.[21] The main reason for leaving the country was to take up a job in another country.[22]

When analyzing reasons for emigration, one should distinguish between push and pull factors.[23] The rationale for migration, therefore, arises as a result of a kind of compulsion, the realization by people of the great variation in the level and pace of economic development in the world, and especially of the significant disparities in the amounts of labour income and taxes and the related purchasing power of money in different countries.[24]

16 International Migrant Stock, https://www.un.org/development/desa/pd/content/international-migrant-stock (13.03.2022).

17 COVID-19…, *op. cit.*

18 Immigrants in European Society – General Figures, https://ec.europa.eu/info/strategy/priorities-2019–2024/promoting-our-european-way-life/statistics-migration-europe_pl (13.03.2022).

19 COVID-19…, *op. cit.*

20 OECD, Database on Immigrants in OECD and non-OECD Countries: DIOC, https://www.oecd.org/els/mig/dioc.htm (13.03.2022).

21 M. Galka, Which EU Country Has the Most Citizens Living Abroad? http://metrocosm.com/eu-diaspora-map/ (13.03.2022).

22 Informacja o rozmiarach i kierunkach czasowej emigracji z Polski w latach 2004–2020, https://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-zagraniczne-ludnosci/informacja-o-rozmiarach-i-kierunkach-czasowej-emigracji-z-polski-w-latach-2004–2020,2,14.html (13.03.2022).

23 Migration and Remittances: Eastern Europe and the Former Soviet Union, https://openknowledge.worldbank.org/handle/10986/6920 (14.03.2022).

24 Cf. W. Quaisser, Die Osterweiterung der Europäischen Union: Konsequenz für Wohlstand und Beschäftigung in Europa, Bonn 2000, p. 113.

The rationale and effects of labour migration play an important role in taxation issues (rates, equity, tax collection, money distribution).[25] There is a need to create agreements to combat tax competition between countries, especially in the EU, because an ideal tax system is not possible. Important in this context are the method of collecting taxes, their amount and the profitability of economic activity and maximization of budget revenues, distribution of taxes, and minimizing income disparities between individuals.[26] It is about 'maximizing social welfare'; its condition is a tax system that stimulates economic growth. Income taxes on employee wages are an essential issue as they are the main surcharge on employees' net salaries and constitute an element of labour costs. The existing differences in tax rates, also for the taxation of income from business activity between EU countries, are a gap that entrepreneurs can exploit and may constitute a premise for the location of their businesses.[27]

Relocation generally increases the competitiveness of enterprises, their development, and the development of individual countries' economies. For these reasons, the role of developing countries is to use fiscal instruments, which, through healthy competition, would enable the achievement of competitive advantages in international market actions, including developing the country's socio-economic development.[28] Globalization of both social and economic processes is progressive. The increasing freedom of movement of capital and people is an additional factor strengthening the intensity of this phenomenon.[29] Accordingly, the issue of the relocation of companies and its causes as a natural process in an era of increasing globalization is not without significance.[30] Relocation as a form of adaptation to a changing environment is an expression of the desire of economic entities to optimize the taxation of their income using tax competition.[31] In terms of income tax, the imposition of tax directly reduces the scale of consumption or business expenditures; hence the natural behaviour of a taxpayer is to avoid taxation or minimize its negative impact. This may come down to legitimate optimization of the level of taxation by taking advantage of the flexibility of tax structures or by migration to countries with lower tax burdens and thus taking advantage of tax

25 L. Michalczyk, Ekonomiczne…, *op. cit.*

26 Cf. K. Wach, Systemy podatkowe krajów Unii Europejskiej, Wolters Kluwer, Kraków 2005; J.E. Stiglitz, Ekonomia Sektora Publicznego, Warszawa 2010.

27 Cf. M. Sosnowski, Tax competition and the relocation process, 'Ekonomia i Prawo' 2015, vol. 14, no. pp. 33–45. DOI: http://dx.doi.org/10.12775/EiP.2015.003 (10.03.2022).

28 *Ibidem*.

29 Cf. R.L. Thompson, Globalization and the Benefits of Trade, The Federal Reserve Bank of Chicago, Chicago Fed Letter 2007, vol. 236.

30 Cf. E.E. Leamer, The Effects of Trade in Services, Technology Transfer and Delocalisation on Local and Global Income Inequality, 'Asia-Pacific Economic Review' 1996, pp. 44–60.

31 Cf. A.E. Brouwer, I. Mariotti, J.N. van Ommeren, The Firm Relocation Decision: A Logit Model, 'European Regional Science Association Conference Papers' 2002, no. 2, p. 1.

competition between countries. This competition can be a positive phenomenon resembling perfect competition between enterprises, where countries or regions compete for mobile factors of production in the so-called crawling tax competition.[32] It is a long-term process whereby certain countries, either as initiators or as a reaction to similar actions by other countries, gradually reduce their tax rates, thus freeing up financial resources for investment and the introduction of technological progress by companies.

Such tax competition relates to stable tax systems and typically affects all investors. Additionally, unfair tax competition involves isolated actions by individual countries to 'pull' potential foreign investors away from different countries with low tax rates and direct them to their environment. Transnational companies are primarily motivated by the principle that their business activities should be taxed as little as possible and will therefore be highly sensitive to the level of taxation in the country concerned.[33] The existence of tax competition brings tangible benefits to companies investing and doing business in a country, which generally benefits the country's economy at the same time. As a result, tax competition leads to an equalization of taxes at a socially adequate level. This phenomenon is accompanied by the migration of taxpayers looking for the optimal ratio of public goods received to taxes paid.[34] However, a simple comparison of nominal tax rates to assess the degree of onerousness of a given tax system does not fully reflect the practical burdens borne by entrepreneurs due to different methods of determining the tax base adopted in different countries. Hence differences in the level of effective rates may be the basis for a decision to relocate to other countries. However, it is not the only or most crucial motive inducing entrepreneurs to this type of behaviour.[35] The main factors are invariable: the cost and quality of labour, markets and proximity to major customers, the level of social benefits, the cost of transportation, the level of infrastructure, education, and the state of the environment.[36] The attractiveness of a country is determined by a healthy economy, a stable legal framework for doing business, and support for pro-investment and pro-development projects. Taxpayers respond to tax reforms by changing their incomes within their existing work and changing their state of employment.[37] Top earners can potentially change their

32 Cf. R.W. McGee, The Philosophy of Taxation and Public Finance, Boston/Dordrecht/London 2004, p. 105.

33 M.P. Devereux, R.G. Hubbard, Taxing Multinationals, NBER Working Paper 7920, Cambridge 2000.

34 C. Edwards, V. de Rugy, International Tax Competition, 'Economic Freedom of the World, Annual Report 2002', pp. 49–50.

35 M. Sosnowski, Relocation…, *op. cit.*

36 *Ibidem.*

37 P. Doligalski, Gdzie jest szczyt krzywej Laffera dla najwyższych dochodów w Polsce? Dobrobyt na pokolenia, Raport naukowy 10/2019, https://pdoligalski.github.io/files/raport-podatki.pdf

country of residence to pay lower taxes. Considering the optimal taxation of top earners, taking tax migration into account,[38] Doligalski found that taxpayers are more sensitive to the average tax rate when deciding on tax residency.[39]

2. Rationale and main factors for migration of citizens of the countries studied

Among foreigners residing in Poland, five nations dominate (citizens of Ukraine, Belarus, Russia, India, and Vietnam).[40] Almost 872,000 foreigners from almost 160 countries were reported to the pension and disability system in 2021, of which the most numerous group were citizens of Ukraine, who migrated to Poland (until February 2022) in search of better-paid work, mainly for economic reasons and due to the difficult economic situation in their country (prices for utilities increased dramatically in 2021).[41]

Ukraine was undoubtedly an attractive place to do business before the armed conflict began, not only because of its strategic location but also because of its growing market. However, establishing a business was highly costly and time-consuming (as well as being unprofitable in taxation, fraught with corruption and legal uncertainty).[42] Due to the armed conflict and the influx of Ukrainian citizens to Poland, there will be an unprecedented increase in the number of refugees who will remain in Europe until the conflict ends, and perhaps even forever. The reasons for the migration of Ukrainians in previous years were the possibility of receiving higher wages, receiving better medical care, lower food prices, lower rent for housing, difficulty in opening one's own business, and corruption. Currently, the main reason for migration is the occupation of part of the territory in the east and south of Ukraine and the full-scale war with Russia. According to UN data, as of 1 June 2022, 6,98 million peo-

(10.03.2022).

38 E. Lehmann, L. Simula, A. Trannoy, Tax Me If You Can! Optimal Nonlinear Income Tax Between Competing Governments, 'The Quarterly Journal of Economics' 2014, vol. 129, pp. 1995–2030.

39 Cf. P. Doligalski, Gdzie…, *op. cit.*

40 Obcokrajowcy w Polsce. Wiemy, których jest w naszym kraju najwięcej, https://biqdata.wyborcza.pl/biqdata/7,159116,27598983,obcokrajowcy-w-polsce-wiemy-ktorych-jest-w-polsce-najwiecej.html (10.03.2022).

41 Ukraińcy i Białorusini w Polsce. Dla nich rok 2021 może być przełomowy, https://www.pulshr.pl/praca-tymczasowa/ukraincy-i-bialorusini-w-polsce-dla-nich-rok-2021-moze-byc-przelomowy,78924.html (10.03.2022).

42 H. Vasylevska, Macroeconomic Aspects of the Formation of the Tax Environment in Ukraine, 'Scientific Journals of the Silesian University of Technology, Organization and Management' 2015, vol. 83, p. 1941.

ple have left Ukraine since the beginning of the war (not including the flow of entry), of which 3,69 million went to Poland.[43]

Economic migrants from Ukraine have had a positive impact on Poland's economy.[44] During 2013–2018, about 1.4 million Ukrainian migrants contributed to the growth of Poland's GDP by up to 13%.[45] Ukrainians adapt to the economic environment of Poland and show entrepreneurial initiative. Thus, in 2022, more than 10 200 Ukrainian citizens registered in Poland as private entrepreneurs. The vast majority of them – more than 9,800 – did so after 1 March 2022. This is evidenced by the data of the Centralna Ewidencja i Informacja o Działalności Gospodarczej – CEIDG (Central Register of Business Entities in Poland). The share of entrepreneurs from Ukraine in the total number in Poland has reached 5% since the beginning of the year. The growth is quite sharp: for comparison, in January 2022, only 188 Ukrainians opened their business in Poland, but already in September as many as 2,273 had. Most often, Ukrainians open economic activities in Poland related to internal construction work (every fourth person), programming and IT consulting (16%), hairdressing and cosmetic activities, as well as freight and taxi transportation (7%).[46] Deloitte experts believe that refugees from Ukraine will not only positively affect a reduction of the labour shortage, but will also improve the demographic structure of Poland, and a reasonably implemented long-term plan for the integration of refugees from Ukraine could lead to an increase in Poland's GDP from 0.2% to 3.5%.[47]

Due to the armed conflict, and the influx of Ukrainian citizens to Poland, there will be an unprecedented increase in the number of refugees who will remain in Europe until the conflict ends, and perhaps even forever.

Over the years 2008–2021, an almost 16-fold increase in the number of Belarusians reported for insurance has been registered.[48] Observing migration movements

43 The Influx of People to Ukraine through the Western Border Has Been Going on for Almost a Month, https://www.epravda.com.ua/news/2022/06/6/687857/ (02.11.2022).

44 Cf. M.A. Paszkowicz, A. Hrynenko, Causes and Results of Labour Migrations from Ukraine to Poland, 'Studia Oeconomica Posnaniensia' 2019, vol. 7, no. 4, pp. 7–26.

45 Poles Calculated the Possible Benefits of Refugees from Ukraine for Polish GDP, https://www.yavp.pl/uk/novini/u-polshchi-porakhuvaly-mozhlyvu-koryst-vid-bizhentsiv-z-ukrainy-dlia-polskoho-vvp-20699.html (02.11.2022).

46 Ukrainians in Poland Set Records for Starting Businesses, https://www.yavp.pl/uk/robota-ta-finansi/ukraintsi-v-polshchi-biut-rekordy-z-vidkryttia-pidpryiemnytstva-20667.html (02.11.2022).

47 Uchodźcy z Ukrainy w Polsce. Wyzwania i potencjał integracji 2022, https://www2.deloitte.com/pl/pl/pages/zarzadzania-procesami-i-strategiczne/articles/Uchodzcy-z-Ukrainy-w-Polsce.html?nc=42 (02.11.2022).

48 Rośnie liczba obcokrajowców pracujących w Polsce. Coraz więcej Białorusinów, https://www.money.pl/gospodarka/rosnie-liczba-obcokrajowcow-pracujacych-w-polsce-coraz-wiecej-bialorusinow-6724804642675552a.html (13.03.2022).

from Belarus to Poland, one can notice the increasing scale of emigration with political and economic motives since 2017, especially among young Belarusians.[49] Poland is an attractive labour market for them, and incidentally, the Polish legal system and political situation seem stable from their perspective. There is a shortage of people working in the IT sector or as engineers in the Polish labour market, so immigrants almost immediately find jobs thanks to the high level of qualifications and education acquired in Belarus.[50] As shown in the research, Belarusians more frequently indicate their willingness to take up a job in Poland compared to Russia.[51] The data confirms that the number of Belarusians who have a permanent residence permit in Poland in 2021 exceeds 30,000 people and has increased by 50% over recent years.[52]

On the other hand, the migration of Vietnamese people from their country has been on an upward trend recently and is boosted by the development of information and communication technologies, as well as cheaper and more accessible international tourism services.[53] In addition to economic factors, the main reasons for Vietnamese migration include marriage and family reunification and labour exports. The labour migration of Vietnamese people to other countries has greatly contributed to poverty reduction in Vietnam. Most residents of rural areas have low skills and limited language abilities. According to a Ministry of Labour, War Invalids and Social Affairs (MOLISA) report, to date Vietnam has about 580,000 workers employed overseas, mainly through labour export cooperation, in more than 40 countries and territories, performing about 30 different occupations, ranging from low- to highly skilled labourers and professionals.[54] Northeast Asia has become the largest market for the Vietnamese labour force, with diverse careers due to high incomes, cultural similarities, and bearable weather. The average monthly salary of Vietnamese workers in Northeast Asia is comparatively higher than in other markets, including Europe. The incomes of Vietnamese workers abroad are relatively stable and about two to three times higher than domestic incomes in the same occupations.

It is worth mentioning that many Vietnamese people also fall victim to smuggling, sexual exploitation, and violence. They pay several thousand dollars to be

49 Cf. Nasila się imigracja z Białorusi. To pomoże polskiej „mieszkaniówce"? https://forsal.pl/nieruchomosci/aktualnosci/artykuly/8200371,nasila-sie-imigracja-z-bialorusi.html (10.03.2022); I. Pirozhnik, External Migration as the Factor of Demographic Safety of Belarus, https://spg.apsl.edu.pl/baza/wydawn/spg13/pirozhnik.pdf (02.11.2022).

50 Białorusini emigrują do Polski, https://biznes.interia.pl/praca/news-bialorusini-emigruja-do-polski,nId,5312617 (13.03.2022).

51 Białorusini o Polsce, Rosji i sobie, https://www.osw.waw.pl/pl/publikacje/komentarze-osw/2021–01–29/bialorusini-o-polsce-rosji-i-sobie (13.03.2022).

52 https://www.gov.pl/web/udsc/obywatele-bialorusi-w-polsce--raport (10.03.2022).

53 Consular Department, Ministry of Foreign Affairs of Viet Nam (2012), Review of Vietnamese Migration Abroad.

54 Ministry of Labor, Invalids and Social Affairs, Statistical Yearbook of Labor, People with Merit and Social Affairs 2021, Labor and Social Publishing House 2021.

smuggled to Europe, and Poland has become a so-called smuggling country. As indicated by the data, Vietnam is a developing country, but is still poor and characterized by a high level of corruption.[55] Additionally, there is a significant percentage of Vietnamese people in Poland who have arrived since the 1960s after receiving academic scholarships in socialist countries and who have since remained here, choosing to establish families.[56] Statistical data confirm that the increase in the number of immigrants from Vietnam was significantly influenced by the political transformation in Poland and subsequent accession to the European Union. It was a time of increased migration of foreigners, especially from Ukraine, Belarus, and Vietnam.[57] At present the largest number of economic migrants come to Poland for so-called short- or long-term stays, depending on employment opportunities. Most often these are citizens of Ukraine, Nepal, Belarus, Vietnam, or China.[58]

Analyzing the example of Poland, emigration has constantly been present in the history of this country, both in the past and at present. The phenomenon of emigration among Poles was mainly due to economic and political reasons. According to official data, after Poland's accession to the EU, more than 2 million people left the country, which was the highest level of migration in Polish history. Although the political and economic situation has changed over time, the reasons for financial emigration remain unchanged (the lack of a job and professional perspectives).[59] Analyzing statistical data, about 2.5 million Poles permanently emigrate to other EU countries. At the same time, the total number of emigrants worldwide exceeds 30 million.[60] These are people who emigrated from Poland mainly for economic rea-

55 K. Rogalska, Wietnamski dług. Pracują w Polsce za darmo, nie mają domów, są bici i molestowani, https://noizz.pl/wywiady/kto-przemyca-wietnamczykow-do-polski-ile-kosztuje-przemyt-migrantow-wietnamski-dlug/f9eg5z2 (13.03.2022).

56 Ł. Knap, Słodko-kwaśna historia Wietnamczyków w Polsce, "Jestem dumny z polskiego dowodu" https://ksiazki.wp.pl/slodko-kwasna-historia-wietnamczykow-w-polsce-jestem-dumny-z-polskiego-dowodu-6221991721318529a (13.03.2022).

57 Polska jako kraj imigracji – kto I w jakim celu przyjeżdża do Polski? Fakty o migracjach na XXI wiek, https://migracje.ceo.org.pl/sites/migracje.ceo.org.pl/files/polska_jako_kraj_imigracji.pdf (13.03.2022).

58 Cf. A. Górny, K. Madej, K. Porwit, Ewolucja czy Rewolucja? Imigracja z Ukrainy do Aglomeracji Warszawskiej z perspektywy lat 2015–2019, https://www.migracje.uw.edu.pl/wp-content/uploads/2020/10/WP123181_end2.pdf (03.11.2022); A. Górny, K. Porwit, K. Madej, Imigranci z Ukrainy w aglomeracji warszawskiej w czasie pandemii COVID-19. Wyniki badania panelowego, https://www.migracje.uw.edu.pl/publikacje/imigranci-z-ukrainy-w-aglomeracji-warszawskiej-w-czasie-pandemii-covid-19-wyniki-badania-panelowego/ (03.11.2022).

59 P. Olbrycht, Migracje zarobkowe Polaków – przeszłość i teraźniejszość, https://www.wojsko-polskie.pl/awl/u/3e/b7/3eb7a8cc-bcd8–4d1d-9107–6be9d5265f99/6_pawel_olbrycht.pdf (13.02.2022).

60 Emigracja Polaków – Dokąd wyjeżdżają najczęściej? https://pl.europa.jobs/art-emigracja-polakow-dokad-wyjezdzaja/ (13.03.2022).

sons.[61] Polish emigrants often find work in industry, trade, catering, or construction.[62] Interestingly, according to a survey in 2018, less than 10% of Poles considered going abroad to work, of which less than 20% thought about leaving permanently.[63] In 2019, labour emigration was considered by 19% of Poles, and in 2021 it is 16%. Among the factors that convince Poles to emigrate are mentioned better work, social conditions, travel, prospects for professional development, and more favourable solutions to the tax system.[64]

In this context, it is of interest whether migrants are satisfied with their decision to migrate to another country. Although the answer to this question is beyond the scope of the research conducted in this article, in the case of economic migrants it seems that this is the case, as they voluntarily decide to change their place of residence, choosing better opportunities and conditions for life and personal development.[65]

3. Personal income taxation in the countries studied (Belarus, Poland, Ukraine, Vietnam)

Individuals (including entrepreneurs) who make a voluntary decision to live in another country for economic reasons, in addition to their earning motives and desire to improve their standard of living,[66] may take into account national tax systems, especially concerning the taxation of their income with income tax (hereafter Personal Income Tax - PIT). In all the countries studied, individuals are subject to PIT

61 I. Grabowska-Lusińska, M. Okólski, Migracja z Polski po 1 maja 2004 r.: jej intensywność i kierunki geograficzne oraz alokacja migrantów na rynkach pracy krajów Unii Europejskiej, CMR Working Papers, No 33/91 L. Michalczyk, Ekonomiczny…, *op. cit*.; J. Carby-Hall, Situation of Economic Migrants from Poland and Other A8 Countries in the European Union Member States, Research Program Prepared for the Ombudsman of the Republic of Poland, vol. I, Warsaw 2008.

62 Praca za granicą: czy faktycznie lepsza niż w Polsce? https://inwork.pl/praca-za-granica-wysokie-zarobki/ (12.03.2022).

63 Migracje Zarobkowe Polaków IX – listopad 2018, https://www.workservice.com/pl/Centrum-prasowe/Raporty/Raport-Migracyjny/Migracje-Zarobkowe-Polakow-IX-listopad-2018 (12.03.2022).

64 16 proc. Polaków rozważa emigrację. Dokąd chcą wyjechać? [BADANIE], https://forsal.pl/praca/aktualnosci/artykuly/8304166,emigracja-16-proc-polakow-rozwaza-emigracje-dokad-chca-wyjechac-badanie.html (14.03.2022).

65 A. Olgiati, R. Calvo, L. Berkman, Are Migrants Going Up a Blind Alley? Economic Migration and Life Satisfaction around the World: Cross-National Evidence from Europe, North America and Australia, 'Social Indicators Research' 2013, vol. 114, no. 2, pp. 383–404, http://www.jstor.org/stable/24720253 (14.03.2022).

66 G.J. Leśniak, Lewiatan: Polacy coraz częściej myślą o pracy zagranicą?, prawo.pl, 2 grudnia 2021, https://sip.lex.pl/#/external-news/1795674204?keyword=migracje%20podatkowe&cm=SREST (14.03.2022).

on income derived from various sources.[67] Although characterized by cultural and legal differences, the legal systems of the countries indicated have adopted a very similar definition of tax residency,[68] which is essential for comparing income tax in the tax systems, taken as a primary criterion of housing, although it is sometimes captured differently.[69]

In Ukraine, a tax resident is a domiciled person in the country. In addition, if a taxpayer has a residence in a foreign country, then as long as their permanent residence is in Ukraine, or it is in Ukraine where they have close personal or economic ties, they are treated as a tax resident of Ukraine.[70] In Belarus, as in Poland and Vietnam, a factor of the length of stay is applied; in this case, it is 183 days in a year. If a taxpayer stays in Belarus longer than 183 days in a year, they shall be treated as a tax resident.[71] On the other hand, in Poland a tax resident is a person who has been staying in the country for more than 183 days or whose centre of economic or personal interest is in the territory of Poland.[72] In Vietnam, a tax resident is a person who stays in the country for more than 183 days, who holds a temporary or permanent residence card, or who rents property in the country for more than 183 days per year.[73]

Comparing the taxation of individuals' income, the introductory PIT rate of individuals in Ukraine is 18%. In addition, residents and non-residents pay a military tax, at 1.5%. For entrepreneurs, the tax rate depends on the type of activity, the amount of income received, and the number of employees. There are four tax groups. For example, private entrepreneurs in group I (business activities related to retail sales and provision of services to citizens) are those who do not employ workers and

67 Cf. Law of 19 December 2002, Tax Code of the Republic of Belarus; Personal Income Tax Act of 26 July 1991 (consolidated text Journal of Laws 2021, item 1128, as amended); Law No. 04/2007/QH12 on Personal Income Tax and Article 6 Circular No. 95/2016/TT-BTC on Guidelines for Tax Registration; Law of Ukraine No. 889–VI 'About the Tax to Incomes of Physical Persons'.

68 On the subject of tax residency as a fundamental concept in both international and domestic tax law in the context of double taxation treaties, and in the case of a conflict of residency when two countries recognize an individual as their resident, see H. Litwińczuk, Opodatkowanie pracowników transgranicznych, 'PiZS' 2021, vol. 9, pp. 29–37; R. Mastalski, Prawo podatkowe, wyd. C.H. Beck, Warsaw 2021.

69 Cf. M. Słomka, Rezydencja i odpowiedzialność podatkowa w podatku dochodowym, 'Doradca Podatkowy' 2017, vol. 6, pp. 24–26; A. Mariański, (Nie)sprawiedliwy polski podatek dochodowy od osób fizycznych, Warszawa 2021; D. Mączyński, Międzynarodowe…, *op. cit*.; P. Majka, M. Rydzewska, I.A. Wieleba, Zatrudnianie cudzoziemców. Aspekty prawne, pracownicze i podatkowe. Ze szczególnym uwzględnieniem obywateli Ukrainy, Wolters Kluwer Polska, Warszawa 2022.

70 Tax Residency: You Can't Escape the Family Treasury to an Island, https://ain.ua/ru/2020/12/04/nalogovoe-rezidentstvo-ot-rodnoj-kazny-na-ostrov-ne-sbezhish/ (14.03.2022).

71 Information on Taxation of Income of Citizens of the Republic of Belarus, https://netherlands.mfa.gov.by/ru/consular_issues/citizenship/bc0a773a2bb62ebe.html (14.03.2022).

72 Cf. Arts. 3(1), (1)(a) and (2)(a) and Art. 29(1) of the Personal Income Tax Act of 26 July 1991.

73 Article 22 of Law No. 04/2007/QH12 on Personal Income Tax and Article 6 Circular No. 95/2016/TT-BTC on Guidelines for Tax Registration.

have revenues up to UAH 300,000, for which the tax rate is up to 10% of the subsistence minimum. For group II (provision of services, production, and sale of goods), which includes private entrepreneurs with up to ten employees and revenues of up to UAH 1.5 million, the tax rate is up to 20% of the minimum wage. Entrepreneurs from group III (both private entrepreneurs and legal entities conducting other business activity), with revenues up to UAH 5 million, pay 3% of income (without VAT) or 5% of income (with VAT), while for group IV (without limitation of employment and amount of income, applied to agricultural producers, provided the share of agricultural production in total revenues is at least 75%), for example, for agricultural land and pastures, pay 0.95%, and agricultural land and greenhouse pastures, 6.33%.[74]

On 15 March 2022, Law of Ukraine No. 2120–IX 'On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Regarding the Effect of Norms during the Period of Martial Law' was adopted. According to above, on 1 April 2022 and during the period of martial law for individual entrepreneurs and single taxpayers of groups I and II, the payment of the single tax is voluntary.[75] Such a legal field in Ukraine enables entrepreneurs to survive in difficult military conditions.

An important contribution of supporting Ukrainian public finances was the decision of the Polish government to refuse to collect taxes from refugees from Ukraine who arrived after the full-scale invasion and who work remotely for their Ukrainian employer. This is about the PIT tax which is paid by everyone who receives income in Poland, including foreigners who become tax residents after 183 days of staying in Poland.[76] Migrants who work as employees or who have registered their business activities in Poland should pay taxes in accordance with Polish legislation. To optimize tax payments, Ukrainian migrants can take advantage of preferential programmes to support small businesses in particular, such as *Ulga na strat, Mały ZUS plus*, and reduced social insurance contributions for 24 months.[77]

There are three tax rates for individuals in Belarus: 13% for all individuals, 16% for individual entrepreneurs (lawyers and notaries), and 9% for employees of the High Technology Park. On the other hand, for entrepreneurs, there is a simplified tax system (STS) with a rate of 5% of income (without VAT), 3% of revenue (with VAT) with a total rate of 20%, while limits apply for the indicated rates. For example, for commercial organizations not subject to VAT, revenue may not exceed BYN

74 Taxes in Ukraine. DFL, https://ukraine.trade.gov.pl/pl/f/download/fobject_id:426519 (16.03.2022).

75 Law of Ukraine No. 2120–IX 'On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Regarding the Effect of Norms during the Period of Martial Law', https://zakon.rada.gov.ua/laws/show/2120–20#Text (03.11.2022).

76 Ukrainians in Poland Can Pay Only Ukrainian Taxes, https://ain.ua/2022/07/19/ukrayinczi-v-polshhi-mozhut-platyty-lyshe-ukrayinski-podatky-brdo/ (03.11.2022).

77 Business in Poland for Ukrainians: How to Pay Lower Taxes, https://uapl.info/biznes-u-polshchi-dlia-ukraintsiv-iak-platyty-menshi-podatky (03.11.2022).

1,337,415, and the number of employees may not exceed 50. For VAT payers, revenue may not exceed BYN 2,046,668. As for general corporate income tax, the standard rate is 18% of income for entrepreneurs, and the prevailing VAT rate is 20%.[78]

On the other hand, there are two tax rates for individuals in Poland – 12% and 32% (the latter after exceeding the amount of PLN 120,000 of income) – and the tax-free amount is PLN 30,000. Entrepreneurs also have the right to opt for a registered income lump sum, whose rates, depending on the business activity, range from 2% to 17%, and a flat tax of 19%, regardless of the level of income earned. However, due to the legislative changes resulting from the so-called Polish Order,[79] the obligatory health rate (not deductible from this year's tax) is a tax that amounts to 9% for natural persons conducting and not conducting business activity or 4.9% for those settling the flat tax.[80]

For Vietnam, tax rates for individuals range from 5% to 35%, depending on the income earned. For example, up to VDN 60 million, the tax rate is 5%, up to VDN 120 million it is 10%, and above VDN 960 million it is 35%. In business activities, the tax rates range from 0.5% to 5%, depending on the subject of the business activity.

A detailed comparison of income tax rates in the countries studied is shown in Table 1.

Table 1. Tax rates in selected countries Source: own study

Country	Tax rates – for individuals	Tax rates – for businesses
Belarus	16% for individual entrepreneurs (attorneys and notaries) 9% for employees of the High Technologies Park	STS – 5% of revenue without VAT STS – 3% of revenue with VAT 18% of revenue
Poland	17%, 32% Reduction of PIT rate from 17% to 12% for the first tax threshold up to PLN 120,000 from 1 July 2022	17% and 32% – general rules (in reality 28% and 41%) (from 1 July 12% instead of 17%) 19% – flat tax (in reality 23.9%) from 2% to 17% – lump sum depending on the type of business
Ukraine	18%	Tax group I – 10% of the minimum wage Tax group II – 20% of the minimum wage Tax group III – 3% without VAT, 5% with VAT Tax group IV – from 0.95% to 6.33%.
Vietnam	5%–35%	0.1% to 10% depending on the type of activity

78 Doing Business 2020, https://www.doingbusiness.org/content/dam/doingBusiness/country/b/belarus/BLR.pdf (13.03.2022).

79 Cf. Act of 29 October 2021, Amending the Personal Income Tax Act, the Corporate Income Tax Act, and Certain Other Acts (Journal of Laws of 2021, items 2105, 2349, 2427, and 2469); Personal Income Tax Act of 26 July 1991 (Journal of Laws of 2021, item 1128, as amended).

80 Cf. P. Borszowski (ed.), Prawo podatkowe z kazusami i pytaniami, Warszawa 2020; A. Hołda (ed.), Zmiany w podatkach i księgowości 2022. Polski Ład, Warszawa 2022.

Based on the data presented in Table 1, it may be concluded that the Polish tax system is not competitive with the methods of the other analyzed countries. The tax burden for entrepreneurs and individuals is comparable, with the taxation of business activity being the most favourable in the case of Vietnam. Even though the Polish tax system seems ineffective due to the low level of realization of tax functions,[81] which should be realized in a market economy.[82] Individuals (and entrepreneurs) choose Poland as a destination for economic migration. People coming from the East Asia are looking for more stable conditions for their professional and business development. The factors inducing migration are, above all, political and economic conditions (escape from corruption, membership in the EU structures, and a stable legal and tax system, in the emigrants' opinion). In the case of Polish entrepreneurs, the sentiments seem to be quite different. The directions of tax changes in Poland lead to the emigration of Polish citizens to more competitive tax systems. In the era of the COVID-19 pandemic, the introduction of such revolutionary changes in income taxes as proposed in the Polish Order is not conducive to the development of entrepreneurship in Poland. The cost of financing is rising due to the increases in interest rates, fuel, energy, and labour prices, and, incidentally, the tax burden. This contributes to the search for more social and stable tax systems.

Given the shape of the current personal income tax regulation, the lack of an effective system of tax incentives and changes to adjust to the economic situation is a cause of disruption to the redistributive and stimulative function of the tax system.[83] Changes in the current tax system should take into account the demographic changes in the country to a greater extent, using the method of tax incentives; one should strive to strengthen the effectiveness of implemented policies on population migration and the prevention of poverty in society, and take measures related to simplification of the tax system. It should also strive to minimize the formality associated with tax settlements; changes in tax privileges in the field of personal income tax should take into account the principle of compensation of tax reliefs and exemptions;[84] changes in the tax preferences of taxpayers engaged in economic ac-

81 Cf. R. Zieliński, Funkcje podatków w doktrynie prawnofinansowej oraz ich znaczenie dla praktyki stanowienia prawa podatkwoego, 'Roczniki Nauk Prawnych' 2019, vol. 29, no. 1, pp. 115–130, https://www.ceeol.com/search/article-detail?id=785408 (20.03.2022); E. Tegler, Funkcje system podatkowego i oceana jego sprawiedliwości, Acta Universitatis Lodziensis. Folia Iuridica, Tom 54 (1992) pp. 101–118.

82 W. Szymański, Efektywność funkcji podatkowych polskiego system podatkowego na przyjładzie podatku dochodowego od osób fizycznych, 'Pieniądze i Więź' 2015, vol. 3, no. 18, pp. 71–84.

83 *Ibidem.*

84 Cf. A. Mariański, Sprawiedliwość podatkowa w zakresie kosztów uzyskania przychodów w podatku dochodowym od osób fizycznych, Studia Prawno-Ekonomiczne, 2020, Tom 117, pp. 79–97; A. Mariański, Exemptions and reliefs from personal income tax and the principle of tax equity, 'Ruch Prawniczy, Ekonomiczny i Socjologiczny' 2021 vol. 83, no. 1, pp. 7–20; P. Borszowski, K. Kopyściańska, M. Kopyściański, W. Srokosz, P. Zawadzka (eds.), Regulacje prawa finansów

tivity should result in increased flexibility of tax forms.[85] Income taxes, and in particular the tax on personal income, being a direct levy of a universal nature in terms of its subjective and objective character which ultimately burdens the taxpayer's pay at the stage of its generation, should be imposed according to the taxpayer's capacity (depending on the taxpayer's situation, type of object of taxation, and its quantification). This is known as the taxpayer's ability to pay,[86] which takes into account their situation, the nature of the object of taxation, and its quantification,[87] which is a manifestation of tax fairness.[88] While it means that 'any tax should treat all subjects in the same economic conditions in the same way',[89] a fuller understanding of this principle is possible in combination with the principle of universality and equality of taxation,[90] which are its concretization.[91] In the doctrine of tax law, it is accepted that this principle sets all standards of taxation, and equal taxation of persons in this situation should be based on the principle of ability to pay.[92] Not all tax preferences are of the same nature and weight, as the motivation for their introduction by the legislature, and the purposes they are intended to serve, vary.

In tax migration, it is worth emphasizing that in modern democratic states under the rule of law, taxes on personal income should not play a primary fiscal role. Their legal construction takes income as the tax base reflecting the material situation of taxpayers. Their nature allows personalization of the tax burden through various tax discounts and rebates (due to the individual situation of each taxpayer – age, ability to work, health, the need to support family members), meaning that they must

publicznych i prawa podatkowego. Podsumowanie stanu obecnego i dynamika zmian, Warszawa 2020, pp. 410–422; A. Mariański, Źródła przychodów – niesprawiedliwe I skomplikowane różnicowanie opodatkowania dochodu osób fizycznych, „Przegląd Ustawodawstwa Gospodarczego" 2020, no. 10, pp. 22–27.

85 W. Szymański, Efektywność…, *op. cit*..

86 Cf. E.K. Drozdowski, Zasada zdolności płatniczej a polski system podatkowy, Seria Prawo nr 223m, Poznań 2018; A. Nita, Teoretyczne i normatywne wyznaczniki sprawiedliwego opodatkowania, Toruński Rocznik Podatkowy, 2013; A. Pomorska, Zakres i instrumenty personalizacji podatkowej (wybrane problemy), (in:) S. Wieteska, M. Wypych (eds.), W poszukiwaniu efektywności finansów publicznych, Łódź 2009.

87 Cf. E. Małecka-Ziembińska, Sprawiedliwy system podatkowy – w poszukiwaniu modelowych rozwiązań, 'Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach' 2016, no. 294, pp. 98–107.

88 Cf. A. Mariański, Exemptions…, *op. cit*.; A. Nita, Zdolność płatnicza podatnika jako kryterium sprawiedliwego opodatkowania, 'Kwartalnik Prawa Podatkowego' 2017, no. 4, pp. 9–27.

89 *Ibidem.*

90 M. Kosek-Wojnar, Zasady podatkowe w teorii i praktyce, Warszawa 2012; J. Orłowski, Konstytucyjna zasada powszechności opodatkowania – wybrane zagadnienia, 'Studia Prawnoustrojowe' 2013, vol. 22, pp. 81–100; A. Gomułowicz, Zasada sprawiedliwości w polskim systemie podatkowym, 'Ruch Prawniczy, Ekonomiczny i Socjologiczny' 1989, vol. 3, pp. 99–130.

91 Cf. A. Mariański, Tax…, *op. cit*.

92 A. Nita, Teoretyczne…, *op. cit.*

also carry out social tasks. Although it should provide the state with revenue to cover public expenditure, when taxes are improperly structured and usually too high,[93] they interfere with other critical non-fiscal functions.[94] This is because the fiscal function is not and should not be the sole determinant of the principles of taxation and thus is not the only function of taxes.[95] The broad formulation of tax income and the realization of redistributive and stimulative goals result in numerous exclusions, exemptions, and tax benefits (so-called tax preferences). For these reasons, modern income taxes are characterized by considerable complexity.[96]

It is also necessary to take into account so-called 'fiscal efficiency', which also includes the so-called 'costs of taxation' with this tax (and not tax costs, also important from the point of view of the construction of income tax, especially for business entities),[97] which includes both the costs of collection (administrative costs), the costs of compliance of taxpayers with tax regulations, as well as the costs of substitution (efficiency) resulting from the distorting effect of taxes on economic decisions as well as on the labour market.[98] Although the primary purpose of a tax should be fiscal, the tax system should not be characterized by excessive fiscalism[99] or cause adverse collateral effects in the economic or social sphere.[100]

Conclusion

Summarizing the overview and general research carried out in this paper on the rationale for economic migration in the Eurasian countries studied (Belarus, Poland, Ukraine, and Vietnam), with a particular focus on the income taxation of individuals (self-employed and non-employed), it must be pointed out that taxation conditions and a stable tax system alone were not the only factors considered by individuals migrating from Poland and to Poland from Ukraine, Belarus, and Vietnam. They show

93 J. Sokołowski, Zarządzanie przez podatki, Warszawa 1995, p. 25.

94 A. Pomorska, Potrzeba i kierunki reform podatków dochodowych w Polsce, Lublin 2016, pp. 49–50.

95 Cf. A. Gomułowicz, Funkcje systemu podatkowego, (in:) A. Gomułowicz, D. Mączyński, Podatki i prawo podatkowe, Warszawa 2022, p. 349; R. Lipniewicz, Jurysdykcja…, *op. cit.*; R. Zieliński, Funkcje…, *op. cit.*, pp. 115–130.

96 Cf. A. Mariański, Exemptions…, *op. cit.*, pp. 22–27.

97 Cf. M. Brzostowska, P. Kubiesa, PIT. Komentarz, Warszawa 2022; A. Mariański (ed.), Opodatkowanie działalności gospodarczej w Polsce, Warszawa 2016; J. Glumińska-Pawlic (ed.), Działalność gospodarcza w sektorze MŚP. Praktyczne aspekty tworzenia, funkcjonowania i likwidacji przedsiębiorstwa, Warszawa 2020; A. Gomułowicz, Prawna formuła kosztu podatkowego, Wolters Kluwer, Warszawa 2016.

98 E. Małecka-Ziembińska, Efektywność fiskalna podatku dochodowego od osób fizycznych w Polsce, Wydawnictwo Uniwersytetu Ekonomicznego w Poznaniu, Poznań 2012, p. 54.

99 R. Zieliński, Funkcje…, *op. cit.*, p. 120.

100 K. Nizioł, Prawne aspekty polityki podatkowej, Warszawa 2007, p. 68.

that the rationale for economic migration to Poland by individuals varied for the countries studied. For individuals, especially those doing business from former Eastern Bloc countries (Ukraine, Belarus), among other vital premises for economic migration were legal certainty, the rule of law, and a stable tax system, which appeared to be the case in Poland, perceived as an attractive EU country for them, even though for Poles themselves it is not such due to frequent changes in laws, including tax laws, made during the fiscal year.

In this context, the best concluding remark of the considerations undertaken in this article seems to be the still valid statement of the scholar of migration studies Ernst Ravenstein:

Bad or burdensome laws, high taxes […] an inadequate social environment, and even coercion (slave trade, transportation) all created and continue to create migration flows, but none of these flows can compare in their mass with that which arises from the desire inherent in most people to improve their existence in material terms.[101]

Undoubtedly, the opportunity for individuals to earn a stable income, whether in their work or business, without being overtaxed and taking into account their ability to pay within the tax system's legal construction, can and, as it turns out, should be among the reasons for (tax) migration, although it is not necessarily the sole reason for migration for economic reasons.

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101 E.G. Ravenstein, The Laws of Migration, 'Journal of the Statistical Society of London' 1885, vol. 48, no. 2, p. 286.

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Konstytucja Rzeczypospolitej Polskiej a sankcje w postaci konfiskaty rzeczy

The Constitution of the Republic of Poland and confiscation of assets

Abstract: Sanctions, including individual sanctions, relating to property usually apply with war conflicts. Their imposition by international subjects in domestic law raises the question of whether the Constitution of the Republic of Poland allows for the expropriation considered to be related to the attacking state, since, regardless of external circumstances, Poland remains a constitutional state which protected a property. In the article we argue that on the basis of the current Constitution of the Republic of Poland, it is not permissible to seizure the property of private entities considered to be related to

the attacking state, under conditions analogous to the currently applied measures of targeted sanctions like freezing of assets. If the expropriaton were to take place, it would require an amendment to the Constitution of the Republic of Poland. In order to solve the research task, the dogmatic method and legal interpretation appropriate to the Polish science of constitutional law were used in the work.
Keywords: Constitution of Poland, legal sanctions, rule of law, seizure
Słowa kluczowe: Konstytucja RP, sankcje, państwo prawne, przepadek rzeczy

Wprowadzenie

Agresja Federacji Rosyjskiej na Ukrainę wywołała reakcję międzynarodową na bezprecedensową skalę. Jednym ze środków mających stanowić odpowiedź państw UE na napastniczą wojnę przeciwko Ukrainie są sankcje indywidualne, wzorowane na poprzednio przyjętych wobec osób związanych z reżimem białoruskim oraz agresją Rosji na Ukrainę w 2014 r.[1] Takie sankcje zostały wprowadzone także przez Polskę w drodze ustawy z dnia 13 kwietnia 2022 r. o szczególnych rozwiązaniach w zakresie przeciwdziałania wspieraniu agresji na Ukrainę oraz służących ochronie bezpieczeństwa narodowego[2]. Zgodnie z nią wobec osób i podmiotów wpisanych na listę prowadzoną przez ministra spraw wewnętrznych stosowane są środki przewidziane w rozporządzeniach UE. Decyzję o wpisaniu na listę podejmuje minister na wniosek szefa odpowiednich służb. Sankcje są stosowane wobec osób i podmiotów bezpośrednio lub pośrednio wspierających agresję Federacji Rosyjskiej na Ukrainę lub poważne naruszenia praw człowieka lub represje wobec społeczeństwa obywatelskiego i opozycji demokratycznej, lub których działalność stanowi inne poważne zagrożenie dla demokracji lub praworządności w Federacji Rosyjskiej lub na Białorusi oraz bezpośrednio związanych z takimi osobami lub podmiotami, lub wobec których istnieje prawdopodobieństwo wykorzystania w tym celu dysponowanych przez nie takich środków finansowych, funduszy lub zasobów gospodarczych. Znaczna część sankcji wyczerpuje się w zamrożeniu, według terminologii ustawy i rozporządzeń UE, środków finansowych, funduszy lub zasobów gospodarczych będących własnością osób wpisanych na listę, wykluczenie ich z udziału w postępowaniu zamówień

1 Dyrektywa Parlamentu Europejskiego i Rady 2014/42/UE z dnia 3 kwietnia 2014 r. w sprawie zabezpieczenia i konfiskaty narzędzi służących do popełnienia przestępstwa i korzyści pochodzących z przestępstwa w Unii Europejskiej (Dz.Urz. UE L 127/39 z dnia 29.04.2014); rozporządzenie Rady (WE) nr 765/2006 z dnia 18 maja 2006 r. dotyczące środków ograniczających w związku z sytuacją na Białorusi i udziałem Białorusi w agresji Rosji wobec Ukrainy (Dz.Urz. UE L 134 z dnia 20.05.2006, s. 1, ze zm.); rozporządzenie Rady (UE) nr 269/2014 z dnia 17 marca 2014 r. w sprawie środków ograniczających w odniesieniu do działań podważających integralność terytorialną, suwerenność i niezależność Ukrainy lub im zagrażających (Dz.Urz. UE L 078 z 17.03.2014); rozporządzenie Rady (UE) nr 833/2014 z dnia 31 lipca 2014 r. dotyczące środków ograniczających w związku z działaniami Rosji destabilizującymi sytuację na Ukrainie (Dz Urz. UE L 078 z dnia 17.03.2014).

2 Dz.U. poz. 835.

publicznych oraz uznanie za osoby niepożądane na terytorium RP. W rozprawie podnosimy inne zagadnienie: czy obowiązująca Konstytucja RP dopuszcza sankcje w postaci konfiskaty mienia podmiotów popierających państwo napastnicze?

1. Istota sankcji nakierowanych

Pojęcie „sankcje" ma zastosowanie w różnych dziedzinach prawa, w tym w prawie międzynarodowym publicznym, karnym czy cywilnym. Jest rozumiane (i wykładane) w ramach danej dziedziny prawa ze względu na istotę stosunku prawnego, w związku z którym ma zastosowanie. Sankcje wprowadzane w związku z konfliktem międzynarodowym, jako instytucja prawa międzynarodowego publicznego, są środkiem wywierania presji wykorzystywanym w celu przywrócenia porządku międzynarodowego. W analizowanym przypadku chodzi o tzw. sankcje nakierowane, tj. sankcje adresowane do konkretnych osób lub podmiotów gospodarczych uznanych za powiązane z państwem napastniczym[3]. Dodać należy, że pojęcia sankcji w prawie międzynarodowym publicznym, mających sprzyjać przywróceniu stanu przestrzegania prawa naruszonego poprzez działania napastnicze, nie można utożsamiać z pojęciem sankcji w prawie krajowym ani stosować z niego analogii[4]. W prawie międzynarodowym stosuje się sankcje nakierowane „zamrażające" korzystanie z własności, tj. uniemożliwiające właścicielowi korzystanie z własności, natomiast nie pozbawiające go tej własności. W odróżnieniu od nich rozważeniu poddajemy zagadnienie zgodności z obowiązującą Konstytucją RP sankcji polegających na przepadku na rzecz Skarbu Państwa znajdujących się na terytorium Rzeczypospolitej Polskiej środków finansowych i zasobów gospodarczych (odpowiednio: rzeczy, mienia) konkretnych osób lub podmiotów gospodarczych uznanych za powiązane z państwem napastniczym.

2. Charakter pozbawienia własności w Konstytucji RP

Własność i inne prawa majątkowe są dobrami konstytucyjnie chronionymi (art. 21 w zw. z art. 64 Konstytucji RP[5]), ale nie mają charakteru absolutnego. Obowiązująca Konstytucja RP dopuszcza ingerencję w prawo własności[6], w tym jego pozbawie-

3 M. Trzcionka, Sankcje gospodarcze w polityce zagranicznej USA po II wojnie światowej, s. 204, https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/41491/trzcionka_sankcje_gospodarcze_w_polityce_zagranicznej_usa_2011.pdf?isAllowed=y&sequence=1 (4.05.2022).

4 A. Kociołek-Pęksa, J. Menkes, Problematyka sankcji i countermeasures w prawie międzynarodowym publicznym – wymiar filozoficznoprawny, (w:) P. Jabłoński, J. Kaczor, M. Pichlak (red.), Prawo i polityka w sferze publicznej. Perspektywa wewnętrzna, Wrocław 2017, s. 92.

5 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz. U. Nr 78, poz. 483 ze zm.).

6 S. Jarosz-Żukowska, Konstytucyjna zasada ochrony własności, Kraków 2003; *eadem*, Własność w okresie przeobrażeń ustrojowych w Polsce z perspektywy orzecznictwa Europejskiego Trybu-

nie w dwóch formach: poprzez wywłaszczenie albo przepadek rzeczy. Konstytucja dopuszcza wywłaszczenie jedynie wówczas, gdy jest dokonywane na cele publiczne i za słusznym odszkodowaniem (art. 21 ust. 2 Konstytucji RP). Przepadek rzeczy z kolei może nastąpić po łącznym spełnieniu dwóch przesłanek: tylko w przypadkach określonych w ustawie i tylko na podstawie prawomocnego orzeczenia sądu.

W przypadku sankcji międzynarodowych instytucja wywłaszczenia nie ma zastosowania – przede wszystkim dlatego, że nie dochodzi do wypłaty słusznego odszkodowania[7]. Na płaszczyźnie obowiązujących przepisów prawa pozostaje zatem do rozważenia możliwość zastosowania sankcji w trybie przepadku rzeczy. Aby tak zakwalifikować projektowane sankcje – w postaci konfiskaty, należy je rozważyć z dwóch perspektyw. Po pierwsze: czy konfiskata mienia jako sankcja stosowana w związku z konfliktem międzynarodowym w ogóle mieści się w konstytucyjnym (art. 46) rozumieniu przepadku rzeczy. Po drugie: czy dopuszczalny jest przepadek rzeczy osoby fizycznej lub osoby prawnej (lub innej jednostki organizacyjnej), wobec których nie toczyło się żadne postępowanie karne i co do których sąd nie orzekł popełnienia przestępstwa.

W prawie karnym przepadek rzeczy czy konfiskata majątku (znana w PRL na gruncie kodeksu karnego z 1969 r.[8] i zniesiona na mocy jego zmiany z 1990 r.)[9] są poprzedzone nie tylko wykazaniem osobie nim objętej czynu bezprawnego, ale także stwierdzeniem winy sprawcy. Jest to konstrukcja prawna, w której m.in. stwierdza się, że konkretna osoba jest sprawcą danego czynu, czyn ten jest przestępstwem, że jest bezprawny, że między zachowaniem sprawcy a skutkiem zachodzi związek przyczynowy. Podobnie w prawie cywilnym przepadek świadczenia może nastąpić, jeżeli świadczenie zostało świadomie spełnione w zamian za dokonanie czynu zabronionego przez ustawę lub w celu niegodziwym (art. 412 k.c.). Procedura cywilna przewiduje także postępowanie sądowe dotyczące przepadku rzeczy przewidzianego w prawie celnym (art. 610 i następne k.p.c.). Przedmiotowe przesłanki trudno zastosować w przypadku sankcji związanych z konfliktem zbrojnym. Inaczej niż w prawie krajowym, nie są one oparte na popełnieniu określonego czynu przez właściciela, ale są adresowane do konkretnych osób lub podmiotów gospodarczych ze względu

nału Prawa Człowieka, Wrocław 2016, s. 95 i n.; A. Frankiewicz, Konstytucyjna regulacja własności w Rzeczypospolitej Polskiej, „Studia Erasmiana Wratislaviensia" 2009, s. 189, https://www.bibliotekacyfrowa.pl/dlibra/publication/27607/edition/34397?language=pl (5.06.2022).

7 Na temat wywłaszczenia faktycznego zob. S. Jarosz-Żukowska, Wywłaszczenie faktyczne w orzecznictwie Europejskiego Trybunału Praw Człowieka, (w:) A. Bator, M. Jabłoński, M. Maciejewski, K. Wójtowicz, Współczesne koncepcje ochrony wolności i praw podstawowych, Wrocław 2013, s. 83 i n.; na temat konfiskaty mienia i zakresu regulacji zob. A.H. Ochnio, Konfiskata rozszerzona w prawie wybranych państw europejskich, „Prokuratura i Prawo" 2016, nr 12, s. 95–137.

8 Ustawa z dnia 19 kwietnia 1969 r. Kodeks karny (Dz.U. Nr 13, poz. 94).

9 Ustawa z dnia 23 lutego 1990 r. o zmianie Kodeksu karnego i niektórych innych ustaw (Dz.U. Nr 14, poz. 84).

na ich dwie cechy główne: przynależność państwową i istotne znaczenie dla polityki państwa napastniczego[10].

Te dwie przesłanki trzeba rozważyć w kontekście polskiego konstytucyjnego modelu pozbawienia własności. Jak podkreśla się w orzecznictwie polskiego Trybunału Konstytucyjnego, „kryteria wprowadzenia ograniczenia (własności – przyp. autorów) w prawie polskim odpowiadają uznanym kryteriom mieszczącym się w granicach interesu publicznego powoływanego przez akty prawa międzynarodowego jako granica wkraczania w stosunki własnościowe (…). Konstrukcja ochrony własności w polskim prawie (art. 21 Konstytucji), dopuszczająca możliwość ograniczenia własności z uwagi na interes publiczny (art. 64 Konstytucji w zw. z jej art. 31 ust. 3), jest więc zgodna z europejską tradycją prawną i odpowiada regulacjom obowiązującym w Unii Europejskiej”[11].

Rozważyć zatem należy w pierwszej kolejności istnienie interesu publicznego w przypadku wyzucia z własności na podstawie sankcji kierowanych. Pojęcie interesu publicznego jest kłopotliwe w podjęciu próby dookreślenia. Próby jego zdefiniowania nie przyniosły jak dotąd jednoznacznych ustaleń. Przyjmujemy wyjaśnienie, zgodnie z którym zbiorowość (utożsamiona często z państwem) wybrałaby racjonalnie, dobrowolnie i nie kierując się interesem jednostkowym[12], lecz aby osiągnąć wspólne cele[13]. Za należące do kategorii interesu publicznego uznaje się te dobra, które są ważne dla wspólnego istnienia, egzystowania.

Poprzez odwołanie do tak rozumianego interesu publicznego uzyskujemy odwołanie do potrzeby funkcjonowania społeczności jako całości, dla wspólnego pożytku – w tym sensie interes publiczny ma wielki potencjał normatywny i perswazyjny[14]. Warto dodać, że w konwencyjnym systemie ochrony praw człowieka ten termin użyty jest wprost właśnie jako cel usprawiedliwiający ingerencję w prawo własności (art. 1 Protokołu 1 do EKPC)[15]. Nie ułatwia to jednak zaklasyfikowania konkretnych celów jako interesu publicznego, a rozwiązania konfliktu, albo też znajdowanie punktu równowagi między interesem wspólnym (publicznym) a indywid-

10 Pomijamy przy tym zagadnienie szczegółowe w postaci posiadania przez te osoby wielokrotnego obywatelstwa i związanych z tym następstw. Pomijamy także motyw lojalności państwowej i wynikające z niej następstwa dla obywateli.

11 Wyrok TK z dnia 28 stycznia 2003 r., K 2/02, https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/wyrok-trybunalu-konstytucyjnego-sygn-akt-k-2–02–17006043 (4.05.2022).

12 W. Lippman, The Public Interest, (w:) *idem*, The Public Philosophy, Routledge London 1956, s. 42.

13 V. Held, The Public Interest and Individual Interests, New York, Basic Books 1970, s. 207.

14 O użyciu tego pojęcia w argumentacji piszą m.in. Ø. Ihlen, K. Raknes, Appeals to ‘the public interest’: How public relations and lobbying create a social license to operate, „Public Relations Review” 2020, vol. 46.

15 A. McHarg, Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights, „Modern Law Review” 1999, vol. 62, wyd. 5, s. 684.

ualnym, są zawsze tak dobre i przekonujące jak procedury oraz uzasadnienia decyzji, które te konflikty rozwiązują.

Takie cele łatwiej zrekonstruować na gruncie norm prawa krajowego i to zarówno w sytuacji wywłaszczenia (gdzie cel publiczny jest wprost wskazany jako konieczna przesłanka), jak i przepadku – stosowanego jako środek o charakterze represyjnym.

3. Usprawiedliwienie ingerencji w konstytucyjne prawo własności w odniesieniu do instytucji przepadku rzeczy

Własność jest jedną z fundamentalnych kategorii prawnych określających status jednostki[16]. Z tego powodu przejmowanie własności prywatnej ze względu na (domniemane) związki łączące z państwem napastniczym to zdarzenie bezpośrednio odnoszące się do ram ustroju państwa prawnego. Polski porządek prawny oparty jest na konstrukcjach prawnych prawa rzymskiego, z jego podstawą w postaci rozdzielenia prawa prywatnego od prawa publicznego[17]. Podstawę jego podziału stanowi różnica chronionego interesu. Stosunki majątkowe, w tym własność czy odpowiedzialność za wyrządzoną szkodę, to prawo prywatne. Obywatele czy podmioty gospodarcze nie odpowiadają ze swojej własności za szkodę (w szerokim jej rozumieniu, szerszym niż rozumienie cywilistyczne) wyrządzoną przez państwo, którego są obywatelami. Ta fundamentalna dla państwa prawa zasada miała zastosowanie nawet do bezprecedensowych w skali świata zbrodni niemieckich, kiedy zastosowano regulacje prawne wynikające z podziału prawa na prawo publiczne i prywatne. Prawodawca współczesny ma prawo ocenić, że to był błąd, którego nie warto powtarzać. Niemniej jednak przejmowanie własności prywatnej ze względu na działania państwa jest odstępstwem od tej – kluczowej dla cywilizacji europejskiej – konstrukcji i jako takie nie może następować w sposób spontaniczny czy na niepewnej podstawie prawnej, lecz na podstawie wypracowanych standardów[18]. Z tego powodu również wykonywanie sankcji musi przebiegać w sposób zgodny z Konstytucją RP.

Nie ma w doktrynie prawa wątpliwości, że w art. 46 Konstytucji RP przyjęto karnistyczne rozumienie pojęcia „przepadek rzeczy". Jak w trakcie prac nad przygotowaniem Konstytucji RP dowodził P. Winczorek, w Konstytucji powinno być przewidziane odstępstwo od ochrony własności w związku z czynami krymi-

16 J. Helios, Własność w ujęciu filozoficznym i socjologicznym. Wybrane problemy, (w:) U. Kalina-Prasznic (red.), Własność w prawie i gospodarce, Wrocław 2017, s. 60.

17 Na temat wywłaszczenia w prawie rzymskim i jej pozostałościach we współczesnym prawie polskim zob. np. R. Kamińska, Czy w prawie rzymskim istniała instytucja wywłaszczenia? „Miscellanea Historico-Iuridica" 2018, t. XVII, z. 2, s. 72 i n.

18 E. Łętowska, Rzeźbienie państwa prawa. 20 lat później, Warszawa 2012, s. 11.

nalnymi[19]. Jak wyjaśnia P. Sarnecki[20], tradycyjnie wiąże się instytucję „przepadku rzeczy" z prawem karnym (w szerokim rozumieniu) w sytuacji uznania popełnienia pewnych przestępstw (wykroczeń), a ponieważ przepadek rzeczy staje się represją, „dolegliwość ta może obywatela spotykać jedynie w trybie realizowania wobec niego odpowiedzialności karnej". Zwraca uwagę nie tylko związanie przepadku rzeczy z odpowiedzialnością karną, ale także jej odniesienie wyłącznie do obywateli. Z kolei B. Banaszak i M. Jabłoński[21], charakteryzując zakres zastosowania art. 46 Konstytucji, stwierdzają jednoznacznie, że przypadki objęte art. 46 mają związek z popełnieniem przestępstwa, a Z. Siwik dodaje: w art. 46 regulowany jest rodzaj dolegliwości karnej za popełnienie czynu zabronionego (przestępstwa lub wykroczenia), polegającej na przepadku na rzecz Skarbu Państwa narzędzi lub innych przedmiotów, które służyły lub były przeznaczone do popełnienia czynu zabronionego, lub przedmiotów pochodzących bezpośrednio z czynu zabronionego, a także na przepadku przedmiotów przestępstwa polegającego na naruszeniu zakazu wytwarzania, posiadania, obrotu lub przewozu określonych przedmiotów[22]. Szerszy zakres zastosowania art. 46 Konstytucji dopuszcza T. Sroka[23], ale także on zaznacza, że w zastosowaniu zwrotu „przepadek rzeczy" chodziło o użycie terminologii prawa karnego. Jest to dolegliwość o charakterze wtórnym, tj. ma charakter dodatkowej dolegliwości prawnej (kary dodatkowej), a nie głównej[24].

Trzeba dodać, że nieco inna koncepcja została wyrażona w orzecznictwie TK, zwłaszcza w ustaleniach wyroku z dnia 3 czerwca 2008 r. (P 4/06)[25], w którym TK przypomniał, iż pojęcia konstytucyjne mają znaczenie autonomiczne względem pojęć ustawowych i konstytucyjne rozumienie „przepadku rzeczy" nie musi łączyć się z prawem karnym. Wątku tego jednak nie rozwinął; w szczególności – nawet pośrednio – nie odniósł się do sankcji w rozumieniu prawnomiędzynarodowym, tylko (prawidłowo) skoncentrował się na kontrolowanych w tym konkretnym postępowaniu przepisach prawa o ruchu drogowym i rozporządzenia w sprawie usuwania pojazdów. Przepadek jest stosowany w celu niedopuszczenia do bogacenia się dzięki czynom niezgodnym z prawem, a zarazem stanowi formę represji.

19 Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego 1995, Nr 15, s. 79.

20 P. Sarnecki, Komentarz do art. 46, (w:) L. Garlicki (red.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, t. III, Warszawa 2003, s. 3–4.

21 B. Banaszak, M. Jabłoński, Komentarz do art. 46, (w:) J. Boć (red.), Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku, Wrocław 1998, s. 92.

22 Z. Siwik, Komentarz do art. 46, (w:) J. Boć (red.), Konstytucje…, *op. cit.*, s. 93.

23 T. Sroka, Komentarz do art. 46, (w:) M. Safjan, L. Bosek (red.), Konstytucja RP, t. I: Komentarz, art. 1–86, Warszawa 2016, s. 1159.

24 P. Sarnecki, Komentarz…, *op. cit.*, s. 3–4.

25 Wyrok TK z dnia 3 czerwca 2008 r., sygn. akt P 4/06, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=1060&sprawa=3996 (5.06.2022).

Działania naruszające prawo nie mogą stać się źródłem korzyści ani też być opłacalne dla podmiotów nieprzestrzegających przepisów. Takie *ratio legis* wynika zarówno z regulacji prawa karnego, jak i cywilnego[26].

Z punktu widzenia przepadku rzeczy jako sankcji za popieranie państwa napastniczego nie bez znaczenia jest ta cecha przepadku rzeczy, że nie ma on charakteru samoistnego – pierwotnego. W polskim porządku konstytucyjnym sankcje (jako akty stosowania prawa) nie są aktami samoistnymi. Muszą mieć właściwą podstawę prawną. Nie ma przy tym znaczenia, czy chodzi o sankcje nakładane przez ONZ, UE czy Polskę samodzielnie. Polska jest państwem prawnym zarówno w stosunkach wewnętrznych, jak i zewnętrznych (art. 9 w zw. z art. 2 Konstytucji RP), a konstytucyjna ochrona własności i innych praw majątkowych ma zastosowanie zarówno wobec obywateli RP, podmiotów gospodarczych zarejestrowanych w Polsce, jak i pozostałych podmiotów mających własność lub inne prawa majątkowe w Polsce.

Myśl leżąca u podstaw sankcji nakierowanych nie jest wspólna z – przywołaną przez TK – „wspólną myślą leżącą u podstaw unormowań przewidujących przepadek"[27]. A skoro w przypadku przepadku rzeczy chodzi o pozbawienie podmiotu własności, to konstytucyjne rozumienie tego pojęcia wykładane jest w sposób ścisły i nie powinno być rozciągane na nowe postaci pozbawiania podmiotu prawa prywatnego własności (odjęcia własności).

4. Warunki konstytucyjne pozbawienia własności poprzez przepadek rzeczy

Geneza przepisu konstytucyjnego i jego charakter wyjaśniają warunki, w jakich przepadek może być zastosowany. Zgodnie z art. 46 Konstytucji przepadek rzeczy może nastąpić tylko w przypadkach określonych w ustawie i tylko na podstawie prawomocnego orzeczenia sądu. Pierwszy warunek dotyczy określoności nie tylko przepadku, ale także jego podstaw – to jest określenia czynu, jaki przepadek poprzedza, a owa określoność powinna spełniać takie wymogi, jak czyn zabroniony pod groźbą kary, wskazane w art. 42 Konstytucji.

Drugi warunek dotyczy organu i trybu, w jakim przepadek może zostać orzeczony. Organem tym jest wyłącznie sąd, a tryb zakłada wydanie orzeczenia prawomocnego po przeprowadzeniu postępowania sądowego łącznie z wyczerpaniem toku instancji. Jak zauważa P. Sarnecki, własność nie może być odebrana ani przez akt ustawodawczy, ani przez akt władzy wykonawczej. Niezgodne z art. 46 Konstytucji są wszelkie ustawy, na których podstawie organy administracji publicznej dokonywałyby konfiskaty określonego mienia (obojętnie z jakich powodów)[28]. Wymóg

26 *Ibidem*.
27 *Ibidem*.
28 P. Sarnecki, Komentarz…, *op. cit.*, s. 2.

orzeczenia sądu nie dotyczy jednak wyłącznie organu, jaki ma kompetencje decydowania o sankcji w postaci przepadku rzeczy, w szczególności jego niezawisłości i merytorycznego przygotowania. Postępowanie sądowe oznacza także indywidualne rozpatrzenie sprawy i stwierdzenie znamion tak przedmiotowych (stwierdzenie popełnienia czynu zagrożonego przepadkiem i okoliczności jego popełnienia), jak i podmiotowych – to jest przypisanie sprawcy odpowiedzialności za ten czyn. Artykuł 46 Konstytucji nakazuje zatem, żeby przepadek rzeczy następował wyłącznie w drodze indywidualnego stwierdzenia okoliczności zezwalających ustawą na orzeczenie takiej sankcji oraz z zapewnieniem osobie, której sankcja ma dotyczyć, prawa do udziału i obrony w tym postepowaniu – i gwarantuje to.

Zgodnie z orzecznictwem Trybunału Konstytucyjnego, ocena regulacji prawnych dotyczących prawa własności nie sprowadza się do zagadnienia prawnej dopuszczalności wprowadzania ograniczeń, ale odnosi się do kwestii dochowania konstytucyjnych ram, w jakich podlegające ochronie konstytucyjnej prawo może być ograniczane[29]. Co warte podkreślenia, instytucję przepadku rzeczy, jako kluczową dla zrozumienia własności, TK zasadnie wywodzi z prawa rzymskiego i w związku z nim interpretuje, wskazując, że ochrony prawnej nie mają korzyści majątkowe uzyskane sprzecznie z prawem (*lucrum inhonestum vel illicitum*). Wyraz tej zasady stanowi instytucja przepadku świadczenia, przedmiotu czy korzyści majątkowej[30]. W przypadku sankcji związanych z popieraniem państwa napastniczego jest prawdopodobne, że przepadek rzeczy nie wiąże się z uzyskaniem korzyści majątkowych sprzecznie z prawem, ale z popieraniem państwa napastniczego.

Wnioski

Naszym zdaniem wzgląd na fundamentalnie ingerujący w istotę prawa własności charakter sankcji uniemożliwia zastosowanie wykładni rozszerzającej art. 46 Konstytucji RP[31], tj. wprowadzenia do systemu prawnego w drodze ustawy normy konstytucyjnej. Istota pozbawienia własności wymaga podejmowania aktów stosowania prawa (sankcji) na konstytucyjnie pewnych podstawach i zgodnie ze standardami międzynarodowymi[32]. Szczególnie w tym zakresie należy wyeliminować

29 Wyroki TK z dnia 12 stycznia 1999 r., sygn. akt P 2/98, OTK ZU Nr. 1/1999/2.

30 Wyrok TK z dnia 13 lipca 2004 r., sygn. akt P 20/03,
https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=615&sprawa=3561 (5.06.2022).

31 P. Sarnecki, Komentarz…, *op. cit.*, s. 4.

32 Por. szerzej na temat kryteriów usprawiedliwienia ingerencji w prawo własności S. Jarosz-Żukowska, Własność…, *op. cit.*, s. 54–94. Nie ma tu znaczenia ewentualny fakt akceptacji tych rozwiązań przez większość społeczeństwa, co przy odpowiedniej oprawie medialnej jest możliwe do osiągnięcia, a co może służyć uargumentowaniu działań prawodawcy, nawet tych „o charakterze totalizującym; por A. Breczko, A. Miruć, Totalizujące praktyki we współczesnych demokracjach, „Białostockie Studia Prawnicze" 2016, z. 20B, s. 18 i n.

ryzyko działania wątpliwego konstytucyjnie. Takiej gwarancji nie stwarza uregulowanie przedmiotowej materii na poziomie ustawowym. Po pierwsze, wiąże się z nią ryzyko, że w czasie obowiązywania ustawy Trybunał Konstytucyjny orzeknie, że jest ona niekonstytucyjna, ze wszystkimi tego negatywnymi skutkami, w tym – natury finansowej. W polskim porządku prawnym nie przewiduje się bowiem obligatoryjnej prewencyjnej kontroli ustaw z taką konsekwencją, że wykluczałaby ona kontrolę następczą. Nie bez znaczenia jest też bieżący kontekst sytuacyjny działalności TK i fakt, że część krajowych i zewnętrznych uczestników stosunków politycznych i prawnych kontestuje prawomocność TK i podejmowanych przez niego orzeczeń. Jest to istotny fakt prawny, który – niezależnie od jego prawnej oceny – ma miejsce i jako taki powinien być uwzględniony przez racjonalnego prawodawcę.

Pozbawianie własności w trybie sankcji prawnomiędzynarodowych, jeśli miałoby mieć miejsce, to – ze względu na swój pionierski charakter – wymaga umocowania konstytucyjnego. Jest to konstrukcja prawna, w której nie tylko nie należy udowodnić osobie popełnienia przestępstwa (bo nie o przestępstwo w niej chodzi), ale dowodzi się jedynie związków osoby z działalnością napastniczą państwa, pozwalających przypisać jej odpowiedzialność prawną za naruszenie wartości uznanych przez społeczność międzynarodową (odpowiednio: UE, Polskę) za wymagające ochrony. Bez zmiany normy z art. 46 Konstytucji wprowadzenie w miejsce zamrożenia konfiskaty mienia wymaga spełnienia warunków konstytucyjnych, to jest zastosowania indywidualnego trybu sądowego orzekania przepadku i przypisania konkretnej osobie – właścicielowi odpowiedzialności za czyn zabroniony ustawą.

Pozbawianie własności to materia bezpośrednio wchodząca w skład ustrojowych podstaw państwa i jeśli ma zachodzić, to powinna zostać w nich ujęta. Wątpliwości co do istnienia konstytucyjnej podstawy działania uzasadniają konstytucjonalizację sankcji, ich wkomponowanie w konstytucyjny system mechanizmów praworządności. Konstytucjonalizacja problematyki jest też istotna z punktu widzenia zasad jej wykładni. W prawie konstytucyjnym odróżnia się zasady wykładni regulacji konstytucyjnych od zasad wykładni regulacji ustawowych. Konstytucjonalizacja przepadku rzeczy w związku z toczącym się konfliktem zbrojnym stanowi też zabezpieczenie przed pochopnym znoszeniem własności lub innych praw majątkowych. Warto na koniec podkreślić, że – niezależnie od okoliczności –każde arbitralne i selektywne stosowanie prawa nie może być uznane za usprawiedliwione, a także dopuszczalne. Innymi słowy, istota sankcji – jako instytucji prawa międzynarodowego publicznego – uzasadnia zastosowanie innej konstrukcji prawnej niż przewidziany w art. 46 Konstytucji RP przepadek rzeczy.

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