Beyond the Law :

Legal assessment of the Polish State's activities in response to the humanitarian crisis on the Polish-Belarusian border

Edited by:
Witold Klaus

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ILS PAS

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LEGAL ASSESSMENT OF THE POLISH STATE'S ACTIVITIES IN RESPONSE TO THE HUMANITARIAN CRISIS ON THE POLISH-BELARUSIAN BORDER

edited by Witold Klaus

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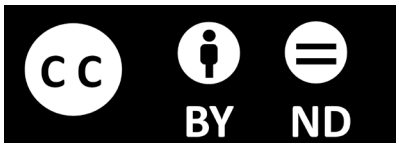

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Dear Readers,

We present to you a study which is a legal commentary to the dramatic events that have been taking place on the Polish–Belarusian border since August 2021. The humanitarian crisis unfolding there, or in fact the Polish government's response to it ,not only does it raisemany moral but also legal questions. In this publication, we attempt to answer the most important of the latter. This selection of issues comes from questions and doubts appearing in press materials, and also from requests made by people helping on the border and acting as part of the Grupa Granica organisation.

As you will see, the issues we address in this publication cover many different areas of law, which often overlap. They concern migration law, constitutional law, administrative law, criminal law, humanitarian law, international law and human rights law. This required assembling an expert team of authors who would be capable of providing answers to these questions – answers that are often far from obvious.

The publication is the product of collaboration between two research centres operating at the Institute of Law Studies of the Polish Academy of Sciences: the Migration Law Research Centre and the Centre for Research on International Criminal Law. The authors represent various research institutions, although most of them are active members of one of the PAS centres.

We have tried to make sure that this study has mainly a practical value. For this reason, our goal was to offer concise and detailed answers to the questions and doubts which have been raised. The articles we are offering to readers are based on the academic expertise of the authors, but we have tried to use relatively clear language and not to cloak our argumentation in convoluted legalese. I hope that we have succeeded in doing so and that this publication will be of use to a wide range of readers who would like to understand how to evaluate the actions of those in power from a legal point of view.

The findings presented in this report refers to the legal status as of 1st May 2022.

Witold Klaus

Magdalena Półtorak

Can an application for international protection be refused and when is it considered to be submitted?

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According to the international law that is binding for Poland, EU law and domestic law, an application for international protection cannot be refused. Pursuant to Art. 56 (2) of the Polish Constitution, a foreigner who seeks protection in the Republic of Poland from persecution may be granted refugee status in accordance with international agreements binding the Republic of Poland. Art. 24 of the Act on granting protection to foreigners within the territory of the Republic of Poland of 13 June 2003 (hereinafter: the Protection Act) states that an application for international protection shall be submitted to the Head of the Office through the commanding officer of the Border Guard division or the commanding officer of the Border Guard post.

This means that any person who, while being at the border of the Republic of Poland, notifies a Border Guard officer performing any official actions towards him or her of the intention to cross the border in order to apply for international protection in Poland should be granted entry into the territory of Poland, and the Border Guard officers are obliged to accept a relevant application from that person.

A contrario, i.e. departing from the obligation to receive an asylum request in a situation in which a person, who is de facto under the Border Guard jurisdiction, declares his or her intention to submit such request constitutes a violation of the law. When a foreigner is placed in a guarded facility, a detention centre for foreigners, a custodial facility or a penitentiary institution, the application for international protection is submitted through the commanding officer of the Border Guard division or the commanding officer of the Border Guard post with territorial jurisdiction over the seat of the guarded facility, detention centre for foreigners, custodial facility or penitentiary institution. However, usually the applications are submitted by foreigners while crossing the border.

Therefore, the key step in commencing the proceedings (and thus in the actions of the Border Guard officer) is establishing the intention to cross the border in order to grant international protection.[1] This intention may be expressed in any form and, as soon as it is expressed, a foreigner should be treated as an applicant within the meaning of the EU regulations. This means that the Border Guard officer's failure to identify the reasons for crossing the border has a direct effect in limiting access to the refugee procedure.[2]

Any person who has lodged an application for international protection (expressed his or her will to do so) should be guaranteed a real opportunity to submit an application as soon as possible. This should be understood as e.g. access to information on the possibility of filing an application in a language which the person understands, use of an interpreter or contact with social organisations for this purpose. The Border Guard officers are under the duty to accept the application and then forward it to the Head of the Office for Foreigners so that it can be examined. It must be stressed that the Border Guard do not have any decision-making powers with regard to assessing the legitimacy of an application for granting international protection while expressing such powers, e.g. in their notes, exceeds their statutory competence.[3]

1 J. Chlebny (ed.) (2020). *Prawo o cudzoziemcach. Komentarz* [Law on Foreigners: Commentary]. Warsaw: C.H. Beck.

2 See also W. Chróścielewski, R. Hauser, J. Chlebny (2019). 'Realizacja prawa do wszczęcia postępowania w sprawie o udzielenie ochrony międzynarodowej podczas przekraczania granicy' [Exercise of the right to initiate an international protection procedure when crossing a border]. In: J. Korczak, K. Sobieralski (eds.). *Jednostka wobec władczej ingerencji organów administracji publicznej. Księga Jubileuszowa dedykowana Profesor Barbarze Adamiak* [An individual in the face of interference from public administration bodies: Jubilee Book dedicated to Professor Barbara Adamiak]. Wrocław: Presscom, pp. 65–79.

3 P. Dąbrowski (2019). 'Niedopuszczalność odmowy wjazdu cudzoziemca na terytorium RP bez wyjaśnienia, czy cudzoziemiec deklaruje wolę ubiegania się o ochronę międzynarodową. Glosa do wyroku Naczelnego Sądu Administracyjnego

If, for reasons attributable to the Border Guard, it is not possible to accept the application on the day on which the person seeking international protection appears in person at the Border Guard post or division, he or she should be informed (in a language which he or she understands) when and where the application will be accepted, and that fact should be recorded in the report. The reasons for non-acceptance of an asylum request may be technical such as lack of an interpreter. The report should contain at least basic information about the Border Guard officer ('who, when, where and what activities were undertaken'), the foreigner ('who and in what capacity was present'), information that the foreigner declared his or her intention to submit an application for international protection ('what was agreed as a result of the activities and how') and additional information on the date and place of accepting the application for international protection. The report should be read out to the foreigner, who should then sign it. The acceptance of the application itself and its registration in the IT system should take place no later than within three working days from the date of receiving the declaration of intention to submit the application. By way of exception, in the situation of a mass influx of foreigners into the territory of Poland, this deadline may be extended to 10 working days. In this context, however, it is essential to mention applications aimed at legalising the stay of Ukrainian citizens under temporary protection. Art. 3 of the Act on Assistance to Citizens of Ukraine stipulates that the application should be submitted no later than 90 days from the date of entry into the territory of the Republic of Poland in any executive body of a municipality on the territory of the Republic of Poland. However, the application registration in the IT system is performed by the Commander-in-Chief of the Border Guard within 30 days from the date on which the municipality authority informs him or her about the application having been submitted.

Importantly, if the applicant is a disabled person, an elderly person, a pregnant woman, a single parent or a person in foster care, a hospital, a detention centre or a penitentiary institution and cannot appear in person at the seat of the Border Guard authority, a written declaration of intention to file an asylum request may be made by mail or by e-mail.

It should also be stressed that foreigners who declared their intention to apply for international protection during border control or who submit such an application (Art. 28 (2) § 2 of the Act on Foreigners) cannot be refused entry, even if they do not meet the entry conditions (i.e. do not have a visa or even a passport). The so-called 'Pushback Act' passed in October 2021, however, attempts to legitimise issuing an order to leave the territory of the Republic of Poland in a situation where a foreigner has 'crossed or attempted to cross the border in violation of the law' or 'has been apprehended immediately after illegally crossing the border that constitutes an external border.' However, these provisions are incompatible with international regulations (see text by "Grażyna Baranowska").

An application for international protection is considered to have been lodged when it is recorded in the register (known as the 'Register on Foreigners') and then forwarded to the Head of the Office for Foreigners.

Pursuant to Art. 30 of the Protection Act, the Border Guard body which is competent to accept the application, i.e. the Border Guard, is obliged to:

- establish the identity of the person to whom the application relates;
- obtain sufficient data and information to fill in the application form, photograph the applicant and take his or her fingerprints;
- determine whether the applicant holds documents entitling him or her to cross the border or is legally present on the territory of the Republic of Poland;
- inform the applicant in writing in a language he or she understands about:
    - » the rules and procedure of granting international protection;
    - » his or her rights and obligations and the consequences of failure to comply with them, as

z dnia 20 września 2018 r., II OSK 1025/18' [Commentary to the judgment of the Supreme Administrative Court of 20 September 2018, II OSK 1025/18]. *Orzecznictwo Sądów Polskich* 3, p. 150.

well as the consequences of explicit and implicit withdrawal of the application for international protection;

- the possibility of consenting to a representative of the Office of the United Nations High Commissioner for Refugees being informed about the course of the proceedings on the application for international protection, reviewing the case file and taking notes and extracts from it;
- organizations that provide assistance to foreigners;
- the scope of social assistance and medical care, and their period of eligibility;
- the possibility to apply for financial assistance and the rules of admission to the centre for foreigners, hereinafter referred to as 'the centre';
- the procedure and principles for providing free legal assistance and the entities providing such assistance;
- the address of the reception centre where he or she is to report within two days from the date of filing the application.

When the application is submitted, the Border Guard is also obliged to provide the assistance of an interpreter and conduct medical examination and necessary sanitary treatment of the body and clothing of the person who is the subject of the application. Importantly, in the case of disabled persons, elderly persons, single parents and pregnant women to whom the application pertains, the Border Guard is also obliged to provide transport to the reception centre, and, in justified cases, food during transport.

Once the above steps have been taken, the application should be immediately entered into the register (the Register on Foreigners). At the same time, the Border Guard authority should conduct an individual interview with the applicant to determine the Member State responsible and send the fingerprints of the person concerned to the EURODAC system. This stage of the procedure ends with forwarding the application to the Head of the Office for Foreigners, which should take place within 48 hours from its submission.

Grażyna Baranowska

Can a state limit the processing of asylum applications (evaluation of the provisions of the so-called Pushback Act)

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Obligation to process asylum applications

The obligation to process refugee applications arises from the Convention Relating to the Status of Refugees, EU law, case law of the European Court of Human Rights and a number of human rights treaties. The Universal Declaration of Human Rights explicitly states that every human being has the right to seek asylum (Art. 14 (1)), with the term *asylum* meaning a situation of seeking international protection.

According to the 1951 Convention Relating to the Status of Refugees (the so-called Geneva Convention), to which Poland has been a party since 1991, all states-parties are obliged to accept applications for international protection. The Convention does not provide for the possibility of its suspension. However, in time of war or other grave and extraordinary circumstances, states have the option to take provisional measures with respect to a particular person before declaring that person a refugee (Art. 9). These measures are, nevertheless, individual and do not affect the procedure for examining an application for international protection.

The obligation to process an application for international protection also results from EU law. The Asylum Procedures Directive (2013/32/EU) sets out the details of the functioning of the asylum system in the European Union and stipulates, for instance, that applicants for international protection must be allowed to remain in an EU member state for the entire procedure. Such a person should also be granted prior entry to the territory of a Member State if he/she expressed a wish to apply for international protection. The provisions of the Schengen Borders Code explicitly state that the issuance of refusals of entry to the territory of any EU state, shall in no way limit the provisions on the right to international protection (Art. 14 (1)). Like the Geneva Convention, the Asylum Procedures Directive also does not allow for an application not to be processed.

It is also important that the Asylum Procedures Directive distinguishes three steps of submitting an application for international protection (Art. 6 (1)-(3)). The first step is making an application, i.e. a declaration of a wish to apply for international protection. This is an informal step, expression of intention, which should unconditionally trigger subsequent steps of the procedure, including entry into the territory and prohibition of expulsion from it. The second step is registration of the application on the appropriate form. This is a formal step, carried out in Poland and in accordance with internal regulations at the relevant Border Guard checkpoint. The form is filled out by Border Guard officers. Collection of fingerprints from the applicants in order to identify them is a part of this procedure. Finally, the third step is lodging the application which means that it is formally registered in relevant national and EU IT systems (for more see text by "Magdalena Półtorak").

The European Convention on Human Rights and its additional protocols do not contain an explicit obligation to receive and examine applications for international protection, but they do contain a prohibition on mass expulsion of aliens (Art. 4 of Protocol No. 4 to the European Convention on Human Rights). When examining complaints concerning this prohibition, the ECtHR refers to the obligation to receive and examine asylum applications submitted. The Court has already repeatedly found a violation of the Convention by Poland in connection with the failure to process applications for international protection submitted at the border with Belarus at Terespol (the cases of *M.K and Others* and *D.A. and Others v. Poland*).

Provisions of the Pushback Act

The so-called Pushback Act[1] entered into force on 25 October 2021. With regard to persons seeking international protection, the Act allows the Head of the Office for Foreigners not to process the application of a person detained immediately after illegally crossing the border. This provision should be regarded as a breach of Poland's international obligations, which do not allow for the suspension of asylum procedures. Whether or not the border was crossed in compliance with the law has no bearing on the procedure for international protection. This follows directly from the provisions of the Geneva Convention, which stipulated from the outset that persons seeking protection may enter other countries illegally and recommends that penalties should not be applied to persons who are unlawfully present on the territory of a State party or who have crossed the border illegally (Art. 31 (1) of the Convention). The Convention specifies that such persons should come directly from the territory where they are in danger (on whether Belarus can be considered a safe country see text by "Marcin Górski").

In theory, the amended provisions of the Pushback Act on granting protection to foreigners within the territory of the Republic of Poland have a similar wording. In order for a particular person's application not to be ignored, he/she must be arriving directly from the territory in which his/her life or freedom was threatened by persecution or in which there was a risk of serious harm. However, for this to happen, the legislature imposed an obligation on these applicants to present credible reasons for their illegal entry into the territory of Poland (newly added art. 33 (1a) of the Act on granting protection to aliens within the territory of the Republic of Poland). Meanwhile, it should be noted that persons arriving from Belarus are at risk of serious harm in that country and there is evidence that they are forced to enter the territory of Poland by Belarusian services, which use practices that could be considered as torture against them. Thus, they would meet the conditions under the Act, as they are unable to reach the border crossing point and apply for international protection there. The introduction of this exception in the Pushback Act therefore does not make the Act compatible with Art. 31 (1) of the Geneva Convention.

1 Act of 14 October 2021 on amending the Act on foreigners and certain other acts, Journal of Laws. 2021, item 1918. The authors use the abbreviation Pushback Act in the text.

Grażyna Baranowska

The legality and permissibility of push-back policies (forcing people back over a border) and assessment of the attempts to legalise it in Poland

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What are push-backs?

Push-backs are an illegal international practice of forcing migrants back to the country from which they crossed the border (usually irregularly) without giving them an opportunity to apply for refugee status and without launching other administrative procedures against them, including return procedures. Usually border guards who are engaged in pushback operations 'do not hear' the wish to apply for international protection, so they do not receive such applications.

International and EU law and the pushback practice

The obligation to examine applications for international protection arises from the 1951 Convention Relating to the Status of Refugees (the Geneva Convention), EU law and a number of human rights agreements to which Poland is a party (see text by "Grażyna Baranowska"). According to the principle of non-refoulement, refugees cannot be expelled or returned to territories where their life or freedom would be likely threatened[1]. Under the push-back procedure, the personal circumstances of asylum seekers are not assessed, thus this procedure contravenes the principle of non-refoulement. There is no doubt that the practice of push-backs also violates Art. 4 of Protocol No. 4 to the European Convention on Human Rights, which prohibits collective expulsions of foreigners. In the last two years, the European Court of Human Rights has twice (*the cases of M.K and others* and *D.A and other v. Poland*) found a breach of the European Convention on Human Rights by Poland in complaints prior to the current crisis, in which it was not possible for persons arriving from Belarus to apply for international protection at the Terespol border crossing.

The practice of push-backs also violates EU law, in particular the so-called Asylum Procedures Directive (2013/32/EU). Under its provisions, persons who apply for international protection should be allowed to remain in an EU Member State for the entire procedure. The directive provides for a simplified procedure and an accelerated procedure, but does not allow, in any situation, for the application not to be processed. Also, if a foreigner does not submit an application for international protection, the push-back practice cannot be used against them. A return procedure must be initiated against each person who has entered the territory of an EU Member State, even if they crossed the border illegally and the EU Member State wishes to deport them. The details of the procedure are regulated by the so-called Return Directive (2008/115/EC). Following this procedure is important because it guarantees that the principle of non-refoulement will not be violated, as it provides for the obligation to determine whether returning the foreigner to the country of origin or another country where they have the right to stay will not entail danger to their life or physical integrity. If expulsion poses a threat to their safety, such a person may not be deported and should be provided with legal residence (under Polish law, this is either humanitarian protection or tolerated stay).

Furthermore, it should be stressed that each procedure of returning a foreigner means that it is carried out in full respect of the law, i.e. at a border crossing point. EU regulations, including the Schengen Bor-

1 Art. 33 of the Geneva Convention, Art. 19 (2) of the EU Charter of Fundamental Rights, as well as in numerous agreements in the field of rights human, see e.g. Art. 3 of the UN Convention Against Torture.

ders Code, do not provide for the possibility to send a foreigner back to the state border and force them to cross it in an unauthorised place. This is explicitly laid down in the second sentence of Art. 13 (1) 'A person who has crossed the border illegally and who is not allowed to stay on the territory of the Member State concerned shall be apprehended and subjected to procedures that meet the requirements of Directive 2008/115/EC,' i.e. the provisions of the Return Directive. Entry can only be refused at a border crossing point (Art. 14 of the Code), but in this case, the state border is not crossed at all. Once the border is crossed, a return procedure has to be initiated to return the foreigner.

Attempts to legalise the practice of push-backs in Poland

As a result of the situation on the Polish-Belarusian border, Polish authorities have made two attempts to legalise push-back practices. The first one is a temporary measure, i.e. an amendment to the executive order of the Minister of Internal Affairs and Administration on regulating or rather limiting border traffic on account of the COVID-19 pandemic. It authorises forcefully returning foreigners who crossed the border with Russia, Belarus or Ukraine after 20 August 2021 and do not belong to any of the categories listed in the Regulation. The second measure is stipulated in the Pushback Act, which came into force on 25 October 2021. According to this law, persons apprehended immediately after they have illegally crossed the border are returned on the basis of a provision that includes a ban on re-entry into the territory of Poland. Currently, the executive order and the Act contain different regulations and are simultaneously in force.

Executive order of the Minister of Internal Affairs and Administration (August 2021)

In August 2021, the Minister of Internal Affairs and Administration amended the Executive order on temporary suspension or restriction of border traffic at specific border crossing points. Due to the COVID-19 pandemic, the original regulation of March 2020 limited border crossings at selected crossing points and against selected categories of persons. However, the rather extensive (and repeatedly supplemented) list of circumstances allowing border crossings never included persons seeking international protection. Foreigners who do not belong to any of the categories of persons listed in the annex to the executive regulation may be granted permission to enter Poland 'in particularly justified cases' (Art. 2 (7)). This permission is issued by the commanding officer of the Border Guard post who, after obtaining the consent of the Commander-in-Chief of the Border Guard, may allow the person concerned to enter the territory of Poland. As this is the only way for persons seeking international protection to enter Poland, the regulation is inconsistent with Polish and international law: asylum seekers should not have to obtain additional entry permits.

The August 2021 amendment to the exective order further provides for the right to send back to the state border persons who do not fall into any of the categories listed above, and therefore also those seeking international protection (Art. 1.2b). This forced return does not take place at a border crossing point, but is instead an illegal crossing from Poland. Importantly, migrants are forced back not only at the border crossing point where border traffic has been suspended or restricted, but also outside the territory of the border crossing point. This means that any person on the territory of Poland who entered the country from Russia, Belarus or Ukraine and does not belong to any of the categories listed in the Regulation, is returned to the Polish border.

The October 2021 Pushback Act

At the same time as the executive order was passed (20 August 2021), the government filed a bill legalising push-back practices (23 August 2021), but with slightly different provisions. This law became effective on 25 October 2021.

According to the Act on amending the Act on foreigners and some other acts, persons apprehended immediately after they have illegally crossed the border are ordered to leave the territory of Poland. The act does not specify the place where the order to leave the territory of Poland is to be carried out, but under the law this can only be done at a border crossing point. In practice, however, the Border Guard forces migrants to cross the Polish border in other places, which is in violation of law. The grounds for these actions is a decision issued by the commanding officer of the Border Guard post with jurisdiction over the place where the migrant crossed the border, ordering them to leave the territory of Poland and banning them from re-entering the Schengen territory, including a specification of this ban. The decision may be appealed against to the Commander-in-Chief of the Border Guard, but the appeal does not suspend the execution of the decision (added Art. 303^1 (9a) and 303b of the Aliens Act). The Act thus covers a smaller group of persons than the executive order, as it applies only to those detained immediately after they have crossed the border. At the same time, the Act, unlike the executive order, which is intended to respond to the challenges of the COVID-19 pandemic, is not a temporary measure. The Act also allows for applications for international protection to not be processed (see text by "Magdalena Półtorak").

Katarzyna Strąk

The order to leave the territory of the Republic of Poland in light of Directive 2008/115 (the Return Directive)

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To address illegal border crossings, the Act of 14 October 2021 on amending the Act on foreigners and some other acts (the Pushback Act) introduced a new instrument into the Polish legislation, namely an order to leave the territory of the Republic of Poland. According to the Border Guard, 1860 such orders were issued to third-country nationals within a month (November 2021). The aim of this analysis is to evaluate the admissibility of using this instrument in light of the Return Directive.

Pursuant to the amended wording of Art. 303(1)(9a) and 303b of the Act on Foreigners, if a person was apprehended immediately after illegally crossing the border, which is an external EU border within the meaning of Art. 2 (2) of the Schengen Borders Code, the competent commanding officer of the Border Guard post shall draw up a report on border crossing and issue an order for the foreigner (third-country national) to leave the territory of the Republic of Poland. The order to leave the territory of the Republic of Poland specifies the obligation to exit the territory of the Republic of Poland and the prohibition of re-entry into the territory of the Republic of Poland (re-entry ban) and other Schengen States as well as the period of the re-entry ban, which may vary from six months to three years.

The order to leave the territory of the Republic of Poland may be appealed against to the Commander in Chief of the Border Guard, which does not, however, suspend the enforcement of the order. Furthermore, the data of a foreigner who has been ordered to leave the territory of the Republic of Poland are entered on the list of foreigners whose stay on the territory of the Republic of Poland is undesirable. The order is passed on to the Head of the Office for Foreigners, who transfers the foreigner's data stored in the register to the Schengen Information System for the purpose of refusing entry.

The explanatory memorandum to the draft law states that the new procedure is intended to streamline and accelerate the return procedures. Therefore, in reality, the new procedure pertains to those who are physically present in the territory of the Republic of Poland without a legal title to stay there. This means that the situation of these persons should first be examined by reference to the Return Directive and the return procedure laid down therein, including, alternatively, with reference to the exceptions stipulated by the Directive itself. This conclusion is also supported by Art. 13 (1) of the Schengen Borders Code, pursuant to which a person who has crossed the border illegally and who has no right to stay on the territory of the Member State shall be apprehended and made subject to procedures respecting Directive 2008/115. However, the explanatory memorandum makes no reference to that directive or the Schengen Borders Code.

According to Art. 2 (1) of the Return Directive, in conjunction with Art. 3 § 2), it applies to third-country nationals who are staying illegally on the territory of a Member State, whereby illegal stay is defined as presence on the territory of a Member State of a third-country national who does not fulfil or no longer fulfils the conditions for entry into the Member State as now set out in Art. 6 of the Schengen Borders Code and who has thus in fact crossed an external border in breach of the law. For such persons, the Directive, in Art. 6 (1) provides that in the first place a return decision shall be issued to persons staying illegally, under a fair and transparent procedure that guarantees the inviolability of a number of fundamental rights. It should be noted that Directive 2008/115 should be interpreted as precluding the use of any legal fiction whereby a Member State considers that a third-country national is not present on the territory of that Member State if he or she is in a special transit zone or border area set up by that Member State, meaning that the Member State may apply special national provisions to such persons.

The Directive stipulates that certain exceptions may apply as regards the limitation of who falls within the Directive. From the point of view of this analysis, the relevant exception is set out in Art. 2 (2) (a), labelled 'border cases'. According to this provision, Member States may decide not to apply the Directive to, inter alia, third-country nationals who are apprehended or intercepted by the competent authorities in connection with the illegal crossing of the external border of those States and who have not subsequently obtained an authorisation or a right to stay in that State. Moreover, 'frontline' Member States are even encouraged by the European Commission to use this exception in situations of significant migratory pressure, 'when this can provide for more effective procedures'. Indeed, the purpose of this provision, as interpreted by the Court of Justice of the EU in the *Affum* ruling, is to permit Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the Directive, in order to be able to remove more swiftly third-country nationals who have been intercepted when crossing those borders. In other words, according to the *Arib* judgment, a Member State may be justified in failing to follow all the procedural stages prescribed by the Return Directive, in order to speed up the return of third-country nationals who are unlawfully present on the territory of that Member State to a third country by immediately returning those persons to the external border that they have crossed illegally.

Thus, although the Return Directive allows for third country nationals apprehended in connection with the unlawful crossing of an external border to be excluded from its application, the possibility for Member States to invoke the above exception cannot be made in a manner that disregards some of the criteria set out in the Directive itself. Such provisions must respect the general principles of international law and the fundamental rights of third-country nationals, as well as the minimum guarantees foreseen in Art. 4 (4) of the Directive, namely to ensure a sufficient level of protection for third-country nationals excluded from the scope of the Directive which is no less favourable than the level of protection set out in the Directive's provisions on: limitations on the use of coercive measures, postponement of removal, emergency health care and necessary medical treatment in case of illness as well as detention conditions, and respect for the principle of non-refoulement. Moreover, it follows from the European Commission's *Return Handbook* that the decision of a Member State to make use of the derogation and not to apply the Directive to 'border cases' must be made clear, in advance, in the national implementing legislation, otherwise it can develop no legal effect. There are no specific formal requirements in this respect, however, it is important that it should be clear from the national legislation – directly or indirectly – whether and to what extent the Member State applies this derogation.

However, nowhere in the explanatory memorandum to the Pushback Act is the Return Directive explicitly cited, nor are the derogations to its application. Instead, the lawmakers call the new procedure 'proceedings on crossing the border in violation of the law' (which could be considered an indirect reference to the term 'border cases', if not for the fact that it is an informal term), specifying that its objective is mainly to streamline and accelerate the return procedures. The introduction of an additional item to the provision of Art. 303 of the Act on Foreigners which stipulates that 'proceedings concerning the obligation to return shall not be initiated' is also not a crucial factor in terms of assessing whether Art. 2 (2) (a) of the Return Directive has been correctly implemented, as Art. 303 of the Act regulates the prerequisites for not initiating such proceedings. Moreover, if there are doubts as to whether the prerequisites indicated in this provision are met at the stage prior to the proceedings, the authority should initiate them and verify the circumstances of the case in the investigation procedure. This argument is important in light of the vague concepts used in the legislation, in particular the concept of 'apprehended immediately after crossing the border'. It is conceivable that this will refer to persons wishing to get through the wire fences currently erected on the border, crossing the Bug river or climbing the wall after it has been built.

During the application of the amended version of the Act on Foreigners, it may turn out that the boundaries between the provision of Art. 303^1 (9a) and the provision of Art. 302^1 (10), according to which a foreigner who has illegally crossed or attempted to cross the border but the circumstances referred to in Art. 303^1 (9a) do not apply, will be blurred. Under Art. 302^1 (10) – but also in other circumstances listed in Art. 302 – a return decision is issued (a third-country national is subject to the return procedure in accordance with the standards set out in the Return Directive). Moreover, there are reservations about the fact that the wording of the Pushback Act does not at any point refer explicitly to the special minimum guarantees, listed in Art. 4 (4) of the Directive, applicable to 'border cases'. It is also alarming that it is in fact unclear how the enforcement of 'leaving the territory of the Republic of Poland' is carried out in practice against third-country nationals. The enforcement practice of the Act on Foreigners is unknown due to the introduction of – firstly – a state of emergency and now – a prohibition to be present (currently till 30 June 2022) in the area along the Polish-Belarusian border, to which access is extremely restricted. The frequent press conferences of the spokeswoman of the Border Guard (or information provided in posts on social networks, e.g. Twitter or Facebook), which provide basic statistics on the number of attempts to illegally cross the border and the number of orders to leave the territory of the Republic of Poland issued, are not enough to dispel these doubts. The orders to leave the territory of the Republic of Poland only refer to "bringing a person to the state border line".

In conclusion, the Return Directive provides for the possibility of limiting the rights of third-country nationals who are de facto present on the territory of a Member State by having recourse to the exception laid down in Art. 2 (2) (a). The form of termination of the stay of such persons on the territory of the Member State concerned (form and content of the order, as well as the legal remedies) are governed by national law. However, there are serious doubts as to the manner in which this exception was introduced into the Polish legal order, to the possible inaccuracy as to whether and to what extent the Republic of Poland applies this derogation from the Return Directive, as well as to the lack of indication as to whether and how the minimum guarantees under Art. 4 (4) of the Directive are respected.

Marcin Górski

Is deportation to Belarus legal, or can Belarus be considered a safe third country?

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As the Court of Justice of the EU ruled in the case of *Shiraz Baig Mirza* (§ 42), 'in the common European asylum system of which the Dublin III Regulation and Directive 2013/32 form an integral part, the concept of a safe third country may be applied by all the Member States'. According to Art. 38 of the Asylum Procedures Directive on common procedures for granting and withdrawing international protection, Member States may apply the safe third country concept only if the competent authorities (of the Member State) have satisfied themselves that the applicant for international protection will be treated in the particular third country to which they would be returned in accordance with the following principles:

a) that person's life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
b) there is no risk of suffering serious harm as defined in the Qualification Directive (2011/95/EU);
c) the principle of non-refoulement in accordance with the Geneva Convention is respected;
d) the prohibition of refoulement, laid down in international law, is respected when it contradicts the right to freedom from torture and cruel, inhuman or degrading treatment;
e) there is a possibility of requesting refugee status and, if such status is granted, of obtaining protection in accordance with the provisions of the Geneva Convention.
f) Only if all the above conditions are met, would there be grounds for deportation.

In the case of Belarus, not only did the Polish authorities never ascertain, as required by Art. 38 (1) of the Procedural Directive, whether the principles set out in that provision had been complied with, but it is also a well-known fact that those conditions have not been satisfied.

First, at a systemic level, Belarus does not guarantee the protection of the life and liberty of individuals against threats on account of nationality, membership of certain social groups or political opinion.

Second, there is a real risk of 'serious harm' within the meaning of Art. 15 of the Qualification Directive. The Directive regards as such, for example, the imposition and carrying out of the death penalty and torture and inhuman or degrading treatment or punishment of an applicant in his or her country of origin. Belarus is the last European country that not only provides for the death penalty in its legislation, but also practices it. Furthermore, the catalogue of acts for which the law permits the death penalty is very broad, and includes such acts as sabotage, murder of a police officer, plotting to overthrow the regime and acts of terrorism. It doesn't take much imagination to understand how easily such charges can be brought by the politically controlled apparatus of the Belarusian state and how easily they can lead to a death sentence under these circumstances. Moreover, as Belarus does not participate in the European Convention on Human Rights (ECHR), there are no particular barriers for the Belarusian authorities from deporting foreigners to countries where they may face deprivation of life or be subjected to torture or inhuman or degrading treatment or punishment.

Thirdly, Belarus is not a party to the Geneva Convention, so it does not offer proper protection to those applying for refugee status. And although it has internal national regulations which provide for this form of protection, given the fact that Belarus cannot be considered a state based on the rule of law, this protection may be illusory and revoked at any time.

The European Court of Human Rights (ECtHR) has already explained on a number of occasions, in the context of Polish cases involving foreigners who were attempting to cross the Polish-Belarusian border,

that there are reasonable grounds for assuming that applications for international protection lodged in Belarus, e.g. as a consequence of deportation of a foreigner to Belarus, may not be accepted. Looking at some judgments of the ECtHR in the cases of foreigners attempting to cross the Polish-Belarusian border, there are good reasons to assume that applications for international protection lodged in Belarus, e.g. as a consequence of deporting a foreigner to that country, may not be examined fairly, and thus foreigners risk being deported to their countries of origin, where they will be exposed to treatment contrary to Art. 3 of the ECHR (such as torture or inhuman or degrading treatment). Some examples of ECtHR judgments in this area include *M.K. and Others v. Poland* (§ 185 of the judgment), *D.A. and Others v. Poland* (§ 64 of the judgment) or *M.A and Others v. Lithuania* (§ 105, 113 of the judgment).

Thus, leaving aside the assessment of the other conditions set out in Art. 38 of the Procedural Directive, the failure to satisfy those three principles alone renders deportation inadmissible.

Karolina Wierczyńska

The use of 'Push-back policies' by Polish officers from the perspective of the provisions of the Rome Statute of the International Criminal Court

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In assessing the conduct of Polish officers in the context of their push-back operations, or deportation, meaning the process of forcing back to Belarus persons who, in the opinion of the Polish authorities, have illegally crossed the border, I will confine myself to one crime listed in Art. 5 of the Statute of the International Criminal Court (hereinafter ICC) and defined in Art. 7 thereof, namely the crime against humanity. Given the absence of genocidal intent, the assessment will not address whether the conditions for the crime of genocide, as defined in Art. 6 of the ICC Statute, are met. Furthermore, due to the absence of an armed conflict on the territory of Poland, the assessment will not address war crimes or aggression, as we are not dealing so far with acts that could be qualified as aggression. For such an evaluation to be possible, acts of aggression would have to occur which, according to Art. 8 bis of the Statute, would 'by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations'. According to the Understandings regarding the amendment to the Statute, these conditions must be met contemporaneously and must be sufficiently grave to justify the indisputability of such an assessment. The incidents at the border that are currently taking place do not meet these prerequisites to the extent that would justify describing them as acts of aggression.

It is also worth noting that Belarus (whose officers are responsible for the incidents at the border) is not a party to the ICC Statute. Thus, for it to fall under the jurisdiction of the International Criminal Court, the only possibility is for the UN Security Council to refer the case to it (on the basis of Art. 13 (b)). However, this is difficult to envisage in a situation where Russia is a permanent member of that body.

According to the definition in the ICC Statute, crimes against humanity must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Such acts include murder, extermination, torture, as well as 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' (Art. 7 (1) (k)). For an act to be considered as an attack against a civilian population, a series of actions must be used in support of state policy. However, in order for the Court to address the reported crimes against humanity, they must not only be systematic or widespread, but also the case must be admissible and the Court has to assess whether to prosecute given case. (Art. 17 of the ICC Statute). The admissibility of a case depends on whether the State has taken any action to punish the perpetrators of the alleged crimes, and whether the gravity of the case justifies further action by the Court. The case cannot therefore concern marginal issues and crimes. The pushback policy is a plan organised by the Polish state (by its officers, by order of the executive authorities and with the consent of the legislative authorities) to forcibly remove from the territory of Poland persons who, according to the government, have illegally crossed the border. In the assessment of the actions of the State, however, it is irrelevant whether these persons are admitted to the asylum procedure or whether they have crossed the border legally or illegally. If they are on Polish territory, the state is under the obligation to provide them with protection and assistance if they are in a condition that could endanger their life or health.

However, these migrants are not given the right to apply for asylum despite the fact that some of them are refugees who were forced to flee from their previous place of residence (e.g. Afghanistan). These people are being taken to the Polish border and forced to cross it illegally into Belarus. The Polish authorities not

only fail to provide them with the opportunity to request international protection, but also fail to provide assistance, and they even forcibly remove them from hospitals. These measures have also been applied to mothers with children or people who are ill. As a result of this policy, nine deaths have already been officially confirmed (data as of 28 December 2021). The deaths were caused by low temperatures, starvation, hypothermia, lack of access to medicines and failure to receive adequate medical assistance in a timely manner.

The Polish authorities are not granting aid to the sick and the hypothermic migrants, nor are they allowing other entities (humanitarian organisations or medical services) to administer such aid, by preventing their entry into the zone covered by the state of emergency. These are widespread and systematic actions, consistently directed against the civilian population, leading to death (from hunger, hypothermia, and failure to receive assistance) and physical harm. These actions are a means of implementing a deliberate state policy designed to remove these people from the territory of Poland. The persistence, scale and systematic nature of these operations is also evidenced by the fact that the Polish authorities had already committed violations in similar circumstances. The judgments of the European Court of Human Rights have already confirmed this twice, finding that Poland was in breach of the European Convention on Human Rights (ECHR) by making it impossible to apply for international protection and by carrying out collective expulsions from its territory.

In *M.K and Others v. Poland*, the Court addressed the illegality of collective expulsions as contrary to the provisions of Art. 3 of the ECHR and Art. 4 of Protocol IV to the Convention, describing the Polish expulsion policy as a wider state policy and thus acknowledging its systemic character (§ 208). Infringements of the same provisions for the same reasons were also confirmed by the Court in the judgment *D.A and Others v. Poland* Undoubtedly, we can classify the above-described acts as a crime against humanity. Their nature, their widespread and extensive character and the participation of state officials who knowingly and intentionally carry out the crime substantiate this.

As for the admissibility of the case before the Court, it is certainly not a marginal case, as push-backs affect hundreds of people every day. We already know of several deaths on the Polish–Belarusian border. However, the scale of physical violations cannot be established due to the limited possibility of reaching the expelled persons. Moreover, the state does not conduct any investigation, and the behaviour of its officers towards those trying to cross the border is not frowned upon by the authorities at all. As indicated above, the opposite process is taking place: These behaviours are part of a planned state policy. Additionally, individuals who make critical comments about the actions of border guards are publicly condemned, accused of damaging the reputation of Polish soldiers and threatened with criminal prosecution.

By implementing such a policy, the state aims mainly to remove these people from Poland. The scale of the problem and the simultaneous lack of reaction on the part of the authorities so as to punish those guilty of such a policy means that these actions may be judged as crimes against humanity. Poland has been a party to the ICC Statute since 2002. There is, therefore, no obstacle to informing the Court of the scale of the violations on the Polish-Belarusian border by means of referrals. As a result, the ICC Prosecutor may, but need not, as he or she will assess the interests of justice, initiate a preliminary examination of the push-back situation.

Marcin Górski

Lawfulness of the introduction of a state of emergency and the limitations on civil rights under it, including restriction on movement

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Under Art. 228 § 1 of the Constitution of the Republic of Poland, the introduction of t state of emergency is permissible only in situations of special threat, if the ordinary constitutional measures are insufficient. Furthermore, the declaration of a state of emergency is admissible only in the event of a threat to the constitutional system of the state, security of citizens or public order (Art. 230 § 1 of the Constitution). The prerequisites specified in both these provisions must be met jointly for the introduction of a state of emergency to be permissible, and therefore legal.

A state of emergency, pursuant to Art. 230 (1) and (2) of the Constitution, may be imposed once, for a period no longer than 90 days, and then extended only once for a maximum of 60 days.

Art. 233 (1) of the Constitution identifies the fundamental freedoms and rights that may not be restricted when a state of emergency is imposed. The enactment of limitations to these rights and freedoms is allowed only to the extent defined by law (in accordance with Art. 228 § 3 of the Constitution).

The Act on State of Emergency regulates the scope of restrictions on freedoms and human and civil rights in Chapter 3 (Art. 15–21). In accordance with Art. 18^2 (1) and (2) of the same Act, 'orders or prohibitions may be introduced during a state of emergency' with respect to, inter alia, 'staying or leaving designated places, facilities and areas at a designated time' and 'obtaining permission from public administration bodies to change the place of permanent and temporary residence'.

The Ordinance of the President of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency in some parts of the Podlaskie Voivodeship and some parts of the Lubelskie Voivodeship stipulates in § 2 (4) that 'during the state of emergency, ... a ban is introduced on staying in designated places, facilities and areas located in the territory covered by the state of emergency at a designated time'.

Thus, it is apparent at first glance that contrary to Art. 18^2 (1) of the Act on State of Emergency in conjunction with Art. 228 (3) of the Polish Constitution, § 2 (4) of the Presidential Ordinance of 2 September 2021 did not specify either the 'designated places, facilities and areas' that the ban was to concern or the 'designated time' to which the ban was to apply. Let us add right away that the problem is not the duration of the state of emergency, as this is defined on the basis of Art. 230 of the Constitution and Art. 3 (2) of the Act on State of Emergency, and not on the basis of Art. 18 of the Act on State of Emergency. Nor is it a matter of the area in which the state of emergency is in force, for that too is defined on the basis of Art. 3 of the State of Emergency Act and not on the basis of Art. 18 thereof.

It can hardly be assumed in this case that this omission is a mere legislative shortcoming (if only an extreme one). Even the current government is able to avoid such an obvious mistake. It should therefore be concluded that the Polish political authorities deliberately decided to determine the territorial and temporal scope of the ban in such an indefinite (and unconstitutional) manner, in order to cause a chilling effect.

If the services responsible for enforcing the law in Poland acted with the same basic efficiency as such services do in civilised countries, then the prohibition 'specified' in § 2 (4) of the Ordinance of 2 September 2021 would not be enforced at all. This is because it is impossible to enforce a ban which does not specify where and when one is not allowed to stay. It is a 'blank check' prohibition. This enforcement, which de facto and *contra legem* takes place, is therefore based on the officers of the state conjecturing what the legislators wished to express. Such guessing as to the content of the prohibition, which constitutes an infringe-

ment of constitutional rights and freedoms, has the features of the prohibited act of an officer exceeding his or her powers (Art. 231 § 1 of the Penal Code). This is precisely what is prohibited by the principle of legalism, which is the cornerstone of this criminal provision.

It cannot be ruled out that the President of the Republic of Poland, by issuing such a grossly flawed regulation, was attempting to escape responsibility for enforcing the stay ban with measures of direct coercion by shifting this responsibility to officers of the Border Guard or the Polish Army. The practices of recent years clearly raise such a suspicion.

If legal sanctions are imposed for the violation of the said restrictions, it is the duty of the courts to refuse to apply the provisions of the ordinance that are contrary to the law. In practice, this means that the defendants must be acquitted of the charges against them. Provided that the courts act correctly, the only result of the regulation would be the chilling effect it was intended to produce. It should be assumed that this was also the intention of the lawmaker, as it is unlikely that the lawmaker was not aware of such an obvious flaw in the regulation.

At this point we should also refer to the Act of 17 November 2021 amending the Act on State Border Protection and some other acts. It added a regulation to the Act on State Border Protection, which enables the minister of internal affairs to impose, by means of a regulation, 'a temporary ban on staying in a specified area in the border zone adjacent to the state border constituting an external border within the meaning of the Schengen Borders Code' (Art. 12a of the Law on State Border Protection). Under the amendment, Art. 18d has also been added to the Act, according to which the violation of a residence ban introduced by a ministerial decree is a misdemeanour punishable by arrest or a fine. Pursuant to Art. 12a of the aforementioned Act, the Ministry of Internal Affairs and Administration issued an ordinance of 30 November 2021 on the introduction of a temporary ban on staying in a specified area in the border zone adjacent to the state border with the Republic of Belarus, which introduces a temporary ban on staying in 183 administrative districts of certain communes located within the borders of the Lubelskie and Podlaskie provinces.

The essence of such a regulation is an unconstitutional 'prolongation' of the state of emergency beyond the constitutional time limit (Art. 230 § 2 of the Constitution of the Republic of Poland) through ignoring the constitutional ban on the use of an urgent procedure with respect to acts governing the political system and jurisdiction of public authorities (Art. 123 § 1 of the Constitution of the Republic of Poland). This regulation is therefore unconstitutional both in terms of procedure (because it was passed in violation of Art. 123 § 1 of the Constitution) and substance (because it violates Art. 230 § 2 of the Constitution of the Republic of Poland, as it introduces an extension of the state of emergency beyond the constitutional time limit that is contrary to this provision). Moreover, the regulation in question also violates Art. 92 § 1 in conjunction with Art. 230 § 1 of the Constitution, as the provision of the act authorises the prolongation of the state of emergency by a body other than the one indicated in the Constitution (i.e. other than the President of the Republic of Poland). Finally, the said regulation is in breach of Art. 31 (3) and Art. 52 (3) of the Constitution of the Republic of Poland, in that it mandates the limitation of the constitutional freedom of movement by way of a regulation, whereas such limitations may only be introduced by way of a law. The Ordinance of the Ministry of Internal Affairs and Administration of 30 November 2021 is, therefore, also unconstitutional, being, as it were, an extension of the same substantive defects that can be found in the legal basis for its enactment.

In practice, this means that state officials are obliged, on pain of criminal liability under Art. 231 of the Criminal Code, to refrain from holding possible violators of the temporary stay ban liable for offences. The courts, on the other hand, are under an obligation to acquit such violators of the charges of infringement of the temporary restraining order, since the charges would have to be based on a breach of a regulation, the application of which is inadmissible for reasons of its unconstitutionality. Let us add here that it is

the MIAA regulation itself, and not 'merely' the legislative authorisation that is unconstitutional, which relieves the court of any possible dilemmas in the application of the refusal to apply the unconstitutional statutory provision. To sum up, persons staying in the area covered by the temporary stay ban discussed here do so in a perfectly legal manner.

Patrycja Grzebyk

Do humanitarian organisations, such as the Polish Red Cross, have the right to operate in a state of emergency?

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The state of emergency declared by the ordinance of the President of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency in parts of the Podlaskie Voivodeship and parts of the Lubelskie Voivodeship (and later extended by the ordinance of the President of the Republic of Poland of 1 October 2021) imposed a 'ban on staying at designated times in designated places, facilities and sites located in the area covered by the state of emergency' (§ 2 (4)). This restriction prevents humanitarian organisations from working effectively in the area under the state of emergency, as the employees of these organisations are unable to reach those in need without the consent of the authorities.

The situation when goods necessary for humanitarian aid (food, clothes, medicines, tents, and blankets, etc.) are handed over to the local population or local authorities to be distributed is not acceptable as humanitarian aid is not supposed to be the domain of activists, people of good will, but of professionals who know the rules of providing such aid (the principles of humanity, neutrality, impartiality and independence) and are able to correctly assess the needs of beneficiaries, guarantee the quality of goods delivered, as well as comply with the principles of transparency of aid and accountability for possible abuse towards the donors or beneficiaries. The Polish government has so far promoted professionalising humanitarian aid, e.g. by organising the Warsaw Humanitarian Expo or by emphasising humanitarian issues during its participation in the work of the Security Council from 2018 to 2019 (Poland's promotion slogans were Solidarity-Responsibility-Engagement), as well as by taking part in the adoption of a number of documents referred to below.

The key document for providing humanitarian assistance within the EU and by the EU and its states is the Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, which was signed by the Polish government. The statement reads that:

- 'Humanitarian aid is a fundamental expression of the universal value of solidarity between people and a moral imperative.'
- 'Humanitarian aid should be transparently allocated on the basis of identified needs and the degree of vulnerability. This means that aid recipients should be identified based on objectively verifiable criteria and that aid should be delivered in such a way that defined priority needs are matched by adequate funds.'
- 'Humanitarian action is a collective responsibility at an international level, involving many different organisations, governments, local communities and individuals.'

Importantly, it does not matter what the cause of the humanitarian crisis is: whether it is caused by a natural disaster or, for example, by deliberate human action. If there is a threat to life or health, aid should be delivered. The right to humanitarian assistance can be derived from fundamental human rights such as the right to life, the right to food, the right to housing, the right to clothing, and the right to health care, which are listed respectively in Art. 6 of the International Covenant on Civil and Political Rights and Art. 11 and 12 of the International Covenant on Social, Economic and Cultural Rights. The right to humanitarian assistance is explicitly mentioned in Art. 22 of the Convention on the Rights of the Child.

It states that:

1. 'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.'

2. 'For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.'

Humanitarian assistance is also mentioned in Art. 11 of the Convention on the Rights of Persons with Disabilities: 'States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'

The articles on the protection of persons affected by disasters adopted in 2016 by the International Law Commission (ILC), to which Poland did not raise any objections, stipulate that it is the affected country (in this case affected by "disaster" provoked by the Belarusian authorities) that has the main obligation to provide protection and disaster relief assistance. Indeed, it is the state that decides who should provide this assistance, but when the state is unwilling or unable to fulfil this obligation, it has the duty (sic!) to ask for help from external actors (Art. 11), and any humanitarian organisation (assisting actors) may offer its assistance (Art. 12). Simultaneously, the state may not arbitrarily withhold consent to external assistance (Art. 13). The articles of the ILC make it clear that the state must facilitate aid, not obstruct it.

The Guidelines for Improving National Response and International Disaster Relief adopted by the International Conference of the Red Cross and Red Crescent (ICRC), in which Poland participated, convey a similar message.

Components of the International Red Cross Movement, including the Polish Red Cross, have a special role in relief efforts. They are mentioned in almost every humanitarian document adopted by the UN (including the International Law Commission) and the EU.

The Polish Red Cross operates under the Polish Red Cross Act, according to which it is a humanitarian organisation with a special status and special (statutory) privileges to help it organise humanitarian activities both in the territory of Poland and abroad. Art. 1 of the Act clearly states that the tasks of the Polish Red Cross include organising and carrying out humanitarian work, including activities for the protection of human health and life, and providing assistance in all circumstances when these goods are endangered. Thus, the Polish Red Cross – defined in Art. 2 of the Act as an organisation providing voluntary assistance to the social health service and health service of the Armed Forces – has the possibility to grant aid to all persons in need to the extent of its human, material and financial capabilities. In turn, the Polish state should support, or at least not interfere with, the work of the Polish Red Cross in this respect.

In conclusion, humanitarian organisations (including the Polish Red Cross) have the right to offer humanitarian assistance also in areas under the state of emergency. However, they may provide this assistance only with the consent of the State affected by a particular humanitarian disaster/crisis that is Poland (as regards the territory of Poland) or Belarus (as regards the territory of Belarus). However, Polish authorities cannot arbitrarily deny humanitarian organisations access to people affected by a crisis. When it comes to

the Polish Red Cross, since its activities are regulated by law and its role in the territory of the Republic of Poland is recognised, it may be presumed that its employees have the right to provide humanitarian assistance in areas covered by the state of emergency, and only an explicit exemption in Act on the state of emergency could overturn such a presumption. At present, therefore, there is a contradiction between the provisions of the Polish Red Cross Act, which recognises its special status, and the provisions of the Act on the state of emergency, which states in Art. 15, inter alia, that restrictions on human rights apply to any legal entity that has its registered office or conducts activities in the area covered by the state of emergency. It is not clear which provisions of the Act should have a *lex specialis* status in a situation where a state of emergency is declared in the event of a humanitarian crisis, even if the main justification for its introduction is a constitutional premise, i.e. a threat to the security of citizens or to public order.

The failure to provide humanitarian assistance or the obstruction of humanitarian assistance from other humanitarian actors, including in particular all components of the International Red Cross and Red Crescent Movement, implies responsibility on the part of Polish state as it violates explicit treaty and customary norms.

Witold Kuźnicki

Operations of the Polish Armed Forces during the ongoing crisis

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Present state of affairs

Introduction

The military is one of the foundations of state security. In the Polish legal order, in accordance with many laws, such as the Act on State of Emergency or the Police Act, it is the last-resort tool of the state to protect internal security. As the crisis on the Polish–Belarusian border in July 2021 escalated, troops and subdivisions of the Polish Armed Forces were sent to assist the Border Guard. Soldiers, in particular those from 16th and 18th Mechanized Divisions and from the Territorial Defence Forces, were assigned a number of policing and reconnaissance tasks. The clearly defined tasks of soldiers, however, lacked a clear and publicly available legal basis for their actions.

Background of the current situation: the use of the military in the fight against the pandemic

The current operations of the RP Armed Forces are an extension of the domestic engagement of the army in 2020. During the first phase of the battle against the COVID-19 pandemic, the RP Armed Forces were used to carry out domestic policing operations. In mid-March 2020, after the borders were almost fully closed, including those with other European Union countries, soldiers were used to support the activities of other services: the Police and Border Guards. This was done on the basis of two ordinances of the Minister of National Defense, dated 14 and 18 March, respectively, and two ordinances of the President of Poland, dated 15 and 18 March, respectively, which approved these ordinances. Given the scale of the challenges, the support was extensive. The tasks included supporting the Border Guard in border protection, patrolling the streets, providing food support to isolated citizens, and supporting health services.

After almost three months of supporting border control and in view of lifting the control on the internal borders of the European Union again, on 12 June 2020 the Minister of National Defence issued an ordinance revoking an earlier ordinance on the units and subunits of the Polish Armed Forces supporting the Border Guard. From that time until the outbreak of the humanitarian crisis on the Polish–Belarusian border (called an operation or even a hybrid war by Polish government officials), the Border Guard conducted its operations without the assistance of military personnel.

Case Study: An Incident Involving the Military and Civilians

In November 2021, there were a number of high profile media incidents involving military personnel that exposed the wider public to the involvement of the Polish Armed Forces in operations against migrants. After one of these incidents, on 26 November 2021, which involved soldiers of the Territorial Defence Forces (TDF), the TDF Command issued a statement citing the legal basis for their actions. The wording of this statement was changed twice within three days.

In the first version of the press release, the WOT Command cited an undated presidential ordinance on support of the armed forces as the legal basis for their actions. In the second version, it cited an ordinance dated 15 March 2020. In the final version, however, the order was said to be a 'classified document'. Each of these statements had the same date of issuance.

Legal Status

The legal basis for the actions of the military assisting the Border Guard

The Armed Forces of the Republic of Poland, except for the Military Gendarmerie (hereinafter referred to as MG), do not hold independent powers to carry out law and order functions. The authority of the Military Gendarmerie is limited exclusively to the list of persons set forth in Art. 3 §2 of the Act on Military Gendarmerie and Military Law Enforcement, in particular soldiers on active military duty or persons who are not soldiers, if they collaborate with soldiers on active military duty in committing an act prohibited by law under penalty. The MG has no autonomous competence with respect to civilians who are not civilian employees of military institutions or do not collaborate with such persons. Military divisions and subdivisions may obtain broader authority to maintain public order in the country only exceptionally under selected provisions: the Police Act, the Border Guard Act and the Act on State of Emergency.

In the current crisis on the Polish-Belarusian border, the provisions of the Border Guard Act, particularly Art. 11b, were used from the very beginning. According to this article, military detachments and subdivisions act as assistance to the Border Guard and are coordinated by the commanding officer of the Border Guard division or the Commander-in-Chief of the Border Guard, depending on the territorial coverage of the operation. Art. 11b differs from Art. 11c in that it does not allow the Polish Armed Forces to take independent actions.

The key to the legitimacy of policing operations of soldiers in Poland is the process of authorisation by the constitutional organs of the state. Two scenarios are possible for the Art. 11b of the Border Guard Act: one based on the ordinance of the President of the Republic of Poland, issued on the motion of the Prime Minister, or – in case of urgency – another based on the decision of the Minister of National Defence, taken on the motion of the minister in charge of internal affairs. In the second case, however, again the key is the order of the President of Poland approving or revoking the decision, which should be issued immediately.

The powers and duties of the military in law enforcement operations

Soldiers deployed to support the Border Guard are granted a number of powers specific to Border Guard officers. In particular, they may conduct a personal search, check a person's identity or otherwise identify a person or detain a person in the manner and in the cases specified by the provisions of the Code of Penal Procedure and other acts. They may also search persons, objects, premises and vehicles in the manner and in the cases specified in the provisions of the Code of Penal Procedure and other laws.

Moreover, these rights are exercised according to the rules and in the manner specific to the Border Guard officers. Thus, the law imposes on soldiers obligations arising from acts and the regulation of the Council of Ministers on the exercise of some rights by Border Guard officers. In particular, it is mandatory for soldiers who perform official duties to provide their rank, name and surname, in a fashion that makes it possible to record these data and the reasons for taking official actions. Additionally, at the request of the person with regard to whom the action is being carried out, the soldier is obliged to indicate the legal basis for the action.

It is worth noting that during the incident on November 16, when soldiers on duty in Wiejki near Michałow detained three photojournalists, the recordings show that they did not comply with the obligation to provide their data. Such conduct, if it occurred under the Border Guard Act, raises the question of a possible breach of duty by a public official.

Classified ordinance of the Minister of National Defence and ordinance of the President of the Republic of Poland

According to the latest version of the TDF spokesperson's statement of 26 November 2021, the ordinance of the President of the Republic of Poland, under which the Polish Armed Forces currently operate, remains classified. In past practice, Presidential orders that are published in *Monitor Polski* have never been exempted from public disclosure. The key word here is 'shall publish' from Art. 11b of the Act on Border Guard. This word should be interpreted as requirement of publication, hence transparency. While the law allows the Minister of National Defence to publish regulations in the classified edition of *Dziennik Urzędowy*, there are no such regulations for acts published in *Monitor Polski*.

Conclusion

The absence of an openly published Presidential ordinance is a serious problem for both those bound by the law and those who enforce it. While it might be advisable to file a complaint against the inaction of a government body, the history of administrative court rulings may suggest that the complaint is highly likely to be rejected, because the provisions that provide for the right to lodge a complaint concern cases where the action is addressed to a uniquely designated entity.[1] However, given Art. 231 §1 of the Penal Code, this situation may result in future legal repercussions for public officials who were required to publish the Order of the President of the Republic of Poland. The failure to promptly and transparently publish the act in *Monitor Polski*, which would have validated or repealed the decision of the Minister of National Defence, should be interpreted as a failure to carry out official duties. The possible imposition of a secrecy clause, which is not stipulated by the law, should be interpreted as a breach of such duties.

However, there is a higher risk for those directly involved in actions taken in response to the crisis on Poland's eastern borders. As demonstrated by the revisions to the 26 November statement of the Territorial Defence Forces Command, no clear guidelines were available in the Polish Armed Forces. A public officer has a primary legal obligation to become familiar with the acts that define his or her powers and duties. Thus the soldiers performing their official duties in Poland may expose themselves to charges of both abuse of power and dereliction of duty. Meanwhile, in an unclear legal situation caused by the central authorities, it is impossible to satisfy this obligation. Both the actions that exceed the powers specific to Border Guard officers, as well as those where they do not fulfil the duties specific to them, resulting from laws and relevant regulations, may be qualified as fulfilling the requirement of Art. 231 §1 of the Criminal Code. The criminal sanction for this offence is imprisonment for up to three years.

The lack of a clear and publicly available basis for the operation of the Armed Forces of the Republic of Poland in the country and their involvement in carrying out policing tasks is at odds with the constitutional principles of a democratic state of law and the civic and democratic control over the Armed Forces. It also generates the aforementioned legal risks for both soldiers and civilians. For the sake of the legal security of civilians and soldiers, de-escalation of contentious incidents, and protection of constitutional order, it should be recognised that soldiers operate under the Border Guard Act. This provides the space and framework for mutual action: complying with the powers granted to soldiers by the Act, as well as enforcing the duties under the Act. These duties include, in particular, the above mentioned requirement for an officer who is performing official duties to state their rank and first and last name in a way that makes it possible to record these data.

However, any questioning of the legal basis for the actions of public officials in the absence of the publication of the relevant President's ordinance should be made only at the judicial stage of examining disputes

1 Cf: G. Wierczyński (2016). *Redagowanie i ogłaszanie aktów normatywnych. Komentarz* [Editing and announcing normative acts. Commentary on the Act on the publication of normative acts and some other legal acts, taking into account all amendments to the Act published until 1 March 2016]. Warsaw: Wolters Kluwer.

between soldiers performing their duties under the Act and the persons in relation to whom possible actions are taken, and not during the operation itself. It is also to be hoped that the legal basis, which should be provided by the central authorities to soldiers, will be reviewed by the judiciary relatively soon.

Witold Klaus

Criminalisation of solidarity. Whether activists who help forced migrants in the borderland can be penalised for their actions?

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Since early August 2021, when the humanitarian crisis began to unfold on the Polish-Belarusian border, the key actors who provide real help to migrants in borderland forests are activists and local residents. The role of the latter cannot be overestimated, especially when they live and act in a state of emergency zone to which no one else has access. This assistance has been met with both great appreciation from one – large – part of society and with condemnation from another. Some of those who condemn it include public officials (both members of the Border Guard and other law enforcement agencies) who threaten activists rescuing people in border area with criminal prosecution. The two legal provisions that they most often refer to are: assistance in facilitating illegal stay in Poland (Art. 264a § 1 of the Polish Criminal Code – hereafter PCC) and assistance in organising illegal border crossings (Art. 264a § 2 PCC). In this analysis, I would like to discuss these regulations from the point of view of whether they permit punishment for granting humanitarian aid.

It is worth remembering that both of the above-mentioned regulations are included in the Polish legislation because criminalisation of these behaviours is required by international law. In fact, Art. 264a PCC was introduced in 2004 in order to implement Directive 2002/90/EC requiring adequate punishment for persons who support the illegal entry, transit and stay of migrants on the territory of the EU. The enactment of these provisions also amended Art. 264 § 3 PCC, which significantly increased the penalty for committing this crime: the lower limit was raised from three to six months, and the upper limit from five to eight years (Art. 1 § 3 of the Framework Decision 2002/946/JHA). Furthermore, criminalisation of people smuggling is mandated by United Nations regulations, more specifically by a special protocol on this crime adopted in 2000 to the Convention against Transnational Organized Crime.

Facilitation of illegal stay

In Poland, facilitation of illegal stay means different types of activities that aim at:

- helping to legalise the stay of an undocumented person, e.g. by entering into a marriage of convenience with them, false declaration of parenthood in order to try to legalise the stay, or fraud of documents necessary for granting the legal stay;
- improving the undocumented person's situation and enabling them to function despite being undocumented, e.g., employing the undocumented person or providing them with a place to stay, hiding them, but also offering a car ride or providing with food or shelter.[1]

Importantly, for these actions to be deemed criminal, the perpetrator must be acting for personal or financial profit. While the concept of a financial profit is quite obvious (someone must reap a specific, material benefit from their actions), the term 'personal profit' is not necessarily so. Moreover, this term does not originate from Directive 2002/90/EC, but was added by the Polish legislature. In Polish case law it is understood rather broadly and ambiguously. The courts have recognised such benefits to be e.g. unpaid help in the household, care for the offender's parent and running their household, the possibility to drink alcohol free of charge, or assistance in legalising their child's stay in Poland. As can be seen, the spectrum of these activities is very wide, and the courts are struggling to interpret the term. It should be borne in mind,

1 See commentary to Art. 264a PCC: Z. Ćwiąkalski In: W. Wróbel, A. Zoll (eds.) (2017). *Kodeks karny. Część szczególna*. Vol. II. Part II. *Komentarz* [Criminal Code: Special Part. Volume II. Part II. Commentary]. Warsaw: Wolters Kluwer, LEX.

however, that these verdicts were issued in different real-life circumstances, none of which was even remotely similar to the situation on the Polish-Belarusian border.

The crime of facilitating illegal stay can only be committed intentionally and only with a direct intent, i.e. the goal of the perpetrators must be to facilitate the illegal stay of a specific person in Poland.

How, then, can the current interpretation of these provisions be applied to humanitarian actions, which entail, on the one hand, providing assistance in the forest (delivering food, clothes and medicines) and, on the other hand, delivering other types of relief, such as hosting forced migrants in a warm house or giving them a lift to a hospital? First, the Polish legislation does not recognise any exceptions to the provision of humanitarian assistance. On the other hand, Art. 264a § 2 PCC mentions the possibility of extraordinary mitigation of punishment by the court or even waiving the punishment when the perpetrator was not acting to achieve financial gain. However, this person has still committed a crime. In these cases, however, the key requirement for the crime is, as I mentioned above, an intentional act (i.e. intention and goal of facilitating the stay in Poland) and achieving a specific benefit (personal or financial). Meanwhile, people who offer aid in the forest act in order to prevent deaths or serious illnesses of forced migrants on the border. Therefore, it is not possible to speak about the commission of a crime. Still, even if the activists act in order to help forced migrants in their stay in Poland, it is not an illegal stay, but it aims at the legalisation of this stay; e.g. while waiting for the European Court of Human Rights to issue an interim measure, which will oblige the Polish authorities to accept the asylum application. Therefore, the intention is to assist the asylum seekers in obtaining a legal stay and these actions are undertaken only because the Polish authorities have failed to fulfil their obligations and to follow the procedures required by law. Between August and early December 2021, the Court received 47 such applications, concerning 198 persons, 44 of which were filed in Poland, mostly in connection with the prohibition of refoulement to Belarus.

Furthermore, none of the activists receive any financial gain from their actions. They are volunteers who help out of the kindness of their hearts and in order to prevent people from dying at the border. However, even if they are full-time employees of civil society organisations, their remuneration is not linked to assistance in illegal stay; on the contrary, their work is to support people in need and to offer relief (including legal or humanitarian assistance) to people fleeing danger and seeking (or wishing to seek) asylum in the European Union. It is also hardly plausible that these activists achieve any personal gain as a result of their actions. Quite the reverse, they suffer from cold, sleepless nights, trauma, threats or even violence from the enforcement agencies, and sometimes resentment from neighbours who support the government's actions. All this leads to the conclusion that humanitarian assistance in the borderland carried out by activist or local residents who help forced migrants do not meet the requirements of Art. 264a § 1 PCC, and therefore cannot be considered illegal under criminal law.

Organising illegal border crossings

The second provision that the Polish authorities refer to paint a picture of illegality of humanitarian action is Art. 264 § 3 PCC which criminalise illegal smuggling of people across the border, in other words, helping to organise illegal border crossings. The Polish Supreme Court ruled that organising 'does not have to be reduced solely to efforts to facilitate the mere physical crossing of that border which is in violation of the law. For it may also consist of efforts to provide shelter for persons illegally crossing the border of the Republic of Poland or means of transporting these persons to specific locations'. It should be remembered, however, that these actions must be connected with organising further border crossing: from Poland to another EU country. Therefore, in no way do they apply to the humanitarian assistance carried out in the Polish-Belarusian border area, as the activists did not take part in helping migrants to cross this border. In other words,

their assistance was delivered after forced migrants had been crossed the border. Moreover, the activists do not cooperate with smugglers who organise further travel of migrants in Europe.

Again, in order to punish for organising illegal border crossing, such an act must be committed intentionally and with direct intent, i.e. the perpetrator must want to organise or help someone organise the border crossing illegally.[2] Such a situation does not occur in cases of humanitarian aid because the purpose of the assistance is certainly not to organise illegal crossing of the Polish–Belarusian border for forced migrants. One can even say that by protecting these migrants from Polish enforcement and preventing their deportations, the activists actually stop migrants from illegally crossing the Polish border (towards Belarus). Incidentally, it may be noted that in order for the crime of organising border crossing to occur, persons who cross the border must do so illegally (against the law). Meanwhile, persons seeking international protection, who come directly from a territory where their life or freedom is threatened (in this case from Belarus) do not commit a crime of illegal border crossing in accordance with Art. 31 (1) of the 1951 Geneva Convention Relating to the Status of Refugees. Consequently, also the actions of the individuals who are involved in helping asylum seekers cannot constitute a crime. The activists also do not participate in organising the crossing of the Polish–German border as this is not the purpose of their assistance.

In addition, the provision of Art. 264 § 3 PCC criminalises organising border crossings for 'other persons'. This means that for the offence to be committed, the offender must assist at least two persons in their border crossing. If they helps just one person, e.g. by giving that person a lift somewhere, or by hosting forced migrants at home, they does not commit a crime.[3]

International standard

As I have mentioned, both types of crimes were instituted as a result of the implementation of international laws. Both the European Commission and the UN have drawn up guidelines to these regulations. In both cases, they clearly state that criminalisation of behaviours associated with crossing the borders and organising this practice can in no way mean criminalisation of humanitarian aid or any other humanitarian efforts, as conducting such efforts is actually required by law. The UN guidelines also call for non-punishment of family members who help their loved ones cross borders. They also explicitly say that especially assistance given to those seeking international protection must not be penalised.

Conclusions

In conclusion, it should be noted that rendering humanitarian assistance to forced migrants in Poland does not constitute a crime under the Polish law. We cannot talk about assistance in undocumented stay or in organising illegal border crossing either. Activities such as providing food, clothing, medicines or other resources to help people survive in the forest on the Polish–Belarusian border are entirely legal. Hosting migrants at home should also be considered as such (especially when staying outdoors in bad weather, particularly at night, could put them at risk of significant deterioration of their health or even loss of life). Likewise, a free ride, whether to the nearest hospital, place of assistance, or to a larger city, where they can find help is perfectly legal. This position is also shared by human rights organisations.

2 See commentary to Art. 264 PCC: Z. Ćwiąkalsk In: Ibid.

3 See commentary to Art. 264 PCC: A. Lach In: V. Konarska-Wrzosek (ed.) (2020). *Kodeks karny. Komentarz* [Criminal Code: Commentary]. Warsaw: Wolters Kluwer.

Magdalena Perkowska

Repeal of criminal liability of refugees who cross state borders [1]

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Pursuant to Art. 31 (1) of the Geneva Convention Relating to the Status of Refugees, a person who has crossed a border illegally should not be liable to punishment if:

- is a refugee within the meaning of the Convention;
- arrives directly from a territory where his or her life or freedom is threatened;
- reports promptly to the authorities and provides credible reasons for his or her unlawful entry or stay.

Pursuant to Art. 17 § 1 item 4 of the Code of Criminal Procedure (hereinafter: the Code of Criminal Procedure), a negative procedural prerequisite for instituting criminal proceedings (or for discontinuing proceedings that have already been instituted) is the fact that the law provides that the perpetrator shall not be subject to punishment. Theoretically, this regulation explicitly refers to the provisions of the Act and, since it is an exception, it should not be interpreted broadly. Nevertheless, it seems that it should be applied in the current case for two reasons. First, Art. 31 § 1 of the Geneva Convention is sufficiently precise to lend itself to direct application. Secondly, Art. 10 § 2 of the Code of Criminal Procedure sets out an exception to the rule of liability for a crime in cases stipulated by a statute or international law. Thus, the initiation and conduct of criminal proceedings against aliens is inadmissible if the conditions laid down in the Geneva Convention are met. Furthermore, the recommendations issued by the Office of the United Nations High Commissioner for Refugees on the interpretation of this provision say that the principle of non-prosecution should be extended to all crimes that were committed by a refugee as a means of fleeing from his or her country of origin or in connection with this principle, thus in the context of fleeing motivated by a well-founded fear of persecution in the country of origin.

Consequently, there is a contradiction between the provisions of the Geneva Convention and the provisions of the Misdemeanours Code and the Penal Code in the normative approach to the issue of criminal responsibility for illegally crossing the border. It is therefore necessary to determine which of these provisions should be applied, and the inconsistency should be resolved based on the provisions of the Polish Constitution. The Constitution stipulates, firstly, that Poland shall observe international law binding on it; secondly that an international agreement ratified with the consent expressed in a statute shall override the statute, if the statute cannot be reconciled with the agreement (Art. 91 of the Constitution); and thirdly that international agreements ratified by the Republic of Poland on the basis of constitutional provisions in force during their ratification and published in the Journal of Laws shall be regarded as agreements ratified with the consent expressed in the statute and the provisions of Art. 91 of the Constitution of the Republic of Poland shall apply to them if it results from the international agreement that they concern the category of issues listed in Art. 89 (1) of the Constitution of the Republic of Poland.[2] The Geneva Convention is such an international agreement. In the event of a clash with Polish laws, the Geneva Convention takes precedence and its provisions are binding in the domestic legal order *ex proprio vigore*. Thus, under Polish law, a refugee as described in Art. 31 (1) of the Geneva Convention who has crossed our borders in violation of the law is not subject to punishment.

1 The text is based on the article entitled 'On the "crossing" of the borders of the state and refugee law', which will be published in W. Cieślak, M. Romańczuk-Grącka (eds.) (2022). In dubio pro humanitate. Olsztyn: UWM Publishing House.

2 Cf. M. Grzybowski (eds.) (2008). *Prawo Konstytucyjne* [Constitutional law]. Białystok: Temida2, p. 120.

Even a reasonable suspicion that the circumstances mentioned in Art. 31 (1) of the Geneva Convention have occurred will mean that it is inadmissible to hold a foreigner criminally responsible for committing a crime or an offence of illegal border crossing. Even if the circumstances and arguments presented by the detainee do not seem credible, law enforcement agencies should not assess them subjectively, and should adopt *a pro favorem libertatum* approach in doubtful cases. From that moment on, law enforcement authorities should apply only the provisions of the Act on granting protection to foreigners within the territory of the Republic of Poland, and thus initiate relevant administrative proceedings.[3]

The Supreme Court made a similar statement in the judgment of 16 June 2015 in the case of Sri Lankan nationals participating in the support programme for victims of trafficking. They were charged and convicted for illegally crossing the border of the Republic of Poland under Art. 264 § 2 of the Criminal Code. In the opinion of the Supreme Court, there was a gross violation of the law in that case. Since there were reasonable suspicions that the women were victims of human trafficking, there also had to be doubts about the degree of social harm of the offence they had committed. It was therefore unacceptable to use the institution of voluntary punishment. The fact that the foreigners pleaded guilty and acceded to the prosecutor's motion was of no significance. We can find analogies here with cases in which foreigners who applied for refugee status immediately after crossing the border are accused of illegal border crossing. In these cases, there are also considerable doubts as to the degree of social harm of the committed act. It should be unacceptable to apply voluntary punishment, which significantly shortens the criminal trial and precludes the possibility to conduct an evidentiary hearing. The current practice of courts in Poland shows that they do not verify at all whether a foreigner fulfils the prerequisites of Art. 31 (1) of the Geneva Convention. Thus, there is a regular violation of international law.

With reference to Art. 31 (1) of the Geneva Convention, meeting two conditions is problematic in the current situation on the Polish-Belarusian border: an alien arriving directly from the territory where his or her life or freedom is in danger and presenting credible reasons for his or her illegal entry or stay to the authorities. According to the Border Guard, today mainly citizens of Iraq, Afghanistan, Syria, Somalia and Tajikistan are 'pushed back' from the Polish border. The requirement of direct arrival required by the Geneva Convention is interpreted by the Polish authorities literally and is considered a necessary condition for applying for international protection. In fact, foreigners are arriving from the territory of Belarus. However, this country cannot be regarded as a safe country (see more in "Marcin Górski" chapter).

We must remember that Art. 31 (1) of the Geneva Convention must be interpreted with regard to the purpose for which it was adopted and not literally. It should not, therefore, be understood as a journey in which the crossing of the border between the country of origin and the host country takes place in immediate succession. Under that legislation, a refugee must have the right to transit through other countries and not to stay in those countries if he or she considers them unsafe for him or her or his/her family or if they do not offer international protection.

This was confirmed by e.g. the European Court of Human Rights (ECHR) in the judgment in *D.A. and others v. Poland*. The ECtHR recalled the importance of the principle of non-refoulement, the violation of which may lead to a violation of Art. 3 of the European Convention on Human Rights (hereinafter ECHR), namely the prohibition of torture, and inhuman or degrading treatment. This also applies in the

3 I. Rzeplińska (2007). 'Karnoprawne problemy polityk towarzyszących swobodnemu przepływowi osób – aspekty praktyczne ['Criminal law issues in policies related to free movement of persons: Practical aspects]. In: W. Czapliński, A. Wróbel (eds.). *Współpraca sądowa w sprawach cywilnych i karnych* [Judicial cooperation in civil and criminal matters]. Warsaw: C.H. Beck, p. 415; M. Perkowska (2015). 'Problem nielegalnego przekroczenia granicy przez osoby ubiegające się o nadanie statusu uchodźcy' [The problem of illegal border crossings by asylum seekers]. In: W. Pływaczewski, M. Ilnicki (eds.). *Uchodźcy- nowe wyzwania dla bezpieczeństwa europejskiego na tle standardów praw człowieka* [Refugees: New challenges for European security in the context of human rights], Olsztyn: UWM Publishing House, pp. 52-62.

case of expulsion of a foreigner to a third country, insofar as it results in the direct or indirect exposure of the foreigner to treatment contrary to this provision.

At this point, it should be recalled that the principle of non-refoulement is the cornerstone of the international refugee protection regime and is the most important of the fundamental rights of refugees. As noted in the literature, it means not only protection against expulsion or refoulement to the borders of the state, but also applies to such measures as refusal of entry at the border. This protection covers both persons who have been granted protection status and those who have not yet been officially identified as refugees.[4] Hence the Polish authorities, after the procedure has been meticulously conducted, are obliged to make sure that there is no risk of expelling a foreigner to a country where he or she is under the threat of torture or inhuman or degrading treatment, or of refusing him or her entry if he or she has arrived from such a country.

In the ruling of *D.A. and others*, the ECtHR found that in Belarus the migrants are at risk of being transferred to Russia and from there to Syria, which is a situation of chain refoulement. Thus, Belarus is not a safe country for them. The ECHR issued a similar ruling in the case of Russian citizens of Chechen nationality (*M.K. and others v. Poland*). Thus, the basis for state responsibility may be expulsion of a foreigner to a country that will not provide him or her with proper access to the asylum procedure and transfer him or her to the country of origin.

Accordingly, the use of the push-back procedure in the zone of the state of emergency and earlier at the Terespol border crossing constitutes a violation of the refoulement ban. A good-faith application of Art. 33 of the Geneva Convention must involve a thorough examination of the state of affairs in the country to which the refoulement is to take place. This includes a careful analysis of whether the country in question guarantees that no further transfer will be permitted to the country of origin which contravenes the Convention.

4 B. Wierzbicki (1993). *Sytuacja prawna uchodźcy w systemie międzynarodowej ochrony praw człowieka* [The legal status of the refugee in the system of international protection of human rights]. Białystok: Reklamowo-Wydawnicza Agencja Dziennikarzy AG-Red, pp. 131–132; B. Wierzbicki (1993). *Uchodźcy w prawie międzynarodowym* [Refugees in international law]. Warsaw: PWN, p. 91; B. Mikołajczyk (2004). *Osoby ubiegające się o status uchodźcy: ich prawa i standardy traktowania* [Asylum-seekers: their rights and standards of treatment]. Katowice: Publishing House of Silesian University, pp. 111–112.

Marcin Princ

Power of attorney in administrative procedures: General principles and credibility assessment

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A party's proxy often plays a very important role in administrative proceedings, including in the course of applying for international protection. The institution of a proxy is closely related to the need to strengthen the position of a party to proceedings vis-à-vis the public administration. One has to fully agree with the statement that 'the right to support and representation is recognised as one of the canons of administrative proceedings in view of European standards',[5] and the right to appoint an attorney guarantees 'a fuller realisation of the principle of active participation of a party in administrative proceedings'.[6]

The Act on granting protection to foreigners within the territory of the Republic of Poland (hereinafter: the Protection Act) specifies that, as a rule, asylum proceedings are governed by the provisions of the Code of Administrative Procedure (hereinafter: the Code of Administrative Procedure). It follows from these regulations that a party may act through an attorney unless the nature of the proceedings requires the party to act in person (Art. 32 of the Code of Administrative Procedure). The power of attorney for litigation in the administrative procedure is less formal, and its basic limit is the steps that a party must take in person.

Sometimes the nature of the factual acts requires direct contact between the administrative body and the party to the proceedings, as the procedure requires the party to appear in person in order to undergo a medical examination, take part in a hearing,[7] or in a status interview in proceedings for granting international protection. As follows from the Act on Protection, a foreigner must submit the application for granting international protection in person (Art. 26 (1)), collect the travel document after the proceedings have been completed (Art. 31 (6)) or the travel document provided for in the Geneva Convention (Art. 89ib). The wording of these provisions does not, however, rule out the assistance of the party's attorney in the above-mentioned actions.[8]

According to Art. 33 §1 of the Code of Administrative Procedure, a party's attorney may be a natural person who has the capacity to perform legal acts, regardless of whether they are a Polish citizen and whether they have any professional qualifications or experience. What is important is that the attorney should be trusted by the party. The power of attorney must include the name of the attorney, as well as the name of the person granting the power of attorney, it should be signed by the party, and should clearly indicate the limits of authority.[9] As Przybysz explains, 'it should be clear from the wording of the power of attorney in what actions (all or some of them), in what proceedings (the entire proceedings or a specific stage), and before what authority the proxy may act on behalf of the authoriser.'[10] The power of attorney should be granted in writing (recorded in paper or electronic form) or filed on record. The attorney must attach the original or an officially certified copy of the power of attorney to the file (if the

5 H. Knysiak-Molczyk (2013). 'Konstrukcja prawna pełnomocnictwa procesowego' [Legal structure of the power of attorney]. In: K. Knysiak-Molczyk (ed.). *Czynności procesowe zawodowego pełnomocnika w sprawach administracyjnych i sądowoadministracyjnych* [Procedural acts of a professional representative in administrative and judicial-administrative cases]. Warsaw: Wolters Kluwer, p. 17.

6 H. Knysiak-Sudyka (ed.) (2020). *Pełnomocnik strony w postępowaniu administracyjnym i sądowo administracyjnym* [Proxy in administrative and administrative court proceedings]. Warsaw: Wolters Kluwer, p. 19.

7 M. Szubiakowski In: M. Wierzbowski (ed.) (2017). *Postępowanie administracyjne - ogólne, podatkowe, egzekucyjne i przed sądami administracyjnymi* [Administrative procedure: General, tax, enforcement and administrative courts]. Warsaw: C.H. Beck, p. 58.

8 J. Chlebny In: J. Chlebny, W. Chróścielewski, P. Dańczak, P. Dąbrowski, A. Liszewska, R. Rogala (2020). *Prawo o cudzoziemcach: komentarz* [Law on Foreigners: Commentary]. Warsaw: CH Beck, p. 1030.

9 Judgment of the Supreme Administrative Court in Warsaw of 29 April 1998, IV SA 1044/96, LEX 45639.

10 See commentary to Art. 33: P.M. Przybysz In: *Code of Administrative Procedure. Commentary updated*, LEX/el. 2021.

attorney is a barrister or a legal counsellor, they may certify a copy of the power of attorney themselves).

The legislation provides that:

> "a party who does not have a domicile or habitual residence or a seat in the Republic of Poland, another Member State of the European Union, the Swiss Confederation or a Member State of the European Free Trade Association (EFTA), a party to the Agreement on the European Economic Area, if he or she has not appointed an attorney residing in the Republic of Poland to represent the case and does not act through a consul of the Republic of Poland, shall be obliged to appoint a proxy for service in the Republic of Poland, unless service is effected by means of registered electronic delivery' (Art. 40 § 4 of the Code of Civil Procedure)."

If he or she fails to do so, all letters will remain on file, but they will have the legal effect as if they had been served.

In view of the rather sparse and unelaborated provisions referring to the institution of a power of attorney, the rules expressed in the Civil Code and the Code of Civil Procedure should be applied alternatively when granting such a power of attorney.[11] It is worth emphasising that not allowing an attorney to participate in administrative proceedings is tantamount to not allowing a party to the proceedings[12] and affects the implementation of the principle of active participation of a party in administrative proceedings. Each authority conducting the proceedings is obliged to ensure the participation of the attorney in the proceedings until the revocation of his or her power of attorney[13] and his or her absence or refusal to admit him or her may result in reopening of the proceedings pursuant to Art. 145 § 1 (4) of the Code of Administrative Procedure.[14]

In practice, there is some doubt as to the language in which the power of attorney should be drafted. The starting point for further analysis of the matter is the principle of the official status of the Polish language as set out in the Constitution of the Republic of Poland, which also applies to proceedings to which foreigners are parties. The Polish language is the official language of constitutional state bodies as well as bodies, institutions and offices. Additionally, 'entities performing public tasks on the territory of the Republic of Poland shall perform all official acts and make declarations of intent in Polish, unless specific provisions provide otherwise' (Art. 4 of the Act on the Polish Language).

The power of attorney may be drawn up in Polish or in a foreign language. In the latter case, however, the document should be submitted together with its translation into Polish. However, the Act does not impose any form of translation or qualifications of the translator. It is worth emphasising that the Act on Protection (Art. 11) obliges the authority to provide a translation of documents drawn up in a foreign language admitted as evidence in proceedings. However, this does not apply to the power of attorney.

In practice, there is doubt as to whether an administrative authority may question the legitimacy of a power of attorney submitted in administrative proceedings and whether the power of attorney can be subject to assessment at all. We must agree with the statement that 'the administrative authority examines the validity of the power of attorney... *ex officio* and should not allow a person who does not hold a valid power of attorney to participate in the case[15]. According to the resolution of the Supreme Court, which

11 Z. Janowicz (1999). *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure: Commentary]. Warsaw: Wydawnictwo Prawnicze PWN, p. 150.

12 Judgment of the NSA in Warsaw of 16 June 1998, III SA 1597/96, LEX 35482; Judgment of the NSA of 29 July 2016, II FSK 87/16, LEX 2101631; A. Wróbel In: M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel (2020). *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure: Commentary]. Warsaw: Wolters Kluwer, LEX – Art. 32; A. Golęba In: H. Knysiak-Sudyka (ed.) (2019). *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure: Commentary]. Warsaw: Wolters Kluwer, LEX – Art. 40.

13 Judgment of the Supreme Administrative Court of 29 July 2016, II FSK 87/16, LEX 2101631.

14 P. Przybysz, Warsaw (2021) – Art. 32.

15 A. Wróbel In: M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel (2020) – Art. 33.

may be relevant to administrative proceedings, 'when a person who cannot be a proxy in fact acts as a legal representative, there is a lack of proper authorisation which causes the proceedings to be invalid'. Therefore, due to the consequences of a wrongly appointed proxy or an inability to be a proxy, the competent authority should verify the submitted power of attorney. Verifying the power of attorney is therefore justified also with a view to protecting the interest of the party to the proceedings. This brings to light one of the basic roles of a public administration body, which is related to the principle of information (Art. 9 of the Code of Administrative Procedure). A public administration body is 'obliged to duly and comprehensively inform the parties of the factual and legal circumstances which may affect the determination of their rights and obligations being the subject of administrative proceedings'. In addition, the administrative body should ensure 'that the parties and other persons involved in the proceedings do not suffer prejudice due to ignorance of the law, and shall give them the necessary explanations and guidance to this end.' However, the procedural authority may not interfere in the choice of an attorney, as this is within the autonomous will of the party to the proceedings,[16] nor should it persuade him or her to give up his or her proxy. The right to grant a power of attorney, to withdraw a power of attorney, and to temporarily exclude his or her participation from the proceedings is within the exclusive jurisdiction of the authoriser and not of the authority conducting the proceedings. The applicant, in view of the possible consequences of the actions and negligence of the proxy, should therefore choose his or her representative with extreme care.

16 P.M. Przybysz (2021) – Art. 33.

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