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ARTICLES

LUCIA BAKOŠOVÁ*

Crossing Slovak Borders: Border Defence and Illegal Migration

■ **ABSTRACT:** *Since the establishment of the Slovak Republic in 1993, it has faced migration flows that have had a considerable effect on the protection of Slovak state borders (internal and external), the legal regulation of illegal migration, and the provision of international protection to those in need. The aim of this study is to analyse the role, competence, and procedures of relevant Slovak authorities regarding border defence and illegal migration, and the related possibility of detaining foreigners. Apart from illegal migration, this study analyses situations in which an illegal migrant claims to be a refugee in the course of the procedure. The analysis focuses primarily on the relevant Slovak legislative acts, mainly the Act on Asylum, the Act on the Residence of Foreigners, and the Act on the Police Force, as well as the subsequent jurisprudence of the Supreme Court of the Slovak Republic and the Constitutional Court of the Slovak Republic, which also reflects on the applicable European Union legislation, as well as international treaties in the analysed areas.*

■ **KEYWORDS:** the Slovak Republic, border defence, illegal migration, foreigner, asylum seeker, detention

1. Introduction

The Slovak Republic (hereinafter 'SR'), has faced challenges in protecting its state borders and managing migration, both legal and illegal, ever since its establishment in 1993. The most notable migration flows in the SR are associated with the Yugoslavian War (1991–2001), the 2015 migration flows as a result of the Syrian civil war, and recently, the flow of Ukrainian citizens seeking refuge from Russian Federation's aggression since February 2022 or the 2022–2023 migration flows of

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citizens from Syria and other countries. Although, there is a considerable amount of illegal migrants crossing the Slovak state borders, the SR has never become the main destination for third-country nationals and even the outbreak of the migration crisis in the European Union (hereinafter 'EU') has not changed the dominantly transit character of the state.[1] The same is true for the current migration flow, when almost all illegal migrants move to Austria or Germany for family reunification. Migration, as such, significantly influences the politics of states and has the temporary and long-term potential to change the population structure of individual countries. To protect Slovak state borders, especially the external border with Ukraine, and to combat illegal migration, the SR adopted numerous legal acts in this area, which are analysed in this study. As a Member State of the EU and the Schengen Area,[2] SR's legislation and jurisprudence reflect the Schengen[3] and asylum aquis,[4] as well as international treaties in which it is a contracting party.[5]

1 Bolečeková and Olejárová, 2018, p. 229; Bolečeková and Olejárová, 2017, p. 577.

2 The SR is a Member State of the European Union since 1 May 2004 and a Member State of the Schengen Area since 21 December 2007.

3 Schengen aquis consists of a set of rules and legislation that ensures the proper functioning of the Schengen Area. It regulates the abolishment of border controls at the internal borders of the Member States and aims to strengthen border controls at the external borders. The main documents are Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Convention implementing the Schengen Agreement of 14 June 1985 and Schengen Accession Agreements. Furthermore, the Schengen aquis is formed, that is, by Regulation (EU) No. 2016/399 setting out the Schengen Borders Code, Regulation (EU) No. 2017/2225 of the European Parliament and of the Council of 30 November 2017 amending Regulation (EU) No. 2016/399 as regards the use of the Entry/Exit System, Regulation (EC) No. 810/2009 establishing the EU's Visa Code, Regulation (EU) No. 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard.

4 Asylum acquis consists of a set of rules and legislation on asylum procedure within the European Union. The main documents are Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; Directive 2013/3/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

5 For instance, Convention relating to the Status of Refugees (1951) and Protocol relating to the Status of Refugees (1967), International Covenant on Civil and Political Rights,

This study examines the role, competence, and procedures of relevant Slovak authorities regarding border defence, particularly the protection of the external border with Ukraine and illegal migration. Apart from illegal migration, this study analyses the situation in which an illegal migrant claims to be a refugee in the course of the procedure and what the implications are. The analysis focuses on relevant Slovak legislative acts, mainly Act No. 480/2002 Coll. on Asylum[6] and Act No. 404/2011 Coll. on Residence of Foreigners,[7] Act No. 171/1993 Coll. on Police Force, as well as national strategies for migration and integrated border management. This study particularly focuses on the subsequent jurisprudence of the Supreme Court of the SR and the Constitutional Court of the SR, which also reflects on the applicable EU legislation and international treaties in the analysed areas. The rest of this paper is divided into two main chapters. In the first chapter, we point out which Slovak authorities are competent to protect Slovak internal and external borders, the technical and procedural means that are used to protect the borders, and the current challenges in border defence. In the second chapter, we focus on illegal migration and the provision of international protection. Particular focus is placed on the possibility of detention of an illegal migrant and situations in which an illegal migrant claims to be a refugee in the course of the procedure.

2. Border defence in the Slovak Republic

The SR borders five states: Czechia, Poland, Ukraine, Hungary, and Austria. After joining the EU and subsequently the Schengen Area, the SR has a 97.8-kilometre external land border with Ukraine and an external air border on three Schengen airports in Bratislava, Košice, and Poprad. The protection of borders is carried out in compliance with Schengen acquis and it includes activities that should prevent illegal crossing of the SR's external land and air borders. However, border protection must not prevent entitled persons from accessing the existing forms of international protection (asylum and subsidiary protection). The main domestic legislative acts regulating border defence are Act No. 404/2011 Coll. on Residence of Foreigners, Act No. 171/1993 Coll. on Police Force, and internal instructions from the Ministry of Interior. The Act on the Residence of Foreigners regulates, among others, the scope of police force activities for the provision of border control of SR borders, the area of residence of foreigners in the SR territory, and conditions for

European Convention of Human Rights and Fundamental Freedoms (1950), Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (2000), Protocol against the Smuggling of Migrants by Land, Sea, and Air (2000).

6 The full name of the act is 'Act No. 480/2002 Coll. on Asylum and Amendment of Certain Acts.'

7 The full name of the act is 'Act No. 404/2011 Coll. on Residence of Foreigners and Amendment and Supplementation of Certain Acts.'

the entry or exit of foreigners into or out of the SR territory. Part two of the Act on the Residence of Foreigners (Articles 3–19) regulates border control, entry, and exit through external borders, as well as the refusal of entry. Most provisions refer to the Schengen Borders Code.[8] The Act on the Police Force sets out, among others, the organisation of police force and its competences. Concerning the protection of state borders, a police officer is authorised under Article 17 and following articles[9] to detain a person, request proof of identity, check travel documents and other accompanying documents of persons crossing the external border, and check facts related to crossing the external border. In accordance with Article 26 Paragraph 2, in the case of suspicion of committing a crime by a person crossing the external border, the police officer is entitled to search the person, things, and means of transport. The police officer also has the same power in cases of suspicion of committing an offence related to crossing the external border and an offence in the area of foreigners' stay on the territory of the SR.

■ *2.1. Authorities operating in the framework of border protection*

The main authority in border defence is the Bureau of Border and Foreign Police of the Presidium of the Police Force (hereinafter 'the Bureau'). The Bureau was established on 1 April 2000 as a body with a nationwide scope to ensure control of the borders of the SR. It directly manages, methodically directs and controls the activity of its organisational components in the performance of tasks in the area of: (a) border controls,[10] (b) the fight against illegal migration and smuggling, (c) risk analyses, (d) cooperation with the European Border and Coast Guard Agency (hereinafter 'Frontex Agency'), (e) analysis of travel documents, (f) residence regime of foreigners, (g) returns of foreigners, (h) expulsion of foreigners, (i) visa practice, and (j) to a limited extent in the area of asylum procedures[11] and the implementation of the Dublin Regulation.[12]

The Bureau, at the regional level, consists of four Directorates of Border and Foreign Police. In their direct subordination, the Border Control Department of the Police Force, Foreign Police Department of the Police Force, Mobile Unit of the Police Force, Asylum Department of the Police Force Humenné, and Mobile

8 Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).
9 Arts. 18–26 of the Act on the Police Force.
10 For more details on border control by the Bureau, see chapter 2.2. Border Control and Border Surveillance on the External Border.
11 For more details on border control by the Bureau, see chapter 3.2. Detention of Asylum Seekers.
12 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Intervention Unit of the Police Force are established at the local level. The Bureau has direct authority over two departments of police detention for foreigners in Medveďov and Sečovce. Their main task is implementing the detention of nationals of third countries and their repatriation to their home countries or the countries from which they entered the SR. The National Anti-Illegal Migration Unit of the Office of the Border and Foreign Police of the Presidium of the Police Force is responsible for detecting and investigating cross-border criminal activities associated with illegal migration and human trafficking.[13]

The Bureau manages several information systems. One of the primary sources of information is the Migration and International Protection Information System (hereinafter 'MIPIS'), which allows for the recording of foreign nationals' events in a hierarchical resolution process within departments. Person identification is based on the parallel search and comparison of fingerprint data from multiple databases. Since its launch in 2010, MIPIS has been integrated with the Automated Fingerprint Identification System, the Automated European Fingerprint Identification System, and since 2015 with INTERPOL. The potential resulting from integration into the fingerprint information systems of the Bureau is planned for further development, primarily through integration into the Central Visa Information System and Schengen Information System. The MIPIS is a fundamental source of information on illegal migration. Based on recommendations from the Schengen evaluations of air and land borders in 2012 and 2013, access to data from the MIPIS was made available to all Police Force units through central inspection control. This contributes to improved cooperation within the Police Force and influences the development of the security situation. Given the above and the fact that the MIPIS was funded from EU funds, it is necessary to ensure the sustainable development of this information system and create conditions for flexible updates based on changes in the integrated information system, national and European legislation, and the ability to respond flexibly to tasks arising from application practices.[14]

■ *2.2. Border control and border surveillance on the external border*

Border control in general consists of border checks conducted at border crossings and border surveillance carried out at the so-called 'green border.' On the one hand, their aim is to facilitate legitimate border crossings for *bona fide* travellers, and on the other hand, to prevent and detect cross-border criminal activities, particularly smuggling, human trafficking, and terrorism. The primary objective of border control is to verify the identity of individuals and other relevant information to allow entry into or exit from the territory of a Member State of the Schengen Area/EU. These checks may also cover means of transport and objects in

13 Úrad vlády Slovenskej republiky, 2022, p. 6.
14 Ibid., pp. 25–26.

the possession of persons crossing borders. As a fundamental rule, all individuals must undergo checks. According to Article 8 of the Schengen Borders Code, all persons shall undergo a minimum check to establish their identities based on the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate, by using technical devices and consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost, and invalidated documents; of the validity of the document authorising the legitimate holder to cross the border; and of the presence of signs of falsification or counterfeiting. Particular emphasis in the applicable legislation is placed on the entry/exit checks of third-country nationals who are subject to thorough checks. These checks comprise, among others, verification of the conditions governing entry and, where applicable, of documents authorising residence and the pursuit of a professional activity, possibly verification of the identity of the holder of the visa and authenticity of the visa.

According to Article 13 of the Schengen Borders Code, the primary objective of border surveillance is to prevent unauthorised border crossings, counter cross-border criminality, and take measures against persons who have crossed the border illegally. It is conducted through patrols, terrain monitoring, or other technical means. The utilisation of specific technical methods also depends on the nature and complexity of the terrain. The border surveillance system on the external border of the SR with Ukraine is implemented through a combination of personnel and technical resources. In accordance with Article 10 of the Act on the Residence of Foreigners, a police department is allowed, when performing border control in an area close to the external border, to place and use technical devices and equipment intended for border control, which identify and document unauthorised external border crossings or prevent unauthorised external border crossings.

To perform border surveillance effectively, four levels of control are utilised on the external land border. The first level involves the deployment of technical means in the immediate vicinity of the external border. The second level is implemented through physical checks conducted by officers of the Border and Foreign Police Units stationed near the border. The third level is ensured by monitoring vehicles and officers from the specialised Mobile Intervention Unit of the Border and Foreign Police Directorate in Sobrance. The fourth level of control involves coordinating with other Police Force units (particularly Public Order and Traffic Police) to secure cooperation in border control. Currently, over two-thirds of the external border with Ukraine is secured by a camera chain system that records and evaluates unauthorised crossings. Automation and extensive deployment of technical resources for border surveillance significantly reduce the need for

personnel to guard the “green border.” However, it is necessary to ensure the maintenance and renewal of this system in the upcoming years.[15]

In December 2022, the SR adopted the National Strategy for European Integrated Border Management for the years 2023–2026 and the establishment of the Steering Committee for the Implementation of European Integrated Border Management (hereinafter ‘National strategy 2023–2026’). Under the National strategy 2023–2026 a steering committee for the implementation of European integrated border management was created to monitor, coordinate, and update the performance of individual tasks, in which the ministries of the interior, finance, foreign affairs, labour, and social affairs, as well as the Office for Personal Data Protection, will be represented.[16] In accordance with the National strategy 2023–2026, the SR should increase the deployment of experts for operational activities organised by the Frontex Agency and contribute more personnel to the Standing Corps of the European Border and Coast Guard or actively participate in international activities aimed at combating illegal migration. The intensification of cooperation with countries of origin of illegal migrants and anticipation of risky situations in the areas of smuggling and human trafficking is one of the key tasks of this strategy.

3. Illegal migration in the Slovak Republic

Illegal crossing of the Slovak state border or illegal entry into the territory of the SR is sanctioned within the limits of national law, which reflects the transposed legal acts of the EU as well as international standards on this matter. Under the Slovak Criminal Code, the illegal crossing of a state border in the SR is not considered a crime. Under Article 116 Paragraph 1 of the Act on the Residence of Foreigners, a foreign national commits an offence in the area of border control if (a) they unlawfully cross the external border, (b) they intentionally avoid or refuse to undergo border control when crossing the external border, or (c) they present a foreign travel document, another document authorising the crossing of the external border, or a visa that does not belong to them during border control. However, this article does not apply to a foreigner who has submitted an asylum application immediately upon entering the territory of the SR or to a victim of human trafficking. For an offence under the aforementioned article, a fine of up to 1,600 euros may be imposed.[17]

According to ‘Statistical overview of legal and illegal migration of foreigners in Slovakia: 2022,’ there was a considerable increase in documented illegal

15 Ibid., pp. 8–9.
16 Ibid., p. 5.
17 For the list of all the offences and fines see Art. 116 of the Act No. 404/2011 Coll. on Residence of Foreigners and Amendment and Supplementation of Certain Acts.

migrants in 2022 (11,242) in comparison to 2021 (1,769). Most illegal migrants were identified during their illegal stay in SR territory. Only a fraction (549) were caught at the external border. The prevailing numbers of illegal migrants were from Syria (9,160), Ukraine (594), and Marroco (560).[18] The 2022–2023 migration flow is still intensive. From 1 January to 31 May 2023 the Police Force registered 7,183 foreigners for secondary transit migration. At the time of writing, the weekly average numbers for the last five weeks were already above the limit of 655 detected migrants on this secondary transit migration, and a further increase is anticipated. Regarding the measures adopted in the current migration flow, most are applied in the area of the Slovak-Hungarian border. In particular, border controls and border surveillance have been strengthened, and members of the Police Force have been dispatched to Hungary to strengthen external border controls as well as to the operation of the Frontex Agency.[19]

Migration issues primarily fall under the auspices of the Ministry of the Interior, which implements its agenda in the field of migration and asylum mainly through two bodies—the Migration Office and the Bureau of Border and Foreign Police of the Presidium of the Police Force; the Ministry of Foreign and European Affairs, and the Ministry of Labour, Social Affairs, and Family,[20] which establishes legal norms and determines legal regulations for employing foreign nationals, sets up criteria for the entry of different categories of foreign nationals into the Slovak labour market, including conditions for granting work permits, establishing legal norms regarding social care for foreigners, asylum seekers, repatriated persons, and Slovaks living abroad.[21] Since the role and competences of the Bureau were mostly analysed in the previous chapter, we focus only on its role and competences during an asylum procedure. In asylum proceedings, the relevant units of the Bureau carry out initial actions related to the acceptance of a foreigner's declaration requesting asylum or subsidiary protection. In proceedings that take responsibility for examining an asylum application, the Bureau performs tasks related to ensuring the transfer of the foreigner to the state that has taken responsibility for examining the asylum application. The Bureau, as the sole unit within the Ministry of the Interior of the SR, is responsible for implementing so-called 'Dublin transfers'. This includes planning transportation, including air transportation, communication with the relevant authorities of the receiving Member State, ticketing arrangements, provision of escorts and, if necessary, medical personnel, and handing over Dublin applicants for international protection to the competent authorities in the responsible Member State. Similarly, all necessary actions

18 Prezídium Policajného zboru, 2022, pp. 27–28.
19 Šimko, 2023.
20 For more information on competences of the mentioned Ministries, see Arts. 3–19 of the Act No. 575/2001 Coll. on the Organisation of Government Activities and the Organisation of the Central State Administration.
21 Bachtíková et al., 2012.

are performed when a foreigner is received on the territory of the SR within the framework of the Dublin procedures.[22] The Bureau also cooperates closely with the Frontex Liaison Officer based in Bratislava, and regularly provides information on cases of illegal migration in the SR in the form of structured statistics and analytical descriptions. The Bureau and its organisational units are responsible for the execution of forced returns.

The main authority active in the analysed area is the Migration Office of the Ministry of Interior of the SR (hereinafter 'Migration Office').[23] The Migration Office is a professional division of the Ministry of the Interior acting in the area of asylum and integration of refugees and foreigners who were provided subsidiary protection and in the field of documentation and foreign cooperation to this extent.[24] The main tasks performed by the Migration Office are: (1) development of the national asylum policy, (2) decision-making in administrative procedures related to granting asylum, (3) analysis of information about asylum seekers' countries of origin, and (4) establishment of asylum facilities. Through non-governmental organisations (currently the Slovak Humanitarian Council), it also provides supplementary care for asylum seekers and participates in the integration of persons granted international protection. The Migration Office consists of the Director of the Migration Office, Procedural Department,[25] Organisation and Legal Department,[26] Migration and Integration Department,[27] Dublin Centre,[28]

22 Úrad vlády Slovenskej republiky, 2022, p. 12.
23 The Migration office was established by Resolution No. 501 of the Government of the SR on 13 July 1993.
24 Regulation No. 39/2015 of the Ministry of Interior of the Slovak Republic on the Organisational structure of the Ministry of Interior of the Slovak Republic.
25 This department is in charge of asylum-related administrative procedures and carries out comprehensive activities in this respect. Its responsibility is to ensure compliance of the asylum procedure with the national principles of the migration policy, EU legislation, and international agreements and treaties in this regard, to which the SR has acceded and is bound.
26 This department prepares draft legislation governing asylum matters and is involved in the transposition of EU legislation in this field into national law. Additionally, responsibilities of this department include legal representation of the Ministry before courts in international protection matters. It also performs activities of filing, personal data protection, confidential information protection, statistics and electronic data processing.
27 This department cooperates with competent government authorities, local governments, and non-governmental organisations to integrate beneficiaries of international protection into society, in particular, accommodation, employment, social security, and education, including the preparation, implementation and coordination of projects involving asylum matters. The department provides methodological guidance, and it manages and supervises social work at asylum facilities.
28 The Dublin Centre performs the specific function of a national access point for the Slovak Republic, which is in charge of the implementation of the Dublin Regulation, aiming to determine which EU Member State is responsible for examining an application for international protection lodged by an asylum seeker or a third-country national without a permit to reside in the territory of the Slovak Republic.

Department of Documentation and International Cooperation, and Asylum[29] Facilities Unit.[30]

The main legal document, apart from the EU asylum aquis and international treaties,[31] applicable to illegal migration is the Act on the Residence of Foreigners. Illegal migrants who are detained by the police on the territory of the SR are brought to the foreign police department of the Police Force on the basis of authorisation under the Act on the Residence of Foreigners, where a person's security check will be carried out in the information systems of the Ministry of the Interior of the SR to evaluate the security risk of detained persons and their stay on the territory of the SR. Subsequently, they go through dactyloscopic prints and photo identification procedures. Since 2010, all illegal migrants have been registered in the MIPIS.

Under Article 61a of the Act on the Residence of Foreigners, a third country national who is staying in the SR territory without authorisation, may remain in the SR territory for the: (a) duration of obstacles to administrative expulsion according to Article 81; (b) provision of institutional care related to urgent health care; (c) duration of quarantine measures; (d) time of execution of detention, substitution of detention, execution of a custodial sentence, or execution of house arrest; (e) period to exit the country according to Article 83(1); (f) duration for the reasons specified in Article 84(4); (g) detention according to Article 88 or Article 88a, or obligation imposed regarding alternatives to detention; this does not apply if the asylum seeker is entitled to stay in the territory of the SR according to special regulation or; (h) preparation and execution of administrative expulsion or return according to a special regulation, unless this is a third country national according to (g).

■ *3.1. Detention of foreigners*

A common practice in states when a foreigner crosses the state border illegally, or is residing in a state illegally is detention. The Act on the Residence of Foreigners regulates the conditions under which a foreigner or asylum seeker may be detained as well as the length of detention and alternatives to detention. It is

29 This department is responsible for documenting activities and providing information and analysis about countries of asylum seekers' origin. It is in charge of the Migration Office's activities related to international cooperation, including tasks resulting from the SR's membership in the EU and cooperation with the European Asylum Support Office.

30 This unit manages, coordinates, and supports the asylum facilities, the integration centre, and the transit centres at the international airports. It is fully in charge of the reception of asylum seekers. Additionally, it fulfils tasks resulting from the 'Agreement between the Government of the SR, UNHCR, and IOM concerning the humanitarian transfer of refugees in need of international protection through the Slovak Republic.' It cooperates with relevant international and non-governmental organisations, governmental authorities, and local governments focusing on refugee issues. Ministry of Interior of the Slovak Republic, 2018, p. 6.

31 See footnote No. 4.

important to note that the term “detention” is not defined in the Act. In established jurisprudence,[32] the Supreme Court of the SR defines this term as follows:

> Detention of a foreigner means restriction or, depending on the nature, length, consequences, and method of detention, even deprivation of his liberty. It is therefore a very sensitive interference with one of the most important rights of an individual. Such an intervention can only be permissible under strictly defined conditions, defined not only by the Act on the Residence of Foreigners but above all by the constitutional order of the SR. According to Article 8(1) of the Charter of Fundamental Rights and Freedoms,[33] personal freedom is guaranteed. According to Article 8(2) of the Charter, no one may be deprived of his freedom other than for the reasons and in the manner established by law.[34]

Furthermore, the jurisprudence of the Supreme Court and the Constitutional Court of the SR reflects the international obligations of the SR under the European Convention on Human Rights, Article 5(f),[35] the International Covenant on Civil and Political Rights, Article 9,[36] and the Charter of Fundamental Rights of the European Union, Article 6.[37] All the aforementioned legal documents prohibit arbitrary deprivation or limitations of personal freedom.[38]

In accordance with Article 88(1) of the Act on the Residence of Foreigners, a police officer shall be entitled to detain a third-country national: a) subject to administrative expulsion proceedings in order to ensure his/her departure to the country pursuant to Article 77(1) if 1. there is a risk he/she would escape; or 2. the third-country national avoids or prevents the preparation process of his/

32 For instance, see the Judgment of the Supreme Court of the SR on 13 August 2014, Case 1 Sža 23/2014; Judgment of the Supreme Court of the SR on 6 February 2015, Case 1 Sža 5/2015; Judgment of the Supreme Court of the SR on 30 March 2016, Case 10 Sza 8/2016.

33 Charter of Fundamental Rights and Freedoms was adopted by Constitutional Act No. 23/1991 Coll., which was adopted by the Federal Assembly of the Czech and Slovak Federative Republic on 9 January 1991. After the disintegration of the Czech and Slovak Federative Republic (1992), the Charter of Fundamental Rights and Freedoms became an integral part of the Constitution of the Slovak Republic.

34 Judgment of the Supreme Court of the SR on 30 March 2016, Case 10 Sza 8/2016.

35 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

36 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

37 Everyone has the right to liberty and security of person.

38 Berthotyová, 2017, p. 108.

her administrative expulsion to be executed; b) for the purpose of execution of the administrative expulsion or of the order for expulsion; c) for the purposes of his/her transfer or preparation thereof under a special regulation[39] if there is a significant risk of him/her escaping; or d) for the purpose of his/her return under an international treaty[40] if he/she has illegally crossed the external border or is residing illegally in the territory of the SR.

Administrative expulsion, in accordance with Article 77 of the Act on the Residence of Foreigners, is a decision of the police department that a foreigner does not have or has lost the entitlement to stay in the SR territory and is obliged to leave the SR territory with the option of determining the time by which he/she has to depart back to his/her country of origin, country of transit, or any third country, which the third-country national voluntarily decides to return to and which would accept him/her or to the territory of a Member State in which he/she has been granted the right of residence or provided with international protection. A decision on administrative expulsion shall also include the country into which the foreigner was expelled if such a country could be defined. In its decision on administrative expulsion, the police department may place an entry ban into the SR territory or the territory of all Member States. Similarly, according to Article 15(1) of the Return Directive 2008/115/EC, Member States may only detain a third-country national whose removal is in progress to prepare the return or carry out the expulsion, particularly in cases where there is a risk of absconding or the said third-country national is evading the preparation of the return or the execution of the expulsion, or otherwise obstructing it. Detention may only be resorted to if other less coercive measures cannot be applied effectively in the specific case.[41] The risk of escape, avoidance, or obstruction in the process of preparing for the execution of administrative expulsion must always be assessed individually in proceedings concerning the detention of a foreigner. The conclusion regarding the risk of escape cannot be justified by generalising the previous behaviours of other foreign nationals.[42]

The only requirement for the application of Article 88(1) b) of the Act on the Residence of Foreigners is an enforceable decision of administrative expulsion or penalty of expulsion. Therefore, there are no specific legal requirements related to the risk of flight or the risk of evading or obstructing deportation. The lack of regulation of detention criteria for deportation makes it more difficult to prioritise

39 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

40 For instance, Council Decision 2007/839/ES of 29 November 2007 concerning the conclusion of the Agreement between the European Community and Ukraine on readmission of person.

41 Judgment of the Supreme Court of the SR from 15th July 2015, Case 10 Sza 6/2015.

42 Judgment of the Supreme Court of the SR from 13th August 2014, Case 1 Sža 23/2014.

voluntary departure because the police department will only grant a third-country national the option of voluntary departure when it is proven that there are no grounds for detention, according to Article 88 of the Act on the Residence of Foreigners.[43] It is within the full power of the police department to decide whether to provide the third-country national with the option of voluntary departure or to implement the decision and order a detention. The legislation does not contain a sufficient framework to limit the authority of the police department to order detention without justified reasons, such as the need to prevent flight or evasion, or to hinder the execution of deportation.[44]

Detention under Article 88(1) c) of the Act on the Residence of Foreigners is based on Article 28(2) of the Dublin III Regulation which states that a Member State may detain a third-country national to ensure the transfer procedure if there is a significant risk of absconding. As for the application practice in the SR, the interpretation of "transfer procedure" used in the Dublin III Regulation allows for detention for this purpose even before the issuance of the return decision. In practice, the detention of third-country nationals awaiting transfer to another Member State under the Dublin III Regulation is possible after their apprehension on the territory of the SR, once it is established that transport to another Member State under the Dublin III Regulation can be applied. In accordance with the Dublin III Regulation, detention during the transfer procedure cannot exceed 3 months until the execution of the transfer of the third-country national from the territory of the SR. Another criterion justifying detention on this ground is the requirement of a significant risk of absconding. The legal regulation does not specifically explain when the risk of absconding becomes significant. One indication may be that the third-country national already has a record in the EURODAC system, indicating that they have fled from another Member State. This can be understood as evidence of a significant risk of further absconding.[45]

Detention under Article 88(1) d) of the Act on the Residence of Foreigners is associated with the return of a foreigner based on a readmission agreement. Regarding the rights and interests of the individual, return based on readmission is understood in the general context of administrative expulsion proceedings. Therefore, as stipulated in Article 6(1) of the Return Directive 2008/115/EC, an individual decision on administrative expulsion must be issued to end the irregular stay of a third-country national in the territory of the SR. However, it is debatable whether the mentioned norm really regulates a special reason for detention or whether it should be sufficient to apply it in the execution of the decision on administrative expulsion, according to Article 88(1) b) of the Act on the Residence of Foreigners.[46]

43 Berthotyová, 2017, p. 127.
44 Ibid., pp. 127–128.
45 Berthotyová, 2017, pp. 139–140.
46 Berthotyová, 2017, pp. 149–150.

Likewise, the Act on the Residence of Foreigners states the rights of detained third-country nationals as well as the conditions at detention centres.[47] It is important to note, that the provisions mentioned below are *mutatis mutandis* applicable to detained asylum seekers. The police department is obliged to ensure that the third-country national is advised immediately after his/her detention, and in the language he/she understands: (1) the reasons for detention, (2) the possibility of notifying the consulate of the country of his/her nationality about his/her detention, (3) the possibility of notifying any of his/her close persons and his/her legal representative about his/her detention, and (4) the possibility of examining the legality of the detention decision. As for the rights of detainees, for instance, they are entitled to a continuous eight-hour period of sleeping and two walks per day in the specified area, each lasting at least one hour. A third-country national younger than 18 years of age shall be entitled to three walks per day, one in the morning and two in the afternoon. A third-country national younger than 18 years of age is entitled to access education and leisure-time activities. Vulnerable persons and families with children have access to psychological and social services and counselling and crisis interventions. A third-country national may lodge requests and complaints with the public authorities of the SR, which shall be immediately sent by the police department.

3.1.1. Maximum lengths of detention

Article 88(4) of the Act on the Residence of Foreigners establishes maximum lengths of detention. A third-country national may be detained for the time as reasonably necessary, but not for more than six months. The police department is authorised to repeatedly extend the detention of a third-country national during this period, with the total time of detention not exceeding six months. If it is anticipated that, in spite of the necessary steps taken to execute the administrative expulsion or the order for expulsion of the third-country national, the execution will be prolonged because of poor cooperation of the third-country national or due to a failure of the consulate to issue an emergency travel document within the period of time in the first sentence, the police department may decide, even repeatedly, to extend the period of detention, where the total period of extension may not exceed 12 months. The detention period may not be extended to families with children or vulnerable people. A third-country nationals is detained on the date of the detention decision. Due to the transposition of the Return Directive 2008/115/EC, the maximum duration of detention, which was previously 180 days, has been extended to a maximum of 18 months. Decisions on detention and its extensions are made by a competent police authority that can be directly reviewed by a court. Based on the Administrative Procedure Code, a detained foreigner can file an administrative lawsuit under Article 221 and the following articles of

47 See Arts. 90–100 of the Act on the Residence of Foreigners.

Act No. 162/2015 Coll. Administrative Procedure Code. In accordance with Article 88(5) of the Act on the Residence of Foreigners, the police department shall issue a detention decision forthwith to the third-country national and they shall place him/her in the facility.

As concluded by the Supreme Court of the SR in Case 10 SZa 23/2015, detention is lawful only when its purpose persists throughout the period. If the competent authority justifies the specified duration of detention with demonstrable facts that justify the determined period as the time necessary for the detention of a foreigner, its decision is in accordance with the law in terms of determining the duration of detention.[48] The detention facility is obliged to immediately release a third-country national from detention if: (a) the purpose of detention has ceased, based on a valid court decision; (b) the detention period has expired; (c) the decision on detention has lost its validity due to the person being included in a program for the support and protection of victims of human trafficking; and (d) the third-country national has provided a monetary guarantee to the account of the Police Force based on a decision of the police authority, which amounts to an alternative measure in accordance with Article 89 of the Act on the Residence of Foreigners.[49]

3.1.2. Alternative methods of detention

In addition, it is important to mention Article 89 of the Act on the Residence of Foreigners, which provides for alternative methods of detention. According to EU law, all alternatives must be exhausted first, and detention should be the last resort unless they cannot be effectively applied based on an individual assessment of each case.[50] Detention should only occur after full consideration of all possible alternatives or when monitoring mechanisms fail to achieve a lawful and legitimate purpose. Article 8(4) of the recast directive obliges Member States to establish rules in their national legislation that regulate alternatives to detention. Alternatives to detention include (a) reporting obligations, such as the obligation to report to the police or immigration authorities at regular intervals; (b) surrender of passports or travel documents; (c) residence requirements such as the obligation to stay at a specific address; (d) release on bail with or without guarantee; (e) requirements for a guarantor; (f) release into the care of a social worker or within a social care plan involving a community care team or a team of mental health professionals; and (g) electronic monitoring such as electronic bracelets.[51] However, Article 89 offers only two alternative methods: reporting the place of residence, or paying warranty deposits. The police department, acting in the

48 Judgment of the Supreme Court of the SR on 11 December 2015, Case 10 SZa 23/2015.
49 Berthotyová, 2017, pp. 198–199.
50 Art. 8(2) of the recast Reception Conditions Directive 2013/33/EU, Art. 18(2) of the Dublin III Regulation, Art. 15(1) of the Return Directive 2008/115/EC.
51 Berthotyová, 2017, p. 191.

matter of administrative expulsion, is authorised to impose alternative measures instead of detaining a third-country national. Although the introductory sentence of Article 89(1) refers to a police department acting in the matter of administrative expulsion, this provision applies to all grounds for detention under Articles 88 and 88a (detention of asylum seekers), even when the third-country national is not the subject of administrative expulsion proceedings.[52]

From the decision of the administrative authority regarding detention under Article 88, it is necessary to trace why the competent authority did not resort to the application of alternative forms of detention. If the reasoning of the decision of the administrative authority (regarding detention under Article 88(1) d) of the Act on the Residence of Foreigners) includes arguments and evidence as to why it was not possible to utilise less restrictive measures (under Article 89(1) of the Act on the Residence of Foreigners) and it was necessary to proceed directly with the detention of the foreigner, and the claims of meeting the conditions for imposing less restrictive measures could not stand based on the behavior and passivity of the foreigner in creating conditions for the possibility of using less restrictive measures, the objection of insufficient examination of alternative forms of detention cannot challenge the legality of the decision of the administrative authority regarding the detention of the foreigner.[53]

■ *3.2. Detention of asylum seekers*

An amendment to the Act on the Residence of Foreigners that took effect on 1 January 2014 added the provision of detention of asylum seekers. Under Article 88a(1) of the Act on the Residence of Foreigners, a police officer is entitled to detain an asylum seeker if the purpose of detention cannot be achieved by any less severe means: a) in order to check or verify his/her identity or nationality; b) in order to ascertain the facts that constitute the basis of his/her application for granting asylum, which could not be obtained without detention, especially if there is a risk of absconding; c) in the case of a third-country national detained under Article 88(1) a) or (1) b) who applied for asylum if there is reasonable suspicion that he/she applied for asylum in order to delay or frustrate his/her administrative expulsion; d) if it is necessary due to a threat to national security or public order; or e) for the reason stipulated in Article 88(1) c).

An asylum seeker may be detained for the time strictly necessary as long as the reasons referred to in para. 1 exist. The total time of detention of an asylum seeker under paras. (1) a), (1) b), (1) c), and (1) e) shall not exceed six months. Total time of detention of an asylum seeker under para. (1) d) shall not exceed 18 months.

52 Berthotyová, 2017, p. 192.

53 Judgment of the Supreme Court of the SR, 30 September 2015, Case 10 SZa 13/2015.

In case an illegal migrant applies for asylum, in general, this will result in the termination of the detention and the police department will be obliged to release the foreigner from detention without undue delay; the reasons for the original detention of the foreigner will automatically disappear.[54, 55] Furthermore, the Supreme Court of the SR in Case 1 Sža 5/2013 stated that if the entry of such an foreigner into the territory of the SR without authorisation and his detention in the territory of the SR is connected with the intention to apply for asylum in the SR, it cannot be a reason for the detention of the foreigner.[56] Depriving or restricting personal liberty during the course of asylum proceedings cannot be considered compatible with the constitutional order of the SR, with Slovakia's international human rights obligations. Based on the current legal situation, it is also not in line with the provisions of the Return Directive 2008/115/EC.[57] From Article 22 Paragraph 1 of the Asylum Act, it follows that an asylum seeker is entitled to stay on the territory of the SR during the asylum procedure, unless otherwise specified by this law or a specific regulation.[58] However, Article 88(3) of the Act on the Residence of Foreigners states that lodging an application for granting asylum or the request of the third-country national for assisted voluntary return shall not be the reason for releasing the detained third-country national. If the police authority reaches the conclusion that the foreigners' request for international protection was submitted solely with the intention of delaying or even thwarting the execution of the decision on the expulsion of the foreigner, it may decide again, in accordance with Article 90(1) d) of the Act on the Residence of Foreigners, that the reasons for the previous detention persist despite the fact that the foreigner has applied for international protection.[59]

3.2.1. Asylum procedure in the Slovak Republic

Proceedings under Act No. 480/2002 Coll. on Asylum are not affected by the detention of a third-country national. In accordance with Part II of the Act on Asylum, the asylum-granting procedure shall commence with the foreigners' statement at the competent police department[60] that he/she applies for granting asylum or provision of subsidiary protection on the territory of the SR. A preliminary issue that needs to be resolved in the asylum procedure at the very beginning is the determination of the country which, according to the rules in the Dublin Regulation, is responsible for assessing the asylum application. Once the statement under Article 3(1) is made or once the foreigner enters the territory of the SR in

54 Judgment of the Supreme Court of the SR, 27 August 2014, Case 10 Sža 29/2014.
55 Judgment of the Supreme Court of the SR, 2 September 2014, Case 1 Sža 30/2014.
56 Judgment of the Supreme Court of the SR, 3 May 2013, Case 1 Sža 5/2013.
57 Judgment of the Supreme Court of the SR, 13 August 2014, Case 1 Sža 24/2014.
58 Judgment of the Supreme Court of the SR, 13 August 2014, Case 1 Sža 24/2014.
59 Judgment of the Supreme Court of the SR, 15 July 2015, Case 10 Sza 6/2015.
60 See Art. 3(2) of the Act on Asylum, which sets the competent authorities to receive the statement that he/she is applying for the granting of asylum or subsidiary protection.

accordance with Article 4(6) (lodging the application), the police department shall take away the travel document of the applicant or another identification document and shall issue a receipt on confirmation to the applicant. In accordance with Article 3(6) of the Act on Asylum, the applicant is obliged to appear at the reception camp within 24 hours of lodging the application. Initial actions include medical examination and temporary accommodation (usually up to 30 days). During quarantine, the applicant may not leave the camp. In the reception camp, the applicant is registered, photographed, and issued an asylum-seeker card, which is used for identification during his stay in the SR. After lodging the application, an authorised employee of the Ministry shall conduct an entrance interview with the applicant.[61] During the entrance interview, the applicant shall be obliged to provide truthfully and fully all the requested information necessary for a decision on the application to grant asylum. Asylum applications are assessed by the decision-makers in the Migration Office. During the applicant's stay in the camp, accommodation, food, emergency medical care, social and psychological counselling, pocket money, materials, and hygiene equipment are provided free of charge. Social activities are also available in the camps. The camp can only be left on the basis of a pass and only after the positive result of the health check-up has been announced. Currently, there is only one reception camp in the SR, in Humenné. The applicants are then transferred to a residential camp (Opatovská Nová Ves or Rohovce). Third-country nationals applying for asylum in the Department of Police Detention of Foreigners are not automatically placed in the reception camp. During the asylum granting procedure, applicants legally stay in the territory of the SR. Their movement within the SR is limited by their obligation to report to the residential camp or the Department of Foreigner's Police. Applicants interested in leaving the camp must apply for a short-term pass. It is issued by the camp's administrative staff for a maximum of one week. If the applicant is interested in living outside the camp, he/she must apply for a long-term pass to a decision-maker at the Migration Office.[62] In accordance with Article 20 of the Act on Asylum, the Ministry shall decide within six months of commencing the procedure. This time limit may be repeatedly extended by a maximum of nine months if the decision on an asylum application requires the assessment of complex factual or legal issues, or if a large number of applicants have simultaneously submitted an asylum application and it is very difficult to decide within six months from the start of the proceedings, or if it is not possible to decide within six months from the start of the proceedings because of the applicant's lack of cooperation or other obstacles to assessing the asylum application. If necessary, for a proper assessment of the asylum application, the deadline may be further extended by a maximum of three months. The Ministry will inform the applicant in writing about the extension of the deadline

61 An employee of the Migration Office.
62 Bachtíková et al., 2012, pp. 38–40.

for a decision regarding asylum application. Asylum is granted to an applicant who has a well-founded fear of being persecuted in his/her country of origin for reasons of race, ethnic origin, or religion, holding a particular political opinion or membership in a particular social group, and is unable or, owing to such fear, is unwilling to return to such a country, or is persecuted in his/her country of origin for exercise of political rights and freedoms. The Act on Asylum also regulates the granting of asylum on humanitarian grounds and for the purpose of family reunification. The Ministry shall grant subsidiary protection to an applicant to whom it did not grant asylum, provided there are good reasons to consider that the applicant would face a real risk of serious harm if returned to his/her country of origin.

■ *3.3. Role of the courts of the Slovak Republic in migration cases*

On 1 June 2023 the judiciary was reformed in the SR. The decisions of the administrative authority on asylum, detention, and administrative expulsion can now be reviewed by two administrative courts in Bratislava and Košice.[63] In case of an appeal, the Supreme Administrative Court of the SR will review the administrative decision and the decision of the administrative court through a cassation complaint. Before the reform, decisions were reviewed by the Regional Courts in Bratislava and Košice, and in the case of an appeal, until 2021, the Supreme Court of the SR had jurisdiction.

Since the analysed agenda falls under the administrative judiciary, the procedure is regulated by the Administrative Court Procedure (Act No. 162/2015 Coll.) (hereinafter 'ACP'), which came into force on 1 July 2016. The ACP regulates administrative actions separately in the case of asylum, detention, and administrative expulsion in Articles 206–241 of the ACP. In an administrative action, the grounds of the action must be defined, from which it must be clear for what specific factual and legal reasons the plaintiff considers the contested statements of the decision or measures to be illegal. The plaintiff is obliged to be represented by a lawyer or non-governmental organisation that provides legal assistance to foreigners. In principle, the ACP does not grant a suspensive effect to an administrative action unless it further stipulates otherwise, or otherwise, stipulated by a special legal regulation.[64] Administrative actions on asylum have in accordance with Article 213 of the ACP suspensive effect, which means that the effects of the contested decision or measure of the public administrative body, and such a decision or measure, cannot be the basis for issuing subsequent decisions or measures.[65] The ACP introduced deadlines within which the court must decide

63 For more details, see Art. 17 of the Act No. 162/2015 Coll. Administrative Court Procedure and Act No. 151/2022 Coll. on on the Establishment of Administrative Courts and on Amendments to Certain Acts.

64 Art. 184 of the ACP.

65 Berthotyová, 2017, p. 101.

on an administrative action. The length depends on the subject of the proceedings or the special circumstances that the court must consider when making a decision. This varies from seven to 90 days. With regard to the requirement for a speedy court decision, the Constitutional Court of the SR concluded that when the Supreme Court (currently the Supreme Administrative Court of the SR) decides on an appeal against the judgment of a regional court, and the applicable procedural rules allow for a meritorious (final) decision, it is its duty to prefer this method of decision before annulling the first-instance decision and returning the case for further proceedings.[66]

4. Conclusion

Protecting state borders and preventing illegal migration remain pressing issues for many states, including the SR. The applicable legal framework is, to a great extent, influenced by EU norms and Schengen aquis. Regarding border protection, the main domestic act of the SR is the Act on the Residence of Foreigners, which regulates, among others, border control, entry and exit through external borders, refusal of entry, a variety of permitted stays for foreigners, and reasons for the detention of foreigners and asylum seekers. The main authority on border protection is the Bureau of Border and Foreign Police of the Presidium of the Police Force and its organisational units. Police officers are authorised to detain a person, request proof of identity, check travel documents and other accompanying documents of persons crossing the external border, and check facts related to crossing the external border. It is important to note that the Bureau has some authority in the asylum procedure, especially in carrying out initial actions related to the acceptance of a foreigner’s declaration requesting asylum or subsidiary protection, as well as tasks related to ensuring the transfer of foreigners to the state that has taken responsibility for examining the asylum application. Regarding illegal migration, the SR currently faces a migration flow that requires taking measures at internal borders. The main legal act in this area is the Act on the Residence of Foreigners; however, if an illegal migrant applies for asylum, the Act on Asylum is applied. Furthermore, for the duration of the asylum procedure, the asylum seeker is considered a foreigner who legally stays in the territory of the SR. The Act on the Residence of Foreigners regulates the conditions under which foreigners or asylum seekers may be detained (mainly associated with administrative expulsion), as well as the length of detention (no more than 18 months) and alternatives to detention (reporting the place of residence or paying warranty deposit). Illegal migration issues primarily fall under the auspices of the Ministry of the Interior, which implements its agenda in the field of migration and asylum mainly through

66 Finding of the Constitutional Court of the SR, Case II. ÚS 147/2013.

two bodies: the Migration Office and the Bureau of Border and Foreign Police of the Presidium of the Police Force. The Migration Office acts in the area of asylum, integration of refugees and foreigners who were provided subsidiary protection, and in the field of documentation and foreign cooperation. Finally, this study focuses on administrative actions that may be submitted to newly established administrative courts, as well as the specifics of the administrative actions within the asylum, detention, and administrative expulsion agenda.

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The Anatomy of Non-Refoulement: A Centrepiece of International Refugee Law and Human Rights Law

ABSTRACT: *Although the principle of non-refoulement remains vital under international refugee law and human rights law, its content and scope are the subject of extensive scholarly discussions. Therefore, this paper seeks to provide a concise analysis of non-refoulement starting from the 1951 Geneva Convention relating to the Status' Refugees and to explore accurately its meaning based on its material, personal, and geographical scope. This paper also endeavours to briefly examine non-refoulement under universal and regional human rights instruments. Further, it aims to compare the interpretations of non-refoulement under international refugee law and human rights law based on the relevant case-law of international and domestic courts in addition to that of the respective monitoring mechanisms.*

KEYWORDS: asylum, the principle of non-refoulement, international human rights law, international refugee law, Refugee Convention

1. Introduction

Modern international refugee law was formulated immediately after the end of the Second World War when millions of Europeans had fled the old continent owing to prolonged persecution, mainly by the Nazi and Stalinist regimes.[1] In addition to family reunification and non-discrimination, non-refoulement emerged as the most significant principle of international refugee law from the outset. Succinctly,

1 Gatrell, 2000

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the principle of non-refoulement reflects the humanitarian imperative of solidarity—the prohibition against sending back non-nationals to a country where there is a real risk of persecution or serious violations of human rights. The principle of non-refoulement applies to states, obligating them to not force refugees or asylum seekers to return to a country where they are likely to be subjected to persecution.' Further, the 'principle of civilization'[2] is enshrined under numerous treaties: It is found in several international instruments related to refugee, humanitarian, and human rights laws, while it is also a well-established norm of international customary law. When analysing treaties containing the prohibition of refoulement, one can conclude that besides explicit and obvious wording, the principle of non-refoulement exists in implicit form as well. In these instances, case-law and the interpretation of respective monitoring bodies shed light on the implied meaning of some provisions of human rights treaties, mostly related to the prohibition against torture and other forms of ill-treatment. Thus, the aim of this paper is (1) to define the legal contours of non-refoulement; (2) to integrate the relevant case-law of international and domestic courts as well as respective monitoring bodies; and finally, (3) to compare the content and scope of non-refoulement under international refugee law and human rights law.

2. The principle of non-refoulement under international refugee law

The principle of non-refoulement acquired the status of international treaty law by virtue of Article 3 of the 1933 Convention relating to the International Status of Refugees[3] as follows:

> Each of the Contracting Parties undertakes not to remove or keep from its territory by applications of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order...

This provision later served as a model for further legislation.[4]

The most significant step in the evolution of non-refoulement was unquestionably the adoption of the 1951 Geneva Convention relating to the Status of

2 Grahl-Madsen, 1982, p. 439.

3 Convention of 28 October 1933 relating to the International Status of Refugees, League of Nations, Treaty Series Vol. CLIX No. 3663.

4 Jager, 2001, p. 730.

Refugees (hereinafter: 'Refugee Convention')[5] under the auspices of the United Nations (UN). Article 33(1) of the Refugee Convention states:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

According to the contemporary interpretation of non-refoulement under Article 33, no reservations are allowed to be attached thereto under Article 42[6] and under VII (1) of the 1967 Protocol,[7] and thus it embodies a *lex specialis* as part of the set of rules of international refugee law under further human rights instruments.

The principle of non-refoulement is undoubtedly a landmark in international refugee law; moreover, given its considerable impact on the regime of the Refugee Convention, it can be labelled 'the cornerstone of international refugee law.'[8] As Gammeltoft-Hansen established, 'the non-refoulement obligation serves as the entry point for all subsequent rights that may be claimed under the 1951 Refugee Convention. Without this, little else matters.'[9] Simultaneously, it is important to note that in accordance with Article 33(1) of the Refugee Convention, non-refoulement does not indicate the right of the individual to be granted asylum in a particular State.[10] Rather, it means that when a particular State is not prepared to grant asylum to a person who is in need of international protection, it must adopt a fair procedure and ensure that the person will not be sent to a country where his or her life, dignity, or freedom would be endangered owing to his or her race, religion, nationality, membership of a particular social group, or political opinion.[11] The prohibition of refoulement applies to all authorities of a State Party to the Refugee Convention and all persons acting on behalf of a State Party. Regarding the standard of proof for the prohibition of refoulement, 'would

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5 1951 Geneva Convention relating to the Status of Refugees, Geneva, 28 July 1951, U.N.T.S., vol. 189, p. 137.

6 Art. 42(1) of the Refugee Convention. At the time of signature, ratification, or accession, any State may make reservations to articles of the Convention other than to Arts. 1, 3, 4, 16(1), 33, 36–46 inclusive.

7 Protocol relating to the Status of Refugees, New York, 31 January 1967, U.N.T.S., vol. 606, p. 267.

8 San Remo Declaration on the Principle of Non-Refoulement (September 2001) [Online]. Available at: https://perma.cc/JH4T-JDQD (Accessed: 20 August 2023).

9 Gammeltoft-Hansen, 2011, p. 44.

10 Weis, 1995, p. 342.

11 Lauterpacht and Bethlehem, 2003, p. 76.

be threatened' indicates a relatively high threshold, a 'reasonable degree of likelihood that the persecution will occur.'[12]

Despite the clear correlation between the two, non-refoulement differs from asylum[13] from both conceptual and legal perspectives. While non-refoulement is a negative obligation for States, prohibiting them from sending any person back to a country where they are likely to face persecution, asylum is a positive one encompassing the granting of a new residence and long-term protection from the jurisdiction of another State. In other words, non-refoulement is an obligation for States, whereas asylum is one of their rights, which simultaneously means that it is not a right of the individual.[14] As a consequence of this normative separation, the Refugee Convention, except in its Preamble,[15] does not comprise any provision on asylum, which was intentional on the part of the drafting fathers of the Refugee Convention. The statement of the delegate of the UK on the Conference of Plenipotentiaries unambiguously clarified this stance: 'The right of asylum… was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him.'[16] Nevertheless, unalienable interactions exist between the State's obligation of non-refoulement and the State's right to grant asylum: Non-refoulement shall be considered when a State decides whether to grant or refuse asylum. From this perspective, the separation of non-refoulement and asylum seems quite hypothetical, as in practice, before removing an asylum seeker from State territory, the respective State must conduct an assessment of non-refoulement under any circumstances.

Under Article 33(1) of the Refugee Convention, the material scope of the principle of non-refoulement is relatively broad. The wording 'in any manner whatsoever' means any act of sending back non-nationals when there is a real risk of persecution. According to contemporary jurisprudence, the legal nature of that act is irrelevant, and it can be realised through deportation, extradition, maritime

12 R v Secretary of State for the Home Office, ex parte Sivakumaran and Conjoined Appeals (UNCHR Intervening) [1998] AC 958 (UK), para. 993.

13 Asylum, that is, helping those who seek refuge from danger, has a long history. Traditionally, asylum was a religious duty that used to be linked to a holy place that provided divine protection from manmade jurisdiction. However, as the concept of sovereign nation States emerged after the Peace of Westphalia, the power to grant asylum shifted from religious institutions to State authorities. The right to seek asylum started to be recognised as a human right only in the 20th century, in the era of the adoption of universal human rights treaties. Rabben, 2016, pp. 27–66; Schuster, 2002, pp. 44–56.

14 Chetail, 2019, pp. 190–190.

15 Refugee Convention, Preamble, Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem for which the United Nations has recognized an international scope and nature cannot therefore be achieved without international co-operation.

16 UNGA 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting' (22 November 1951) UN Doc. A/CONF.2/SR/13, 13.

interception, non-admission at the border, transfer, and rendition, among others.[17] Subsequently, the essence is not the act but its consequence, that is, putting the dignity, life, or liberty of the person in danger. Simultaneously, refoulement is different from expulsion or deportation, as these concepts cover a more formal process whereby a lawfully residing non-national may be required to leave a State or be forcibly removed.[18] The prohibition of refoulement encompasses not only the prohibition to return to the country of origin, but also to any country where the person's life or freedom would be threatened based on any of the five limitative grounds.

Regarding the personal scope, the protection against refoulement under Article 33(1) applies to any person who, on the one hand, meets the 'inclusion criteria' for refugees provided under Article 1A(2) of the Refugee Convention, and on the other hand, does not fall under the scope of the 'exclusion criteria.'[19] Additionally, the prohibition of refoulement applies not only to refugees but also to asylum seekers, which can be primarily explained by the declaratory nature of refugee status. As the United Nations High Commissioner for Refugees (UNHCR) eloquently stated,

> a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee.[20]

The UNHCR also established the following:

> every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because application might be rejected at borders

17 Chetail, 2019, p. 187; Lauterpacht and Bethlehem, 2003, p. 87.

18 Goodwin-Gill and McAdam, 2021, p. 466.

19 UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' (2007) (hereinafter: UNHCR 2007 Advisory Opinion) [Online]. Available at: https://www.refworld.org/docid/45f17a1a4.html (Accessed: 3 October 2023).

20 UNHCR 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (2011) UN Doc. HCR/1P/4/ENG/REV.3, para. 38.

or otherwise returned to persecution on the grounds that their claim had not been established.[21]

One may thus conclude that the declaratory nature of refugee status is based on a rebuttable presumption that asylum seekers are assumed to have a refugee status with regard to the benefits of non-refoulement protection for the duration of the asylum procedure unless proven otherwise. As Goodwin-Gill and McAdam remark, 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx.'[22] Consequently, non-refoulement is of special significance for asylum seekers: As they may be potential refugees, they should not be returned or expelled while their asylum application is pending. Additionally, as Chetail observes,[23] the personal scope of non-refoulement under the Refugee Convention can be also supported by the principle of *effet utile*. According to the International Court of Justice, which based its position on *effet utile* in the Case Concerning the Territorial Dispute between Libya and Chad, the principle of effectiveness is among the 'the fundamental principles of interpretation of treaties.'[24] *Effet utile* means that among the numerous methods of treaty interpretation, the one which best captures the practical effect of the respective norm shall be applied, and this cannot be realised if asylum seekers are not protected based on non-refoulement.

The asylum seeker's application *per se* triggers the application of non-refoulement as soon as the person is within the jurisdiction of the State Party to the Refugee Convention. The European Court of Human Rights (ECtHR) pointed out in *Amuur v. France*[25] and *Hirsi et al v. Italy*[26] that non-refoulement extends protection from the moment when the person concerned intends to enter the border of another country, that is, it not only protects those already staying in the territory of a particular State from expulsion. As the Human Rights Committee (HRC) remarks, this jurisdiction is extended to 'anyone within the power of effective control of that State Party, even if not situated within the territory of the State Party.'[27] Therefore, non-refoulement has a so-called extraterritorial scope, meaning that it is applicable in those territories that are not part of State territory

21 UNHCR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc. A/AC.96/815, para. 5.
22 Goodwin-Gill and McAdam, 2021, p. 469.
23 Chetail, 2019, p. 188.
24 Case Concerning the Territorial Dispute, Libyan Arab Jamahiriya v Chad, Judgment of 3 February 1994, ICJ Reports 6, para. 51.
25 ECtHR, *Amuur v France* (Application No. 19776/92), Judgment, 25 June 1996.
26 ECtHR, *Hirsi Jamaa et al v Italy* (Application No. 27765/09), Judgment, 23 February 2012.
27 UN Human Rights Committee (HRC), General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 10.

in a legal sense but are under the effective control of the respective State Party.[28] According to the UNHCR interpretation, when the drafters of the Refugee Convention intended a particular clause of the treaty to apply only to those within the territory of a State Party, they chose language that leaves no doubt regarding their intention. Besides, the UNHCR established that any interpretation that tailors the geographical scope of Article 33(1) as not applicable to measures whereby a State, outside its territory, drives back refugees to a country where they face the threat of persecution would be manifestly inconsistent with the humanitarian object and purpose of the Refugee Convention and its 1967 Protocol. The first two paragraphs of the Preamble of the Refugee Convention read as follows: 'considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,' and 'considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.' The UNHCR underpins the overriding humanitarian object and purpose of the Refugee Convention based on a comprehensive review of the *travaux préparatoires*. The UNHCR, in accordance with Article 32 of the 1969 Vienna Convention on the Law of Treaties[29] on the supplementary nature of historical interpretation, is of the view that turning to the drafting history of Article 33(1) is not necessary owing to the unambiguous wording of this provision; however, the *travaux préparatoires* might be of interest in explaining the content and scope of non-refoulement.[30]

Although non-refoulement has a relatively broad scope of application, it is not an absolute term under the Refugee Convention. While drafting the Refugee Convention, the 1951 Conference of Plenipotentiaries raised concerns related to the absoluteness of the prohibition of non-refoulement;[31] therefore, the final text of Article 33(2) states,

> the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

28 De Boer, 2015, pp. 118–134; Goodwin-Gill, 2011, pp. 443–457; Trevisanut, 2014, pp. 661–675.

29 Art. 32 of the 1969 Vienna Convention on the Law of Treaties. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result that is manifestly absurd or unreasonable.

30 UNHCR 2007 Advisory Opinion [Online].

31 Goodwin-Gill and McAdam, 2021, p. 468.

This provision encompasses two exceptions that reflect a State-centred approach: The first is related to the public security of the host country, while the second protects the host country specifically against crime. Nonetheless, these provisions should be interpreted restrictively and only be applied in highly exceptional circumstances. The wording of Article 33(2) clearly implies this restrictive approach regarding the second exception defending the host country specifically against crime: (i) 'convicted by a final judgment' suggests that effective remedies were exhausted; (ii) 'for a particularly serious crime' suggests that international crimes, such as crimes against humanity and crimes against the State, for example, terrorism, should be considered; and (iii) 'constitutes a danger to the community of that country' suggests that owing to the risk of subsequent offence, the person is dangerous for the host country.[32] However, Article 33(2) of the Refugee Convention does not affect the host State's non-refoulement obligations under international human rights law, which are absolute and allow no such exceptions (see in detail below).[33]

Although under Article 33(1) of the Refugee Convention, a return to the State where persecution has occurred is prohibited, a return to any other State is not, which has led to restrictions applied by host States such as the 'first country of arrival rule' and the 'safe third country rule'. This approach often entails 'chains of deportation' that lead to refugees finding themselves in the State where they first arrived after fleeing their homeland.[34] Additionally, some States practice 'extraterritorial refoulement' and intercept refugees on the high seas to keep them outside territorial waters. In *Sale v Haitian Centers Council*, the US Supreme Court[35] found that intercepting Haitians on the high seas and returning them to their home State is lawful; however, the Inter-American Court of Human Rights[36] declared that it breaches Article 33 of the Refugee Convention. In the same vein, the ECtHR declared a similar bilateral agreement between Italy and Libya, concluded in 2012, unlawful in *Hirsi Jamaa and Ors v. Italy*.[37]

Australia has also pursued a legally dubious practice of 'offshore processing centres' for several years, where asylum seekers not only have been returned to the high seas so they cannot enter State territory, but also their asylum applications have been assessed in these processing centres; even if they are recognised as refugees, they have been legally prevented from settling in Australia. The opening of the offshore processing centres was closely connected with the infamous 'Tampa affair.' In August 2001, a small Indonesian fishing boat overloaded

32 Chetail, 2019, pp. 189–190.
33 Lauterpacht and Bethlehem, 2003, pp. 159, 166, 179.
34 Hernández, 2019, pp. 431–432.
35 Sale v. Haitians Centers Council (1993) 509 US 155.
36 Haitian Interdiction Case 10.675 IACommHR No. 51/96 OEA/Ser.L/V/II.95 doc.7 Rev [1997] 550, paras. 156–158.
37 ECtHR, *Hirsi Jamaa and Ors v. Italy* (Application No. 27765/09), Judgment, 23 February 2012.

with more than 400 asylum seekers, mainly of Hazara ethnicity from Afghanistan, was stranded on the high seas near the Christmas Islands. The asylum seekers were rescued by a Norwegian freighter, the MV Tampa, under the direction of the Australian Maritime Safety Authority. However, when the Tampa's captain set course for the closest port in Indonesia with facilities to dock such a large vessel, some asylum seekers threatened to commit suicide if they were sent back there. Simultaneously, the Australian government refused to grant permission to land any of the asylum seekers, and Australian troops boarded the ship and prevented it from sailing any closer to the Christmas Islands. On the same day, the Australian prime minister submitted a backdated bill on border protection to provide retrospective authority for the boarding of the Tampa. In September, the Australian government concluded agreements with Nauru and New Zealand, and finally, the Tampa's asylum seekers were taken to Nauru, or sent therefrom to New Zealand. In the aftermath of the 'Tampa affair', the Australian government passed a series of laws establishing a new legislative framework for asylum issues, the so-called 'Pacific Solution,' which meant that asylum seekers did not have an automatic right to apply for refugee status if they arrived on many of Australia's offshore islands, including the Christmas Islands. Many human rights organisations have criticised this policy, and the Papuan Supreme Court shut down two processing centres, in Nauru and on Manus Island, in 2017, finding the restriction on the movement of asylum seekers unconstitutional.[38] Nonetheless, on and off since 2011, Australia had automatically sent asylum seekers arriving by boat to Nauru for refugee status determination,[39] until the summer of 2023 when even the last refugees were moved from the offshore processing centre.[40]

3. The principle of non-refoulement under international human rights law

As a result of the normative development of human rights law, non-refoulement has also become a pivotal tool for protection under this branch of international law. As for universal human rights treaties, this fundamental principle was enshrined under Article 3 of the 1984 UN Convention against Torture,[41] which,

38 Gammeltoft-Hansen, 2011, pp. 100–157.

39 Morris, 2023; National Museum Australia, Defining Moments, 'The Tampa affair' [Online]. Available at: https://www.nma.gov.au/defining-moments/resources/tampa-affair (Accessed: 29 January 2024).

40 Doherty and Gillespie, 2023; Tooby, 2023.

41 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, U.N.T.S., vol. 1465, p. 85. Art. 3(1). No State Party shall expel, return ('refouler'), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, the competent authorities shall

for the first time, adopted a general human rights context and extended beyond refugee law. Some years later, Article 16 of the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance[42] reinforced the universal endorsement of non-refoulement.[43] At the regional level, one can identify the principle of non-refoulement in several treaties as well: Article 3(2) of the 1957 European Convention on Extradition,[44] Article 22(8) of the 1969 American Convention on Human Rights,[45] Article 4(5) of the 1981 Inter-American Convention on Extradition,[46] Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture,[47] Article 19(2) of the 2000 Charter of Fundamental Rights of the European Union,[48] and Article 28 of the 2004 Arab Charter on Human

take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

42 International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, U.N.T.S., vol. 2716, p. 3. Art. 16(1). No State Party shall expel, return ('refouler'), surrender, or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights or of serious violations of international humanitarian law.

43 Molnár, 2019, pp. 5–9.

44 Art. 3(2) of the European Convention on Extradition, Paris, 13 December 1957, ETS 24. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or political opinion, or that that person's position may be prejudiced for any of these reasons.

45 Art. 22(8) of the American Convention on Human Rights 'Pact of San José, Costa Rica,' San José, 18 July 1978, U.N.T.S., vol. 1144, p. 123. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

46 Art. 4(5) of the Inter-American Convention on Extradition, Caracas, 25 February 1981 [Online]. Available at: https://www.oas.org/juridico/english/treaties/b-47.html (Accessed: 22 July 2023). Extradition shall not be granted when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion, or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons.

47 Art. 13(4) of the Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, 28 February 1987, OAS Treaty Series, No. 67. Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman, or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

48 Art. 19(2) of the Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Official Journal of the European Union, C 326/391. No one may be removed, expelled, or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Rights.[49] Although it does not constitute a binding law, Para. III (5) of the 1984 Cartagena Declaration of Central America, Mexico, and Panama (hereinafter: the 1984 Cartagena Declaration)[50] is worth mentioning. The wording of the 1984 Cartagena Declaration is the boldest and the most outspoken among that of all the above-mentioned documents, as Para. III (5) identifies non-refoulement as an imperative norm of international law (*jus cogens*). Simultaneously, the 1984 Cartagena Declaration seems to have rarely been applied in practice, so its case-law is undeveloped and national authorities rarely use it when it comes to the protection of refugees.[51]

Additionally, the principle of non-refoulement has appeared implicitly at the universal level. Article 14 of the 1948 Universal Declaration on Human Rights (UDHR),[52] which provides the right to seek and enjoy asylum from persecution, can be directly traced to the horrifying events of the Second World War, along with Article 13[53] (the right to leave one's country) and Article 15[54] (the right to nationality).[55] Since the UDHR has failed to provide the individual right to be granted asylum, just like the right to property, and it was not restated under the 1966 International Covenant on Civil and Political Rights (ICCPR),[56] non-refoule-

49 Art. 28 of the Arab Charter on Human Rights, League of Arab States, 2004 [Online]. Available at: https://www.refworld.org/docid/60a28b534.html (Accessed: 31 May 2023). Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited.

50 Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, Cartagena, 22 November 1984 [Online]. Available at: https://www.refworld.org/docid/3ae6b36ec.html (Accessed: 22 July 2023) Para. III (5) To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees, and in the present state of international law, should be acknowledged and observed as a rule of *jus cogens*.

51 Reed-Hurtado, 2013, p. 5.

52 Art. 14(1) of the United Nations General Assembly Resolution 217 (III) A, 10 December 1948. Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

53 Art. 13(1) of the UDHR Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country.

54 Art. 15(1) of the UDHR. Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

55 Ádány, 2016, p. 239.

56 Art. 7 of the International Covenant on Civil and Political Rights, New York, 16 December 1966, U.N.T.S., vol. 999, p. 171 and vol. 1057, p. 407. No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ment has played a key role in addressing the hiatus of the right to asylum in the UN human rights protection system.[57]

A year later, non-refoulement was enshrined again under Article 45 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: 1949 GC IV)[58] as an inevitable cornerstone of comprehensively recodified international humanitarian law. Article 45 of the 1949 GC IV adopted a more explicit and sophisticated wording of non-refoulement than the UDHR, including political opinion or religious belief as possible grounds of persecution. However, the personal scope of this provision covers only protected persons, that is,

> those who, at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[59]

The text of Article 45 of the 1949 GC IV reflects a *lex specialis*: Since humanitarian law provides an additional protection to human rights law, the application of non-refoulement as a rule of humanitarian law offers additional protection to that under the interpretation of non-refoulement under human rights law.[60]

In addition to the above-mentioned documents, other general human rights instruments constitute an implicit provision where their respective monitoring mechanisms imply the duty of non-refoulement. Most importantly, Article 3 of the 1950 European Convention on Human Rights[61] (ECHR) includes the absolute prohibition of torture or inhuman or degrading treatment or punishment, Based on the aforementioned Article, the European Commission of

57 Lauterpacht, 1948, p. 354.

58 Art. 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, U.N.T.S., vol. 75, p. 287. [...] In no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear persecution for his or her political opinions or religious beliefs.

59 Art. 4 of the International Committee of the Red Cross, Convention (IV) relative to the Protection of Civilian Persons in Time of War – Definition of Protected Persons [Online]. Available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-4 (Accessed: 22 July 2023).

60 Molnár, 2016, pp. 51–61.

61 Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS 5. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Human Rights addressed this issue as early as 1961 in *X v. Belgium*,[62] suggesting that the removal of foreign nationals might contradict Article 3 of the ECHR. The ECtHR officially confirmed the principle of non-refoulement in *Soering v. the United Kingdom*[63] in 1989. In this landmark case, the ECtHR found that the so-called death row phenomenon would have breached Article 3 of the ECHR, that is, the prohibition of inhuman or degrading treatment, if the applicant had been extradited to the US. Two years later, the ECtHR adopted a more cautious stance in *Vilvarajah and Others v. the United Kingdom*,[64] where the five applicants were asylum seekers of Tamil ethnicity from Sri Lanka whose requests were denied in the UK and who had been returned to Sri Lanka. The ECtHR rejected their allegations of a breach of Article 3, citing the risk of ill-treatment, and a breach of Article 13 because of UK's ineffective judicial remedy. In *Vilvarajah*, the ECtHR based its reasoning on the fact that people of Tamil ethnicity were not in a more adverse position than people of other ethnicities in Sri Lanka. However, in *Chahal v. the United Kingdom*,[65] the ECtHR referred to *Soering*, prohibiting the deportation of a Sikh separatist to India because of the risk of violating Article 3. In *Chahal*, the ECtHR held that the prohibition derived from non-refoulement is made in 'absolute terms [...] irrespective of a victim's conduct.'[66] In *Salah Sheekh v. the Netherlands*[67] and in *Saadi v. Italy*,[68] unlike in *Vilvarajah*, the ECtHR held that if the applicant is a member of a community that is the target of persecution, he or she only needs to prove his or her membership of the persecuted community or the mere fact of persecution. In 2011 and 2012, the ECtHR delivered three relevant judgments that are also worth mentioning in this regard. *MSS v. Belgium and Greece*[69] concerned an Afghan asylum seeker who fled Kabul in 2008, entered the EU through Greece, and travelled to Belgium, where he applied for asylum. According to the Dublin rules, Greece was considered the EU Member State responsible for the examination of his asylum application. Therefore, the Belgian authorities transferred him there, where he faced detention in unhealthy conditions before living on the streets without any material support. At issue in the judgment was the risk of violating the right to life, the prohibition of inhuman or degrading treatment or punishment, and/or the

62 EComHR, *X v. Belgium* (No. 984/61), Decision, 30 May 1961.
63 ECtHR, *Soering v. the United Kingdom* (Application No. 14038/88), Judgment, 7 July 1989, paras. 87–88.
64 ECtHR, *Vilvarajah and Others v. the United Kingdom* (Application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), Judgment, 30 October 1991.
65 ECtHR, *Chahal v. the United Kingdom* (Application No. 22414/93), Judgment, 15 November 1996.
66 ECtHR, *Chahal v. the United Kingdom* (Application No. 22414/93), Judgment, 15 November 1996, para. 413.
67 ECtHR, *Salah Sheekh v. the Netherlands* (Application No. 1948/04), Judgment, 11 January 2007.
68 ECtHR, *Saadi v. Italy* (Application No. 37201/06), Judgment, 28 February 2008.
69 ECtHR, *MSS v. Belgium and Greece* (Application No. 30686/09), Judgment, 21 January 2011.

right to an effective remedy. Eventually, in its judgment, the ECtHR found that degrading living conditions can trigger the prohibition of refoulement. In *Sufi and Elmi v. the United Kingdom*,[70] the ECtHR once again highlighted the principle of non-refoulement when it established that the deportation of two applicants to Somalia would constitute a violation of Article 3 because of the humanitarian crisis and indiscriminate violence in the African country. In *Othman (Abu Qatada) v. the United Kingdom*,[71] a case concerning a recognised refugee in the UK who was to be deported to Jordan in the interests of national security, the UK government obtained assurances from Jordan that the applicant would not be subjected to ill-treatment and would be tried fairly by the Jordanian authorities. Despite the efforts of the UK, the ECtHR found a violation of non-refoulement in connection with the flagrant denial of the right to a fair trial.

After the ECtHR delivered the *Soering* judgment, other universal and regional monitoring bodies endorsed the implicit duty of non-refoulement, including the Committee of the Rights of the Child,[72] the Committee on the Elimination of Discrimination against Women,[73] the Inter-American Commission of Human Rights,[74] and the African Commission on Human and Peoples' Rights.[75] Moreover, as the second pillar of the International Bill of Human Rights, Article 7 of the ICCPR reiterates the absolute prohibition of torture and bans it through an extraterritorial interpretation, that is, a State indirectly commits torture by transferring the person concerned to a country where he or she will be tortured or subjected to cruel, inhuman, or degrading treatment or punishment.[76] The HRC elaborated in *Kindler v. Canada*[77] and in General Comment No. 31[78] that the implicit duty of non-refoulement could be connected not only with the prohibition of torture but also with any human right under the ICCPR. Additionally, in

70 ECtHR, *Sufi and Elmi v. the United Kingdom* (Application Nos. 8319/07 and 11449/07), Judgment, 28 June 2011.
71 ECtHR, *Othman (Abu Qatada) v. the United Kingdom* (Application No. 8139/09), Judgment, 17 January 2012.
72 UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 27.
73 UN Committee on the Elimination of Discrimination against Women (CEDAW), Communication No. 33/2011 concerning *MNN v. Denmark*, 8–26 July 2013 CEDAW/C/D/33/2011, para. 8.10.
74 The Haitian Centre for Human Rights et al v United States, Case No. 10.675, Report No. 51/96 (IAComHR 13 March 1997) Doc. OEA/Ser.L/V/II.95 Doc. 7 Rev., para. 167.
75 *John K. Modise v. Botswana*, Decision on the Merits, Comm. No. 97/93, IHRL 223 (AComHpR 2000), para. 91.
76 See Art. 7 of the UN Human Rights Committee (HRC), CCPR General Comment No. 20 (Prohibition of Torture, or Other Cruel, Inhuman, or Degrading Treatment or Punishment), 10 March 1992.
77 Kindler v. Canada (1993) HRC CCPR/C/48/D/470/1991, para. 13.2.
78 UN Human Rights Committee (HRC), General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 12.

Kindler, the HRC returned the ruling of the Supreme Court of Canada that held that the government policy allowing for the extradition of convicted criminals to a country in which they may face death penalty was valid under the Canadian Charter of Rights and Freedoms.[79] Simultaneously, as the aforementioned cases demonstrate, the ECtHR seemed reluctant to expand the possible scope of non-refoulement beyond the prohibition of torture, inhuman or degrading treatment or punishment, the right to life, freedom from slavery and arbitrary detention, and the right to a fair trial.

4. Differences and similarities in the aspects of non-refoulement under international refugee law and human rights law

Indeed, serious violations of any human right would trigger the correlative prohibition of refoulement if the gravity of the human rights violation reaches at least the level of degrading treatment. Therefore, the human rights aspect of non-refoulement coincides substantially with that of its refugee law counterpart. Chetail points out that while degrading treatment and persecution are autonomous in international law, defining both as a serious violation of human rights is correct and 'erodes their distinctive character,' that is, 'degrading treatment equates with persecution under the refugee definition.'[80] In spite of the similarities, the scope of non-refoulement under human rights law differs from that in its refugee law counterpart in three respects. First, the human rights law aspect is not limited to the five grounds (race, religion, nationality, membership of a particular social group, and political opinion) enumerated under Article 33(1) of the Refugee Convention. Second, the human rights law aspect is not limited geographically to those who are outside the country of their nationality. For instance, the human rights aspect of non-refoulement applies to persons pursuing diplomatic missions and to persons who are staying in an area controlled by occupying or peacekeeping missions, or that is otherwise under the effective control of another State.[81] Third, the human rights aspect of non-refoulement has an absolute nature when there is a real risk of torture or of inhuman or degrading treatment or punishment, including the death penalty. In such cases, the human rights aspect of non-refoulement applies not only to refugees and asylum seekers under Article 33(1) of the Refugee Convention, but to anyone. While refugee law offers subsidiary protection exclusively to those

79 The Canadian Charter of Rights and Freedoms is a bill of rights entrenched in the Constitution of Canada, forming the first part of the 1982 Constitution Act [Online]. Available at: https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/pdf/charter-poster.pdf (Accessed: 19 August 2023).
80 Chetail, 2014, pp. 19–72.
81 Noll, 2005, p. 542.

who deserve it under the criteria established by the Refugee Convention, human rights law is inclusive and universal.

It is clear that the norm prohibiting refoulement is part of customary international law, and thus is binding on all States, whether or not they are parties to the Refugee Convention. However, what could remain uncertain is whether the norm has achieved the status of *jus cogens*[82] *per se*. The Executive Committee of the UNHCR in numerous conclusions,[83] the 1969 'Addis-Ababa Convention,'[84] the 1984 Cartagena Declaration of Refugees, the 1984 Convention against Torture, the American Convention on Human Rights and the ECHR, and the EU Charter of Fundamental Rights formulate an absolute ban without exceptions,[85] and so does the case-law of the respective monitoring mechanisms in the case of a prospective violation of the prohibition of torture or inhuman or degrading treatment or punishment. However, as discussed above, Article 33(2) of the Refugee Convention does not establish an absolute prohibition, as it presents two exceptions to the non-refoulement obligations of States.

5. Concluding remarks

The principle of non-refoulement is one of the fundamental building blocks of the universal system for the protection of refugees; however, as has been demonstrated above, it has been repeatedly challenged by asylum States. The significance of non-refoulement lies in its *prima facie* function, as it serves as an entry point when assessing an asylum seeker's refugee application, while it is a precondition for other rights guaranteed by the Refugee Convention. Simultaneously, non-refoulement is limited in applicability and scope under the Refugee Convention, with special regard to the five grounds enshrined under Article 33(1), to the 'outside the country of nationality rule,' and to the exceptions permitted by Article 33(2). As for the human rights law aspect of non-refoulement, the case-law of international and domestic courts and respective monitoring bodies

82 Art. 53 of the 1969 Vienna Convention on the Law of Treaties. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Art. 64 of the 1969 Vienna Convention on the Law of Treaties. If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

83 See Executive Committee of the UNHCR Conclusion No. 25 of 1982, No. 55 of 1989, and No. 79 of 1996.

84 OAU Convention governing the specific aspects of refugee problems in Africa, 10 September 1969, U.N.T.S. vol. 1001, p. 45.

85 Farmer, 2008, pp. 1–36; Allain, 2001, pp. 533–558.

has demonstrated that these limits do not exist: The prohibition of refoulement applies to anyone when there is a real risk that serious violations of human rights, especially degrading treatment, will occur. Despite their differences, then, the meaning of non-refoulement under refugee law coincides in substance with that under human rights law. The reason for this is the essence of non-refoulement, namely the principle of civilisation and solidarity and the prevalence of human rights, including the human rights of refugees.

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Serbian Border Protection Practices in the Case of Illegal Border Crossers

ABSTRACT: *The paper analyses the legal framework of the Republic of Serbia relevant to border control and access to the territory, as well as the practices of the national authorities in the case of persons crossing the border illegally. After a brief outline of the applicable international standards that obligate the Serbian authorities in cases of illegal entry, the author focuses on the examination of the most prominent provisions of three legislative acts: the Law on Border Control, the Law on Aliens, and the Law on Asylum and Temporary Protection. Although certain legislative solutions leave room for minor criticism, the normative framework is assessed as adequate and generally in line with Serbia's international commitments and the European Union (EU) acquis. However, the part of the paper focusing on the practices of the competent Serbian authorities is much more critical. Certain border practices related to illegal entries have been considered problematic by both the EU and international human rights bodies and documented by reputable non-governmental organisations active in the field of asylum. Of the problematic practices presented, three have received judicial responses. The final part of the paper, therefore, examines the adequacy of the review of such practices by national courts. While some progress has been made in the practice of misdemeanour courts in applying the principle of non-punishment for illegal entry with respect to persons expressing their intention to seek asylum in Serbia, the decisions of the Constitutional Court relevant to illegal entry are assessed as partially satisfactory. While its response to pushbacks can be considered largely in line with applicable international standards, the Constitutional Court's position on detention in the transit zone of Belgrade Airport has been criticised.*

KEYWORDS: illegal entry, border control, migrants, persons in need of international protection, Serbia

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1. Introduction

The Republic of Serbia is predominantly perceived as a country of transit for migrants and persons in need of international protection and rarely as a country in which the latter intend to seek and/or obtain asylum. This assertion is supported by the available statistical data that reveal a large discrepancy between the number of persons entering the territory of the Republic of Serbia and those actually involved in asylum procedures. In 2022, 4,181 persons declared their intention to apply for asylum in the Republic of Serbia, while 119,127 persons arrived at asylum centres and reception-transit centres operated by the Commissariat for Refugees and Migration of the Republic of Serbia.[1] The figures also show that out of 4,181 persons who declared their intention to apply for asylum, only 320 of them actually submitted an asylum application to the Asylum Office of the Republic of Serbia, which is the body responsible for examining the asylum application in the first instance, while the Asylum Office, as the second-instance body, granted asylum to 30 persons, rejected 63 applications, and dismissed 2 applications.[2] It is also worth noting that from 2008, when the asylum system of the Republic of Serbia was established, until the end of 2022, only 238 persons were granted asylum.[3]

However, statistics on the number of persons who crossed the border illegally or were prevented from entering the territory of the Republic of Serbia illegally are either unavailable or inaccurate. Among the 119,127 persons who arrived at various asylum and reception-transit centres in 2022, there are certainly many whose entry could be considered illegal on the grounds prescribed by the relevant Serbian legislation. However, in addition to those who managed to enter the territory of the Republic of Serbia, a significant number of persons were prevented from doing so. According to the Ministry of the Interior of the Republic of Serbia, more than 2,000 persons were prevented from illegally crossing the border in the last 3 years;[4] the figures were even higher in the period 2019–2020 when a total of 58,447 persons were prevented by the Border Police from illegally entering the territory, either by 'being caught trying to cross the state border illegally' or by 'giving up after being spotted by the authorities responsible for securing the state border.'[5]

1 Trifunović (ed.), 2023, p. 15.

2 Ibid., p. 18. Similar trends appear to have continued during the first four months in 2023. According to data collected by the UNHCR, out of 20,330 new entries in various centres operated by the Commissariat, only 440 persons expressed their intention to seek asylum, whereas 92 of them decided to officially start the asylum procedure before the Asylum Office by submitting asylum applications. See UNHCR, 2023, p. 1.

3 Trifunović (ed.), 2023, p. 19.

4 Glavonjić, 2023.

5 Ministry of the Interior of the Republic of Serbia, 2021, p. 10.

The statistical data outlined above point to practices that require in-depth examination, both from the perspective of Serbia's international obligations and that of its national legislation. Namely, the obligations Serbian authorities have towards persons who succeed in their attempt to enter the territory illegally, especially those who claim to need international protection, should be examined. With regard to persons whose illegal entry into the territory fails due to the so-called pushbacks, the analysis will identify applicable international and national standards aimed at ensuring that the refusal of entry does not amount to refoulement.

Therefore, this paper begins with a brief outline of the rules contained in the international conventions to which the Republic of Serbia is a party, as well as the standards established by the case law of the European Court of Human Rights (ECtHR) concerning the right of aliens to access the territory and the obligations of the respective states in situations of illegal border crossing (2). This is followed by an analysis of Serbian legislation on illegal entry (3). Three legal acts have been analysed. The Serbian Law on Border Control (LBC) explicitly identifies the prevention of irregular migration as one of its objectives and provides for new procedures related to border control that were not provided for in previous legislation and that directly relate to situations of illegal border crossing by migrants (3.1).[6] The Law on Aliens (LA) applies to persons other than those applying for asylum in Serbia and defines illegal entry and the corresponding procedures and guarantees for refusal of entry (3.2).[7] In addition, access to the territory is analysed from the perspective of the Law on Asylum and Temporary Protection of the Republic of Serbia (3.3) (LATP).[8] The final part of the paper focuses on the practices of competent Serbian authorities considered problematic and contrary to both Serbia's international obligations and its national laws (4). Such practices have been criticised by the European Union (EU) and international human rights bodies, such as the Human Rights Committee (HRC) and the Committee against Torture (CAT) (4.1), as well as by reputable non-governmental organisations (NGOs) active in the field of asylum (4.2). Border-control practices have also been scrutinised by national judicial bodies (4.3). A relatively recent twist in the practice of misdemeanour courts regarding impunity for illegal entry suggests that adequate training of judges serves the purpose of at least partially eliminating bad practices (4.3.1), while the Constitutional Court of Serbia recognised in 2021 that problematic border practices by Serbian police officers amounted to violations

6 The Law on Border Control of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 24/2018.
7 The Law on Aliens of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 24/18 and 31/2019.
8 The Law on Asylum and Temporary Protection of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 24/2018.

of certain constitutional rights (4.3.2). The concluding remarks summarise the results of the analysis (5).

2. Serbia's international obligations regarding border control and access to territory

According to Article 16 of the Serbian Constitution, international treaties ratified by the Republic of Serbia form a part of its legal system and are directly applicable.[9] As stipulated in Article 18, provisions on human rights shall be interpreted in accordance with the international standards and practices of international institutions that monitor their implementation. These two constitutional provisions define the general position of international law in the national legal system of the Republic of Serbia. More importantly, they make international conventions and standards established in the practice of the ECtHR and other international human rights bodies mandatory for the actions of all national bodies, including those involved in border control. Therefore, it is necessary to briefly examine what international obligations and standards are binding to the Serbian border guards and the other national bodies responsible for reviewing their practices.

There is no explicit guarantee in international law of foreigners' right to enter the State's territory. On the contrary. According to the principle of sovereignty over territory, states have the right to control their borders and determine the conditions under which a person may cross them. However, this does not mean that the exercise of sovereign powers by the State at borders is unrestricted. These powers are limited to the extent that international refugee law provides that measures taken at the border may not prevent persons from seeking asylum,[10] but restrictions also derive from international human rights law, which defines the State's obligations towards all non-nationals within its jurisdiction. An implicit guarantee of the right of access to territory is contained in Article 14 of the Universal Declaration of Human Rights, as the right to asylum implies the right to an asylum procedure, which, in turn, cannot be realised without access to the territory.[11] Similarly, certain provisions of the 1951 UN Convention on the Status of Refugees can be interpreted as implicitly guaranteeing the right to access the territory for persons in need of international protection.[12] Article 33 prohibits expulsion 'by any means,' which, according to the official interpretation of the UN High

9 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 98/2006.
10 UNHCR, 2020–2021, p. 1.
11 Dagen and Čepo, 2021, p. 856; Costello, 2012, p. 287.
12 This relates to Art. 1(A,2) of the Convention that defines the term refugee and insists upon the declaratory character of the act of recognizing such status by the contracting parties, Art. 31 that regulates unlawful entry, but most importantly Art. 33 on the prohibition of expulsion or return.

Commission for Refugees (UNHCR), includes 'refusal at the border,'[13] suggesting that the prohibition of expulsion protects persons who are already in the territory of the State party as well as those who have not yet formally entered it.[14]

However, the content of the right of aliens to enter territory has been largely determined by the case law of the ECtHR in Article 3 (prohibition of torture) and Article 4 of Protocol 4 (prohibition of collective expulsion of aliens). The ECtHR has provided valuable standards to answer two important questions: first, when is refusal of entry to be considered a violation of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and second, in what situations and under what conditions should refusal of access to the territory not be considered a violation of the Convention?

By identifying the positive duties of the State in relation to Article 3, the ECtHR has established clear criteria for assessing the lawfulness of various border practices and measures adopted by national authorities. Two situations can be distinguished as follows. If the person at the border expresses an intention to seek asylum and indicates a risk of ill-treatment in the event of a refusal of entry or return, the State is obliged to initiate an asylum procedure to examine these allegations. If, however, there is no indication at the border of an intention to seek asylum or of risk of ill-treatment, the State authorities have an active role to play[15] and are obliged to establish the reasons for which a person seeks to enter the territory, even if it is assumed that the reason for entering the territory is the need for international protection, either because the person has presented himself at the border without documents or because he has not tried to conceal the fact that he does not have a valid document or authorisation for entry.[16]

Standards established within the scope of Article 4 of Protocol No. 4 may also serve as limits on the practices of the State authorities at the border. The ECtHR distinguishes between two possible scenarios. If a group of persons attempts to enter the territory through legal/official border crossings, the standards established in its case law in relation to Article 3, as explained above, apply.[17] However, in the case of an attempt to cross the border outside official border-crossing points, access to the territory may be denied under two conditions: first, the State has ensured real and effective access to the means of legal entry, and, second, the persons had no cogent reasons for not using the means of legal entry to access the territory.[18] As an exception to the general standard of Article 4 of Protocol 4,

13 UNHCR, 2007, para. 7.

14 Shaw and Gibson, 2017, pp. 99–100.

15 Gatta, 2019, pp. 119–120.

16 ECtHR, *M.A. and Others v. Lithuania* (Application No. 59793/17), Judgement, 11 December 2018, paras. 105, 107 and 113; ECtHR, *M.K. and Others v. Poland* (Applications Nos. 40503/17, 42902/17 and 43643/17), Judgement, 23 July 2020, paras. 174, 178 and 179.

17 ECtHR, M.K. and Others v. Poland, para. 204.

18 ECtHR, *N.D. and N.T. v. Spain* (Applications Nos. 8675/15 and 8697/15), Judgement of the Grand Chamber, 13 February 2020, para. 201.

which implies an obligation on the part of the State to make individual decisions on refusal of entry based on an examination of the individual circumstances of each member of the group, a two-part test should be applied restrictively.[19] Whether the two conditions are met must be determined based on an assessment of all circumstances. The standards established in the most recent case law of the ECtHR provide guidance in this respect as they imply that national authorities must offer non-nationals a real possibility of requesting protection at the border, which is assessed based on not only the applicable normative framework but also how it is applied in practice. In other words, for the exception to apply, the means of legal border crossing must meet several conditions: they must exist at the time when the persons enter the territory, and they must be available, real, and effective, particularly for obtaining protection based on Article 3 of the Convention, with interpreters and legal aid available.[20] In any case, for the competent national authorities to be on the safe side as regards the compatibility of their border practices with the ECHR obligations, the obligations arising from Articles 3 and 4 of Protocol No. 4 should be seen as complementary, in order to provide persons seeking to enter the territory, whether legally or illegally, with adequate, full, and effective protection against the risk of ill-treatment in the event of refusal of entry, primarily based on the absolute nature of Article 3 of the ECHR.

3. National legal framework relevant to the case of persons crossing the state border illegally

Access to and crossing of the state borders of the Republic of Serbia are regulated by three legal acts that are applied in a complementary manner, as their scope varies and they are relevant to specific categories of persons. The LBC, as a general act, applies to all persons, both nationals and non-nationals, attempting to cross the border of the Republic of Serbia and regulate border control, the powers of the police in carrying out border control, and the powers of other authorities responsible for integrated border control (3.1). However, the LA applies to the entry, movement, stay, and return of aliens and regulates the respective competencies of Serbian authorities (3.2). Finally, the LATP is most specific and applies to a single category of foreigners: those applying for international protection (3.3).

19 Čučković, 2022, pp. 140–142.

20 ECtHR, *M.H. and Others v. Croatia* (Applications Nos. 15670/18 and 43115/18), Judgement, 18 November 2021, paras. 295 and 300; ECtHR, *Shahzad v. Hungary* (Application No. 12625/17), Judgement, 8 July 2021, paras. 62–65.

■ *3.1. LBC: Prevention of irregular migration as a purpose of border control*

From the beginning, the LBC identifies the prevention of irregular migration as one of the main purposes of border control[21] and designates the Border Police Directorate, the organisational unit of the Police Directorate within the Ministry of the Interior, as the body responsible for its implementation.[22] According to Article 12, border crossing is considered legal if it is carried out 'at a border-crossing point with a valid travel document or another document prescribed for crossing the state border.' Otherwise, the border may be crossed outside an official border-crossing point only with a border permit issued by the Border Police[23] or in exceptional cases of natural disasters.[24] The LBC distinguishes between three types of border control, two of which are new under current law. Border control can be carried out at and outside the border-crossing point, respectively, and in a state of heightened risk. According to Article 66, the Border Police are entitled to carry out their border-control tasks outside the area of a border-crossing point to detect criminal offences and misdemeanours in the field of irregular migration 'on the basis of analyses of risks to border security.' Furthermore, Article 29 provides that in situations of increased risk of non-military challenges and risks that may endanger the state border, public safety, persons, and property in the border area, police officers and other organisational units of the Ministry may assist the Border Police in performing border-control tasks, as well as members and means of the Serbian Armed Forces. In such cases, the LBC provides that the decision must be taken by the Minister of the Interior, that is, the President of Serbia, in the case of army deployment. However, the decision on blocking, which is regulated by Article 11 of the LBC, is within the government's scope. This provision stipulates that not only traffic routes and roads but also entire 'areas not used for lawful crossing of the state border may be blocked in order to prevent illegal crossing of the state border outside the location of the border crossing point.' Both the solution provided for in Article 29 and that of Article 11 were inspired by the 'experience of the MoI (Ministry of the Interior) in managing the migration crisis of 2015'[25] and, subsequently, introduced in the current law, and both have potentially far-reaching consequences for persons trying to enter the territory illegally in the context of massive influxes. While blocking as a means of border control has not yet been implemented, certain border practices involving the Army of the

21 Art. 2 of the LBC.
22 Art. 3 of the LBC.
23 Art. 13 of the LBC.
24 Art. 14 of the LBC.
25 Jugović, 2018, p. 289.

Republic of Serbia, which took place prior to the adoption of the LBC, can now be considered regularised and fall within the scope of Article 29 of the LBC.[26]

Finally, Article 30 provides for restrictions on the performance of any task related to border control and stipulates that in the exercise of their police powers, police officers shall act in accordance with the following principles: impartiality, equality and non-discrimination, humaneness, respect for dignity and reputation, respect for human rights and freedoms, and respect for the rights of vulnerable persons.[27] Article 30 exclusively refers to the police, leaving the armed forces involved in border control activities outside its scope. Members of the armed forces, as part of its *de jure* organs, are obliged to comply with Serbia's international obligations, in particular, those concerning fundamental human rights and freedoms and ensuring humane and equal treatment of any person trying to enter Serbian territory. Thus, although this omission should not have any practical consequences, Article 30 should be amended to explicitly provide for restrictions on any national body carrying out tasks related to border controls, whether it be the police, the armed forces, or others.

▪ *3.2. The LA: Distinction between legal and illegal entry*

Similar to the LBC, the 2018 LA defines entry as 'the arrival of a foreigner on the territory of the Republic of Serbia after crossing the state border, i.e. a border crossing point under border control.'[28] However, it further provides, in Article 14, a list of situations in which entry is considered illegal. These include entry

> (1) away from the place designated for crossing the state border; (2) by evading border control; (3) without the travel or other document required for crossing the state border; (4) by using an invalid or forged travel or other document of another person; (5) by providing false information to the Border Police; (6) during the period in which

26 In 2016, during the European migrant crisis, the Government of the Republic of Serbia adopted a decision on forming joint teams comprising members of the police and armed forces, tasked to control the border of the Republic of Serbia with North Macedonia and Bulgaria. The decision was in force for 20 months, until April 2018. Ministry of Defense of the Republic of Serbia, End of Engagement of the Joint Forces of the Serbian Army and MoI, 02 April 2018 [Online]. Available at: https://www.vs.rs/sr_lat/vesti/61CFE4D9413C11E8AF6A0050568F5424/prestanak-angazovanja-zajednickih-snaga-vojske-srbije-i-mup (Accessed: 16 June 2023).

27 Mole et al., 2019, p. 43.

28 Art. 3(1)(5) of the LA. The same article provides that access to the transit area of an international airport, port anchorage or harbour shall not be regarded as entry into the territory of the Republic of Serbia. The solution has been criticised for not complying with the standards of the ECtHR as persons staying in the transit zones are considered to be within the jurisdiction of the state, thus, making the state responsible in case it fails to provide access to asylum procedures. See Mole et al., 2019, p. 45.

the protective measure of removal or the security measure of expulsion is in force or during the period of a ban on entry.

For the abovementioned reasons, as well as for other reasons listed in Article 15 Paragraph 1 of the LA, the alien shall be refused entry. The decision to refuse entry is the responsibility of the Border Police, which is issued in a standardised form[29] and must state the reasons for refusing entry;[30] an appeal against the decision to refuse entry is possible.[31] The LA provides exceptions where entry may be granted despite grounds for refusal. The exceptions relate to humanitarian reasons, the interests of the Republic of Serbia, and most importantly, if it is required by Serbia's international obligations.[32]

Although most migrants attempting to enter the territory of the Republic of Serbia illegally met the criteria set out in the LA for their entry to be considered illegal, the exemption should be read in three important ways. First, it suggests that persons in need of international protection are excluded from the application of Articles 14 and 15. This follows not only from Article 2, which explicitly provides that the LA does not apply to foreign nationals who have applied for asylum in the Republic of Serbia, but also from Serbia's international obligations towards persons in need of international protection. Second, Serbia's international obligations, as explained in the second part of the paper, relate to all persons in need of international protection who enter its territory, whether legally or illegally, and are not limited to persons who officially initiate the asylum procedure, as can be inferred from the wording used by the legislator in Article 2 of the LA. Third, the exception in Article 15(3) can only be properly applied if it is interpreted as including the obligation of the Border Police to take appropriate measures to assess whether a person entering or attempting to enter the territory illegally requires international protection. However, the LA itself is silent on this point and provides, in Article 9, the principles and procedures for assessing the risks that the alien may pose to the Republic of Serbia and its citizens,[33] not the assessment of the risks that the alien would face in the case of refusal of entry.

■ *3.3. The LATP: How does the asylum application and its outcome determine the course of the procedure?*

The LATP guarantees the right to express intention to apply for asylum in the Republic of Serbia. Although according to Article 4 of the LATP, this right is

29 This solution is welcome as before the entry into force of the Law on Foreigners, the norm was to simply provide verbal denial of entry to the foreigner, with an indication in his/her travel document. See Krstić, 2018, p. 80.

30 Art. 15(2) of the LA.

31 Art. 15(6) of the LA. However, the appeal against the decision on the refusal of entry does not have an automatic suspensive effect.

32 Art. 15(3) of the LA.

33 Jugović, 2018, pp. 290–291.

granted to 'an alien who is in the territory of the Republic of Serbia,' the relevant provision should be interpreted in line with international standards and include persons who are at the borders and in airport transit zones.[34] The LATP further stipulates that the right to express the intention to apply for asylum is guaranteed regardless of whether the entry was lawful, that the intention must be expressed "without delay," and that the foreigner is only obliged to provide 'a reasonable explanation for his/her unlawful entry.'[35] These conditions activate the principle of non-punishment for illegal entry.

The asylum procedure officially begins with the submission of the asylum application to the Asylum Office, an organisational unit of the MoI, which is responsible for examining the asylum application in the first instance.[36] Article 95 of the LATP provides for the right to appeal to the Asylum Commission within 15 days of receipt of the first instance decision, which has a suspensive effect.[37] An appeal against the decision of the Asylum Commission may be lodged with the Administrative Court and also suspends the enforcement of the second-instance decision.[38]

The provisions of the LATP suggest that a person's illegal entry/stay in the Republic of Serbia is tolerated as long as the asylum procedure continues. Once the final decision of the authority is reached, there are two possibilities. On the one hand, if the asylum application is accepted and the person is granted international protection, the person's stay is regulated in accordance with rules applicable to the relevant form of protection (refugee status, subsidiary protection, humanitarian protection, and temporary protection). On the other hand, if the final asylum decision is negative, the LA is reactivated, in particular its Article 74, which stipulates that the stay of a person whose 'application for asylum has been rejected or has been the subject of a final decision' is considered unlawful and the return decision is issued by the competent authority. In such cases, the return decision specifies the time left for a voluntary return[39] with the right of appeal against it, after which the person is forcibly removed in accordance with Article 81 of the LA.

Finally, it should be noted that both the LATP (Article 6) and LA (Article 83) guarantee the principle of non-refoulement in similar terms. Both stipulate

34 Mole et al., 2019, p. 46. According to available statistical data, during 2022, the intention to seek asylum was most often expressed in police stations (2,498), at border crossings (888), and in airports (689) and less frequently in the Asylum Office (102) and detention centres (4). See Trifunović (ed.), 2023, p. 18.

35 Art. 8 of the LATP.

36 Art. 36 of the LATP.

37 The Asylum Commission comprises of the Chairperson and eight members. They are appointed by the Government of the Republic of Serbia for a four-year term. To be appointed, the person must hold Serbian citizenship, have a university degree in law, minimum five years of working experience and 'must have an understanding of the human rights legislation.' Art. 21 of the LATP.

38 Art. 96 of the LATP.

39 Art. 77 of the LA.

that no one can be returned to a territory where he or she would be subjected to torture, inhuman or degrading treatment, or punishment, while the LA offers a wider scope of protection and prohibits forcible return in case of the risk of the death penalty or the threat of a serious violation of rights guaranteed by the Constitution of the Republic of Serbia.

4. Practices of competent authorities – problems and challenges

Despite some critical remarks made in the previous part of the paper, Serbia's normative framework on access to its territory is generally considered to be "solid."[40] However, certain practices of competent Serbian authorities have been identified as problematic by both international institutions (4.1) and civil society organisations active in the field of asylum (4.2), followed by relevant responses from national judicial bodies (4.3).

■ *4.1. Serbian border practices from the perspective of relevant international organisations and bodies*

In its 2022 Progress Report on Serbia, the European Commission confirmed that Serbia's asylum legal framework is 'largely aligned with the EU acquis' but that further legislative alignment is needed, including with regard to 'effective access to the procedure.'[41] More specifically, the Commission noted that improvements are needed in access to and provision of information on the asylum procedure, an essential element of protection for those entering the territory illegally; it identified practices at Belgrade International Airport as problematic, because 'transit procedures provided for in the Asylum Law are not yet implemented' and that those entering Serbia via Nikola Tesla Airport are not properly informed about asylum procedures or legal counselling opportunities.[42] The Commission also noted that the principle of non-refoulement was not adequately implemented with regard to persons 'subject to extradition procedures,' as they were not given effective access to asylum.[43] The European Commission made the same remark on Serbia's border control legislation. Although it described it as 'largely aligned with the EU acquis,'[44] the Commission made it clear that 'significant investment is needed in human, financial and technical resources for border control (second line checks, border surveillance and equipment for detecting forged documents) and in infrastructure at border crossing points in line with Schengen requirements.'[45] This observation

40 Krstić, 2018, p. 82.
41 European Commission, 2022, p. 62.
42 Ibid., p. 63.
43 Ibid.
44 Ibid., p. 64.
45 Ibid., p. 65.

is relevant for assessing the requirements identified by the ECtHR as necessary to qualify a border-crossing point that offers real and effective access to the means of legal entry—a precondition for considering refusal of entry compatible with the ECHR in cases of collective illegal entry.

However, universal human rights bodies appear to have been far more critical, and, importantly, their comments were very specific and related to problematic border practices. In its Concluding Observations on Serbia's Third Periodic Report, the HRC expressed concern about, *inter alia,* 'reported cases of efforts to deny access to Serbian territory and asylum procedures' and 'collective expulsions'.[46] A more recent assessment of Serbia's practices came from another UN treaty body, the CAT. In its 2021 Concluding Observations on Serbia's Third Periodic Report, the CAT noted that

> asylum seekers are prevented from accessing the asylum procedure and being identified at an early stage due to insufficient procedural safeguards for the assessment of claims and the granting of international protection, particularly in the transit zone of Nikola Tesla International Airport in Belgrade and at the border entry points.[47]

The CAT recommends that Serbia

> ensures access to the territory and sufficient and effective protection from refoulement at Nikola Tesla International Airport by making sure that persons detained in the transit zone of the airport receive information about their right to seek asylum, including effective access to the asylum procedure, immediately and in language they understand

and establishes a border monitoring mechanism to ensure that 'border authorities act in accordance with the principle of non-refoulement and the prohibition of collective expulsion.'[48] Notably, the concerns expressed by the HRC in 2017 largely coincided with those expressed by the CAT in 2021, suggesting that Serbia's practices had not changed significantly. Although very important, the

46 HRC, 2017, p. 6. The Committee recommended Serbia to 'strictly respect its national and international obligations by: (a) ensuring that access to formal procedures for asylum applications is available at all border points, notably in international airports and transit zones, and that all persons engaging directly with refugees or migrants are appropriately trained; (b) ensuring that all asylum applications are assessed promptly on an individual basis with full respect for the principle of non-refoulement and that decisions of denial can be challenged through suspensive proceedings; (c) refraining from collective expulsion of aliens.' Ibid.

47 CAT, 2021, p. 7.

48 Ibid.

reports of international organisations and bodies do not provide information on the specific practices that gave rise to their concerns. As international monitoring mechanisms largely rely on the so-called shadow reports submitted by civil society, it is worth outlining their respective findings.

■ *4.2. Practices criticised by NGOs active in the field of asylum*

In contrast to the reports published a few years ago, which focused on problematic pushback practices to Northern Macedonia and Bulgaria and arbitrary returns from Belgrade Airport,[49] recent reports by reputable civil society organisations and activists do not refer to pushback at the borders to such an extent, while certain problematic practices regarding access to asylum procedures seem to persist, as well as problems with procedures in the transit zone not only of Belgrade Airport but also of other international airports.

The lower frequency of pushback practices is explained by the current absence or limited presence of civil society organisations at these borders, with the caveat that there is 'a very high probability that such practices still exist,' which is confirmed by UNHCR data that 576 refugees and migrants were pushed back to North Macedonia in 2022.[50] In addition, a barbed-wire fence appears to be under construction on the border with North Macedonia. According to Klikaktiv, 'between June 2021 and June 2022, a minimum of additional 10–15 km were built;' the fence has three layers, is three to four metres high, and 'between the doubled fence, there is a space for patrolling army and police vehicles.'[51] The novelty of the border with Bulgaria is the deployment of FRONTEX officers based on the Status Agreement on border management cooperation between the EU and Serbia, which entered into force in 2021.[52] Generally, the Status Agreement has the potential to improve the quality of border-control activities in at least three ways. First, while regulating the tasks and powers of the members of border-control teams, the Agreement provides for soft or indirect monitoring of the activities carried out. Namely, according to Article 5(3) of the Agreement, the coordinating officer of the European Border and Coast Guard Agency 'may communicate its views to the competent authority of the Republic of Serbia on the instructions given to the team,' and 'in cases where the instructions issued to the team are not in compliance with the operational plan, the coordinating officer shall immediately report to the executive director of the Agency,' which may even lead to the suspension or termination of an operation. Second, and more specifically, Article 6 explicitly states that a 'breach of fundamental rights or violations of the principle of non-refoulement' shall be considered grounds for suspension or termination of an operation. Last but not least, the Agreement in Article 9 emphasises the importance of the respect

49 Belgrade Centre for Human Rights and International Rescue Committee, 2018, p. 3.
50 Kovačević, 2023.
51 Klikaktiv, 2022, p. 7.
52 Kovačević, 2023.

for fundamental rights in performing joint border-control activities, explicitly requiring the members of the teams to exercise their powers in accordance with the right to 'access asylum procedures, human dignity and the prohibition of torture, inhuman or degrading treatment, the right to liberty, the principle of non-refoulement and the prohibition of collective expulsions.' Persons who are not prevented from entering the territory of the Republic of Serbia illegally, but manage to do so, confront various problematic practices. Namely, they are rarely informed about the possibility of registering their intention to seek asylum and the consequences of such registration.[53] At their first contact with the police officer, either in the green zone or inside the territory, several options arise. The police officer can automatically register the intention to apply for asylum, initiate a misdemeanour procedure for illegal entry, or issue a refusal to enter the Republic of Serbia.[54] Even in the best-case scenario of automatic registration of the intention to seek asylum, reports from civil society organisations indicate that the practice of issuing such registrations only in Serbian and Cyrillic continues.[55] Consequently, most asylum seekers do not understand the content of the registration certificate, which includes instructions to report to the designated asylum or reception-transit centre within 72 hours. As official asylum and reception centres are not easily accessible, while asylum seekers do not have the relevant information or means to do so within 72 hours, they 'may be at risk of refoulement.'[56] This is due to another problematic practice, namely that their failure to report to the asylum or reception centre within the prescribed time limit may result in the refusal to issue a new registration certificate, thus, rendering their stay irregular.[57]

NGOs have identified illegal entry practices at airports as particularly problematic. This is confirmed by the available statistics for 2022. First, no significant difference is observed between the number of persons declaring their intention to seek asylum at border crossings (888) and airports (689).[58] Second, compared to 2021, an increase was observed in the number of asylum seekers registered at airports in 2022.[59] Finally, compared to 689 persons whose intentions to seek asylum were registered at Serbian airports, 4,092 persons were denied entry to the territory at airports of the Republic of Serbia for various reasons that constitute illegal entry and denial of entry in accordance with the relevant provisions of

53 Trifunović (ed.), 2023, p. 29.
54 Krstić, 2018, p. 83.
55 Trifunović (ed.), 2023, p. 28.
56 Ibid., p. 29.
57 Petrović (ed.), 2017, p. 29.
58 Trifunović (ed.), 2023, p. 18.
59 Ibid., p. 31.

the LA.[60] Problematic practices identified by reputable civil society organisations include registration of the intention to seek asylum only after the intervention of legal aid providers, alleged disregard by police officers of oral and written requests for access to the asylum procedure, non-issuance of individual decisions to all foreigners refused entry to Serbia, non-availability of interpreters, and subsequent difficulties both in providing relevant information on asylum procedures and obtaining necessary information on the reasons for attempting to enter Serbian territory.[61] Other sources have reported that people arriving at Serbian international airports are also detained and even subjected to ill-treatment.[62]

■ *4.3. National court responses*

Three problematic practices of various Serbian bodies with competence in matters relating to illegal border crossings have received judicial responses. An improvement has been observed in the practice of the misdemeanour courts in applying the principle of non-punishment for illegal entry to persons expressing an intention to seek asylum in Serbia (4.3.1); however, the decisions of the Constitutional Court are partially satisfactory. While its response to refoulement practices can be considered largely in line with national law and international standards, its position on detention in the transit zone of Belgrade Airport has been criticised (4.3.2).

4.3.1. Practice of misdemeanour courts in punishing illegal entry

Illegal entry is considered a misdemeanour under both the LBC[63] and LA.[64] However, according to Article 8 of the LATP, an alien cannot be punished for illegal entry if he or she expresses the intention to apply for asylum in the Republic of Serbia. Based on the available analyses of the case law of Serbian misdemeanour courts, a significant improvement can be observed in the application of the principle of non-punishment for illegal entry for persons in need of international protection, and this gradual shift has continued since 2015.[65] Prior to 2015, police officers regularly issued requests for the initiation of misdemeanour proceedings against persons entering the territory illegally, while misdemeanour courts found persons guilty of illegal entry, regardless of whether they needed international

60 Ibid., p. 32. Notably, statistics contained in the Belgrade Centre for Human Rights' 2022 report were received from the Ministry of the Interior. Figures from other sources are much higher. For example, in his AIDA Country Report, Kovačević outlines that 8,682 persons were denied entry at Belgrade Airport during 2022, with additional 228 entry refusals in Niš Airport. See Kovačević, 2023.

61 Trifunović (ed.), 2023, pp. 33–37.

62 Kovačević, 2023.

63 Art. 71 of the LBC.

64 Art. 121 of the LA.

65 Buha et al., 2020, p. 13.

protection.[66] However, in 2015, this practice began to change, and the principle of non-punishment for illegal entry was correctly applied in several hundred cases.[67] The number of foreigners guilty of illegal entry decreased significantly in 2016. Although those found guilty still included persons from countries with a high likelihood of producing persons in need of international protection,[68] some misdemeanour courts were praised for their good practice of discontinuing misdemeanour proceedings once the intention to seek asylum was expressed.[69] Similar trends were observed in subsequent years.[70] Despite considerable improvements, proceedings before the Serbian misdemeanour courts are still criticised for not offering every foreigner the basic procedural guarantee of being able to use his or her own language, while the decisions of the misdemeanour courts regularly lack substantive facts and subsequent explanations as to how the assessment of the foreigner's need for international protection was made.[71]

4.3.2. The response of the Constitutional Court to bad border practices

In 2020, the Constitutional Court of Serbia issued an important decision concerning Serbian Border Police officers' pushback practices.[72] The case involved 17 Afghan nationals who, as part of a larger group of 24 people, illegally crossed the border between Serbia and Bulgaria in December 2017 and were arrested by the Serbian Border Police. After spending the night in detention, the group was brought before the Pirot Misdemeanour Court, which, after recognising them as persons in need of international protection, closed the case and instructed the police to issue them with registrations of the intention to seek asylum in the Republic of Serbia. Despite these instructions, police officers drove the group to the green border zone and ordered them to leave the territory of Serbia. The Constitutional Court found that the border guards had violated the Afghan nationals' right to liberty and security by denying them the opportunity to challenge the legality of their detention and to be assisted by a legal representative.[73] Most importantly, the Constitutional Court also found that by deporting the group to Bulgaria, Serbian Border Police officers violated Article 39(3) of the Constitution (prohibition of return) in conjunction with

66 The Belgrade Centre for Human Rights stated, in its 2015 Right to Asylum in the Republic of Serbia report, that 8,881 foreigners were punished by misdemeanour courts for illegal entry out of approximately 13,000 applications submitted by the police. See Petrović (ed.), 2016, p. 51.

67 Petrović (ed.), 2016, p. 52.

68 In 2016, a total of 2,221 foreigners were found guilty for illegally crossing the border, out of which 1,062 came from refugee-producing countries. See Petrović (ed.), 2017, p. 34.

69 Ibid., p. 35.

70 Tošković (ed.), 2018, pp. 29–30; Petrović (ed.), 2019, pp. 36–37; Trifunović (ed.), 2020, p. 36; Trifunović (ed.), 2021, p. 35.

71 Krstić and Davinić, 2019, pp. 59–65.

72 Constitutional Court of Serbia, Už-1823/2017, 29 December 2020.

73 Ibid., pp. 19–21.

Article 4 of Protocol 4 of the ECHR (prohibition of collective expulsion of aliens).[74] The Court also found that the acts of the police officers contained elements of inhuman treatment because of the circumstances in which the applicants were expelled to Bulgaria. Namely, they were expelled in a forest, during a freezing night after confiscating the documents previously issued to them. The Court, thus, concluded that

> due to the actions of members of the state authority, there was a violation of the guarantee of the prohibition of expulsion, with elements of inhuman treatment, which is reflected in the obligation to implement the legal procedure in relation to migrants, i.e. the possibility of expelling foreigners only on the basis of the decision of the competent authority carried out in accordance with the procedure prescribed by law.[75]

The Constitutional Court should be commended not only for drawing extensively on the relevant case law of the ECtHR but also for directly applying the prohibition of the collective expulsion of aliens contained in Article 4 of Protocol 4 to the ECHR, despite the absence of an explicit guarantee in the Serbian Constitution.

However, the Constitutional Court rejected the constitutional complaint concerning the detention of an Iranian refugee at Belgrade Airport for 30 days without access to the asylum procedure, interpreter, or legal counsel.[76] According to Kovačević, the Court's arguments were based solely on the fact that the legal framework in force at the time 'did not envisage the procedure in which a foreigner can be deprived of liberty in the transit zone.'[77] Thus, the Serbian Constitutional Court failed to apply the well-established standards of the ECtHR and independently assess the relevant criteria for classifying the person's situation as a deprivation of liberty.[78]

5. Conclusion

The above analysis shows that the Serbian normative framework on border control, foreigners, and asylum is, with minor exceptions, in line with international and

74 Ibid., p. 28.
75 Ibid., p. 27.
76 The judgement is not available on the website of the Constitutional Court. Information about this judgement has, therefore, been retrieved from the available AIDA Country Report. See Kovačević, 2023.
77 Ibid.
78 Ibid.

EU rules applicable to migrants and refugees trying to illegally enter the territory of the Republic of Serbia. Academic writing and relevant reports of international organisations confirm this state of affairs. However, the real-world practices of the competent Serbian authorities are less than satisfactory. The most problematic aspect seems to be the failure of various national authorities that come into contact with persons entering the country illegally to properly distinguish between those in need of international protection and other migrants. This *prima facie* distinction is crucial and determines the further course of the procedures to be followed, as well as the rights and obligations of the alien. Given the absolute nature of the principle of non-refoulement, national authorities responsible for illegal entry should be constantly reminded that their acts or omissions may have serious consequences for the most vulnerable category of persons—those in need of international protection. With the experience gained during the 2015 migrant crisis and the significant resources and efforts invested by various international organisations in the training and education of national authorities, some progress and improvements are visible. However, two observations need to be made. First, bad practices at the borders are not eliminated. The available data show that pushbacks still occur, albeit to a lesser extent than a few years ago, that much remains to be done to improve access to asylum procedures, and that national courts, especially the Constitutional Court, need to be more rigorous in reviewing the practices of other bodies in matters of illegal entry. Second, practices documented in the previous period have yet to receive an international judicial response. In contrast to other countries in the region, Serbia's border practices have not yet been followed by the ECtHR. This may change soon, as several cases are either pending before the ECtHR or have been communicated to the Serbian Government.[79]

79 ECtHR, *O.H. and Others v. Serbia* (Application No. 57185/17), Application communicated to the Serbian Government on 23 June 2021; *A.H. v. Serbia and North Macedonia* (Applications Nos. 60417/16 and 79749/16), Applications communicated to the Serbian Government on 27 May 2021; *M.W. v. Serbia* (Application No. 70923/17), Application communicated to the Serbian Government on 26 March 2019.

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Situation of Illegal Migrants at Polish Border: Legal Standards and Practice

ABSTRACT: *The problem of migration in Europe has become increasingly pressing. The primary causes of this problem were the recent migration crises and Russian aggression in Ukraine in 2022. All these events had an impact on most European Union (EU) members, including Central and Eastern European states. This region also witnessed the Belarus–EU border crisis, which, in particular, involved Poland as the EU Member State, sharing the longest border with Belarus. Several months later, Poland encountered a wave of migrants fleeing Ukraine following Russian aggression.*

This study aims to examine the existing legal standards in this regard. The focus of this analysis is twofold. On the one hand, it is crucial to analyze international legal standards, including the 1951 Convention Relating to the Status of Refugees, the EU legal framework, and the international human rights protection system, in particular the case law of the European Court on Human Rights (ECtHR) and provisions of the International Covenant on Civil and Political Rights (ICCPR). However, the analysis would not have been complete without focusing on the Polish legal system and domestic practices regarding illegal migrants. This study also attempts to consider recent events on the Polish border, including the 2021–2022 Polish-Belarussian border crisis and the massive influx of migrants from Ukraine fleeing from armed conflict following Russian aggression in 2022.

KEYWORDS: illegal migrants, European Convention on Human Rights, Polish-Belarussian border crisis, refugees, Polish border

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1. Introduction

In recent years, the problem of migration in Europe has become increasingly pressing. The primary factors that triggered this problem were the 2015 migration crisis, the COVID-19 pandemic, and Russian aggression against Ukraine in 2022. All these events had an impact on most EU members, including Central and Eastern European states. This region also witnessed the Belarus–EU border crisis, which, in particular, involved Poland as the EU Member State, sharing the longest border with Belarus. Several months later, Poland encountered a wave of migrants fleeing Ukraine following Russian aggression.

This study aims to analyze the existing legal standards in this regard. The focus is on the existing legal framework regarding both the international law of human rights, notably the relevant case law of the ECtHR and domestic law. This study also considers the existing practices in dealing with illegal migration at the Polish border.

According to the 1997 Polish Constitution, the Republic of Poland shall respect international law binding upon it.[1] This includes international provisions guaranteeing the protection of refugees' rights, such as the 1951 Convention Relating to the Status of Refugees,[2] and international treaties on human rights protection, such as the International Covenant on Civil and Political Rights ICCPR[3] and the European Convention on Human Rights (ECHR).[4] Poland is also a Member State of the EU and the Council of Europe (CoE), which implies adherence to legal standards on migrant protection. Owing to the limited scope of this contribution, the analysis focuses mostly on ECtHR case law. Naturally, the situation of illegal migrants at the Polish border is primarily regulated by Polish legal standards. Both regimes are analyzed separately.

2. International legal standards

International standards on the protection of the rights of migrants in Europe have evolved in recent years into a system based on the mutual cooperation of various systems, including the CoE, EU, and United Nations (UN). Therefore, these standards should be perceived from a slightly broader perspective, as constituting

1 Art. 9 of the Constitution of the Republic of Poland, 2 April 1997, (Dz. U. 1997, No. 78, item 483).
2 Convention Relating to the Status of Refugees, 28 July 1951.
3 International Covenant on Civil and Political Rights, 16 December 1966, GA resolution 2200A (XXI).
4 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950.

the European paradigm of protection of aliens.[5] As this analysis focuses on the situation of illegal migrants at the Polish border, attention should be drawn to the international legal standards that are binding on Poland.

In general, the protection of illegal migrants focuses primarily on guaranteeing their safety. This includes preventing deportation to a state in which the individual might be subjected to the death penalty or any other risk of deprivation of life due to his return, or in which the individual might be susceptible to the risk of torture, cruel, inhuman, or degrading treatment or punishment.

Within the framework of international law, these standards were derived from the 1951 Convention Relating to the Status of Refugees. This convention prohibits a lawful expulsion of a refugee 'save on grounds of national security or public order.'[6] States are also prohibited from expelling or returning 'a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'[7]

It should be stressed that within the framework of international human rights law the necessity to protect refugees was mentioned in the Universal Declaration on Human Rights (UDHR). In addition, the 1951 Convention referred its preamble to the UDHR.[8] The Declaration provides the right to seek and enjoy asylum from persecution in other countries.[9] Under Article 14(2), this right may not be invoked in case of prosecutions genuinely arising from non-political crimes or acts contrary to the purposes and principles of the UN.[10]

The UDHR standards have been transferred to the ICCPR. The Covenant stipulates that an alien may be expelled from the territory of a state only in pursuance of a decision reached in accordance with the law. Naturally, the alien is entitled to special procedural safeguards, including the right to representation or effective remedy.[11] The Human Rights Committee (HRC), in its General Comment No. 15, clearly stated the scope of rights enshrined in the ICCPR that are guaranteed to aliens.[12] The Committee also stated that collective mass expulsions would amount to a violation of Article 13[13] of the ICCPR and provided for certain procedural protection for an alien facing expulsion.[14] The committee also

5 Karska et al., 2023, pp. 23, 69–70.
6 Art. 32(1) of the Convention relating to the Status of Refugees.
7 Art. 33 of the Convention relating to the Status of Refugees.
8 Preamble of the Convention relating to the Status of Refugees.
9 Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris, 10 December 1948, GA resolution 217 A, Art. 14(1).
10 Ibid., para. 2.
11 Art. 13 of the ICCPR.
12 HRC, General Comment No. 15, 1986, The position of aliens under the Covenant, para. 7.
13 Ibid., para. 10.
14 Ibid., paras. 9–10.

raised the issue of deportation or expulsion to a state where an individual could be subjected to a death penalty.[15]

The HRC, in its General Comment No. 36, focused on particular obligations derived from the right to life[16] with respect to aliens. Under GC No. 36, the duty to protect the right to life requires state parties to take special measures to protect persons in vulnerable situations, including refugees and stateless persons.[17] The obligation to respect and ensure the right to life requires state parties to refrain from deporting, extraditing, or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists in that their right to life under Article 6 of the ICCPR would be violated. Such a risk must be personal and cannot be derived merely from the general conditions of the receiving state, except in the most extreme cases.[18] The HRC also stressed that the obligation not to extradite, deport, or otherwise transfer, pursuant to Article 6 of the ICCPR, may be broader than the scope of the principle of non-refoulement under international refugee law, as it may also require the protection of aliens not entitled to refugee status. In such cases, state parties should also provide access to refugees or other individualised or group status determination procedures for protection against refoulement.[19]

Guarantees for the protection of aliens have also been enshrined in the ECHR, but the text of the Convention is modest in this regard. The only provisions directly applicable to aliens are Article 16 of the ECHR (prohibition of restricting the public activity of aliens),[20] Article 4 of Protocol No. 4 to the ECHR (prohibition of collective expulsion of aliens),[21] and Article 1 of Protocol No. 7 to the ECHR (procedural guarantees regarding the expulsion of aliens).[22] Despite the low number of particular guarantees enshrined in the ECHR, the jurisprudence of the ECtHR in this regard is extensive and may be described as incomparable to other international mechanisms for the protection of individual rights and freedoms.[23] The above provisions, especially Article 3(2) of Protocol No. 4, have been the subject of recent ECtHR analysis.[24]

15 HRC, *Kindler v. Canada* (Communication No. 470/1991), 11 November 1993; HRC, *Judge v. Canada* (Communication No. 829/1998), 13 August 2003; Nowak, 2005, pp. 151–153; Gliszczyńska-Grabias, 2012, pp. 155–156.
16 Art. 6 of the ICCPR.
17 HRC, General Comment No. 36, 3 September 2019, Art. 6 right to life, CCPR/C/GC/36, para. 23.
18 Ibid., para. 30.
19 Ibid., para. 31.
20 Art. 16 of the ECHR.
21 Art. 4 of the Protocol No. 4 to the ECHR.
22 Art. 7 of the Protocol No. 7 to the ECHR.
23 Karska et al., 2023, p. 24.
24 ECtHR, *H.F. and Others v. France* (Application Nos. 24384/19 and 44234/20), Judgment, 14 September 2022, paras. 243–284.

The cornerstone of protecting the rights of aliens, such as illegal migrants and asylum seekers under the ECHR, is the protection of the right to life (Article 2) and freedom from torture, inhuman, or degrading treatment or punishment (Article 3). These two provisions formed the basis for a wide collection of ECtHR case law regarding the protection of aliens. Apart from these two provisions, Article 13 (right to an effective remedy) also plays a significant role in cases concerning illegal migration.

The ECHR does not guarantee the right to political asylum and the ECtHR does not itself examine the actual asylum applications.[25] However, the expulsion of an alien by a contracting state may give rise to an issue under Articles 2 and 3 of the Convention, and hence engage the responsibility of that state under the ECHR, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country. In such circumstances, both provisions imply an obligation not to deport the person in question to that country.[26]

The guarantees deriving from the right to life under the ECHR mostly focus on the transfer of an individual to a third state, in which that individual faces the risk of being subjected to the death penalty. The ECtHR stated that such a prohibition is derived from Article 1 of Protocol No. 13.[27] The ECtHR also stressed that Protocols No. 6 and 13 to the ECHR, which have been ratified by almost all Member States of the Council of Europe, contributed to the interpretation of Article 2 of the ECHR as prohibiting the death penalty in all circumstances.[28]

According to the ECtHR, the principles deriving from Articles 2 and 3 of the ECHR regarding the assessment of removal cases are the same. The ECtHR stated that where there are substantial grounds to believe that the person in question, if expelled, would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment in the destination country, Articles 2 and 3 of the ECHR imply that the state must not expel that person. The ECtHR may examine the two articles together[29] or analyze Article 2 of the ECHR in the context of its examination of the complaint under Article 3 of the ECHR.[30]

25 ECtHR, *F.G. v. Sweden* (Application No. 43611/11), Judgment, 23 March 2016, para. 117.
26 Ibid., paras. 110–111; ECtHR, *Saadi v. Italy* (Application No. 37201/06), Judgment, 28 February 2008, paras. 124–125.
27 ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom* (Application No. 61498/08), Judgment, 2 March 2010, para. 118.
28 Ibid., paras. 115–128.
29 ECtHR, *F.G. v. Sweden* (Application No. 43611/11), Judgment, 23 March 2016, para. 110.
30 ECtHR, *J.H. v. the United Kingdom* (Application No. 48839/09), Judgment, 20 December 2011, para. 37.

Article 3 of the ECHR had been used as the basis to challenge the refusal to admit an individual to the state party's territory.[31] However, the far wider scope of this provision regarding issues concerning deportation and extradition should be noted. The ECtHR formulated the basis for such protection in its well-known judgment *Soering v. UK*.[32] Over time, the ECtHR clarified its jurisprudence in this regard.[33]

On numerous occasions, the ECtHR stressed in its case law that state parties have the right, as a matter of well-established international law and subject to their treaty obligations, including the ECHR, to control the entry, residence, and expulsion of aliens.[34]

Recently, in *Ilias and Ahmed v. Hungary* the ECtHR stressed that the right to political asylum is contained in neither the ECHR nor its Protocols. However, deportation, extradition, or any other measure to remove an alien may give rise to an issue under Article 3 of the ECHR and hence engage the responsibility of the contracting state under the ECHR, where substantial grounds have been shown for believing that the person in question, if removed, would face a real risk of being subjected to treatment, contrary to Article 3 of the ECHR in the receiving country. Under such circumstances, Article 3 of the ECHR entails the obligation not to remove the individual from that country.[35]

The Court also stressed that the assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 of the ECHR must necessarily be rigorous and inevitably involve an examination by competent national authorities and later by the ECtHR of the conditions in the receiving country against the standards of Article 3 of the ECHR. These standards imply that the ill-treatment that the applicant alleges he or she will face if returned must attain a minimum level of severity if it falls within the scope of Article 3 of the ECHR. The assessment of the required severity is relative, depending on the circumstances of the case.[36]

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31 EComHR, *East African Asians v. the United Kingdom* (Application Nos. 4715/70, 4783/71 and 4827/71), 6 March 1978, paras. 20–21; ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (Application Nos. 9214/80, 9473/81 and 9474/81), Judgment, 28 May 1985, paras. 90–91; Ovey and White, 2002, pp. 80–81.

32 ECtHR, *Soering v. the United Kingdom* (Application No. 14038/88), Judgment, 7 July 1989, paras. 81–111.

33 ECtHR, *Vilvarajah and Others v. the United Kingdom* (Application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), Judgment, 30 October 1991, paras. 107–116; ECtHR, *Chahal v. the United Kingdom* (Application No. 22414/93), Judgment, 15 November 1996, paras. 83–107; Ovey and White, 2002, pp. 82–85.

34 E.g. ECtHR, *Khasanov and Rakhmanov v. Russia* (Application Nos. 28492/15 and 49975/15), Judgment, 29 April 2022, para. 93.

35 ECtHR, *Ilias and Ahmed v. Hungary* (Application No. 47287/15), Judgment, 21 November 2019, paras. 125–126.

36 ECtHR, *Ilias and Ahmed v. Hungary* (Application No. 47287/15), Judgment, 21 November 2019, para. 127.

In its case law, the ECtHR referred to the issue of pushbacks. It examined cases where border guards prevented individuals from entering the territory of a state party through land borders[37] or by from the sea.[38] A lack of access to the territory may be connected to preventing illegal migrants from lodging asylum applications or refusing to initiate asylum proceedings. The ECtHR cases pertaining to pushbacks concerned allegations of violations of Article 3,[39] Article 3 taken together with Article 13[40] of the ECHR, Article 4 of Protocol No. 4,[41] or Article 4 of Protocol No. 4, in conjunction with Article 13 of the ECHR.[42]

In this regard, international legal standards are complemented by applicable EU acts.[43] Poland is an EU Member State, and the Polish border is also an EU Border. It should be stressed that the main scope of this study is not the exhaustive analysis of the EU legal system concerning illegal migration. This would be impossible due to the limited scope of the analysis. The Court of Justice of the European Union clearly states that an alien can apply for international protection in the territory of a Member State, including at its borders or in transit zones, even if he or she is staying illegally in that Member State and irrespective of the prospects of success of such a claim.[44]

The Schengen Borders Code provides requirements for the legal entry of foreigners. According to this, third-country nationals should possess a valid travel document entitling the holder to cross the border (the document must extend at least three months after the intended date of departure from the territory of the Member States and it should be issued within the previous 10 years); possess a valid visa (or valid residence permit or a valid long-stay visa); justify the purpose and conditions of the intended stay; and have sufficient means of subsistence (for

37 ECtHR, *M.A. and Others v. Lithuania* (Application No. 59793/17), Judgment, 11 December 2018; ECtHR, *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17), Judgment, 23 July 2020.

38 ECtHR, *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), Judgment, 23 February 2012.

39 ECtHR, *M.A. and Others v. Lithuania* (Application No. 59793/17), Judgment, 11 December 2018, paras. 105–115; ECtHR, *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17), Judgment, 23 July 2020, paras. 174–186.

40 ECtHR, *D. v. Bulgaria* (Application No. 29447/17), Judgment, 20 July 2021, paras. 117–137.

41 ECtHR, *Shahzad v. Hungary* (Application No. 12625/17), Judgment, 8 July 2021, paras. 60–68; ECtHR, *M.H. and Others v. Croatia* (Application Nos. 15670/18 and 43115/18), Judgment, 18 November 2021, paras. 295–304; ECtHR, *A.A. and Others v. North Macedonia* (Application Nos. 55798/16, 55808/16, 55817/16 et al.), Judgment, 5 April 2022, paras. 113–123.

42 ECtHR, *N.D. and N.T. v. Spain* (Application Nos. 8675/15 and 8697/15), Judgment, 13 February 2020; ECtHR, *Shahzad v. Hungary* (Application No. 12625/17), Judgment, 8 July 2021, paras. 75–79; *A.A. and Others v. North Macedonia* (Application Nos. 55798/16, 55808/16, 55817/16 et al.), Judgment, 5 April 2022, paras. 128–132.

43 European Parliament and the Council regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 9 Marc 2016.

44 CJEU, C-821/19 *European Commission v. Hungary*, 16 November 2021, para. 136; CJEU, C-72/22 PPU *M.A. v. Valstybės sienos apsaugos tarnyba (State Border Guard Service)*, 30 June 2022, para 58; see also Chlebny, 2023, p. 9 et seq.; Kużelewska and Piekutowska, 2023, pp. 39–52.

the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted). Third country nationals may not be persons for whom an alert has been issued in the SIS for the purpose of refusing entry and are not considered a threat to public policy, internal security, public health, or the international relations of any of the Member States, in particular, where no alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds.[45]

Under the Schengen Borders Code, a third-country national who does not fulfil all the above conditions shall be refused entry into the territories of the Member States. This is without prejudice to the application of special provisions concerning the right to asylum and international protection, or the issue of long-stay visas.[46] Refusal of an entry must be based on a substantiated decision stating the precise reasons for refusal,[47] and individuals who are refused entry have the right to appeal under national law.[48]

The EU legal system also addresses the issue of pushbacks. The Common European Asylum System is based on the principles enshrined in the 1951 Geneva Convention Relating to the Status of Refugees. The Treaty on the Functioning of the EU clearly states that the EU common policy on asylum, subsidiary protection, and temporary protection should offer appropriate status to any third-country national requiring international protection and be compliant with the non-refoulement principle enshrined in the Convention Relating to the Status of Refugees.[49] This guarantee had also been reaffirmed by the EU Charter on Fundamental Rights[50] and Directive 2013/32/EU.[51]

3. Polish legal standards

This study would not be complete without a specific emphasis on Polish legal provisions concerning migration and asylum proceedings. The Constitution of Poland – in line with international standards – guarantees the foreigners' 'right of asylum in the Republic of Poland in accordance with principles specified by statute.'[52] The same provision states that aliens who seek protection from persecution in

45 Art. 6(1) of the Schengen Borders Code.
46 Art. 14(1) of the Schengen Borders Code.
47 Art. 14(2) of the Schengen Borders Code.
48 Art. 14(3) of the Schengen Borders Code.
49 Treaty on the Functioning of the European Union, 26 October 2012, C326/47, Art. 78.
50 Art. 18 of the Charter of Fundamental Rights of the European Union, 18 December 2000, 2000/C, 364/01.
51 European Parliament and the Council directive 2013/32/EU on common procedures for granting and withdrawing international protection, 26 June 2013, Art. 9; also Sadowski, 2023, p. 108; Florczak, 2003, p. 106.
52 Art. 56 of the Constitution of the Republic of Poland.

Poland, 'may be granted the status of a refugee following international agreements to which the Republic of Poland is a party.'[53]

Main legal framework in this regard derives from two acts: Act on aliens (*Ustawa o cudzoziemcach*)[54] and Act on granting protection to foreigners on the territory of the Republic of Poland (*Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*).[55]

The Act on Aliens outlines certain requirements for the alien crossing the border. Apart from the obligation to have a valid travel document, valid visa, or other valid document or permit to enter another country,[56] an alien entering Polish territory should justify the purpose and conditions of the intended stay and be in possession of proof of health insurance and sufficient financial means to cover the costs of the planned stay.[57]

Apart from that, the Act on Aliens also recognizes stay for humanitarian reasons and tolerated stay. A permit for the stay of a foreigner is issued on humanitarian grounds in the territory of the Republic of Poland if the individual is repatriated to the state in which his rights protected under the ECHR would be infringed (this concerns rights enshrined in Articles 2, 3, 4, 5, 6, 7, and 8). Consent for such a stay is also issued if the individual's return to the state infringes upon the rights of the Child protected under the Convention on the Rights of the Child.[58] A permit for the tolerated stay of a foreigner is issued if the obligation to return: may only take place in a country in which his rights protected under the ECHR would be infringed (rights enshrined in Articles 2, 3, 4, 5, 6, and 7); if there are circumstances for refusing a residence permit on humanitarian grounds; it is unenforceable for reasons beyond the control of the authority competent for the forced execution of the decision on the obligation of the foreigner to return and the foreigner; can only be made in a country to which expulsion is inadmissible under a court decision or due to a decision of the Minister of Justice on refusal to expel the foreigner.[59]

The Act on granting protection to foreigners lays down conditions for granting refugee status:

> a foreigner shall be granted refugee status if, as a result of a well-founded fear of persecution in his country of origin on account of

53 Ibid.

54 Act on aliens (*Ustawa o cudzoziemcach*), 12 December 2013 (with further changes), Dz.U. 2013, item 1650.

55 Act on granting protection to foreigners on the territory of the Republic of Poland (*Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*), 13 June 2003 (with further changes), Dz. U. 2003, No 128, item 1176.

56 Art. 23 of the Act on Aliens.

57 Art. 25(1) of the Act on Aliens.

58 Art. 348 of the Convention on the Rights of the Child.

59 Art. 351 of the Convention on the Rights of the Child.

> race, religion, nationality, political opinion or membership of a particular social group, he is unable or unwilling to avail himself of the protection of that country.[60]

Persecution must, by nature or repetition, constitute a serious violation of human rights, or an accumulation of various acts or omissions.[61] The reasons for this persecution should be properly assessed.[62]

Granting protection to foreigners also entails the possibility of subsidiary protection. This type of protection is available to individuals who do not meet the refugee status conditions. An alien may be granted subsidiary protection if returning to his country of origin may expose him to a real risk of suffering serious harm by the imposition of the death penalty or execution, torture, inhuman or degrading treatment or punishment, or a serious and individualised risk to life or health resulting from the widespread use of violence against civilians in a situation of international or internal armed conflict.[63]

The aforementioned law also provides conditions for the refusal to grant refugee status or subsidiary protection. A foreigner will thus be denied refugee status if there is no well-founded fear of persecution in the country of origin; he enjoys the protection or assistance of UN bodies and has the practical and legal possibility of returning to the territory where such protection or assistance is available without jeopardizing his life, personal safety, or freedom; there are serious grounds to believe that he has committed a crime under international law or a crime of a non-political nature; and he has rights and obligations related to the possession of Polish citizenship.

The granting of refugee status shall also be denied to a foreigner with respect to whom there are serious grounds for believing that he has instigated or otherwise participated in the commission of crimes under international law.[64]

A foreigner will be denied subsidiary protection if there is no real risk of suffering serious harm; there are serious grounds to believe that he has committed a crime under international law (or has instigated or otherwise participated in the commission of such crimes) or has committed a crime on the territory of Poland or has committed an act outside this territory which is a crime under Polish law, or

60 Art. 13(1) of the Act on granting protection to foreigners on the territory of the Republic of Poland.

61 Art. 13(3) of the Act on granting protection to foreigners on the territory of the Republic of Poland.

62 Art. 14 of the Act on granting protection to foreigners on the territory of the Republic of Poland.

63 Art. 15 of the Act on granting protection to foreigners on the territory of the Republic of Poland.

64 Art. 19 of the Act on granting protection to foreigners on the territory of the Republic of Poland.

the foreigner constitutes a threat to state security or society.[65] Subsidiary protection will also be denied if a foreigner, prior to arrival in Poland, has committed a crime punishable by imprisonment under Polish law and has left his country of origin only to avoid punishment.[66]

The Act on granting protection to foreigners does not directly refer to the issue of pushbacks; however, it indirectly mentions this issue[67] by referring to the standards of the 1951 Convention Relating to the Status of Refugees.[68] This should be understood as compliant with the relevant international standards in this area. The illegal character of the practice of pushbacks has also been stressed by domestic courts[69] and the ECtHR.[70] In the next section, this issue is subjected to further analysis in terms of the practice of the authorities.

4. Domestic practice concerning illegal migrants at Polish border

The issue of pushbacks has been raised by the ECtHR. The ECtHR in *M.K. v. Poland* analyzed applications concerning the existence of a systemic practice of misrepresenting the statements given by asylum-seekers in the official notes drafted by the officers of the Border Guard serving at the border checkpoints between Poland and Belarus. The irregularities in the procedure concerned the questioning of foreigners arriving at the Polish-Belarusian border at the relevant time, including the lack of proper investigation into the reasons for which they sought entry into Poland,[71] which was also confirmed by the judgments of the Supreme Administrative Court.[72] The applicants possessed the necessary documents and made numerous attempts to cross the border and sought representation by Polish and Belarusian lawyers but were not allowed to meet with them.[73]

With respect to Article 3 of the ECHR, the ECtHR stated that the impugned measure taken by the Polish authorities fell outside the scope of Poland's strict

65 Art. 20(1) and (2) of the Act on granting protection to foreigners on the territory of the Republic of Poland.

66 Art. 20(3) of the Act on granting protection to foreigners on the territory of the Republic of Poland.

67 Art. 38(3) 2) of the Act on granting protection to foreigners on the territory of the Republic of Poland.

68 Art. 33 of the Convention Relating to the Status of Refugees.

69 Supreme Administrative Court (*Naczelny Sąd Administracyjny*), 26 July 2018. II OSK 1752/18, LEX nr 2529020P; Dobrowolski, 2018, LEX.

70 ECtHR, *N.D. and N.T. v. Spain* (Application Nos. 8675/15 and 8697/15), Judgment, 13 February 2020, paras. 206–232; Rogala, 2021, pp. 11–22.

71 ECtHR, *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17), Judgment, 23 July 2020, para. 174.

72 Supreme Administrative Court, 26 July 2018; Supreme Administrative Court, 17 May 2018. II OSK 2766/17.

73 ECtHR, *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17), Judgment, 23 July 2020, para. 175.

international legal obligations[74] and that there was a very real risk of ill-treatment following the return of the first applicant to Belarus and subsequently to Russia, which led to a violation of Article 3.[75]

Regarding Article 4 of Protocol No. 4, the ECtHR noted that even though individual decisions were issued with respect to each applicant, they did not properly reflect the reasons given by the applicants to justify their fear of persecution. The applicants were not allowed to consult lawyers and were denied access to them even when their lawyers turned up at the border checkpoint and demanded that they be allowed to meet their clients. The ECtHR also stressed that the applicants attempted to cross the border legally and tried to make use of the procedure for lodging applications for international protection that should have been available to them under domestic law,[76] which was different from the situation in *N.D. and N.T. v. Spain*.[77]

The Court found that the decisions to refuse entry into Poland were not taken with proper regard to the individual circumstance of each of the applicants. Rather, they were part of a wider policy of not receiving applications for international protection from persons presenting themselves at the Polish-Belarusian border and of returning those persons to Belarus in violation of domestic and international law. These decisions constituted the collective expulsion of aliens within the context of Article 4 of Protocol No. 4[78] to the ECHR.

The ECtHR also analyzed this issue from the perspective of Article 13 of the ECHR, taken in conjunction with Articles 3 and 4 of Protocol No. 4 to the ECHR. The ECtHR reaffirmed that the return of applicants to Belarus amounted to a violation of Articles 3 and 4 of Protocol No. 4 to the ECHR. In this context, the ECtHR stated that applicants were to be treated as asylum-seekers and established that their claims concerning the risk that they would be subjected to ill-treatment if returned to Belarus were disregarded by the authorities responsible for border control, and their personal situation was not taken into account. According to the ECtHR, an appeal against the refusal of entry and a further appeal to the administrative courts were not effective remedies within the meaning of the ECHR because they did not have automatic suspensive effect. The Government did not indicate any other remedies which might satisfy the criteria under Article 13 of the ECHR. Accordingly, the Court finds that there has been a violation of Article 13

74 ECtHR, *M.S.S. v. Belgium and Greece* (Application No. 30696/09), 21 January 2011, para. 340; ECtHR, *Ilias and Ahmed v. Hungary* (Application No. 47287/15), Judgment, 21 November 2019, para. 97.

75 ECtHR, *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17), Judgment, 23 July 2020, paras. 182–186.

76 Ibid., paras. 206–208.

77 ECtHR, *N.D. and N.T. v. Spain* (Application Nos. 8675/15 and 8697/15), Judgment, 13 February 2020, para. 231.

78 ECtHR, *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17), Judgment, 23 July 2020, para. 210.

of the Convention taken in conjunction with Articles 3 and 4 of Protocol No. 4[79] to the ECHR.

The judgment in *M.K. and others v. Poland* concerned a severe issue relating to the systemic practice of not receiving applications for international protection from persons presenting themselves at the Polish-Belarusian border and of returning them to Belarus. It was also stressed that Belarus was not a safe country for refugees from Russia.[80]

The 2021–2022 Polish-Belarusian border crisis also concerned other EU Member States, such as Lithuania and Latvia. It was triggered by an incident concerning the forced landing of a Ryanair passenger plane[81] in 2021 and following sanctions imposed by EU. At that time Belarusian President Alexander Lukashenko threatened EU that he would allow 'migrants and drugs' to flood into western Europe if sanctions were imposed on his country.[82] In August 2021 and subsequent months, thousands of illegal migrants attempted to cross Belarusian borders and get to Poland, Lithuania, and Latvia. Belarusian authorities aided illegal migrants in getting to their territory by air and then accompanied them to the border. A. Lukashenko admitted that the involvement of Belarusian border troops in the process is 'absolutely possible.'[83]

Poland, Lithuania, and Latvia described the crisis as hybrid warfare.[84] All three states declared a state of emergency and announced their decisions to build border walls on their borders with Belarus.[85] All three states implemented practices allowing migrant pushbacks to Belarus by the Lithuanian, Latvian, and Polish border guards.[86] In case of Poland this involved the Regulation of the Minister of Internal Affairs and Administration (*Rozporządzenie Ministra Spraw Wewnętrznych i Administracji*).[87] This regulation allowed to turn back the 'persons at border crossings, where border traffic has been suspended or restricted and outside the territorial scope of the border crossing'[88] to the state border line.

This issue was raised by human rights organizations[89] and the Polish Commissioner for Human Rights (Ombudsman). The Commissioner for Human Rights

79 Ibid., paras. 219–220.
80 Ibid., para. 155.
81 E.g. United Nations, 2021.
82 Evans, 2021.
83 Rosenberg, 2021; Kużelewska and Piekutowska, 2023, pp. 39–52.
84 Henley, Roth and Rankin, 2021.
85 Gera and Grieshaber, 2022.
86 ECRE, 2023.
87 Minister of Internal Affairs and Administration, Regulation amending the regulation on temporary suspension or restriction of border traffic at certain border crossing points (*Rozporządzenie Ministra Spraw Wewnętrznych i Administracji zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych*), 20 August 2021, Dz.U. 2021, item 1536.
88 Ibid., § 1; See also Zdanowicz, 2023, pp. 107–109.
89 E.g. Violence and Pushbacks at Poland-Belarus Border, 2022.

stated *inter alia* that the aforementioned regulation makes the right of foreigners to apply for international protection in Poland under the 1951 Geneva Convention and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland a fiction.[90]

The Commissioner also expressed an opinion for the ECtHR and stressed that the practice of pushbacks to the border line impairs the right of foreigners to apply for international protection in Poland. He also noted that the violations found by the ECtHR in earlier judgments[91] have not been eliminated.[92] The Commissioner moreover found that the catalogue of persons authorized to cross the border, as defined in § 3(2) of the Regulation, is too narrow. For example, it does not include persons signaling their intention to apply for international protection.[93]

The Polish Ombudsman also took part in domestic proceedings concerning the Iraqi-born family of seven, which was turned back to the state border line. The Voivodship Administrative Court in Białystok (*Wojewódzki Sąd Administracyjny w Białymstoku*) took note of the Ombudsman complaint and found the pushback of foreigners to be contrary to the provisions of domestic law, including the Constitution of the Republic of Poland, and international agreements binding on Poland. The Court further noted that the obligations of the Border Guard under the norms of statutory and international rank cannot be reconciled with the application of the pushback procedure on the basis of the Regulation.[94]

This issue was raised in number of judgments of Polish courts. The Voivodship Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie – WSA*) examined several cases of foreigners apprehended on Polish territory shortly after illegally crossing the border with Belarus. The WSA annulled the decisions on leaving the Republic of Poland issued by the Commander of the Border Guard and stressed that it was not possible to determine, on the basis of incorrectly collected evidence, whether the aliens had expressed a desire to apply for international protection on the territory of Poland. The Court also referred to the non-refoulement principle under 1951 Convention, EU acquis concerning asylum, and ECHR.[95]

90 Sobczak, 2021b.

91 ECtHR, *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17), Judgment, 23 July 2020; ECtHR, *D.A. and Others v. Poland* (Application No. 51246/17), 8 July 2021.

92 Rzecznik Praw Obywatelskich, 2022a.

93 Ibid.

94 Rzecznik Praw Obywatelskich, 2022b; Voivodship Administrative Court in Białystok (*Wojewódzki Sąd Administracyjny w Białymstoku*), 15 September 2022, II SA/Bk 492/22, p. 30 et seq.

95 Voivodship Administrative Court in Warsaw (Wojewódzki Sąd Administracyjny w Warszawie - WSA), 26 April 2022, IV SA/Wa 420/22; WSA in Warsaw, 27 April 2022, IV SA/Wa 471/22; WSA in Warsaw, 20 May 2022, IV SA/Wa 615/22; WSA in Warsaw, 27 May 2022, IV SA/Wa 772/22; see also Helsińskiej Fundacji Praw Człowieka, 2022; Perkowska, 2023, p. 37.

In another judgment, the Voivodship Administrative Court in Białystok (*Wojewódzki Sąd Administracyjny w Białymstoku*) annulled the decision on leaving, which had the effect of returning an unaccompanied Syrian minor from Poland to Belarus. According to the Court, it was not clear whether the minor and accompanying adult were informed about the possibility of applying for international protection, which would be required in respect for the principle of non-refoulement. It was not clear where exactly they were apprehended and which procedure should be applicable. The case file did not clearly explain whether the aliens had been heard before being returned to Belarus. The Court noted that appropriate procedures related to the appointment of a guardian and guarantees for unaccompanied minors were not applied to the alien minor, and the case was not properly explained. The Court also stated that this constituted a collective expulsion, contrary to Article 4 of AP No. 4 to the ECHR.[96]

The Voivodship Administrative Court in Białystok (*Wojewódzki Sąd Administracyjny w Białymstoku*) also examined the Regulation of the Minister of Internal Affairs and Administration, which allowed to turn back to the state border line.[97] The Court decided that the competent authority should have, depending on the situation, either initiated proceedings to oblige the applicant to return or allowed the applicant to formally lodge an application for international protection as soon as possible. In several judgments, the WSA in Białystok stressed that the Minister's Regulation was issued in excess of his statutory competence and should not be applied. The Minister can only restrict or suspend traffic at border-crossing points, but does not have the power to regulate the situation of persons who have crossed borders outside the territorial scope of the border-crossing point.[98]

The ECtHR also referred to the Polish-Belarussian border situation. It decided to indicate interim measures in *R.A. and Others v. Poland*[99] and *H.M.M. and Others v. Latvia*[100] concerning recent events at the borders of Poland and Latvia with Belarus. The measures were applied for a period of three weeks, from 25 August to 15 September 2021 inclusive.[101] The applicants in both cases wanted to enter Latvia or Poland, allegedly to seek international protection. However, they were unable to enter these states or return to Belarus. The applications concerned

96 WSA in Białystok, 27 October 2022, II SA/Bk 558/22 [Online]. Available at: https://bit.ly/3hlekF7 (Accessed: 17 November 2023); see also Helsińskiej Fundacji Praw Człowieka, 2022, p. 3.

97 Minister of Internal Affairs and Administration, Regulation amending the regulation on temporary suspension or restriction of border traffic at certain border crossing points.

98 WSA in Białystok, 15 September 2022, II SA/Bk 492/22; WSA in Białystok, 15 September 2022, II SA/Bk 493/22; WSA in Białystok, 15 September 2022, II SA/Bk 494/22; see also Helsińskiej Fundacji Praw Człowieka, 2022, p. 2.

99 ECtHR, *R.A. and Others v. Poland* (Application No. 42120/21).

100 ECtHR, *H.M.M. and Others v. Latvia* (Application No. 42165/21).

101 ECtHR, Interim measures concerning cases: *R.A. and Others v. Poland* (Application No. 42120/21) and H.*M.M. and Others v. Latvia* (Application No. 42165/21244); ECtHR, 2021a.

73 individuals who relied on Articles 2, 3, and 4 of Protocols No. 4, 5, 6, 8 and 13[102] to the ECHR. The ECtHR requested that Polish and Latvian authorities provide all applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter. It clarified, at the same time, that this measure should not be understood as requiring that Poland or Latvia let the applicants enter their territories.[103]

The crisis at the Polish-Belarussian border and the blanket procedure for returning aliens, who on many occasions might have been entitled to international protection, resulted in numerous applications to the ECtHR in this regard. By the end of 2022, the ECtHR had issued approximately 100 decisions[104] on interim measures according to Rule 39 of the Rules of Court.[105] The ECtHR requested that Polish authorities refrain from transferring applicants to Belarus, as it might constitute a violation of Article 3 of the ECHR.[106]

Several months after these events, the Russian Federation attacked Ukraine and commenced an armed conflict. The aggression of 24 February 2022 triggered a massive influx of refugees to European countries, with Poland being the main destination for Ukrainians fleeing the armed conflict. UNHCR described this crisis as 'fastest growing refugee crisis in Europe since WWII.'[107] In 2022 more than 7.2 million refugees left Ukraine. According to the UNHCR, in June 2023, there were six million refugees from Ukraine recorded in Europe, of which approximately 2.5 million stayed in Poland.[108]

In light of the crisis caused by Russian aggression, the UN Special Rapporteur on the Human Rights of Migrants stated that Polish authorities and hundreds of ordinary Polish citizens have taken immediate action to protect, assist, and integrate Ukrainian refugees. The Polish Parliament adopted a special law granting Ukrainian citizens and their spouses equal access to the Polish labour market, health care, the right to education and other social benefits.[109] It was also stressed that over 2 million refugees currently stay in Poland, and most of them are hosted as guests in private homes by the Polish people.[110]

In connection with the situation at the Polish-Belarussian border, the Special Rapporteur noticed that some migrants remain stranded between the two

102 Ibid.

103 Ibid., also Sobczak, 2021a.

104 Helsińskiej Fundacji Praw Człowieka, 2022, p. 3.

105 ECtHR, Rules of Court, 30 October 23, Rule 39.

106 E.g. ECtHR, *R.A. and Others v. Poland* (Application No. 42120/21); ECtHR, *I.A. and Others v. Poland* (Application No. 53181/21); ECtHR, *A.H.A. and N.A.A.H. v. Poland* (Application No. 53566/21); ECtHR, *A.R. and O.S. v. Poland* (Application No. 53808/21); ECtHR, *J.D. and D.M. v. Poland* (Application No. 54016/21); ECtHR, *D.A.M. and Others v. Poland* (Application No. 54275/21); ECtHR, *A.A. v. Poland* (Application No. 54849/21).

107 UNHCR, 2022.

108 UNHCR, 2023.

109 United Nations, 2022.

110 Ibid.

borders and are subject to violence and pushback from both sides. The Special Rapporteur urged Belarus, Poland, and the EU to establish communication and engage in dialogue regarding the situation at their common borders.[111]

5. Conclusion

Europe has experienced numerous crises related to illegal migration. These issues have involved illegal migrants attempting to enter European states; various EU attempts to remedy the situation; the issue of illegal migrants attempting to enter Poland, Lithuania, and Latvia from Belarus; and Russian military aggression against Ukraine. The last two crises directly affected Poland, causing numerous migrants to cross the Polish border.

As stressed above, Poland is a state party to international law treaties, creating obligations aimed at protecting refugees, such as the 1951 Geneva Convention, ICCPR, and ECHR. These standards are also important for the EU legal system. The most important obligations include non-refoulement; protection of the right to life; prohibition of torture; inhuman or degrading treatment or punishment; and prohibition of the collective expulsion of aliens. It is also crucial to implement the necessary procedures aimed at providing legal safeguards and guaranteeing effective remedies in all cases concerning migrants, especially asylum seekers.

In 2020, the judgment *M.K. and Others v. Poland* revealed a systemic practice of not receiving applications for international protection from persons presenting themselves at the Polish-Belarusian border and of returning them to Belarus. The ECtHR ruled that such a practice led to violations of several articles of the ECHR, including Articles 3 and 4 of Protocol No. 4 and Article 13 of the ECHR, taken in conjunction with Articles 3 and 4 of Protocol No. 4 to the ECHR.

The 2021–2022 Polish-Belarussian border crisis also led to the practice of returning individuals to Belarusian territory (pushbacks). This practice was introduced by the Regulation of the Minister of Internal Affairs and Administration on 20 August 2021. Such a procedure violates the fundamental principle of non-refoulement specified in the Convention Relating to the Status of Refugees. Especially, that it is carried out without analyzing the alien's individual situation.[112]

Numerous allegations of pushbacks resulted in a number of applications to the ECtHR.[113] In most cases, the ECtHR issued interim measures. In December 2021, interim measures were enforced for 28 applications, mostly concerning

111 Ibid.

112 Zdanowicz, 2023, p. 113.

113 ECtHR, *R.A. and Others v. Poland* (Application No. 42120/21); ECtHR, *I.A. and Others v. Poland* (Application No. 53181/21); ECtHR, *A.H.A. and N.A.A.H. v. Poland* (Application No. 53566/21); ECtHR, *A.R. and O.S. v. Poland* (Application No. 53808/21).

the citizens of Afghanistan, Iraq and Syria.[114] It should be emphasised that this problem also concerns minor migrants.[115]

The ECtHR judgments concerning the 2021–2022 Polish-Belarussian border crisis are yet to be delivered, and due to the severe caseload of the ECtHR, this may not happen shortly. On one hand, the ECtHR will most likely be mindful of the context of the situation, the abuse of illegal migrants by the Lukashenko regime, and the situation in Belarus. On the other hand, it is clear that the ECHR imposes certain obligations on state parties, which were stressed in the ECtHR's decisions on interim measures.[116] The state parties also obliged to protect the rights enshrined in Articles 2, 3 and 13 of the ECHR and Article 4 of Protocol No. 4 to the ECHR.

In this regard, it should be noted that, despite the necessity of protecting the state's border, which is also an EU border, the state should comply with its obligations derived from international human rights protection, such as the ECHR, ICCPR, and the principle of non-refoulement derived from the Convention Relating to the Status of Refugees.

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114 ECtHR, 2021b.

115 E.g. WSA in Białystok, 27 October 2022, II SA/Bk 558/22.

116 ECtHR, Interim measures concerning cases: *R.A. and Others v. Poland* (Application No. 42120/21) and *H.M.M. and Others v. Latvia* (Application No. 42165/21).

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DALIBOR ĐUKIĆ*

Migration of Asylum Seekers and the Freedom of Religion or Belief: The Dual Nature of Religious Freedom as a Challenge

ABSTRACT: *This study examines the international and European legal frameworks that protect the rights of asylum seekers who have fled their home countries because of religious persecution. Divided into four main sections, the paper begins by delving into the sources of international law that uphold religious freedom. The second section identifies the specific conditions under which refugee status can be granted based on religious persecution. In the subsequent section of the paper, the focus shifts to scrutinising whether acts of persecution encompass both the internal and external dimensions of religious freedom, as demonstrated through the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights. Notwithstanding the practice of competent asylum authorities and national courts, which reject asylum applications under the assumption that protection should be limited to the internal dimension of religious freedom, this study advocates the need for a comprehensive examination of religion-based asylum claims, considering both dimensions of religious freedom. This stance is rooted in the hypothesis that the distinction between internal and external dimensions of religious freedom should have no practical value for the assessment of the persecution based on religious or belief affiliations or worldviews of asylum seekers.*

KEYWORDS: freedom of religion, migrants, refugees, asylum seekers, forum internum, forum externum

1. Introduction

The international protection of freedom of religion or belief encompasses two distinct dimensions: internal and external. Individuals' inner beliefs are accorded heightened

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protection, as they are intrinsic to human beings and remain inaccessible to external scrutiny. In this context, the justifiable limitations on this dimension of religious freedom are nonexistent. These internal beliefs find expression through various means. Religious persecution predominantly targets the external manifestation of religion or belief. Members of diverse religious groups, often belonging to minorities, face hostility and mistreatment because of their expression of dissenting beliefs or unorthodox religious practices. Consequently, asylum seekers affiliated with these groups are likely to experience a well-founded fear of persecution, thereby meeting the substantive requirements for international protection. Furthermore, the distinction between voluntary migration and migration due to persecution is often unclear.[1]

Assessing religion-based asylum applications poses specific challenges.[2] Is the mere existence of persecuted religious beliefs confined to the internal sphere sufficient to grant refugee status? How can secular authorities accurately assess the religious affiliations of asylum seekers? Does religious persecution encompass only the internal dimensions of belief? Moreover, can competent asylum authorities base their decisions on the assumption that asylum seekers, upon returning to their country of origin, will only practice their religion in private and refrain from publicly manifesting their beliefs? These complex questions form the focal points of this study, which seeks to address them in light of relevant international law and the jurisprudence of two European courts, the European Court of Human Rights and the Court of Justice of the European Union.

This paper begins with an overview of the international protection of religious freedom and then delves into the historical interconnection between religion and migration (section 2.1). It also addresses the intricate issue of defining religion (section 2.2) and the distinction between the internal and external dimensions of religious freedom (section 2.3). Subsequently, the provisions that regulate religious persecution as a basis for obtaining refugee status are presented (section 3). The final section explores the intersection between the two dimensions of freedom of religion and the assessment of religion-based asylum-seeker claims for international protection (section 4). The conclusion synthesises the main findings of this comprehensive analysis.

2. International protection of religious freedom

▪ *2.1. Brief historical background*

Freedom of religion has a long history. Similarly, the claim that the entire history of humankind is a history of migration is not far from the truth.[3] Even in the

1 Mingot and de Arimatéia da Cruz, 2013, p. 175.
2 Rieder, 2022, p. 142.
3 Rystad, 1992, p. 1169.

distant past, large multi-ethnic empires tolerated different religious traditions and practices and experienced huge migration movements (Persia and Rome).[4] In the European public order, the path to religious liberty was paved by international treaties whose primary objective was not to enshrine religious freedom but to prevent religious wars and conflicts. The Religious Peace of Augsburg (1555) established the principle of territorialism, which led to the abandonment of the generally accepted theory of the Holy Roman Empire based on one religion. The principle of *cuius regio, eius religio* was grounded in the migratory patterns of people adhering to the same religious faith, relocating to territories governed by the sovereign of their religion. The Peace of Westphalia has been considered a turning point in the process of creating the European international order. It is also a milestone in the evolution of the international protection of religious liberty. Even though the focus was 'on the religious freedom of the state rather than that of the individual,'[5] the protection of religious freedom was enhanced when the Protestant faiths were recognised internationally, and states were obliged to respect their beliefs. Religious questions were also settled in treaties between European powers and the Ottoman Empire during the 18th and 19th centuries. Most aimed to protect the freedom of worship of Christian populations in the Ottoman Empire.[6] For the region of Central and Eastern Europe, the Treaty of Berlin was of extraordinary significance because the creation and recognition of the independent states of Romania, Serbia, and Montenegro were conditional on their undertaking to respect the religious equality and freedom of worship for all inhabitants on their territory.[7] After the World War I, the Minorities Treaties provided for the 'free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.'[8] This was a period during which a huge compulsory population exchange between Greece and Turkey took place, based on the religious and not ethnic affiliations of their respective populations.[9] It could be concluded that the interwar system of international protection of religious freedom was 'designed to protect either the religious rights of minorities or the rights of religious minorities.'[10]

The post-World War II period holds extraordinary significance for the development of international protection of religious freedom. During this time, freedom of worship and free exercise of religion emerged as key rights, even before

4 Evans, 1997, p. 15; Gibbon, 2008, p. 48. The Bible introduces the 'ethic of kinship for people on the move.' Glanville, 2022, p. 23.
5 Evans, 2004, p. 5.
6 Ibid., p. 6.
7 Ibid., p. 9.
8 Polish Minority Treaty, Art. 2. Similar treaties were signed by Czechoslovakia, Yugoslavia, Romania and Greece.
9 Hirschon, 2008, pp. 23–38.
10 Evans, 2004, p. 10.

the adoption of the Universal Declaration of Human Rights.[11] The international community shifted its focus from simply safeguarding minority and group rights to protecting individual rights. This evolution reflected a changing paradigm in the approach to human rights considerations at the global level. The freedom of thought, conscience, and religion was protected by core universal human rights instruments, such as the 1948 Universal Declaration of Human Rights (UDHR),[12] the 1966 International Covenant on Civil and Political Rights (ICCPR),[13] and the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief.[14] Furthermore, regional instruments of human rights protection were adopted during the second half of the last century and provided for human rights protection at the regional level. The most significant are the 1951 European Convention on Human Rights (ECHR),[15] the 1969 American Convention on Human Rights,[16] the 1981 African Charter on Human and Peoples' Rights,[17] and the 2000 Charter of Fundamental Rights of the European Union.[18] This complex framework for the international protection of freedom of religion or belief (FoRB) enshrines the individual and collective (including corporative), private and public, and internal and external dimensions of this fundamental right. In terms of protecting religious freedom, the provisions outlined in these instruments largely demonstrate a consistent approach.

In the same historical context, notable developments occurred in the field of international migrant protection in the form of the adoption of multilateral treaties that specifically addressed three distinct categories of migrants. These categories included refugees,[19] migrant workers,[20] and smuggled and trafficked

11 Lindkvist, 2017, pp. 2–3.

12 Universal Declaration of Human Rights [Online]. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed: 30 June 2023).

13 International Covenant on Civil and Political Rights [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (Accessed: 30 June 2023).

14 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief; cf. Bielefeldt and Wiener, 2021.

15 European Convention on Human Rights [Online]. Available at: https://www.echr.coe.int/documents/d/echr/convention_eng (Accessed: 30 June 2023).

16 American Convention on Human Rights [Online]. Available at: https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf (Accessed: 30 June 2023).

17 African Charter on Human and Peoples' Rights [Online]. Available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed: 30 June 2023).

18 Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C364/1.

19 See the 1951 Geneva Refugee Convention, supplemented by its 1967 Protocol.

20 See Migration for Employment Convention (1949), Convention (No. 143) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers (1975) and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

migrants.[21] The multilateral instruments which protect these three categories of migrants provide exceptionally detailed legal frameworks constituting central specialised sources of law within the domain of international migration law.[22]

■ *2.2. Towards the definition of religion*

As religion or belief can be a key factor in recognising refugee status, it is essential to examine the definition of religion or belief according to the norms of international law and international refugee law. Many scholars conclude that international law does not offer a specific definition of religion or belief,[23] and that the 'search for a single, discrete definition of religion is an undertaking bound for failure.'[24] Some suggest that the term religion should be abandoned and replaced with other phrases which will not 'fall into the same definitional pitfalls of the original term,'[25] while the others are committed to a so-called 'methodological atheism' or negative real definition of religion.[26] General Comment 22 on Article 18 of the ICCPR provides that the terms 'religion' and 'belief' should be interpreted in a broad sense and clarifies that Article 18 protects not only theistic beliefs and established or traditional religions but also non-theistic and atheistic beliefs.[27] However, if religious freedom is to be protected, it is necessary to define exactly what is being protected.

The jurisprudence of the European Court of Human Rights (ECtHR) has shaped the international understanding of the protection of religious freedom. Although the ECtHR has refrained from providing an abstract definition of religion,[28] certain principles can be inferred from its case law. The ECtHR has established a distinction between what is protected and what is not based on two key criteria: the beliefs 'should attain a certain level of cogency, seriousness, cohesion and importance,' and they should be deemed 'worthy of respect in a democratic society' and compatible with human dignity.[29] Therefore, communism,[30]

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21 See Protocol Against the Smuggling of Migrants by Land, Sea and Air and Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2000).
22 Chetail, 2019, p. 166.
23 Santini and Spatti, 2020, p. 112.
24 Miller, 2016, p. 841.
25 Stinnet, 2005, p. 429.
26 Berger, 1990, p. 100. More on various definitions of religion: Wilson, 1998, pp. 141–162.
27 UN Human Rights Committee (HRC), CCPR General Comment No. 22. Art. 18 (Freedom of Thought, Conscience, or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4.
28 ECtHR, *Kimlya and others v. Russia* (Applications Nos. 76836/01 and 32782/03), Judgment, 1 October 2009, para. 79.
29 ECtHR, *Campbell and Cosans v. the United Kingdom* (Application Nos. 7511/76 and 7743/76), Judgment, 25 February 1982, para. 36.
30 ECtHR, *Hazar, Hazar and Acik v. Turkey* (Applications Nos. 16311/90, 16312/90 and 16313/90), Judgment, 11 October 1991.

pacifism,[31] Druidism,[32] atheism,[33] and even veganism[34] have been accepted by the Court as beliefs that fall within the scope of the protection of freedom of thought, conscience, and religion. However, there are some limitations to the broad construction of the terms religion and belief, as not every kind of thought, opinion, or idea falls within the scope of the protection of religious freedom. The ECtHR has determined that Article 9 of the ECHR, safeguarding freedom of conscience, thought, and religion, does not extend to a person's 'conscience' of belonging to a minority group,[35] language preferences,[36] or beliefs regarding the disposal of bodies after death.[37] Although the ECtHR has established criteria to identify beliefs that fall under the protection of Article 9 of the ECHR, in concrete cases, it has recognised beliefs based on conscience and thought about the aspects of human conscience without assessing whether they meet the aforementioned criteria. Therefore, international law lacks a universally accepted definition of 'religion' and 'belief'. The prevailing approach suggests interpreting those terms broadly, and considering each borderline case separately.

Furthermore, international refugee law does not define religion precisely. According to the Geneva Convention, a refugee is an individual who, owing to legitimate fear based on various factors, including religion, is unable or unwilling to return to their country of origin.[38] Nonetheless, the Convention refrains from specifying the exact meaning of the term 'religion' and omits any explicit reference to beliefs. According to the UNHCR's 2004 Guidelines on Religion-Based Refugee Claims, beliefs should be interpreted broadly, encompassing theistic, non-theistic, and atheistic beliefs. It should be underlined that the Guidelines provide for an over-inclusive definition of beliefs, which are forms 'of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind.' This broad interpretation of beliefs has been expanded by including dissident groups, such as heretics, apostates, schismatics, and pagans.[39] The so-called Qualification Directive (QD)—Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011—adopts the wider conception of religion that encompasses

31 ECHR, *Arrowsmith v. the United Kingdom* (Application No. 7050/75), Decision, 12 October 1978, p. 126.
32 ECtHR, *Chappell v. the United Kingdom* (Application No. 10461/83), Judgment, 30 March 1989.
33 ECHR, *Angelini v. Sweden* (Application No. 10491/83), Decision, 3 December 1986.
34 ECHR, *C.W. v. the United Kingdom* (Application No. 18187/91), Decision, 10 February 1993.
35 ECtHR, *Sidiropoulos and others v. Greece* (Application No. 26695/95), Judgment, 10 July 1998, para. 41.
36 ECtHR, *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64), Judgment, 23 July 1968, para. 6.
37 ECHR, *X v. Germany* (Application No. 8741/79), Decision, 10 March 1981, p. 137.
38 Art. 1 of the Convention and Protocol Relating to the Status of Refugees.
39 Guidelines on International Protection: Religion-Based Refugee Claims under Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, paras. 5 and 6.

'theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.'[40] Over the past few years, the number of atheist asylum seekers granted asylum for religious reasons has noticeably increased.[41] Therefore, the international refugee law comports with the global tendency to expand the protection of religious freedom to cover even secular worldviews. However, this approach is not limitless and should be applied with scrutiny as excessive inclusiveness may affect the quality of the protection provided. If the criteria for defining religion are excessively inclusive and encompass every idea or worldview, the distinctive significance of religion may be diluted. Consequently, the unique protection granted to religious freedom, which is prevalent globally in nearly every state, may come under scrutiny.

■ *2.3. Freedom to believe and freedom to act*[42]

This section examines the extent of the international protection of religious freedom and the limits of permissible and non-permissible interference with the right to religious freedom. The provisions of international law that shape the framework for the international protection of religious freedom have a dual structure. The first element pertains to the definition of the scope of the freedom subject to protection. Despite the UDHR being a nonbinding document, it is generally regarded as a force of customary international law. Article 18 of the UDHR, which upholds the right to freedom of thought, conscience, and religion, has served as the foundation for the creation of legally binding covenants and has significantly influenced the development of FoRB protection at both universal and regional levels. According to Article 18 of the UDHR, freedom of thought, conscience, and religion encompass the right to change one's religion or belief, as well as the freedom to manifest religion in private and public. International human rights instruments provide examples of the potential manifestations of religion, such as worship, teaching, practice, and observance.[43]

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40 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of the European Union, L337/9. The same approach is adopted by the European Court of Justice, CJEU, Grand Chamber, *Bundesrepublik Deutschland v. Y and Z* (Joined cases C-71/11 and C-99/11), fn. 38, para. 63.

41 Bowcott, 2014.

42 As per the United States Supreme Court, the freedom to exercise religion 'embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' Cantwell v. Connecticut, 310 U.S. 296, 303–304 (1940).

43 Art. 18(1) and (2) of the ICCPR; Art. 9(1) of the European Convention on Human Rights.

The second element pertains to the limitations on the right to religious freedom. These limitations apply only to the manifestation of religion. Similar to a few other human rights, these limitations must be prescribed by law, be necessary in a democratic society, and pursue legitimate aims, such as safeguarding public safety, protecting public order, health, morals, or the rights and freedoms of others.[44] Therefore, every limitation on the freedom of religion does not constitute a violation of the international protection of religious freedom. Consequently, every interference with the freedom of religion cannot qualify as religious persecution, which enables victims to obtain refugee status.[45]

The differentiation between mere beliefs and their expression is typically determined by the extent of protection afforded to each. The former, often referred to as *forum internum*, is absolutely and unconditionally protected. This refers to 'the inner nucleus of a person's convictions,' which theoretically remains beyond the reach of the law or any external coercion.[46] On the contrary, the manifestations of internal beliefs, referred to in the jurisprudence of the ECtHR as *forum externum*, may be subject to limitations under the conditions outlined in the ICCPR and other universal or regional human rights protection instruments. Regarding the distinction between the internal and external dimensions of religious freedom from the perspective of dealing with religious persecution, two significant points merit consideration. First, although the boundaries of the absolutely protected internal dimension of religious freedom are not always clearly delineated, any form of coercive intrusion into internal beliefs must be deemed unjustified interference with the right to religious freedom. Second, the distinction between the internal and external dimensions of religious freedom should not be equated to the distinction between the private and public manifestations of religious beliefs.[47] The external dimension encompasses both private and public manifestations, and certain public actions may significantly impact an individual's deep internal beliefs (e.g. disclosure of someone's beliefs due to oath-taking procedures).

3. Religious persecution

Religious persecution is not a recent phenomenon but has historical roots. Throughout history, examples of religious persecution can be found, including the persecution of Christians in the Roman Empire, the persecution of religious

44 Art. 9(2) of the European Convention on Human Rights.
45 Madera, 2022, p. 123.
46 Bielefeldt, Ghanea and Wiener, 2016, p. 64. General Comment of the Human Rights Committee No. 22 summarises: 'Art. 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally.'
47 For the opposite opinion: Nowak, 2005, p. 410.

dissidents in various faiths, and the targeting of traditional religious organisations as the predominant political approach in communist states worldwide. Even today, religious persecution is prevalent in many regions worldwide. Belonging to a specific religious group or expressing divergent religious views that deviate from the orthodox teachings of a religious organisation can lead not only to the denial of religious freedom but also to the derogation of other fundamental human rights.[48] The right to freedom of religion or belief is inherent to all human beings, irrespective of any official authorisation or permission.[49] The UN Human Rights Committee stated in their General Comment No. 15 that 'the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.'[50] Therefore, freedom of religion is a right that belongs to refugees, migrants, and asylum seekers regardless of their status. This is particularly important because among migrants, refugees, and asylum seekers, there are individuals who may have faced persecution in their countries of origin based on their religious or belief affiliations or worldviews.

Article 1 of the Geneva Convention establishes that one of the conditions for acquiring refugee status is the existence of a 'well-founded fear' of being subjected to persecution for various reasons, including religion. Religion is acknowledged as a protected category for asylum-seeking, recognising the significant role that religious persecution plays in initiating the mass influx of asylum seekers and refugees.[51] Critical enquiry involves identifying the conditions under which refugee status can be granted based on religious persecution. First, it is essential to highlight the distinction between religious persecution and the justifiable limitations on religious freedom. The ECtHR evaluates whether interferences with freedom of religion or belief are 'prescribed by law,' serving one of a defined set of legitimate aims (such as public safety and order, health, morals, or the rights and freedoms of others), and, finally, whether such interferences are 'necessary in a democratic society' to achieve legitimate aims. The 'necessity' test requires the states to prove that interfering with human rights was a 'pressing social need' that was 'proportionate to the legitimate aim pursued.'[52] Numerous limitations on the manifestation of religion may not be justifiable, such as the prohibition of worship or various forms of discriminatory practices targeting specific religious groups. Not every limitation on religious freedom constitutes persecution; every act of religious persecution constitutes an unjustifiable limitation on religious freedom. In their guidelines, the UNHCR recommends that the authority which delivers decisions on asylum applications 'must not only take into account international

48 Madera, 2022, p. 125.
49 OSCE ODIHR, 2014.
50 UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986.
51 McDonald, 2022, p. 43.
52 Durham and Scharffs, 2019, p. 230.

human rights standards, including lawful limitations on the exercise of religious freedom, but also evaluate the breadth of the restriction and the severity of any punishment for noncompliance.'[53] Hence, justifiable limitations on religious freedom that do not impose severe punishments as consequences of noncompliance do not constitute persecution and therefore do not provide grounds for obtaining refugee status.

According to the 2004 UNHCR Guidelines on International Protection No. 6, claims based on religion may involve religion as a belief (including a non-belief), identity, or way of life.[54] Persecution for religious reasons can take various forms, such as limiting or prohibiting the expression of religious beliefs, discriminating against individuals based on their religious affiliation, and imposing forced conversions or adherence to the practices of another religion.[55] The mere fact that persecution has taken place is not sufficient to fulfil the requirements for refugee status. In the EU, the QD has set standards in this area. Thus, there must be a 'causal link' between an individual's religion and the act of persecution. The persecution must be 'sufficiently serious' by its nature or repetition as to constitute a severe violation of basic human rights,[56] or 'be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner.'[57] The Directive enumerates specific acts of persecution that render individuals eligible for refugee status or subsidiary protection.[58] It also prescribes that during the assessment of whether an applicant has a well-founded fear of persecution, it is irrelevant if the applicant does not possess a religious characteristic that attracts persecution. What is significant is that the persecutor attributes this characteristic to the applicant.[59] Furthermore, the fear of persecution does not have to be based on personal experiences. Therefore, in

53 See UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 2004, para. 16.

54 Ibid., para. 5.

55 More examples of different forms of religious persecution could be found in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 72.

56 The inalienable rights according to Art. 15(2) of the ECHR: the right to life, the prohibition of torture, inhuman and degrading treatments, the prohibition of slavery and servitude, and the rule of 'no punishment without law.' Derogation in time of emergency.

57 Art. 9 of the EU Directive 2011/11/9.

58 Those are: '(a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Art. 12(2); (f) acts of a gender-specific or child-specific nature.' Art. 9(2) of the EU Directive 2011/11/9.

59 Art. 10 of the EU Directive 2011/11/9.

cases of asylum claims based on religious persecution, the decision-maker must carefully examine the specific circumstances, individual situation of the claimant, and the legal framework for the protection of religious freedom in their country of origin.

The provisions of international law that regulate religious persecution do not seem to differentiate between internal and external religious freedom. However, states enjoy wide margin of appreciation in implementing international provisions and standards regarding the status of refugees.[60] Two European courts, the ECtHR and the European Court of Justice (CJEU), have set specific standards that appear to incline in favour of expanding the breadth of protection afforded to individuals commonly referred to as 'religious refugees.' The subsequent section of this paper will scrutinise the jurisprudence of mentioned courts in which the differentiation between the 'core' of FoRB (*forum internum*) and the fringes of FoRB (*forum externum*) could affect the status of asylum seekers.

4. Forum externum of religious freedom and religious persecution

In the past ten years, courts in Europe, both national and supranational, have played a significant role in defining religious persecution. European states have a margin of appreciation that permits them to implement international norms in a more restricted or narrower manner. These courts' decisions are of particular importance because they have been viewed as a link that can bridge the gap between international legal norms that provide protection for asylum seekers and their implementation at the national level.

The main challenge in evaluating asylum claims based on religious persecution is establishing whether the infringement of religious freedom amounts to an act of persecution. This is the exact question that the Federal Administrative Court of Germany (*Bundesverwaltungsgericht*) referred to the Court of Justice of the European Union in the case of *Bundesrepublik Deutschland v. Y and Z*.[61] The case involved two Pakistani nationals who sought refugee status in Germany because they faced religious persecution owing to their membership in the Ahmadiyya Muslim community. They claimed that they had been repeatedly harassed due to their religious convictions. The Pakistani Penal Code stipulates that Ahmadis can be punished with up to three years of imprisonment or a fine if they 'describe their faith as Islam, preach or propagate their faith or invite others to accept it.'[62] German courts had set the standard of the 'religious subsistence level' (*religiöses Existenzminimum*), which corresponded to the *forum internum* of the right to

60 Madera, 2022, p. 123.
61 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Grand Chamber.
62 Ibid., para. 31.

religious freedom, including private worship.[63] Therefore, the prohibition that affects the “religious subsistence level” solely could constitute persecution. In this regard, the CJEU had to determine whether the persecution or unjustified limitations on the manifestation of religious beliefs (of the *forum externum*) constituted religious persecution.

According to the Court, religious persecution is a severe violation of religious freedom that has a significant effect on the applicant.[64] However, the Court did not specify what constitutes a severe or significant violation. European Directive 2011/11/9 states that violations must be serious enough,[65] but this standard is also vague and prone to subjective interpretation. From the victims’ point of view, any violation or infringement of their rights may be severe or serious. Therefore, objective criteria are deemed to be necessary. The CJEU provided general instructions for competent asylum authorities on how to assess applications based on alleged religious persecution. They must examine the personal circumstances of the applicant and whether he or she faces a genuine risk of prosecution, inhuman, or degrading treatment or punishment as a result of exercising religious freedom in his or her country of origin.[66] However, these instructions do not provide a precise definition of religious persecution, which could help identify the dimensions of religious freedom that can be affected.

The two dimensions of freedom of religion or belief (internal and external) are interrelated and difficult for secular authorities to distinguish. Moreover, recent developments in the field of religious freedom have challenged the notion of absolute and prioritised protection of the internal dimension of religious freedom.[67] The main issue that the case *Bundesrepublik Deutschland v. Y and Z* addressed was whether religious persecution only occurred when the core or essential aspects of religious freedom (i.e. its internal dimension) were violated. The CJEU based its assessment on the concept of “religion” provided in the already mentioned Article 10(1)(b) of the QD, which includes participation in public worship alone or in a community with others. Therefore, the prohibition of such participation may be a “sufficiently serious act” according to the meaning of Article 9 of the QD that constitutes persecution if in the country of origin ‘it gives rise to a genuine risk that the applicant will, inter alia, be prosecuted or subject to inhuman or degrading punishment by one of the actors referred to in Article 6 of the Directive.’ The CJEU emphasises that the key factor is not whether public religious practices constitute the ‘core’ of religion or faith, but the significance that they hold for

63 Lehmann, 2014, p. 67.
64 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Grand Chamber, para. 59.
65 Madera, 2022, p. 126.
66 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z,* Grand Chamber, para. 72.
67 Durham and Scharffs, 2019, p. 179.

the applicant and for the maintenance of his religious identity. The CJEU asserts that the protection granted on the grounds of religious persecution encompasses either personal or communal actions that the believer deems necessary and those mandated by religious doctrine. The CJEU concludes that interference with the external expression of freedom may amount to an act of persecution. This court assessment aligns with the international protection of religious freedom, which covers both aspects of the right.

The ECtHR reached the same verdict, but through different reasoning. In *F.G. v. Sweden*, the Iranian applicant applied for asylum based on fear of persecution due to his political activities and his conversion to Christianity.[68] The Chamber ruled that the execution of the expulsion order against the applicant would not entail a violation of Articles 2 or 3 of the ECHR because Iranian authorities were unaware of his conversion that took place after his arrival in Sweden (a sur place conversion) and because he kept his faith as a private matter. The Grand Chamber dismissed the argument of the respondent state that the applicant could neutralise the risk of persecution because 'he could engage in a low-profile, discreet, or even secret practice of his religious beliefs.' The Grand Chamber determined that the external manifestation of religion is a vital component of religious freedom and

> adopted an interventionist approach that takes into account the status of religious minorities in certain geographical contexts, requires member states to consider situations of doubt to the benefit of an asylum seeker and not to his detriment, and urges a full implementation of international guarantees.

In *Bundesrepublik Deutschland v. Y and Z*, the national court's final query concerned the interpretation of Article 2c of the QD, which defines a refugee as a person with a well-founded fear of being persecuted for religious reasons, among others. The Court ruled that the competent authorities should not expect applicants to refrain from their religious practices to avoid persecution in their country of origin and that the possibility of such avoidance is generally irrelevant for assessing whether their fear is well founded.[69] Hence, the CJEU and ECtHR have extended the scope of protection afforded on the basis of persecution on religious grounds to both dimensions of religious freedom: internal and external.

68 ECtHR, *F.G. v. Sweden* (Application No. 43611/11), Judgment, 23 March 2016, paras. 86–89.

69 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Grand Chamber, para. 80.

5. Conclusion

Religion and migration are two phenomena with deep historical roots that have been interconnected several times throughout history. Protection of religious freedom and the international protection of refugees emerged in the same historical context as in the aftermath of World War II. Therefore, general rules for the protection of religious freedom should be extended to migrants, refugees, and asylum seekers. Furthermore, the provisions of the international migration law regarding religion and religious persecution should be interpreted in light of the standards for the general protection of religious freedom.

International law, including migration law, does not provide a universally accepted definition of religion. It is commonly accepted that the terms 'religion' and 'belief' should be interpreted in a broad sense so that they include secular worldviews. Such a broad approach generates the danger of ultra-inclusiveness, which can decrease the level of protection of religious freedom overall. Be that as it may, there are no general rules or tests that may be applied to distinguish religion from other worldviews that do not fall under the protection of religious freedom. Therefore, each borderline case should be scrutinised separately.

The existence of a well-founded fear of persecution on religious grounds is a key requirement for achieving refugee status. Since religious freedom has two dimensions–external and internal–a violation of either of the two constitutes religious persecution and should be taken into account in the assessment of an application for refugee status. Had the religious affiliation of asylum seekers been limited only to the internal sphere, then all asylum claims would have needed to be approved. The inner beliefs of each person are not accessible to others, and it is difficult for secular asylum authorities to objectively examine them. This would lead to the necessity of granting asylum to everyone claiming to be a member of a persecuted group without any further assessment. This is exactly what the New Zealand Refugee Status Appeals Authority noticed: 'in the absence of any truly independent evidence, it would be easy to manufacture a claim based on personal religious belief.'[70] That is the reason why competent authorities have to examine the existence of external manifestations of religious affiliations of the applicant.

Conversely, the competent asylum authority should not base the denial of refugee status on the expectation that the applicant, upon his return to the country of origin, will refrain from the public expression of religious beliefs. Using this reasoning, no application based on religious persecution would be accepted, as most applicants may escape persecution by renouncing their religion or publicly conforming to permitted religions or beliefs. However, applicants' motivation to

70 Kagan, 2010, p. 1182.

leave their country of origin is to preserve and practice their beliefs, irrespective of whether such a practice is public or private. Hence, supporting the possibility of public renunciations of religion or beliefs as the basis for denying asylum would support violations of religious freedom worldwide.

The evaluation of asylum claims based on religious grounds should encompass a comprehensive analysis of both the dimensions of religious freedom. The objective is to impartially examine whether an applicant belongs to a persecuted religious group. The underlying aim is to extend enhanced international protection to genuinely persecuted individuals, while safeguarding against the misuse of religion as a means to secure refugee status. The prevention of such abuse is crucial, as it mitigates the potential risk of the integrity of the asylum system being undermined by the misuse of religion, which could lead to legitimate cases of persecution being inadequately protected in the future. Striking a balance between granting proper protection to the genuinely persecuted and preventing the exploitation of religious grounds to obtain asylum is vital for upholding the principles of fairness and integrity in assessing the right to asylum.

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ĽUDMILA ELBERT*

Irregular Migrants in the Slovak Republic: Return and Readmission

■ **ABSTRACT:** *Not long ago, the Slovak Republic was in the position of being a country of origin of irregular and regular migrants seeking opportunities in countries of the Western Hemisphere. After the accession of the Slovak Republic to the European Union (EU), it has mainly become a transit country not only for asylum seekers, but also for irregular migrants trying to reach wealthier countries, such as the USA, Germany, France, or Great Britain. Moreover, as a member of the Schengen area, the Slovak Republic has an obligation to secure its external border with Ukraine. However, border control management within the Schengen area is not leak-proof, and this is not only the case for the Slovak Republic. To address irregular migration, the Slovak Republic cooperates with other EU Member States and third countries. The cooperation is not always smooth and oftentimes fails, as evidenced by readmission agreements. Based on the analysis of the judicial review, we conclude that although Slovakia's procedures of detention, return, or readmission are not perfect, the issues of readmission or return of foreigners do not cause security problems for the Slovak Republic. Rather, it creates legal issues regarding the violation of the national or international law obligations; this is because, in case of an incorrect decision, a migrant may possess various rights at the time of detention according to her/his status. However, the final section of the study analyses statistical numbers that confirm that the Slovak Republic still holds the position of a transit country. Controlling the persons who stay illegally within the territory of the Slovak Republic (after the expiration of the permission to stay) and illegally cross its internal borders to or from other states in the Schengen area remains to be the main focus of the Slovak return and readmission policy.*

■ **KEYWORDS:** irregular migrant, expulsion, return, readmission, asylum seeker, detention

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1. The Slovak Republic in the world of migration

The Slovak Republic addresses the topic of migration through policies prepared by its government. On 8 September 2021, the government approved the Migration Policy of the Slovak Republic (hereinafter referred to as the 'Migration Policy'), which is valid until 2025.[1] The policy pays particular attention to the areas of irregular migration and borders, readmission agreements, and returns. Accordingly, the government has expressed its ambition to cooperate with the other EU Member States, countries of transit, and countries of origin in their fight against irregular migration.

In the area of irregular migration and borders, the Migration Policy focuses on activities for securing the external Schengen borders and aims to reduce the potential for the irregular entry of individuals. Secured external borders may eliminate the potential for abuse of the irregular migration issue in the foreign policies of certain transit countries; they may use this method to promote their political or economic position as 'migration hubs' on the migration routes to Europe. Therefore, cooperation with transit and origin countries in addressing irregular migration and supporting their capacities to eliminate irregular migration flows to Europe are crucial.

Readmission agreements as well as return and reintegration policies form an inseparable part of the Migration Policy aiming to combat irregular migration. If the nature of the case permits, the Migration Policy prefers voluntary return, including assisted voluntary returns, over enforced return. In the practical implementation of assisted voluntary returns, state organs of the Slovak Republic cooperate with international organisations and non-governmental organisations (NGOs). Repressive measures like forced returns are implemented only in cases where a foreigner does not adhere to the Slovak legal system. Forced returns are implemented only after all means to ensure a foreigner's compliance with the decision of the administrative or judicial organ about her/his departure from the Slovak territory has been exhausted. The Migration Policy, effective until 2025, defines eight priorities: 1. To establish new or revise current readmission agreements and their implementing protocols; 2. to promote cooperation with the representative bodies of the third countries whose nationals are most often expelled or with whom problems regarding the realisation of expulsion persist; 3. to secure an effective control system for checking the fulfilment of the conditions of assisted returns; 4. to carry out returns in accordance with the legislation and recommendations of the EU, with a preference for voluntary assisted returns;

1 Ministerstvo vnútra SR: *Migračná politika Slovenskej republiky s výhľadom do roku 2025* [Online]. Available at: https://www.minv.sk/?zamer-migracnej-politiky-slovenskej-republiky&subor=419162 (Accessed: 30 June 2023).

5. to ensure the proper enforcement of judicial and administrative expulsions; 6. to carry out joint controls of the employment subjects, secure regulation and monitoring of the employment fields, and identify undeclared work and illegal employment; 7. to promote negotiation of the EU readmission agreements; and 8. to sustainably pursue the improvement of readmission cooperation, prioritising the external relations of the EU with the third countries that currently have insufficient cooperation.

Priorities in this field are based on the National Strategy on Integrated Border Management for the years 2019 to 2022 (hereinafter referred to as the 'National Strategy').[2] It was adopted in accordance with the Regulation (EU) No. 2019/1896 of the European Parliament and of the Council.[3] In its fight against irregular migration, the National Strategy covers cooperation policies with third countries to secure Schengen borders and the return of third-country nationals. As the border between the Slovak Republic and Ukraine forms an external border of the Schengen area, the key element to secure its borders is cooperation with the state organs of Ukraine (especially with the Ukraine's state border service). Specific procedures of intensive cooperation were negotiated in the Agreement between the Slovak Republic and Ukraine on the regime on the Slovak–Ukraine state border, considering cooperation and mutual assistance in border matters.[4] Regular meetings of the states' representatives for borders lead to a mutual exchange of information, assessment of the current border situation, and a prompt solution for any incidents and issues. However, the Slovak Republic also cooperates with countries of the Western Balkan route, where Slovak policemen help to secure the borders of Serbia and Macedonia. To solve the problem of irregular migration, the Slovak Republic works with international organisations such as the International Organisation for Migration (IOM)[5] and United Nations High Commissioner for Refugees (UNHCR; humanitarian transfers), International Centre for Migration Policy Development (early warning; fight against the fundamental causes of the migration; harmonisation of the measures for entrance control; and coordination of foreign, asylum, and refugee policies), and the Organization for Security and Co-operation in Europe (security of borders and borders management).

As one of the crucial means of fighting irregular migration, the National Strategy presents a return procedure of irregular migrants, mainly by the institute

2 Ministerstvo vnútra Slovenskej republiky, 2019. This strategy has been already upgrated for the years 2023 to 2026. See Ministerstvo vnútra Slovenskej republiky, 2022.

3 Regulation (EU) No. 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) No. 2016/1624 (OJ L 295, 14 November 2019, pp. 1–131).

4 Oznámenie Ministerstva zahraničných vecí Slovenskej republiky č. 2/1995 Z.z. o uzavretí Zmluvy medzi Slovenskou republikou a Ukrajinou o režime na slovensko-ukrajinských štátnych hraniciach, spolupráci a vzájomnej pomoci v hraničných otázkach.

5 IOM, 2023.

of readmission, as one of the sanction mechanisms. Readmission agreements cover the conditions of the transfer and admission of persons who enter or are staying within the territory of the Slovak Republic illegally. Readmission agreements create a legal framework for their removal and establish an obligation to readmit a third-country national,[6] as the readmission agreements guarantee the return of irregular migrants to their country of origin or to transit countries.[7]

The readmission policy of the Slovak Republic is in accordance with those of the EU, and the Slovak Republic is bound by the readmission agreements between the EU and third countries. Based on the authorisation contained therein, the Slovak Republic is entitled to negotiate bilateral protocols for the implementation of such agreements between the Slovak Republic and third countries. Eight such bilateral protocols are currently in force. However, the Slovak Republic is also entitled to negotiate its own readmission agreements with third countries. According to the National Strategy for the years 2023 to 2026, the Slovak Republic is a contracting party to fourteen bilateral readmission agreements with other EU member states, two agreements with the states of the European Economic Area, and one agreement with a third country.[8] Bilateral readmission agreements with other third countries do not stay in force after the conclusion of readmission

6 Giuffré, 2020, p. 186.
7 Velluti, 2016, p. 160.
8 Protocol between the Slovak Republic and Austria: the Notification of the Ministry of Foreign Affairs of the Slovak Republic on conclusion of the Agreement between the Government of the Slovak Republic and the Federal Government of the Republic of Austria on Changes and Amendments to the Protocol on the Implementation of the Agreement between the Government of the Slovak Republic and the Federal Government of the Republic of Austria on the Readmission of Persons Entering the Territory of the State Illegally (Readmission Agreement) of 20 June 2002; published in the Collection of Laws of the Slovak Republic under No. 347/2008.
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Protocol between the Slovak Republic and Russia: the Notification of the Ministry of Foreign Affairs of the Slovak Republic on conclusion of the Protocol between the Government of the Slovak Republic and the Government of the Russian Federation on the Implementation of the Agreement between European Community and the Russian Federation on the Readmission of 25 April 2006; published in the Collection of Laws of the Slovak Republic under No. 284/2010.
Protocol between the Slovak Republic and Moldova: the Notification of the Ministry of Foreign Affairs of the Slovak Republic on conclusion of the Protocol between the Government of the Slovak Republic and the Government of the Moldova on the Procedure to Implement the Agreement between European Community and the Moldova on the Readmission of Persons Residing without Authorisation of 10 October 2007; published in the Collection of Laws of the Slovak Republic under No. 354/2010.

agreements at the EU level. Such EU agreements have also replaced the readmission agreement between the Slovak Republic and Ukraine. Based on the National Strategy, the need to negotiate new readmission agreements or protocols depends

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Protocol between the Slovak Republic and Serbia: the Notification of the Ministry of Foreign Affairs of the Slovak Republic on conclusion of the Protocol between the Government of the Slovak Republic and the Government of the Republic of Serbia on the Implementation of the Agreement between European Community and the Republic of Serbia on the Readmission of Persons Residing without Authorisation of 18 September 2007 signed in Brussel; published in the Collection of Laws of the Slovak Republic under No. 76/2011.
Protocol between the Slovak Republic and Switzerland: the Notification of the Ministry of Foreign Affairs of the Slovak Republic on conclusion of the Protocol on the Implementation of the Agreement between the Government of the Slovak Republic and the Swiss Federal Council on the Readmission of Persons Residing without Authorisation; published in the Collection of Laws of the SR under No. 104/2011.
Protocol between the Slovak Republic and Montenegro: the Notification of the Ministry of Foreign and European Affairs of the Slovak Republic on conclusion of the Protocol between the Government of the Slovak Republic and Government of the Montenegro on the Implementation of the Agreement between the European Community and the Republic of Montenegro on the Readmission of Persons Residing without Authorisation; published in the Collection of Laws of the Slovak Republic under No. 107/2013.
Protocol between the Slovak Republic and Hungary: the Notification of the Ministry of Foreign and European Affairs of the Slovak Republic on conclusion of the Protocol between the Ministry of Interior of the Slovak Republic and the Ministry of Interior of the Republic of Hungary on the Implementation of the Agreement between the Government of the Slovak Republic and the Government of the Republic of Hungary on the Readmission of Persons on common border signed in Budapest of 12 September 2002; published in the Collection of Laws of the Slovak Republic under No. 370/2014.
Readmission agreement between the Slovak Republic and Hungary: the Notification of the Ministry of Foreign and European Affairs of the Slovak Republic on conclusion of the Agreement between the Government of the Slovak Republic and the Government of the Republic of Hungary on Changes and Amendments to the Agreement Between the Government of the Slovak republic and the Government of the Republic of Hungary on the Readmission of Persons on common border signed in Budapest of 12 September 2002; published in the Collection of Laws of the Slovak Republic under No. 184/2015.
Protocol between the Slovak Republic and Macedonia: the Notification of the Ministry of Foreign and European Affairs of the Slovak Republic on conclusion of the Protocol between the Government of the Slovak Republic and the Government of the Republic of Macedonia on the Implementation of the Agreement between European Community and the Republic of Macedonia on the Readmission of Persons Residing without Authorisation; published in the Collection of Laws of the Slovak Republic under No. 109/2015.
Protocol between the Slovak Republic and Georgia: the Notification of the Ministry of Foreign and European Affairs of the Slovak Republic on conclusion of the Protocol between the Government of the Slovak Republic and the Government of the Georgia on the Implementation of the Agreement between European Union and the Georgia on the Readmission of Persons Residing without Authorisation; published in the Collection of Laws of the SR under No. 124/2016.
Protocol between the Slovak Republic and Bosna and Herzegovina: the Notification of the Ministry of Foreign and European Affairs of the Slovak Republic on conclusion of the Protocol between the Government of the Slovak Republic and the Council of Ministers of Bosnia and Herzegovina on the Implementation of the Agreement between European Community and the Bosnia and Herzegovina on the Readmission of Persons Residing without Authorisation; published in the Collection of Laws of the SR under No. 133/2016.

on the statistical data, monitoring, and assessment of the situation of irregular migration, with a focus on the countries of origin with the highest numbers of irregular migrants coming to the Slovak Republic.

2. Irregular migrants

Regarding the return and readmission of irregular migrants, we need to define the terms ‘irregular migrant’ and ‘irregular migration.’ Irregularity refers to the migratory status of individuals at a specific time. This status can be related to changes in the national law and policies of the country of transit or destination, where at one time the migrant is assumed to be documented and the other time she/he is undocumented according to the changes of law. A very good example is the status of a refugee; at the time of crossing the border without documents she/he is an irregular migrant, but when she/he claims for asylum she/he becomes a regular. The term ‘irregular’ is often replaced by the terms ‘undocumented’ and ‘unauthorised’,[9] and also ‘clandestine’, as it captures the diversity of the forms of migration non-compliant with all the municipal legal requirements, while simultaneously avoiding the negative connotations of ‘illegal’. According to Costello,[10] a change in the status of a migrant depends on the range of actors (legislative, executive, or judicial) based on different legal authorities (domestic, EU, or even human rights based).

Even though there is no legally binding definition, the IOM[11] provides its own definition of irregular migration. It refers to the movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the state of origin, transit, or destination. This term generally identifies persons moving outside regular migration channels.

The group of irregular migrants may also consist of people with specific rights which the Slovak Republic must observe based on its international obligations, for example, specific rights of refugees or victims of trafficking. According

Readmission agreement between the Slovak Republic and Croatia: the Notification of the Ministry of Foreign Affairs of the Slovak Republic on conclusion of the Agreement between the Government of the Slovak Republic and the Government of the Republic of Croatia on the Readmission of Persons Residing without Authorisation; published in the Collection of Laws of the SR under No. 393/2009.
Etc.

9 Migration Data Portal, 2022.

10 Costello, 2016, p. 64.

11 IOM, no date.

to the Convention Relating to the Status of Refugees,[12] the Slovak Republic, as a contracting state, shall not impose penalties on account of the illegal entry or presence of refugees in the Slovak Republic as a country of refugee, on refugees who are coming directly from the territory of the country of origin, enter or are present in its territory without permission, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (Article 31). Another example can be mentioned in relation to victims of trafficking. The Slovak Republic, as a contracting state of the Council of Europe Convention on Action against Trafficking in Human Beings,[13] shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence has been completed by the competent authorities (Article 10), as well as until the termination of the recovery and reflection period during which it is impossible to enforce any expulsion order against him/her (Article 13).

According to the Migration Data Portal,[14] a migrant can be irregular in three cases. First, the entrance: when she/he enters the country irregularly, for instance, with false documents or without any; next, the residence: when she/he resides in the country irregularly, for example, with cancelled or expired visa/ residence permit; and last, the employment: when she/he is employed in the country irregularly, for example, with the right to reside but not to take up paid employment in the country.

Irregular migration in the conditions of the Slovak Republic is also affected by smuggling. According to the report of the Military intelligence of the Slovak Republic, smuggling groups focus on the transit of irregular migrants partly from the Hungary by road and rail modes of transport and partly through the territory of Ukraine, then through Poland or the Slovak Republic further to Western Europe.[15] Military intelligence reported 1,769 cases of irregular migration in 2021, which represented a 36.6% growth compared to 2020, with 1,295 reported cases. The countries of origin of these irregular migrants were Afghanistan, with 470

12 UNHCR (1951) Convention relating to the status of refugees [Online]. Available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees (Accessed: 30 June 2023); for the Slovak version see *Oznámenie Ministerstva zahraničných vecí Slovenskej republiky č. 319/1996 Z. z. o pristúpení Českej a Slovenskej Federatívnej Republiky k Dohovoru o právnom postavení utečencov a k Protokolu týkajúcemu sa právneho postavenia utečencov*.

13 Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) (2005) [Online]. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=197 (Accessed: 30 June 2023); for the Slovak version see *Oznámenie Ministerstva zahraničných vecí Slovenskej republiky č. 487/2008 Z.z. o podpísaní Dohovoru Rady Európy o boji proti obchodovaniu s ľuďmi*.

14 Migration Data Portal, 2022.

15 *Military Intelligence Annual Report 2021* (2022) Military Intelligence, Ministry of Defence of the Slovak Republic [Online]. Available at: https://vs.mosr.sk/sprava_o_cinnosti_vs_2021_eng.pdf (Accessed: 30 June 2023).

cases, and Morocco, with 285 cases, mainly entering the territory of the Slovak Republic from the Ukraine territory. According to the statistics,[16] we can also add to the countries of origin Ukraine, with 208 cases, and Syria, with 207 cases.

We can compare the statistics of the Military intelligence with numbers of the Bureau of Border and Foreign Police of the Presidium of the Police Force presented in the Statistical Survey of Legal and Illegal Migration in the Slovak Republic,[17] which similarly reports 1,769 cases of irregular migration in 2021 but also reports 11,791 cases in 2022 (with the peak in November 2022), representing a 566% growth. So, the numbers of irregular migrants returned to those at the time of the Slovak Republic's accession to the EU, which the IOM[18] marked as a starting point of the irregular migration downturn. In 2022, the main countries of origin for such irregular migration were Syria with 9,160 cases, Ukraine with 594 cases, Morocco with 560 cases, Tunisia with 418 cases, Turkey with 278 cases, and Afghanistan with 178 cases.

The statistical survey also shows that irregular migration based on the illegal crossing of the Slovak border represents only 210 cases in 2021 and 549 in 2022. The illegal crossing of the Slovak border also covers the cases of readmission in which foreigners are detained outside the territory of the Slovak Republic and are returned on a basis of the readmission agreement after they have illegally crossed the borders of the Slovak Republic in a direction away from the Slovak Republic. On the other hand, irregular migration, as a consequence of an unlawful presence within the territory of the Slovak Republic, is represented by 1,559 cases in 2021 and 11,242 cases in 2022. This shows that irregular migration based on unlawful presence is a much bigger issue for the Slovak Republic. One of the reasons of such unlawful presence is a denial of asylum from that moment a person (former asylum applicant) becomes an irregular migrant without the permission to stay in the territory of the Slovak Republic. In 2022, the migration office had to deal with 547 applications mainly by the citizens of Ukraine (154 cases), Turkey (76 cases), Morocco (73 cases), Bangladesh (53 cases), and Russia (40 cases). In 2021, there were 371 applications mainly by the citizens of Morocco (116 cases), Afghanistan (97 cases), Algeria (24 cases), and India (20 cases). The numbers change depending on the international situation, for example, we can see how the armed conflict in Ukraine affected the migration numbers in the Slovak Republic in 2022.

16 Štatistický prehľad legálnej a *nelegálnej migrácie cudzincov na Slovensku* (2022) [Online]. Available at: https://www.minv.sk/swift_data/source/policia/hranicna_a_cudzinecka_policia/rocenky/rok_2022/2022-rocenka-UHCP-SK.pdf (Accessed: 30 June 2023).

17 Ibidem.

18 *Migrácia na Slovensku* [Online]. IOM, Available at: https://www.iom.sk/sk/migracia/migracia-na-slovensku.html (Accessed: 30 June 2023).

3. Detention as a precondition of effective return or readmission

Act No. 404 of 21 October 2011 on residence of foreigners[19] covers detention procedure in Sections 88 to 100. These sections define the conditions of the detention of third-country nationals, especially those for asylum seekers, alternatives to the detention, and rights and obligations of the police department as well as third-country nationals.

To focus on the area of return and readmission, the most interesting facet would be provisions dedicated to third-country nationals in the position of asylum seekers and those to whom the return decisions are addressed. As there is no complex national report about the practical application of these provisions, it is not an easy task to fully examine it. However, the national legislation, reports of NGOs operating in the territory of the Slovak Republic, and reports of the European Migration Network may be the useful sources of information.

We can compare conditions for the detention of the ordinary third-country national and those of the asylum seeker according to the Slovak legislation. Based on the Section 88 of the Act on Residence of Foreigners, a police officer is entitled to detain the third-country national: a) during the administrative expulsion proceedings to ensure her/his departure to the particular state (country of origin, country of transit, any country of voluntary return after its acceptance of such a person, an EU Member State of her/his right of residence, or Member State which granted her/him some form of the international protection), but only in case there is a risk of absconding or in case when the third-country national is avoiding or trying to prevent the preparation process of her/his administrative expulsion to be executed;[20] b) for the execution of the administrative expulsion or of the penalty of expulsion; c) for the preparation or execution of her/his Dublin transfer,[21] only in case there is a risk of absconding; or d) for her/his return based on the international (readmission) agreement, if such a person illegally crossed the external border or is staying in the territory of the Slovak Republic illegally. The time of

19 For English version see Act No. 404/2011 of 21 October 2011, on Residence of Foreigners and Amendment and Supplementation of Certain Acts – Time version of the regulations effective from 25 May 2018 [Online]. Available at: https://www.minv.sk/?residence-of-an-foreigner (Accessed: 30 June 2023); for current Slovak version see *Zákon č. 404/2011 Z. z. o pobyte cudzincov a o zmene a doplnení niektorých zákonov*.

20 According to the judgment of the Supreme Court of the Slovak Republic of 13 August 2014, No. 1Sža 23/2014, the Court share the position that such avoiding or trying to prevent of the preparation process of her/his administrative expulsion to be executed needs to be assessed individually and it cannot be derived from the generalisation of the previous behaviour of other foreigners.

21 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29 June 2013, pp. 31–59).

the detention may be up to 6 months, in entirety or divided into several shorter periods, and it may be extended if the third-country national does not cooperate or the representative body of the third countries has not provided replacement of the travel documents within a 6-month period, but may not exceed 12 months. The period of the detention cannot be extended in the case of a family with children or vulnerable persons. This procedure applies in the case of the detention of irregular migrants staying illegally within the territory of the Slovak Republic or irregular migrants found on the borders, as well as the detention of persons to whom the return decision has been passed (administrative expulsion).

The Act on Residence of Foreigners covers the detention of asylum seekers in Article 88a. In relation to asylum seekers, detention is applicable only if minor measures are impossible to apply and: a) if there is a need to collect or verify the identity or nationality of the asylum seeker; b) if there is a need to ascertain the facts of the asylum application, which could not be obtained without detention, for example, in case of the risk of absconding; c) if a detained third-country national applied for the asylum within administrative expulsion proceedings and there is a reasonable suspicion that the application is just a tool to delay or frustrate the administrative expulsion; d) if the detention is necessary because of a threat to national security or public order; and e) if there is a significant risk of absconding during the preparation or execution of a Dublin transfer. During such detention, an asylum seeker who has applied for asylum has a right to communicate with the representatives of the UNHCR, family members, and persons who provide her/him with legal aid, as well as a right for their visits in conditions of privacy. Currently detained persons are placed in the Police Detention Centre for Foreigners Medveďov and the Police Detention Centre for Foreigners Sečovce,[22] which are closed facilities where a detained person is deprived of her/his liberty. This is a huge change for asylum seekers because during the ordinary asylum procedure, where there is no need to detain, they stay in the asylum facilities, Residence camp in Rohovce (for single men) and Residence camp in Opatovská Nová Ves (for vulnerable persons as families, single women, and older persons), with free movement after the health inspection of the asylum seeker.

Slovak legislation also recognises alternatives to the detention defined in the Article 89 of the Act on Residence of Foreigners. First alternative is a duty to report the place of residence, while second is a duty to pay warranty deposit. Both alternatives may be imposed only if the procedure of detention has started. The alternatives to the detention cannot be imposed if a deadline for departure had been set within the procedure of the administrative expulsion. In such a case, the procedure of detention does not start, so there is no place for alternatives to detention. Alternatives also cannot be imposed during the procedure of administrative expulsion provided that a third-country national represents a serious threat to

22 For more EMN, 2021.

national security or public order, or threatens national security, public order, or public health. According to the report of the European Migration Network,[23] in practice, the alternative to detention in a form of a duty to report the place of residence is imposed more often, as it is probably simpler to carry out. The main problem of this alternative to detention is that the so-called third-country nationals often have no identification documents, and therefore, it is impossible for them to obtain accommodation. The police department may impose one of the alternatives to detention only if the detainee provides proof: first, the accommodation for the whole time of the execution of this alternative, second, a financial cover of her/his residence.[24] These conditions are almost impossible to meet. These conditions are not applicable to asylum seekers.[25] However, according to the Article 90 of the Act on Residence of Foreigners, the police department is obliged to examine whether the reasons of detention continue to exist throughout the whole detention time, and also, if there is no possibility of imposing an alternative to detention.

Legal remedies, in relation to detention, are very limited. The Act on Residence of Foreigners does not permit any appeal against detention decision, decision on extending the detention, and decision on extending the detention period in the Article 88. Neither does Article 89 permit any appeal against the decision on the imposition of the alternative to detention. However, a foreigner is allowed to apply an administrative claim to the Administrative Court according to the Act No. 162/2015 Coll. Administrative Procedure Code (Articles 221–238).[26] With this administrative claim, a foreigner may seek annulment of the detention decision, decision on extending the detention, and decision on extending the detention period, as well as determination of such a decision as unlawful, provided the claimant had been released from the detention. The foreigner may also apply for a revision of the decision or measure in relation to administrative expulsion. All foreigners, even asylum seekers and irregular migrants, have access to legal aid provided by, for example, the Centre for Legal Aid[27] or NGOs such as the Human Rights League[28] and Slovak Humanitarian Council.[29]

■ *3.1. Detention of asylum seekers in light of the judicial review*

It follows from the aforementioned legislation that the detention of an asylum seeker should be a very rare thing. Yet, the police department used to repeatedly re-detain persons with asylum seeker statuses, even after they applied for asylum.

23 Ibidem.

24 For more HRL, no date.

25 This exemption is defined in the Act on Residence of Foreigners, Art. 88(3), as well as by the judgment of the County Court Bratislava of 5 April 2018, No.7Sa/27/2018.

26 For Slovak version see Zákon č. 162/2015 Z.z. Správny súdny poriadok.

27 Centrum Právnej Pomoci, 2020.

28 *Liga za ľudské práva* [Online]. Available at: https://www.hrl.sk/en (Accessed: 30 June 2023).

29 *Slovenská humanitná rada* [Online]. Available at: https://www.shr.sk/ (Accessed: 30 June 2023).

This practice may be illustrated by two cases, which are chosen to demonstrate the difficult evolution of the police detention practice.

The first analysis assesses the content of the judgment of the County Court Košice of 5 September 2019, No. 2S/19/2019. This case reviewed the detention decision of the police department in relation to WS (hereinafter referred to as the 'claimant') who during the detention procedure applied for asylum. The County Court annulled the detention decision and ordered the immediate release of the claimant from detention. The reason behind the decision of detention of 12 August 2019 was that the detention of the asylum seeker had been deemed necessary at that time (not exceeding the date of 12 October 2019) to execute the decision of administrative expulsion of 30 June 2019 and was based on reasonable suspicion that the applicant applied for asylum only with intention to delay or frustrate her/his administrative expulsion. The decision of administrative expulsion of the claimant, which also imposed an entry ban for a one-year period, was based on the ground of the claimant´s illegal stay in the territory of the Slovak Republic. The detention was meant to ensure the execution of the administrative expulsion, as there was a need to obtain the replacement of the travel documents for the legal departure to the state of origin.

The claimant first contested the previous decision of detention of 30 June 2019 by the administrative claim to the County Court Košice. On 25 July 2019, the County Court delivered judgment No. 1Sa/20/2019 by which it annulled the contested detention decision and kept the claimant in detention. According to the new detention decision, the County Court ordered the police department to clarify the base of its legal assessment of the detention and consequently to amend the evidence. In light of the decision of the County Court, the police department started a new detention procedure on 12 August 2019, when the claimant was also checked on and heard. On 25 July 2019, the new detention decision was issued and subsequently contested by this administrative claim. This new detention decision stated that detention was ordered on the grounds of reasonable suspicion that she/he applied for asylum to delay or frustrate her/his administrative expulsion. The claimant and her/his legal representative argued that the detention decision could not be reviewed due to its incomprehensibility, the lack of reasons, as well as an incorrect legal assessment contained therein. They furthermore claimed that the occurrence of infringement of the essential provisions of the administrative procedure during the proceedings constituted unlawfulness of the decision on hand Moreover, according to them the police department did not consider alternatives to detention and failed to demonstrate the risk of absconding and impossibility to impose minor measures. By the deprivation of liberty for two more months, the police department arbitrarily interfered with the right to personal freedom of the claimant. The legal representative of the claimant also pointed out that as a consequence of the annulment of the first detention decision by the judgment of the County Court of 25 July 2019, which had ordered the release of the claimant

from detention, the claimant was physically taken from the detention facility, where the police officers reversed him and took him back to the detention facility to hear her/him and to impose a new detention decision on her/him. In the time preceding the issue of the new detention decision when the claimant was taken out of the detention facility and released from the detention, the claimant already had not been in the position of a foreigner detained for the purpose of execution of the administrative expulsion or of the order for expulsion.[30] The claimant was in the position of an asylum seeker.

The County Court was reviewing the merits of the contested detention decision of 12 August 2019 by which the police department detained claimant on the same day on the grounds of reasonable suspicion that she/he applied for asylum to delay or frustrate his/her administrative expulsion. The County Court recalled Article 15 of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008,[31] according to which Member States may only keep in detention a third-country national who is the subject of return procedures to prepare for the return and/or carry out the removal process, mainly if there is a risk of absconding or when the third-country national avoids or hampers the preparation of return or the removal process. As soon as it is clear that the real precondition for the expulsion or return does not exist anymore, the detention loses its reasons and the detainee must be released immediately. The police department based its second detention decision on the grounds of the first detention, when the claimant was detained as a foreigner without the permission to enter or stay in the territory of the Slovak Republic. Hence, the police department issued the decision on the wrong factual situation. From a legal viewpoint, the judgement highlights why the police department now has to assess the possibility and reasons of the detention at the time of the imposition of the detention, especially in relation to the asylum seeker who is during the asylum procedure, based on her/his application, considered a foreigner with the permitted residence.

The second analysis is dedicated to the judgment of the Supreme Court of the Slovak Republic of 27 April 2021, No. 10Szak/12/2020, as it discontinues the practice of detention of asylum seekers. This case reviewed the detention decision of the police department in relation to the asylum seeker WA (hereinafter referred to as the 'claimant' or 'complainant') of 20 February 2020, as well as the cassation complaint in relation to this detention decision against the judgment of the County Court Košice of 19 March 2020.

According to the information provided by the Slovak Information Service (SIS), the police detention department decided to detain the asylum seeker WA on

30 Art. 88(1) (b) of the Act on Residence of Foreigners.
31 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24 December 2008).

the grounds of necessity, due to threat to national security or public order.[32] The asylum seeker WA filed an administrative claim against this decision at the County Court Košice. WA pointed out that although it might appear from the operative part of the decision that the detention was imposed on the grounds of necessity due to threat to national security or public order, it was a rough quotation of the Act on Residence of Foreigners without any consideration of alternatives of the reasons for detention. In her/ his view, this decision in its operative part is characterised by a lack clarity and is vague, which constitutes the reason for the annulment of the decision. Therefore, WA sought the annulment of the detention decision and immediate release from the detention. The County Court Košice indeed annulled the decision of detention and referred the case back to the police department for a further proceeding based on the objection of WA regarding the lack of clarity and vagueness of the decision. In the view of the County Court Košice, the decision did not assess detention reasons properly and the brief reference to the nature of classified information with the level 'restricted' obtained by the SIS as unacceptable. The Court surmised that if the person was detained on the grounds of threat to national security or public order, or both, this fact must be clearly identified in the operative part of the decision with reasoning. Although the County Court annulled the detention decision, the Court kept WA in detention, suggesting that the issue of clarification of the operative part should be considered as a rectifiable procedural defect, which would allow a further proceeding of the validity of re-detention of WA as an asylum seeker once all procedural defects were eliminated.

WA filed a cassation complaint against this County Court Košice decision at the Supreme Court of the Slovak Republic. In WA's opinion, the County Court inadequately determined the factual circumstantial evidence of the case, when the court considered the lack of reasoning of the decision as rectifiable procedural defects and did not order the police department to immediately release WA from detention. WA supported these claims with Article 9 Paragraph 3 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013,[33] according to which, in a case where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately. WA therefore suggested to the Cassation Court to alter the judgment of the County Court Košice in the form of annulment of the detention decision and order the immediate release of WA from detention. The Supreme Court of the Slovak Republic rejected this complaint in its judgment of 18 May 2020, No. 10Szak/2/2020.

WA consequently filed the constitutional complaint at the Constitutional Court of the Slovak Republic, which annulled the contested decision of the Supreme

32 Art. 88a (1d) of the Act on the Residence of Foreigners.

33 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29 June 2013, pp. 96–116).

Court by its ruling of 10 November 2020, No. IV.ÚS 398/2020,[34] and referred the case back to the Supreme Court for further proceedings. The Constitutional Court of the Slovak Republic concluded that the contested decision of the Supreme Court of the Slovak Republic violated WA's basic rights, granted to her/him by Article 17(2) and 46(1) of the Constitution of the Slovak Republic,[35] as well as by Article 5(1)(f) and 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[36] In its opinion, the procedural defects of the reasoning of the police department's decision of detention identified by the County Court Košice might not be considered as formal and rectifiable, as these defects seriously violated the right to proper reasoning of the decision. The decision at hand did not contain any assessment and determination of reasons justifying the need of detention of the complainant, and a simple reference to the SIS report was insufficient. Before the detention decision, the police department was supposed to examine if the purpose of the detention could not be fulfilled by minor measures, but the decision absolutely resigned on such a procedure. Defects of the decision affected the fundamental and most essential core of the institute of detention (existence of the reasons laid down by a law), and it followed from the arbitrary action of the police department, which did not fulfil the adversarial principle (audi alteram partem) and the principle of equality of arms. Moreover, the Constitutional Court pointed out that after the annulment of the decision of detention by the judgment of the County Court Košice of 19 March 2020, the police department once again decided about the detention of WA. Consequently, the asylum procedure was completed, and the police department decided about the administrative expulsion on

34 Ruling of the Constitutional Court of the Slovak Republic No. IV.ÚS 398/2020.

35 Constitution of the Slovak republic [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 30 June 2023); for Slovak version see Ústava Slovenskej republiky č. 460/1992 Zb.
Art. 17(2) 'No one shall be prosecuted or deprived of liberty save for reasons and by means laid down by a law. No one shall be deprived of liberty merely for his or her inability to fulfil a contractual obligation.'
Art. 46(1) 'Everyone may claim his or her right by procedures laid down by a law at an independent and impartial court or, in cases provided by a law, at other public authority of the Slovak Republic.'

36 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [Online]. Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG (Accessed: 30 June 2023); for the Slovak version see *Oznámenie Federálneho ministerstva zahraničných vecí č. 209/1992 Zb. o dojednaní Dohovoru o ochrane ľudských práv a základných slobôd a Protokolov na tento Dohovor nadväzujúcich*.
Art. 5(1)(f): 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'
Art. 5(4) 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

13 August 2020, with the consequent realisation of the expulsion from the territory of the Slovak Republic on 3 September 2020. Despite these facts, the Constitutional Court considered annulment of the contested judgment of the Supreme Court necessary, as it might have had real impact on the legal status of the complainant. Based on the opinion of the Constitutional Court, the Supreme Court once again reviewed the contested judgment of the County Court, consequently annulled it, and referred the case back to the County Court for further proceedings and a new decision which would be adopted in accordance with the opinion of the Constitutional Court.

This case may be interesting as since the ruling of the Supreme Court differs accordingly to the specific conditions of the case. The Supreme Court already in 2017 filled an application (No. PL. ÚS 8/2016) at the Constitutional Court,[37] in which the Supreme Court questioned the application practice of administrative bodies as well as the judicial decision-making practice, based only on the reasoning of the national security interest of the Slovak Republic. Such limited justification goes against the imperative of a democratic state and the rule of law, and basic human rights guaranteed by the Constitution of the Slovak Republic. While the administrative body has evidence at its disposal, such evidence is not made part of the case file and is not at the disposal of the foreigner in any form. Aláč[38] argues that based on the Article 23 of the Asylum Procedures Directive,[39] it suffices if complete factual information is at the disposal of the court reviewing the administrative decision of the Migration Office and the court may therefore examine the arbitrariness of the administrative decision and the justification of the SIS's reasoning. However, based on this decision of the Constitutional Court of the Slovak Republic the bare stating of the national security interest of the Slovak Republic as a reason to decide about asylum and subsidiary protection is no longer acceptable. However, the practice of the Migration office continues to be based on the reasoning of the SIS, only without any justification due to classified information.

According to this analysis, one can conclude that the police department strongly relies on the information of state organs, even though they are insufficient for the justification of detention decisions. Its decisions also confirm the police department's reliance on its well-tested practices, even though they can be contrary to the legislation in force. The bright point is that the police department altered its practice according to the judicial review of its decisions as soon as the judgment of the County Court or Supreme Court entered into force.

37 Ruling of the Constitutional Court of the Slovak Republic No. PL. ÚS 8/2016.

38 Álač, 2020, pp. 26 and 29.

39 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common Procedures for granting and withdrawing international protection (recast) (*OJ L 180, 29 June 2013, pp. 60–95).*

4. Return and readmission of irregular migrants in conditions of the Slovak Republic

Act No. 404 of 21 October 2011 on Residence of Foreigners is a legal basis for the realisation of the return procedure of third-country nationals—irregular migrants to whom the decision of the return has been passed, in conditions of the Slovak Republic. This Act stipulates reasons, forms, and means of the realisation of the return. The form of the return depends on the assessment of the particular situation and the status of the third-country national at a given time. To identify the best form of return, state organs may have the person checked by the SIS, use the testimony of the person, the legal assessment, and cooperation with the EU Member States concerned, or NGOs.

The whole return process depends on the development of the EU's security situation, migration flows, as well as the situation in the country of intended return (country of origin of third-country nationals); therefore, it must be comprehensively adapted to such developments. Return policies of the Slovak Republic are more effective due to operating activities of FRONTEX,[40] as Slovak Republic has been participating in its activities since 2019. FRONTEX supports organising, carrying out, as well as financing of return processes organised by one of the EU Member States.

According to the National Strategy, how return is carried out depends on the country of intended return, even by plane or land transit. It may take the form of administrative expulsion, voluntary return, and Dublin return.

The Act on Residence of Foreigners of the Slovak Republic defines administrative expulsion as a decision of the police department that the foreigner does not have or has lost the entitlement to stay in the territory of the Slovak Republic and is obliged to leave the territory with the option of determining the time by when she/he has to depart for her/his country of origin, country of transit, or any third country which the third-country national voluntarily decides to return to and which would accept her/him, or to the territory of a Member State in which she/he has been granted the right of residence or provided with international protection.[41] Slovak legislation (the Act on Residence of Foreigners) also defines the reimbursement of costs of administrative expulsion (Article 80) as well as the obstacles for administrative expulsion which are in correlation with the international obligations of the Slovak Republic in the field of asylum law (principle of non-refoulement) or human rights law (Article 81). Provisions of administrative expulsion of the third-country national (Articles 82–86) differ

40 For the mandate and activities of FRONTEX in 2022 see Frontex – European Border and Coast Guard Agency, 2023.

41 Art. 77 of the Act on Residence of Foreigners.

from those relating to the citizen of the EU and her/his family member (Article 87). The police department executes the administrative expulsion decision if, a) the third-country national failed to depart within the period imposed in the decision on administrative expulsion, b) in the decision on administrative expulsion police department did not impose the period for departure, c) the third-country national should be returned to the territory of the contractual state according to an international agreement (e.g. readmission agreement), d) the third-country national cannot leave the country because she/he does not have any valid travel document or resources to exit the country, or e) the third-country national failed to leave the country under the assisted voluntary return within the period specified in the decision on administrative expulsion or upon notification of the organisation that runs the assisted voluntary return programme that the third-country national intentionally avoided the implementation of the assisted voluntary return (Article 84).

If the administrative expulsion of the third-country national should be carried out only to a neighbouring state, the police department will transport the third-country national to the border crossing. In case the administrative expulsion of the third-country national should be done by air transit or through the territory of a third state, based on the international treaty, the police department may transfer the third-country national to the territory of the state that decided to admit her/his. Air transit may be carried out by an ordinary commercial flight or by operation of the removal by air which is coordinated by two or more EU Member States according to the EU Council decision of 29 April 2004 (2004/573/EC).[42] Both may be carried out with or without police escort, depending on the seriousness of reasons to believe that the third-country national may threaten the safety of the plane, persons or property in the plane, or the order and discipline aboard the plane. Both procedures are based on very similar conditions, but the coordinated removal by air may be considered safer for the public as well as for transferred persons, as they are gathered on the airport and transferred separately from other travellers. The method of the air transit depends on many factors, for example, health conditions of third-country national, safety conditions, number of the third-country nationals who need to be transferred.[43]

Another form of foreigners' transfer is the return procedure based on the voluntary and Dublin returns. Voluntary returns cover returns of foreigners from police detention centres, asylum facilities, or irregular migrants present in the territory of the Slovak Republic outside of the facilities of the Ministry of Interior of the Slovak Republic. In 2022, 81 voluntary returns were carried out (e.g. to Turkey-56, Tunis-10, Uzbekistan-5), and in 2021, there were only 9 cases of

42 2004/573/EC: Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ L261, 6 August 2004, pp. 28–35).

43 The section is processed according to Semjan, 2017.

voluntary returns (e.g. to Serbia-3, Turkey-2). Dublin returns based on the Dublin Regulation[44] represent 39 admitted persons in 2021 and 28 persons in 2022 (into the territory of the Slovak Republic) and 107 transferred persons in 2021 and 44 persons in 2022 (outside the territory of the Slovak Republic). By transferring foreigners to and outside of the Slovak Republic, the EU Member States (including the Slovak Republic) respect the provisions of the Dublin Regulation, which covers the conditions for determination of the responsible state for the decision about the asylum application. Therefore, Dublin transfers deals with foreigners in the position of asylum seekers (admitted persons to the Slovak Republic within the Dublin transfer in 2021 were mainly citizens of Morocco-12, Afghanistan-5, Algeria-4, India-3, and Syria-3; in 2022, they were mainly citizens of Morocco-10, Algeria-3, Libya-3, Pakistan-3, and Syria-3. Regarding transfers from the Slovak Republic to other states, in 2021, there were mainly citizens of Afghanistan-1 to Bulgaria, 69 to Romania, of Pakistan-1 to Austria, 9 to Romania, of Syria-10 to Romania, of Algeria-1 to Austria, 1 to Bulgaria, 1 to Italy, 2 to Romania, of Morocco-2 to Bulgaria, 1 to Germany, and 2 to Romania; in 2022, there were mainly citizens of Afghanistan-8 to Romania, of Pakistan-8 to Romania, of Syria-2 to Bulgaria, 3 to Austria, 2 to Germany, and 1 to the Netherlands).

In 2022, 1,665 decisions on the expulsion were adopted, from which there were 1,605 in relation to irregular migrants, and 1,100 decisions on expulsion were adopted in 2021, with 1,027 in relation to irregular migration. Considering executed expulsions, in 2021, there were 432 cases in relation to irregular migration, 345 to third countries, and 31 to other EU Member States, while in 2022, there were 317 reported cases, with 233 to third countries and 28 to other EU Member States. These numbers cover all cases of the execution of expulsion, including the voluntary return.

Based on the readmission agreements of the Slovak Republic and third states or EU Member States, the Slovak Republic transferred 194 persons in 2021 and 175 persons in 2022. On the other hand, the Slovak Republic had to admit to its territory 29 persons in 2021 and 148 persons in 2022. In 2021, cases of transfer were in relation to Ukraine (172) and Hungary (22), while in 2022, they were in relation to Ukraine (15), Hungary (159), and Czech Republic (1), typifying no significant difference. Cases of transfer in 2022 mainly concern citizens of Syria (127) and Afghanistan (30). Cases of readmission to the Slovak Republic were in 2021 in relation to Ukraine (5), Hungary (1), Czech Republic (12), and Poland (11), whereas in 2022, they were in relation to Ukraine (6), Hungary (1), Czech Republic (95), Poland (30), and Austria (16). It shows us that the cases of readmission to the Slovak Republic in 2022 were 410% higher than that of the year before. Cases of readmission to

44 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29 June 2013, pp. 31–59).

the Slovak Republic concerns, in 2021, mainly nationals of India (11), Afghanistan (7), Pakistan (5), and Czech Republic (3), while in 2022, they were mainly nationals of Syria (118) and Turkey (15). Readmission agreements and protocols for its execution are not publicly available, thus constituting the weakening of the principle of legal certainty and transparency of the readmission procedure.

5. Conclusion

Irregular migration refers to the unauthorised or undocumented crossing of borders or staying within the territory of a particular state. It depends on national laws, subjected to change; consequently, the status of a person may change from one day to another. Irregularity can relate to entry, residence, or employment. As statistics show, the highest number of cases of irregular migration in relation to the Slovak Republic is not represented by individuals' illegal crossing of its external/internal borders but indicated by his/her unlawful presence in its territory.

The procedure of detention may help achieve a successful completion of the return procedure, voluntary or forced, based on readmission. Conditions for detention may be influenced by the status of a person, that is, whether the detention should be related to the ordinary third-country national or asylum seeker. The Slovak Act on Residence of Foreigners makes such a distinction, as irregular migrants may possess specific rights based on the international obligations of the Slovak Republic, which may be difficult to be followed by the state organs. In that case, judicial review plays a crucial role. As the analysis in Section 3.1 concludes, in some cases, the practice of the police department during the detention procedure need to be corrected by County Courts and the Supreme Court of the Slovak Republic.

One of the priorities of the Slovak Republic in the area of irregular migration is to enhance cooperation with countries whose nationals are frequently expelled from its territory. The fact remains that migration issues play a very sensitive role in maintaining relations between countries, as well as individual states and their nationals; this is because migration is very closely related to cultural differences, security issues, while acknowledging the possibility of the economic abuse of social systems by the incoming migrants of any group. Furthermore, the Slovak Republic prefers voluntary returns over forced ones. Readmission is one of the effective measures of return, based on the readmission agreements of the EU with third countries. To implement them, the Slovak Republic is entitled to not only negotiate bilateral protocols with these third countries, but also negotiate its own readmission agreements with them. The form of the return depends on specific conditions of the particular case and status of the third-country national at the time of decision. Return may be carried out in the form of administrative expulsion, Dublin return, and readmission return, either voluntary or forced.

The then Minister of Interior of the Slovak Republic, Roman Mikulec,[45] argues that countries that do not cooperate sufficiently during the return or readmission process must bear consequences manifesting in the field of visa, development, and trade policies. These measures could help with enforcement of return and readmission activities. However, the readmission agreement between the Slovak and Czech Republic was put to test in 2022 due to the illegal transit of irregular migrants through the mutual border to the Czech Republic. As a consequence of the uncontrolled transit of these irregular migrants, the Czech Republic reintroduced control at their internal borders, which was not received with enthusiasm by the Slovak Republic.[46] The then Slovak Head of Police, Štefan Hamran,[47] considers the readmission agreements ineffective because the Slovak Republic would not be able to handle high numbers of irregular migrants from a capacity perspective. Moreover, Hungary is not accepting irregular migrants from the Slovak Republic as well, although the readmission agreement between the Slovak Republic and Hungary is still active. Reasons behind the ineffectiveness of readmission agreements include the time and conditions of their adoption. These agreements were adopted mainly before the accession of the Slovak Republic into the Schengen area, although they are not designed for the management of its internal borders. Finally, based on statistical data, this study shows that the Slovak Republic still holds the position of a transit country. The control of persons illegally staying in its territory (after the expiration of their permission to stay) and illegally crossing internal borders to or from other states of the Schengen area remains a major issue of the Slovak return and readmission policy.

45 Európske Noviny, 2023.
46 TASR, 2022.
47 *Policajný prezident Hamran: Na migrantov nemáme capacity*, 28 September 2022 [Online]. Available at: https://vredakcii.podbean.com/e/policajny-prezident-hamran-na-migrantov-nemame-kapacity/ (Accessed: 30 June 2023).

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KATEŘINA FRUMAROVÁ*

Specifics of Administrative Judicial Protection in Cases of Non-grant of International Protection in the Czech Republic

ABSTRACT: *The Ministry of the Interior, a state administration body, of the Czech Republic decides regarding granting asylum or international protection. The procedure is single-instance, without the possibility of a proper remedy. However, an unsuccessful applicant can defend himself within the framework of administrative justice, where he has two related means of protection at his disposal. First, a lawsuit against the decision of the Ministry of the Interior, which is decided by the regional courts; and second, a cassation complaint against the decision of the regional court, which is decided by the Supreme Administrative Court. Although several specifics apply to judicial protection in matters of international protection (e.g. in relation to deadlines, priority hearing or ex lege suspensive effect), the most significant specific is the unacceptability of a cassation complaint. In a situation where the cassation complaint does not significantly exceed the complainant's (foreigner's) own interests, the Supreme Administrative Court will reject it without dealing with the merits of the case. Therefore, this is a significant limitation of access to judicial protection. This study deals with the essence and reasons for the introduction of this institute, its suitability in asylum law, as well as its conformity with constitutional and international legal standards in this area.*

KEYWORDS: asylum, international protection, procedure for granting international protection, administrative justice, action against the decision of the Ministry of the Interior, cassation complaint, unacceptability of cassation complaint

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1. Introduction

In the Czech Republic, the procedure for granting asylum (international protection) is a single-instance administrative procedure. Therefore, a judicial protection has an important position in these proceedings. This is provided to unsuccessful applicants for international protection within the framework of administrative justice, first in the form of a lawsuit against the negative decision of the Ministry of the Interior, and thereafter in the form of a cassation complaint to the Supreme Administrative Court. In addition to the specifics of judicial protection, the chief focus is on analysing the unacceptability of the cassation complaints. If the cassation complaint does not significantly exceed the complainant's own interests (i.e. the unsuccessful asylum seeker), the Supreme Administrative Court will reject it without dealing with the merits of the case and substance of the complaint.

This article addresses the essence of the institute of an unacceptable cassation complaint, its consequences, and its introduction within the framework of the decision to grant international protection. Further, it analyses the meaning of the institute of unacceptability in the broader context of administrative judicial protection and whether its anchoring specifically for matters of international protection is appropriate and justified. Furthermore, it examines whether this significant limitation of judicial protection curtails the rights of applicants for international protection; that is, whether it is a procedure compatible with constitutional and international legal standards in this area.

2. Proceedings for the granting of international protection in the Czech Republic – basic characteristics

The Charter of Fundamental Rights and Freedoms, which is part of the Czech Republic's constitutional order, stipulates that the Czech Republic provides asylum to foreigners persecuted for exercising political rights and freedoms.[1] However, asylum may be denied to those who act in violation of basic human rights and freedom (Article 43). Based on the Charter of Fundamental Rights and Freedoms, the Asylum Act[2] regulates the granting of asylum and its procedures. In this field, Czech legislation fully respects international obligations, particularly the Geneva Convention on the Legal Status of Refugees and European asylum acquis. The Asylum Act includes both substantive and procedural legislation.

1 For more details see Odehnalová, 2017, pp. 162–169, or the judgement of the Constitutional Court of January 30, 2007, No. IV. ÚS 553/06 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

2 Act No. 325/1999 Coll., On Asylum.

Although the basic legislation is called the 'Asylum Act,' the subject of its regulation is international protection, which is a broader term.

International protection includes asylum and supplementary protection. Asylum is granted to foreigners who prove that they are persecuted for exercising political rights and freedoms, or have a well-founded fear of persecution owing to race, gender, religion, nationality, belonging to a certain social group, or for holding certain political opinions in a state in which they are citizens (in the case of stateless persons, in the state of their last permanent residence).[3] Another reason for granting asylum is reunification with a family member who has already been granted asylum (this form of asylum implements Directive 2003/86/EC on the right to family reunification). The last reason for granting asylum is humanitarian. However, there is no legal right to humanitarian asylum, and it is purely at the discretion of the Ministry of the Interior of the Czech Republic to whom it will be granted, and what reasons it finds worthy of special consideration for granting it. As stated by the Supreme Administrative Court of the Czech Republic,[4]

> the purpose of the institute of humanitarian asylum can be seen in the fact that the decision-making administrative body has the possibility to grant asylum even in situations where none of the precautions envisaged by the exhaustive lists of provisions of Section 12 and Section 13 of the Asylum Act apply, but in which it would still probably be "inhumane" not to grant asylum.

If the asylum seeker does not meet any of the aforementioned reasons, but proves that in the event of his/her return to the homeland, he/she would be in danger of being imposed or executed the death penalty, torture or inhumane or degrading treatment or punishment, or if he/she would find himself in serious danger to life or human dignity in situations of international or internal armed conflict by returning to the homeland, or if his/her departure would be in conflict with the international obligations of the Czech Republic, he/she may be granted additional protection. This protection can also be granted because of reunification with a family member who has already been granted additional protection. Unlike asylum, this protection is granted for a certain period, after which it is reviewed whether the reasons for which it was granted continue. If the reasons persist, its validity is extended. Additional protection is regulated in Article 14a of the Asylum Act, and foreigners have been able to obtain it since 2006, owing to the transposition of the qualification directive[5] into the Czech Asylum Act.

3 In more detail Kosař et al., 2010, pp. 76–145.

4 Judgement of the Supreme Administrative Court of 11 March 2004, No. 2 Azs 8/2004, or the judgement of the Supreme Administrative Court of April 14, 2005, No. 2 Azs 290/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

5 Council Directive 2004/83/EC.

The procedure for granting international protection is an administrative procedure, which is conducted by the Ministry of the Interior of the Czech Republic. The Ministry of the Interior proceeds in accordance with the Asylum Act and the Administrative Code,[6] which is a general procedural regulation of the procedures of administrative authorities. The proceedings initiate with the submission of an application for international protection by foreigners. It must be clear from the application that they seek protection from persecution or serious harm in the Czech Republic. Foreigners are obliged to appear within 24 hours of submitting the application (except in exceptional cases) to the reception centre, where the applicant will provide the Ministry with more detailed information on the submitted application and where the police will perform identification and other acts provided for by law.

In the procedure for granting international protection, the reasons that led the foreigner to leave the country are determined, and whether the foreigner meets the conditions for obtaining asylum or supplementary protection. After all the necessary steps have been taken, the applicant for international protection is usually transferred to a residence centre, where he/she awaits a decision on the application for granting international protection. The Ministry of the Interior decides on the matter no later than six months from the date of providing the data for the submitted application (however, the deadline may be extended). If it finds that the grounds for granting asylum or at least supplementary protection are fulfilled, it will grant the applicant an appropriate type of international protection. Otherwise, the foreigner's application will be rejected. In cases where the application is 'manifestly unfounded,' it is rejected in an expedited procedure. The reasons for establishing the obvious unfoundedness of the application are, for example, economic reasons, a state of general emergency, incorrect data in the application, or their concealment, and others.[7] If the applicant withdraws the application, acquires Czech citizenship, dies, or, for example, if his application is inadmissible,[8] proceedings are stopped.

Table 1: Number of applications by foreigners for international protection in the Czech Republic from 2001–2022[9]

2001	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
18,094	8,484	11,400	5,459	4,021	3,016	1,878	1,656	1,258	833	756
2012	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
753	707	1,156	1,525	1,447	1,450	1,702	1,922	1164	1,411	1,694

6 Act No. 500/2004 Coll., Administrative Code.
7 See Art. 16 of the Asylum Act for more details.
8 Art. 10a of the Asylum Act for more details.
9 Ministry of the Interior of the Czech Republic [Online]. Available at: https://www.mvcr.cz/clanek/statisticke-zpravy-o-mezinarodni-ochrane-za-jednotlive-mesice-v-roce-2022.aspx (Accessed: 1 September 2023).

Table 1 demonstrates that the number of applications from foreigners for international protection was disproportionately high at the turn of the millennium. This was also reflected in the burden on the courts approached by unsuccessful asylum seekers. However, since 2005, the number of applications has decreased, and since 2007, the number of applicants for international protection has not exceeded 2,000. Thus, the situation has stabilised and no longer poses a threat of overloading the courts, as it was in the past.

3. Possibilities of legal defence of an unsuccessful applicant for international protection in the Czech Republic

Generally, administrative proceedings in the Czech Republic are based on the principle of hearing a case in two instances. A participant in the proceedings who is not satisfied with the results of the proceedings—that is, with the issued administrative decision—can file a proper appeal against it. Therefore, with exceptions, administrative proceedings are conducted 'in two stages' (the 1st stage body decides on the matter and then the 2nd stage body hears the matter as the appeals body). As stated by the Supreme Administrative Court of the Czech Republic,[10]

> the principle of two-instance administrative proceedings expresses the subjective right of the participants in administrative proceedings to basically challenge every decision issued in the first instance by a proper remedy, that is, by appeal; the exceptions to this principle are cases where either such right is excluded by law or when the participant waives the right to file an appeal.

Nevertheless, proceedings for granting international protection represent an exception to the traditional principle of two-instance administrative proceedings. It is not possible to file a proper remedy against the decision of the Ministry of the Interior in the matter of international protection, and the 'first-instance' decision of the Ministry acquires legal force on the day it is delivered to the party to the proceedings (to the applicant for international protection). Therefore, it is a single-instance administrative proceeding.

Regarding the constitutional consequences of this exclusion, it is consistently judged that the principle of two-instance administrative proceedings is not constitutionally guaranteed, but guaranteed as a right. The Constitutional Court of the Czech Republic states that neither the Charter of Fundamental Rights and Freedoms nor the Convention for the Protection of Human Rights and Freedoms

10 Judgement of the Supreme Administrative Court of 20 July 2004, No. 5 A 69/2001 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

'guarantee the fundamental right to two- or more-level decision-making in administrative proceedings....'[11] Moreover, it adds that if the law were to concentrate the administrative procedure on one level (which is precisely the case with the procedure for granting international protection), it would not be possible to consider such a regulation in itself unconstitutional. The principle of two instances is not even among the basic principles of the activity and decision-making of administrative bodies,[12] which is also confirmed by the Supreme Administrative Court of the Czech Republic, which states: 'The basic principles of decision-making on the rights and obligations of natural or legal persons by administrative bodies do not include decision-making at two levels.'[13] In my opinion, the single-instance procedure for granting international protection is appropriate because the applicant is able to access judicial protection more promptly.

It follows from the above that it is not possible to request a review of the decision within the public administration, and foreigners must seek protection in proceedings before the courts, specifically within the administrative judiciary. Thus, the primary means of defence for an unsuccessful applicant for international protection, is a lawsuit against the decision of an administrative body filed with the regional court in accordance with the Code of Administrative Justice,[14] followed by a cassation complaint to the Supreme Administrative Court. However, as pointed out below, even judicial protection in matters of international protection demonstrates significant specificity.

An unsuccessful applicant for international protection may first file a lawsuit against the decision of the Ministry of the Interior, which is decided by the administrative courts in proceedings according to Article 65 et seq. of the Code of Administrative Justice. Even if the general legal regulation of this action is contained in this code, the Asylum Act provides some specifics for this procedure, which as *lex specialis* take precedence over the general regulation. Substantive jurisdiction is imposed on the regional courts. However, local jurisdictions are specifically regulated. Locally competent is the regional court where the applicant for international protection was registered to reside on the day of the decision. If the plaintiff submitted an application for international protection in the transit area of an international airport, the Regional Court in Prague has local jurisdiction. The plaintiff is a foreigner—an applicant for international protection—and the defendant is the Ministry of the Interior.

11 Decision of the Constitutional Court of 19 October 2004, No. II. ÚS 623/02 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

12 Arts. 2 to 8 of the Administrative Code.

13 Judgement of the Supreme Administrative Court of 27 October 2005, No. 2 As 47/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023), or Frumarová et al., 2021, pp. 315–316.

14 Act No. 150/2002 Coll., Code of Administrative Justice.

One of the most important elements of a lawsuit is the presentation of claims, from which the factual and legal reasons for which the plaintiff considers the challenged statements of the decision of the Ministry of the Interior to be illegal or void must be evident. The explicit presentation of the contested statements of the decision in connection with the formulation of claims is essential from the perspective of a review of the contested decision by the court.[15] In administrative justice, proceedings are governed by the principle of disposition. Therefore, it is always up to the plaintiff to challenge the decision of the administrative body through a lawsuit in court. Simultaneously, it is up to him

> in the event that he seeks the protection of his rights by means of a lawsuit, to clearly define in this lawsuit which statements of the administrative decision he is challenging, and then specify in the points of the claim, for which factual and legal reasons he considers the challenged statements of the decision to be illegal or void.[16]

Nevertheless, the Asylum Act 'breaks through' this principle to guarantee the highest possible protection to applicants for international protection. Indeed, it stipulates that the court, when assessing a claim in matters of international protection, will also consider new important facts that have arisen after the issuance of the Ministry's decision. If these are facts that relate to possible persecution or the threat of serious harm, the court is not bound by the claims. Another important element of the lawsuit is the presentation of evidence proposed by the plaintiff to prove his claims. The plaintiff is obligated to prove his claims. Therefore, he must state in the lawsuit the specific means of evidence the court is to realise for this purpose. As part of the evidence, the court may repeat or supplement the evidence provided by the administrative body (the Ministry of the Interior). As the Czech administrative judiciary is built on the principle of cassation, the plaintiff (an unsuccessful applicant for international protection) demands annulment of the negative decision of the Ministry of the Interior.

The Asylum Act sets its own deadlines for filing lawsuits (therefore, the general regulations in the Administrative Code do not apply). Depending on the type of decision that foreigners face, the deadline for filing a lawsuit is 15 days, 1 month, or 2 months. In this sense, it is more about 'shortening' the deadlines (since the general deadline for filing a lawsuit according to the Code of Administrative

15 'Judicial review of administrative decisions always takes place within certain and precisely defined limits; it is up to the plaintiff to establish them. The Code of Administrative Justice does not allow the courts to carry out any kind of "general review".' Judgement of the Supreme Administrative Court of 14 February 2006, No. 1 Azs 244/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

16 Judgement of the Supreme Administrative Court of 29 December 2004, No. 1 Afs 25/2004 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

Justice is 2 months). Therefore, the plaintiff must be careful not to miss the deadline. Another element associated with time in this procedure is that claims are heard with priority. Furthermore, an important aspect of judicial protection is that the filing of a lawsuit in matters of international protection has *ex lege* a suspensive effect (with exceptions provided by law, but even within them, a suspensive effect can be requested together with the filing of the lawsuit). This is a specific matter arising from the Asylum Act, because in general (according to the Code of Administrative Justice) a lawsuit does not have a suspensive effect by law. If the lawsuit has a suspensive effect, the foreigner is in the position of an applicant for international protection for the duration of the proceedings on the lawsuit against the decision of the Ministry of the Interior, and cannot, among other things, be deported from the Czech Republic until the end of the court proceedings. I consider the aforementioned specifics and deviations from the general regulation of court proceedings to be appropriate, as they reflect the need for greater protection of the position and rights of the asylum seeker and the need to decide on the matter as promptly as possible.

Table 2: Number of lawsuits and decisions of regional courts in matters of international protection from 2022–2018[17]

	Number of pending actions from previous years	Number of new actions brought in a given year	Number of regional court decisions in a given year	Of which: proceedings discontinued	Of which: negative decisions	Of which: case returned to the Ministry of the Interior
2022	752	708	868	131	446	291
2021	701	963	939	201	598	140
2020	1,004	1,015	1,019	210	703	106
2019	799	1,154	847	175	543	129
2018	679	1,051	808	145	584	79

Table 2 presents that approximately 1,000 unsuccessful applicants for international protection defended themselves against negative decisions annually. Regional courts decide on 800–900 lawsuits each year. Approximately two-thirds of lawsuits are rejected. Only the year 2022 represents a certain deviation, when relatively many decisions of the Ministry of the Interior were annulled by the court and returned for further proceedings. This situation could have been caused by the large number of refugees from Ukraine when it was necessary to stop considering

17 Ministry of the Interior of the Czech Republic [Online]. Available at: https://www.mvcr.cz/clanek/mezinarodni-ochrana-253352.aspx?q=Y2hudW09NQ%3d%3d (Accessed: 1 September 2023).

Ukraine as a safe country of origin and thus, re-evaluate decision-making in these situations.

Foreigners subsequently have the right to submit a cassation complaint to the Supreme Administrative Court of the Czech Republic against the decision of the regional court regarding the lawsuit. Even regarding the general regulation of cassation complaints, the Asylum Act provides for several differences. Cassation complaints are wide-open and extraordinary remedies can be used to seek redress in both substantive and defective processes. Therefore, it can be filed against a decision on the merits and against several procedural decisions, but always only for specific reasons that are exhaustively calculated and precisely defined by the Code of Administrative Justice.[18] Simultaneously, the Code of Administrative Justice also defines situations in which a cassation complaint is inadmissible (e.g. if it is directed only against the justification of the decision, or if the decision contested is of a temporary nature). The Asylum Act formulates two additional reasons for inadmissibility (Article 32). The deadline for filing a cassation complaint is two weeks. As with the lawsuit described above, the emphasis is placed on the priority hearing of the case and the granting of *ex lege* suspensive effect in relation to the cassation complaint.[19]

Furthermore, since 2005, cassation complaints in matters of international protection have been characterised by significant specificity compared with cassation complaints filed in all other areas. In addition to the admissibility of a cassation complaint, the acceptability of a cassation complaint is also examined in matters of international protection. It is a specific institute with significant legal effects that between 2005 and 2021 applied only to matters of international protection within the framework of the Czech administrative judiciary. It was not until April 2021 that its applicability was extended to cassation complaints in some other matters.[20]

The subject of the following analysis is primarily the meaning of the institute of unacceptability and whether its anchoring in matters of international protection is appropriate and justified. The author also focuses on the question whether this limitation of judicial protection of asylum seekers is in accordance with constitutional and international legal obligations.

18 Art. 103 of the Code of Administrative Justice.

19 The filing of a cassation complaint has a suspensive effect if the filing of a lawsuit against the Ministry's decision in the matter of international protection had one. However, the filing of a cassation complaint does not have a suspensive effect if the applicant for granting international protection is at the time of the filing of the cassation complaint in a facility for the detention of foreigners or if he is not allowed to enter the territory.

20 For the extension of the unacceptability of a cassation complaint to cases other than the granting of international protection, see Potěšil, 2022, pp. 129–132, or Jílková, 2019, pp. 140–144.

4. Institute of "unacceptability" of cassation complaints in matters of international protection

The Code of Administrative Justice, which came into force on 1 January 2003 did not originally provide for the unacceptability of cassation complaints. However, Act No. 350/2005 Coll. amended the Code of Administrative Justice in October 2005. This amendment introduced the concept of 'acceptability of an application' for the first time in the Czech legal order. *Sedes materiae* of this new regulation included in the new Article 104a of the Code of Administrative Justice, according to which 'if a cassation complaint in asylum cases (since September 2006 in international protection cases) does not substantially exceed the complainant's own interests in terms of its importance, the Supreme Administrative Court shall reject it for unacceptability.'[21] The chief consequence of the unacceptability finding is that the Supreme Administrative Court does not deal with the merits of the case and dismisses the cassation complaint by resolution.[22] As of April 2021, the unacceptability of a complaint regarding cassation was extended to other cases (beyond international protection).[23]

■ *4.1. The essence of the principle of unacceptability and its application in practice*

Until April 2021 (when the applicability of this institute was extended), Article 104a of the Administrative Procedure Code reads as follows: If a cassation complaint in international protection matters does not substantially exceed the complainant's own interests, the Supreme Administrative Court shall reject it for unacceptability. The hypothesis of this legal norm contains two key terms which need to be clarified, 'matters of international protection' and 'exceeding the complainant's own interests.'

The Supreme Administrative Court of the Czech Republic has interpreted the first term as meaning that unacceptability applies only to cassation complaints against decisions of regional courts which terminate proceedings against decisions of the Ministry of the Interior in the matter of international protection within the meaning of Article 2 Paragraph 15 of the Asylum Act, that is, against decisions to grant asylum or additional protection, not to grant international protection, to discontinue proceedings, to reject an application for international protection as manifestly unfounded, and to withdraw asylum or subsidiary protection.[24] *A contrario*, we can conclude that the procedural decisions of regional courts in

21 Šimíček, 2006, p. 201.
22 See Potěšil, 2021, pp. 74–81.
23 In more detail Staněk and Dvořáková, 2021, pp. 146–153.
24 Decision of the extended senate of the Supreme Administrative Court of 21 January 2015, No. 9 Azs 66/2014 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

international protection cases cannot be rejected on grounds of unacceptability. The Supreme Administrative Court reasoned that procedural decisions are not abused by asylum seekers, their number is negligible and they do not have *ex lege* suspensive effect. Another argument for not applying unacceptability to cassation complaints against procedural decisions of the regional courts is that those decisions do not deal with issues to which the criterion of 'unacceptability,' that is, the overlapping of the complainant's own interests, could well be applied.[25]

The dissenting opinion of one of the judges of the Supreme Administrative Court (Kühn) was critical of this conclusion.[26] He indicated the absurdity of such a conclusion, where a 'higher' procedural standard is granted to something that is less important and essentially preliminary in relation to the merits (a procedural decision in the matter of international protection), while a 'lower' procedural standard is paradoxically applied to a matter of incomparably greater importance (the final outcome of the proceedings before the regional court, whether in the form of a merits decision or in the form of a procedural decision, nevertheless formally concluding the judicial proceeding). This view can be accepted because the above, inter alia, contradicts the traditional legal argument *a maiori ad minus*.

Another key concept is 'overriding the complainant's own interests.' This is a typical example of a vague legal concept widely used in Czech administrative law. Legislators' use of this legal instrument in the context of such a significant limitation of judicial protection in asylum cases caused considerable uncertainty at the outset, as it was not clear which cassation complaints in international protection cases would be found acceptable.[27] However, the Supreme Administrative Court has interpreted this concept precisely;[28] from the outset, it was necessary, in relation to practice, to establish in a predictable manner what considerations and criteria the Supreme Administrative Court would follow when assessing acceptability.

The overriding of the complainant's own interests is a fundamental and intense situation in which (in addition to the protection of an individual's public subjective rights) it is also necessary for the Supreme Court to express a legal opinion on a certain type of case or legal question. In practice, this means that the complainant's interests overlap only if the legal question at issue has a discernible impact beyond a specific case. The primary task of the Supreme Administrative Court in these proceedings is not only the protection of individual public subjective

25 Ibid.

26 Dissenting opinion of Judge Z. Kühn on the justification of the decison of the extended senate of the Supreme Administrative Court of 21 January 2015, No. 9 Azs 66/2014 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

27 Kosař et al., 2010, p. 549.

28 Resolution of the Supreme Administrative Court of 26 April 2006 No. 1 Azs 13/2006.

rights, but also the interpretation of the legal order and unification of the decision-making of regional courts.[29]

To elucidate the cases in which 'overlapping of the complainant's own interests' can be expected, the Supreme Administrative Court has modelled several typical cases which fulfil this concept in practice.[30] Cassation complaints in international protection cases are acceptable, particularly in the following cases: (1) The cassation complaint concerns legal issues which have not been fully addressed by case law of the Supreme Administrative Court. (2) The cassation complaint concerns questions of law which have been dealt with differently in case law. A divergence in case law may arise at the regional court level and within the Supreme Administrative Court. (3) The cassation complaint will also be acceptable in a situation where a case law diversion is to be made. This means that in exceptional and justified cases, the Supreme Administrative Court finds it appropriate to change the interpretation of a certain legal issue uniformly addressed by administrative courts. (4) Another reason for the acceptability of a cassation complaint will be given if a fundamental error is found in the contested decision of the regional court, which could impact the substantive legal position of the complainant. In a specific case, this can be a fundamental legal error, particularly if: 4a) in its decision, the regional court did not respect the established and clear case law and it cannot be ruled out that this disregard will not occur in the future. 4b) in an individual case, the regional court grossly erred in the interpretation of substantive or procedural law.[31]

However, with respect to the fourth reason, it should be emphasised that the Supreme Administrative Court is not called upon to review any misconduct of the regional court within this category of acceptability, but only misconduct of such a significant intensity that it can reasonably be assumed that it had not occurred; the substantive decision of the regional court would be different. Therefore, insignificant errors (primarily of a procedural nature) will generally not be of such intensity to establish the acceptability of a subsequent cassation complaint.

It clearly follows that the institute of acceptability significantly limits and restricts the possibility of an unsuccessful applicant for international protection to defend himself with a cassation complaint against a rejection decision. It is necessary to logically enquire what serious reasons led the Czech legislature to introduce this institute into the legal system.

29 Decision of the Supreme Administrative Court of 26 April 2006, No. 1 Azs 13/2006 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

30 According to these criteria, the Supreme Administrative Court proceeds even now, that is, after unacceptability is also applied to cases outside of international protection. See the decision of the Supreme Administrative Court of 16 June 2021, No. 9 As 83/2021 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

31 Decision of the Supreme Administrative Court of 26 April 2006, No. 1 Azs 13/2006 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

■ *4.2. Reasons for the introduction of the institute of unacceptability – retrospective or prospective court decision making?*

The reasons for this can be seen both on a purely pragmatic and conceptual level.[32] The first group of reasons is clearly explained in the explanatory report on the aforementioned amendment to the Code of Administrative Justice No. 350/2005 Coll. This report states:[33]

> The unacceptability of a cassation complaint against the decision of the regional court in the proceedings on the action against the decision of the Ministry in matters of asylum is introduced. This measure is prompted by the critical development of the asylum agenda at the Supreme Administrative Court in 2003 and 2004. It turned out that court proceedings in asylum cases have become a mere pretext for applicants who cannot legalize their stay in the Czech Republic in any other way to submit applications for the granting of asylum. In the vast majority of cases, however, these are economic migrants (in 90% from Russia, Ukraine, Moldova, Vietnam, Slovakia), for whom the reasons for asylum are clearly not given, and in many cases the applicants do not even claim it themselves. Nevertheless, they use all procedural options in administrative and judicial proceedings, in particular they also abuse cassation complaints in order to make the proceedings before the court last as long as possible, because during this time they can legally stay on the territory of the Czech Republic.[34]

Therefore, the purely practical reason for introducing unacceptability was to drastically reduce disproportionately high amounts of the asylum agenda to the Supreme Administrative Court,[35] which was overloaded.[36]

32 Šimíček, 2006, p. 201

33 See explanatory report to Act No. 350/2005 Coll.

34 In 2003, 1,502 cassation complaints were filed with the Supreme Administrative Court; of which 409 (27%) were of asylum seekers. In 2004, 4,722 cassation complaints were already challenged; of which 3,124 (66%) were asylum seekers. The success rate of cassation complaints in asylum cases was low, not even 6%. See explanatory report to Act No. 350/2005 Coll.

35 On the issue of the congestion of the Supreme Administrative Court see Piatek and Potěšil, 2021, pp. 20–32.

36 The average administrative and judicial proceedings in asylum cases lasted about 27 months at that time, while this time was practically equally divided between proceedings before administrative authorities, the regional court and Supreme Administrative Court. See Kosař et al., 2010, p. 548.

Regarding conceptual or ideological reasons, the question arises whether a retrospective or prospective model of court decision making is more appropriate.[37] Limiting the access of parties to the highest judicial instances (the prospective model) is a custom, particularly in countries with a common law legal tradition.[38] However, it is increasingly gaining ground in the continental legal culture. It is based on the idea that the task of the highest court in the country is to unify jurisprudence and generally provide interpretative guidelines for lower courts (and therefore, for public administration), not to revise for the umpteenth time a case that has already been solved once or more. Such a system of regulation of the supreme courts is generally oriented prospectively, not retrospectively, for individual cases.[39]

The arguments in favour of this model limiting access to high courts are as follows: the role of the case law of these courts is different from that of the courts of lower instances. While the task of lower courts is to arrange justice in a specific case, the purpose of the highest courts is to resolve the most important legal issues and create an established case law that will guide administrative authorities and lower courts in their application practice. In this context, Molek and Bobek ask themselves:[40] 'How can justice be better served at the highest courts in individual cases?' Thousands of similar decisions that no one reads, or by guiding decision-making with important cases that are known and respected by administrative authorities and lower courts? What is better for protecting individual rights? Is it a time-limited and sketchy review of each case or a real and deep analysis and conjecture of key cases performing a governing function?

The institute of the (un)acceptability of a cassation complaint strives for a balance between two (sometimes conflicting) interests: the interest in justice in each individual case and the interest in the effectiveness of objective law. The purely formal emphasis often placed on achieving a fair outcome of the proceedings in its consequences significantly weakens legal certainty and thus

37 Retrospective judicial decision-making is focused on the past. The impact of the case law is limited only to a specific case; for example, cassation complain annuls a specific decision of a lower court, and a lower court is only bound to follow the legal opinion of a higher court in this case. It attempts to retroactively negotiate justice in a specific individual case and correct any mistakes made by lower courts.
Prospective judicial decision-making focuses more on the future. The initial floor plan remains the individual case and the decision in it. However, the case is selected and discussed not only with a view to the past, but also to the future and the impact on future case laws. The final definition of prospective decision-making follows from the above: the court's decision has a more general impact beyond the scope of the given case.

38 Bobek and Molek, 2006, p. 205.

39 The institute of acceptability is primarily inspired by the Anglo-American concept of "leave to appeal" or "writ of certiorari," which is based on the fact that it is up to the discretion of the court, which is to decide on the remedy, whether it will deal with it substantively or not. See Lavický and Šiškeová, 2005, p. 693.

40 Bobek and Molek, 2006, p. 205.

the effectiveness of the law.[41] However, as the Constitutional Court of the Czech Republic succinctly and repeatedly stated,

> no legal order is and cannot be built ad infinitum from the point of view of the system of procedural means to protect rights, as well as from the point of view of the system of organization of review instances. Every legal order brings and necessarily must bring a certain number of errors. The purpose of the review, or of review procedures, it may realistically be possible to approximately minimize such errors, and not eliminate them completely. The system of review instances is therefore the result of measuring the effort to achieve the rule of law on the one hand, and the effectiveness of decision-making and legal certainty on the other. From the point of view of this criterion, the introduction of extraordinary remedies, i.e. the prolongation of proceedings and the breaking of the principle of the immutability of decisions that have already acquired legal force, is adequate only in the event of exceptional reasons.[42]

Thus, for the sake of the functionality and efficiency of the activities of the highest courts and the fulfilment of their roles in the state and society, it is necessary to limit the number of cases that they will review.[43]

■ *4.3. Assessment of the acceptability of a cassation complaint by the Supreme Administrative Court as part of the proceedings on this complaint*

The acceptability of a cassation complaint must be distinguished from the admissibility of a cassation complaint and reasonableness.[44] The admissibility of a cassation complaint is determined by the fulfilment of legal procedural prerequisites, such as the filing of a cassation complaint within the statutory period, proper representation of the complainant by a lawyer, and the absence of other legal reasons for inadmissibility.[45] However, the rationale for the complaint is a matter

41 Decision of the Supreme Administrative Court of 26 April 2006, No. 1 Azs 13/2006 [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

42 Decision of the Constitutional Court of 31 October 2001, No. Pl. ÚS 15/01; similarly, the decision of the Constitutional Court of 6 November 2003, No. III. ÚS 150/03 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

43 More details on the "instance dilemma" Pomahač, 2020, pp. 267–272.

44 For more details see Jemelka et al., 2013, pp. 937–942.

45 Decision of the Supreme Administrative Court of 16 February 2006, No. 8 Azs 5/2006: 'In the case of a cassation complaint filed against a regional court's decision in asylum matters, the Supreme Administrative Court first deals with the question of admissibility of the cassation complaint. Only in the case of an admissible cassation complaint is an examination of its acceptability possible.' [Online]. Available at: www.nssoud.cz (Accessed: 1 September 2023).

of a factual assessment of the cassation grounds stated by the complainant[46] and reflected in the possible (un)success of the cassation complaint.

Therefore, acceptability is an 'intermediate step' in the Supreme Administrative Court's assessment of cassation complaints in matters of international protection. Thus, it is possible to perceive acceptability as a certain 'filter': if the cassation complaint meets the legal conditions of procedural admissibility, then the overlap of the complainant's own interests, that is, its acceptability, is examined in the manner indicated above. Thus, if the complainant presents objections on which the Supreme Administrative Court has already expressed its opinion and published its decision, it is neither necessary nor effective for this court to act and decide again on a similar matter, when the result would undoubtedly be the same conclusion. If the cassation complaint is admissible and acceptable, the Supreme Administrative Court will assess and decide on the merits.

It follows from the above that it is in the interest of the unsuccessful applicant for international protection (i.e. the complainant) not only to fulfil the conditions for the admissibility of a complaint, but also to base the complaint on one of the grounds for a complaint, set out in Article 103 of the Code of Administrative Justice. The complainant is also interested in stating what he sees as an overlap of his own interests in his specific case and for what reason the Supreme Administrative Court should consider the submitted cassation complaint substantively.

The legislature was aware that the unacceptability of a cassation complaint is an institute that by its very nature is highly dependent on judicial discretion. Therefore, it was necessary to ensure that complainants filing a cassation complaint in matters of international protection were sufficiently legally protected against possible arbitrariness when deciding the unacceptability of such a complaint. Therefore, a rule was incorporated into the Code of Administrative Justice, according to which the consent of all members of the Senate was required for a decision on unacceptability (the principle of unanimity).

Therefore, if even a single member of the Senate disagrees with the conclusion about the unacceptability of the cassation complaint, the case cannot be rejected, and its merits must be discussed. As a second safeguard, the legislature intended to increase the number of members of the Senate that decided on matters of international protection at the Supreme Administrative Court. Along with the introduction of unacceptability, special five-member Senates of the Supreme Administrative Court were created. However, this was a somewhat unusual step, as the agenda of international protection is decided at the regional court level only by a specialised single judge (not by a senator), which, in simple terms, means that the legislature considers it simpler and does not see the need for it to be resolved by a senator. Ultimately, these five-member Senates were (by amendment No. 303/2011 Coll.) cancelled, and the classic three-member Senates of the Supreme

46 Art. 103 of the Code of Administrative Justice.

Administrative Court decided on these cases. The aforementioned principle of unanimity in decision-making, not the number of members of the Senate, is thus considered a much more important element of the protection of the applicant for international protection, which is reasonable.

A more problematic aspect associated with unacceptability was that the resolution rejecting the cassation complaint did not need to be justified. This rule was cancelled by amendment No. 77/2021 Coll., which came into force on 1 April 2021 extending the use of the institute of unacceptability even outside the sphere of international protection. The fact that the Supreme Administrative Court did not have to justify its decision regarding the unacceptability of the cassation complaint was considered inappropriate by the public.[47] This was based on the complainant's substantial uncertainty regarding his legal status and the possibility of the court's discretion in assessing the acceptability of the complaint. References were also made to the case law of the Constitutional Court of the Czech Republic, which, for example, in its decision of 20 June 1995, No. III. ÚS 84/94 stated:

> One of the principles, representing part of the right to due process, as well as the concept of the rule of law (Article 36, Paragraph 1 of the Charter of Fundamental Rights and Freedoms, Article 1 of the Constitution of the Czech Republic) and excluding arbitrariness in decision-making, is also the obligation of the courts to justify their judgements.[48]

Another argument was that a brief justification cannot burden the Supreme Administrative Court so much as to significantly affect the total length of court proceedings.[49]

However, there were also experts who considered the option of the Supreme Administrative Court not to justify the resolution, rejecting the cassation complaint for unacceptability as a transparent solution included in the selection of cases.[50] They were based on the assumption that if the Supreme Administrative Court were to have the opportunity to select cases, it would also be correct to do so based on its own consideration. If the Supreme Administrative Court was forced to justify the unacceptability of a complaint in each individual case, it would mean, in their opinion, a *de facto* denial of the meaning of the institute of unacceptability. However, concerns about the (non) justification of the decision were eventually

47 Potěšil et al., 2014, p. 1019; or Kučera, 2005, pp. 7–11. The authors Lavický and Šiškeová consider this unconstitutional – see Lavický and Šiškeová, 2005, pp. 693–703.

48 Similarly, the decison of the Constitutional Court of 11 February 2004, No. Pl. ÚS 1/03 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

49 Ibidem.

50 Šimíček, 2006, pp. 201–205.

unfounded. The Supreme Administrative Court did not justify the resolution of the rejection of the cassation complaint on grounds of unacceptability, except for exceptions, but instead justified the resolutions on unacceptability.

In conclusion, it can be added that the subsequent judicial review of the resolution of the Supreme Administrative Court on the unacceptability of a cassation complaint by the Constitutional Court is relatively limited. As stated by the Constitutional Court, 'assessing the significance of the complaint from the point of view of the overlap of the complainant's own interests is a matter of independent judicial decision, which is fundamentally not subject to review by the Constitutional Court.'[51] The Constitutional Court considers called upon to intervene only in cases in which the Supreme Administrative Court would abuse judicial discretion or its decision would be a manifestation of arbitrariness.[52]

■ *4.4. Unacceptability: yes or no – constitutional and international legal conformity of the institute of "unacceptability" in matters of international protection*

After a detailed analysis of the essence, consequences, and reasons for the introduction of the unacceptability of cassation complaints into the Czech legal system, the question arises whether it is a suitable institute in the field of asylum law and whether it conforms with constitutional and international law. For example, Kučera considered the introduction of the unacceptability of cassation complaints in asylum cases to be an unreasonable and unsystematic intervention for which there are no legally defensible reasons. The author further states[53] that

> the right of asylum is an important right guaranteed both at the constitutional and international level, however, the Constitution of the Czech Republic and the Charter of Fundamental Rights and Freedoms do not guarantee a multi-level judiciary as a fundamental right in non-criminal matters, as well as the Convention on the Protection of Human Rights, rights and fundamental freedoms or the International Covenant on Civil and Political Rights, the current scheme of hearing asylum cases before the court cannot be considered an abuse of the procedural rights of the participants of administrative proceedings. On the contrary, the Supreme Administrative Court represents a necessary corrective for asylum proceedings, both in relation to the decision-making practice of regional courts, where in future only a single judge should decide in all matters, and in relation

51 Decision of the Constitutional Court of 31 October 2007, No. III. ÚS 778/07 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

52 Similarly, the decision of the Constitutional Court of 19 December 2007, No. III. ÚS 2937/07 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

53 Kučera, 2005, pp. 7–10.

to the decision-making practice of the Ministry of the Interior, which cannot be considered an independent body.

The authors Bobák and Hájek are also critical of the effectiveness and constitutional conformity of this institute. Based on a detailed analysis of the decision-making activities of the Supreme Administrative Court in matters of international protection, they stated that inacceptability has not fulfilled the expected goals and that it is not a suitable institute for judicial review of the asylum agenda.[54]

However, it should be emphasised that at the time of its introduction, unacceptability respected the European standards of review in the given area. Article 6 of the European Convention recommends a two-stage trial only for criminal proceedings and not for non-criminal cases. As Molek and Bobek point out,[55] the right to fair trial and effective judicial protection is often confused with the right to discuss matters at all stages, which is incorrect. The right to effective judicial protection (at least in the jurisprudence of the European Court of Human Rights according to Articles 13 and 6, Paragraph 1 of the European Convention), does not mean the obligation of the parties to the Convention to establish a system of appeal or extraordinary remedies. In the context of asylum law, the only obligation of contracting parties is to allow access to national courts for all persons within their jurisdiction (Article 1 of the Convention) effectively (Article 13) and on a non-discriminatory basis (Article 14). However, this does not necessarily mean establishing systems of appeal or extraordinary remedies that are fully within the autonomous competence of a contracting party. The ECtHR repeatedly stated that the right to a fair trial does not include the right to appeal. However, in states that allow appeals to a higher court, the rights arising from Article 6(1) of the Convention must be respected, even in appeal proceedings.[56]

In the context of asylum law, these conclusions are confirmed by the Recommendation of the Committee of Ministers of the Council of Europe No. R (81)16 of 5 November 1981, on the harmonisation of national procedures relating to asylum, which states in Article 5 that the Contracting Party shall provide for the review of asylum decisions by appealing to a higher administrative authority or to a judicial authority. The explanatory memorandum of this article states that both procedures are perceived as alternatives; that is, they fully depend on the legal system of the contracting party, whether the decision on asylum will be reviewed within the framework of the state administration or the judiciary. Thus,

54 Bobák and Hájek, 2015, pp. 47–76.

55 Bobek and Molek, 2006, pp. 205–215.

56 For example, ECtHR, *Delcourt v. Belgium* (Application No. 2689/65), judgment, 17 January 1970, Series A No. 11, para. 25; ECtHR, *Monnell and Morris v. the United Kingdom* (Application No. 9818/82), judgment, 2 March 1987, Series A No. 115, para. 56; ECtHR, *Helmers v. Sweden* (Application No. 11826/85), judgment, 29 October 1991, Series A No. 212-A, para. 31; ECtHR, *Tolstoy Miloslavsky v. the United Kingdom* (Application No. 18139/91), judgment, 13 July 1995, Series A No. 316-B, para. 59.

the contracting state has no obligation to allow a judicial review of the decision on asylum. *A fortiori,* if it allows it, then it is “above the standard”. Moreover, the Explanatory Memorandum expressly states that judicial review does not require an appeal system.[57]

Table 3: Numbers of cassation complaints and decisions of the Supreme Administrative Court on them in matters of international protection from 2022–2018[58]

	Number of pending cassation complaints from previous years	Number of new cassation complaints filed in a given year	Number of Supreme Administrative Court decisions on cassation complaints in a given year	Of which: proceedings discontinued	Of which: negative decision	Of which: case returned to the Ministry of the Interior/ Regional Court
2022	471	256	386	41	241	79/25
2021	495	547	571	40	438	51/34
2020	313	671	567	38	480	30/19
2019	232	478	440	40	359	32/9
2018	162	449	435	28	363	24/20

Table 3 demonstrates the decision making of the Supreme Administrative Court on cassation complaints in matters of international protection in the last five years. The number of newly filed cassation complaints is approximately 500, except in 2022, when it is lower. Simultaneously, unfortunately, the number of cases that have not been settled by the court is increasing, which may be owing to the court’s higher workload in other agendas. Similar to regional courts, it is clear that most cassation complaints are unsuccessful, demonstrating the quality of decision-making on this agenda, particularly by regional courts.

5. Conclusion

At the time of its introduction, the institute of unacceptability of cassation complaints raised a number of questions and uncertainties as to whether the rights of applicants for international protection would be curtailed. Although the primary impetus for its adoption was the effort to reduce the enormous burden on the Supreme Administrative Court and related delays in proceedings, its meaning and functions should be evaluated more at a conceptual level. More judicial instances do not necessarily imply a higher level of judicial protection. Further review

57 Bobek and Molek, 2006, pp. 205–215.

58 Ministry of the Interior of the Czech Republic [Online]. Available at: https://www.mvcr.cz/clanek/mezinarodni-ochrana-253352.aspx?q=Y2hudW09MQ%3d%3d. (Accessed: 1 September 2023).

does not necessarily increase the effectiveness of legal protection; contrarily, it can lead to delays in proceedings and the negation of effective legal protection, which, among other things, should mean speed. Unacceptability lies in the selection of cases with jurisdictional overlap. This unacceptability is left to the Supreme Administrative Court to assess the cassation complaints it will deal with meritoriously.

Kühn states:[59]

> However, unacceptability is not here for judges to make their job easier. It is here for all participants in the proceedings and ensures that the judges of the Supreme Administrative Court will spend their energy on matters that are truly jurisprudentially significant, on matters with a general impact. Only in this way the Supreme Administrative Court will truly fulfil its role, i.e. to unify the case law of regional courts and provide the addressees of legal norms with answers to complex questions of legal interpretation.

This is a logical and reasonable opinion, in which unacceptability can be considered a legal tool that maintains a balance between the interest in justice in each individual case and the interest in the effectiveness of objective law. This is also evidenced by the fact that from 2021, the unacceptability of a cassation complaint was significantly extended outside the area of international protection. Article 104a of the Code of Administrative Justice provides: If a cassation complaint in matters in which a specialised single judge decided before the regional court does not substantially exceed the complainant's own interests, the Supreme Administrative Court will reject it as unacceptable. Therefore, it is an institute that has its justification and future within the concept of administrative justice in the Czech Republic. From *de lege ferenda* viewpoint, it is an institute that has its justification and future within the broader concept of administrative justice in the Czech Republic (not only within the framework of the asylum agenda). Thus, the prospective decision-making model of higher courts should continue to be reflected in the Czech judiciary. The Czech judiciary is multi-instance, therefore, there is no reason why the activities of the highest courts should not primarily focus on ensuring the uniformity of decision making and the interpretation of key legal problems and issues.

It also follows from the above that the institute of unacceptability is in accordance with constitutional and international standards in the areas of asylum and international protection. The Constitutional Court of the Czech Republic has never found Article 104a of the Code of Administrative Justice governing the

59 Kühn et al., 2019, p. 964.

unacceptability to be unconstitutional in its decision-making activities.[60] The constitutionally guaranteed right to a fair trial does not *a priori* include the right to a two-instance trial; this right cannot be derived from the Convention on the Protection of Human Rights and Fundamental Freedoms. Therefore, it is up to each state whether, in a specific case, the parties are allowed to review the decision of the court of first instance and, if so, to what extent and for what reasons. A cassation complaint is classified as an extraordinary remedy, and therefore, it is the legislator's legitimate right to define not only the reasons for which it can be filed but also to determine its acceptability.[61] Therefore, it can be concluded that the unacceptability of a complaint violates the basic rights of applicants for international protection and does not lower the standard of their protection. From the perspective of *de lege ferenda*, this article can be concluded by stating that inacceptability is a suitable and functional tool within the decision-making activity of the highest courts and should continue to be preserved both for the judicial review of the asylum agenda and other public administration agendas.

60 Decision of the Constitutional Court of 9 November 2006, No. I. ÚS 597/06, decision of the Constitutional Court of 29 March 2007, No. III. ÚS 529/07; decision of the Constitutional Court of 15 October 2009, No. IV. ÚS 1850/09; or the decision of the Constitutional Court of 3 January 2017, No. I. ÚS 2334/16 [Online]. Available at: https://www.usoud.cz/vyhledavani-rozhodnuti-us (Accessed: 1 September 2023).

61 Šimíček, 2006, p. 201.

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TEO GILJEVIĆ*

Border Management and Migration Controls in Croatia

ABSTRACT: *After independence in 1991, Croatia adopted an important migration legislation, addressing issues such as Croatian citizenship, aliens, and border protection. Owing to the development of democratic institutions and the war in the early 1990s, migration regulation was not extended until the early 2000s, when accession to the European Union (EU) became the most important strategic objective. Consequently, migration governance started to develop with the EU accession process. During the massive migrations in 2015 and 2016, Croatia was a part of the Balkan corridor, especially after Hungary closed its southern border with Serbia and then Croatia. Croatia adopted a temporary humanitarian approach while providing transfers to the borders of the neighbouring country. After the closure of the Balkan corridor, the Republic of Croatia prioritised the protection of its outer borders, prioritising the region's border protection after accession to the Schengen region. This paper provides an overview of the border management and migration controls in Croatia. In addition to the most relevant legislation regulating migration governance, the paper provides available statistical data on the activities of the Croatian authorities—the Ministry of Interior and the courts. It provides an analysis of the relevant case law of the Administrative Courts and the Constitutional Court and of the jurisprudence of the European Court of Human Rights against Croatia. In its final part, the author discusses the findings and offers some concluding remarks regarding border management and migration controls in Croatia.*

KEYWORDS: border management, police, migrants, Ministry of Interior, courts

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1. Introduction

The Republic of Croatia (RoC) is a European country, geopolitically part of Central and Eastern Europe and geographically located in the southern part of Central Europe and the northern part of the Mediterranean. The RoC shares borders with Slovenia and Hungary in the north, Serbia and Bosnia and Herzegovina in the east, Montenegro in the south, and Italy in the west. After gaining independence from Yugoslavia in 1991, the RoC has been a European Union (EU) Member State since 2013, and an euro area member and a Schengen area member since 2023.

After its independence, Croatia adopted important migration legislation, which dealt with the issue of Croatian citizenship, aliens, and border protection. Owing to the development of democratic institutions and the war in the early 1990s, the immigration regulations were not expanded until the early 2000s, when accession to the EU became the most important strategic objective. Consequently, migration governance began to develop along with the EU accession process. During mass migrations witnessed in 2015 and 2016, Croatia was a crucial part of the Balkan corridor, particularly after Hungary decided to close its southern border with Serbia and subsequently with Croatia. The RoC took a temporary humanitarian approach while providing transfer to the borders of the neighbouring country. Between September 2015 and March 2016, more than half a million people were estimated to have crossed the corridor, receiving a ‘hyper-temporary’ legal status to facilitate the refugees’ movement north. After the closure of the Balkan corridor, the priority of the RoC was to protect its outer borders, following the conditions for accession to the Schengen area.[1]

Croatia is ethnically relatively diverse, with autochthonous minorities originating mainly from ex-Yugoslav countries. Croatian population by ethnic affiliation (population census 2021) includes Croats (91.6%), Serbians (3.2%), and 22 other ethnicities (less than 1% each).[2]

Croatian legislation on border management and migration was developed under the EU and Schengen *acquis communautaire*, and is based on the Constitution of the RoC. Article 26 of the Constitution stipulates that aliens are equal to Croatian

1 See Novak and Giljević, 2022, p. 117.

2 Census of population, households and dwellings 2021. According to the 2021 population census, the Republic of Croatia had 3,871,833 inhabitants, of which 240,079 were members of national minorities as follows: Albanians 13,817 (0.36%), Austrians 365 (0.01%), Bosnians 24,131 (0.62 %), Bulgarians 262 (0.01%), Montenegrins 3,127 (0.08%), Czechs 7,862 (0.20%), Hungarians 10,315 (0.27%), Macedonians 3,555 (0.09%), Germans 3,034 (0.08%), Poles 657 (0.02%), Roma 17,980 (0.46%), Romanians 337 (0.01%), Russians 1,481 (0.04%), Ruthenians 1,343 (0.03%) Slovaks, 3,688 (0.10%), Slovenes 7,729 (0.20%), Serbs 123,892 (3.20%), Italians 13,763 (0.36%), Turks 404 (0.01%), Ukrainians 1,905 (0.05%), Vlachs 22 (0.00%), and Jews 410 (0.01%). Retrieved from [Online]. Available at: https://dzs.gov.hr/u-fokusu/popis-2021/popisni-upitnik/english/results/1501 (Accessed: 28 July 2023).

citizens before the courts, governmental agencies, and other bodies vested with public authority. Article 33 of the Constitution states that aliens and stateless persons may be granted asylum in Croatia, unless they are being prosecuted for non-political crimes and activities contrary to the fundamental principles of international law. No alien legally in the territory of the RoC shall be banished or extradited to another State, except in cases of enforcement of decisions made in compliance with an international treaty or law.[3] The main legislation that regulates border control in the RoC is the State Border Protection Act (SBPA).[4] The Aliens Act is the main legislation in the field of migration,[5] and regulates the entry, movement, stay, and work of aliens who are third-country nationals (TCNs). The asylum system is regulated by the International and Temporary Protection Act.[6]

This paper provides an overview of the border management and migration controls in Croatia. In addition to the most relevant legislation regulating migration governance, the present paper provides available statistical data on the activities of the Croatian authorities—the Ministry of Interior (MoI) and the courts.[7] It provides an analysis of the relevant case law of the Administrative Courts and the Constitutional Court and of the jurisprudence of the European Court of Human Rights (ECtHR) against Croatia. In the final part, the paper discusses the findings and offers some concluding remarks regarding border management and migration controls in Croatia.

2. Legislation in regard to access to Croatian territory and the asylum system

■ *2.1. Access to the territory and the asylum*

Border control has long been regarded as the exclusive privilege of each State. However, international human rights standards limit this right. That is, States have the right to decide who can enter or stay on their territory and under what conditions, but must consider the protection of human rights. In certain circumstances, international law may require States to allow migrants to enter or remain in their territory: if they meet the conditions for international protection (asylum or subsidiary protection in the RoC) or if they are needed for family reunification. However, irregular migrants caught in irregular border crossings have certain

3 Official Gazette, No. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010 – consolidated text and 5/2014.
4 Official Gazette, No. 83/2013, 27/2016, 114/2022 and 151/2022.
5 Official Gazette, No. 133/2020, 114/2022 and 151/2022.
6 Official Gazette, No. 70/2015, 127/2017 and 33/2023.
7 Ministry of Interior (MoI) statistical data [Online]. Available at: https://mup.gov.hr/otvoreni-podaci/287522 (Accessed: 1 July 2023).

human rights, the protection of which must be provided by the bodies responsible for monitoring the State border and preventing irregular migration.[8]

The right to access to territory is not explicitly mentioned in the European Convention on Human Rights (ECHR). However, the ECHR has consistently held that States have the right to control their borders and regulate the entry of non-nationals. Nonetheless, this right is not absolute and must be balanced with respect for human rights, particularly the prohibition of torture, and inhuman or degrading treatment or punishment.[9]

According to Article 5 of the SBPA, the Border Police of the MoI is the competent body for control of the State borders in the RoC. In some exceptional circumstances, the Armed Forces of the RoC may provide support for the protection of the State border when the MoI or the Croatian Prime Minister considers this necessary for security and/or humanitarian reasons. In this situation, the members of the Armed Forces should act according to the instructions of the police.[10]

The Border Police of the RoC supervises and protects 3,318.6 km of the border, of which 2,304.3 km is external and 1,014.3 km is internal. The State border is entirely determined and marked by the Republic of Hungary, while with other neighbouring States, interstate commissions still determine the borderline. There are 88 border crossings on the state border, of which 68 are permanent and 20 are border crossings. The largest number, 50, is located on the border with Bosnia and Herzegovina. State border control tasks are performed in 43 police stations on the external border distributed within 13 police administrations. Of that number, 32 stations are specialised (23 border police stations, 3 airport police stations, 4 maritime police, and 2 maritime and airport police), while 11 stations are of a mixed type.[11] The work of compensatory measures is carried out in 15 police stations distributed within 10 police administrations, and the work of suppressing illegal migration is carried out in 148 police stations distributed within 20 police administrations.[12] According to Articles 1 and 4 of the SBPA, the border police performs the tasks of supervising the State border, preventing and detecting

8 Novak, 2022; Staničić, 2022.

9 Art. 3 of the ECHR.

10 Official Gazette, No. 83/2013, 27/2016, 114/2022 and 151/2022.

11 In the MoI of the RoC, law enforcement is organised in the Directorate of Police (at the national level) as the central organisational unit and 20 police administrations with headquarters in the counties and the City of Zagreb (at the regional level). Police administrations at the local level include 160 police stations, of which 114 are mixed, 14 are traffic police stations, 23 are border police stations, 4 are maritime police stations, 3 are airport police stations, and 2 are maritime police stations.

12 Report on police work in 2022 in the RoC [Online]. Available on https://www.sabor.hr/sites/default/files/uploads/sabor/2023-05-25/203405/IZVJ_POLICIJA_2022.pdf (Accessed: 22 July 2023).

illegal entry and stay, and suppressing cross-border crime in the depth of the state territory, in addition to international border police cooperation.

According to Article 3(1) of the SBPA, the control of the State borders includes protection of the State border and control of crossing the State border (border controls), with the aim to: a) secure the inviolability of the State border and territory; b) protect human life and health; c) prevent and detect crimes and offences and the perpetrators; d) prevent illegal migration; e) prevent and detect other dangers to public security, legal order, and national security.

Regulation (EU) No. 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) No. 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC, established a new European integrated border management framework with a view to managing the crossing of the external borders efficiently. The integrated border management concept has been implemented in Croatia since 2005.[13] On 26 September 2019, the Government of the RoC adopted a new Integrated Border Management Strategy and Action Plan for the implementation of the Strategy.[14] The objectives of implementing the new Strategy in the RoC at the national level include: a) introduction of a new European concept of integrated border management to further consolidate all participants at the national and European level, with an emphasis on effective control of external borders, b) positioning the strategic role of integrated border management at the national and European level, c) harmonisation of political and operational expectations in an effective integrated approach to border management, d) establishing a vision and mission of integrated border management, and e) setting strategic goals for border management.

The Action Plan sets deadlines and determines the bodies responsible for the implementation of individual measures. The Inter-Agency Working Group for Integrated Border Management monitors the implementation of measures identified in the framework of inter-agency cooperation.[15]

The protection of fundamental human rights is a key element of the Croatian Integrated Border Management Strategy. The aim of the Strategy is to ensure

13 The first National Strategy for Integrated Border Management of Croatia was aligned with the regional guidelines set by the European Commission for integrated border management in the Western Balkans in 2004. The Croatian government adopted it on April 21, 2005. The Croatian Government adopted the second National Strategy for Integrated Border Management on July 16, 2014 (Official Gazette 92/2014).

14 Official Gazette, No. 91/2019.

15 The Strategy and Action Plan are jointly implemented by representatives of the MoI, Border Directorate and representatives of the Ministry of Finance, Ministry of Agriculture, State Inspectorate, Ministry of Health, Ministry of Foreign and European Affairs, Ministry of the Sea, Transport and Infrastructure, Ministry of Tourism and Personal Data Protection Agency.

the respect for fundamental human rights for all individuals and in all activities related to integrated border management in accordance with applicable national and international regulations (Article 5.1.4.).

Since Croatia's accession to the EU in 2013, the provisions of the Schengen acquis have been binding and applicable in Croatia. Article 4(2) of the Treaty between the Member States of the EU and the RoC concerning the accession of the latter to the former[16] stipulates mandatory provisions of the Schengen acquis in the RoC based on the relevant decision of the Council: Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) is applicable in its entirety, except for the first sentence of Article 1, Article 5(4) a), Chapter III, and the provisions of Chapter II, as well as the annexes relating to the Schengen Information System.[17] On 1 January 2023, the RoC gained access to the Schengen area. A comprehensive evaluation process[18] started in 2016, and Croatia made significant efforts to fulfil its commitments to comply with the Schengen acquis.[19] Following the positive opinion of the European Parliament,[20] the Council decided on 8 December 2022 on the full application of the provisions of the Schengen acquis in the RoC.[21] The SBPA was amended in 2022, with the aim of adapting it to the Schengen acquis, which is applicable as of 1 January 2023 after border controls at Croatian internal borders were abolished.[22]

Recent years (2019–2022) have been characterised by a large increase in the number of illegal crossings of the State border. Notably, until 2017, there was a moderate number of illegal crossings of the State border, not exceeding 5,000 per year. A certain increase was recorded in 2018, when 8,207 illegal crossings were detected. However, in 2019, as many as 20,278 illegal crossings of the State border were recorded, or 147% more than the previous year. The situation worsened further in 2020, when as many as 29,904 illegal crossings were recorded; however, in 2021, 17,404 illegal crossings (a decrease of 40.2%) were recorded.[23] Neverthe-

16 OJ L 300, 9 November 2013.

17 See more Staničić, 2015, p. 124.

18 See more about Schengen evaluation Vulas 2017 (Report on the Implementation of the National Strategy for Integrated Border Management 2022, p. 1).

19 To efficiently fulfil its duties and meet the requirements for EU accession in border control, the MoI has made significant efforts to uphold its commitments to comply with Schengen regulations and enhancing the administrative capacities of the Croatian border police. See Communication from the Commission, COM(2023) 274 final (2023) *State of Schengen report 2023* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023DC0274 (Accessed: 28 July 2023).

20 European Parliament Legislative Resolution of 10 November 2022 on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Croatia (10624/2022 – C9-0222/2022 – 2022/0806(NLE)).

21 Council Decision (EU) No. 2022/2451 of 8 December 2022 on the full application of the provisions of the Schengen acquis in the Republic of Croatia.

22 Official Gazette, No. 114/2022 and 151/2022.

23 See Staničić, 2022, p. 111.

less, 2022 was marked by a significant increase in the number of irregular arrivals. According to the MoI official report, 50,624 irregular arrivals were recorded in Croatia or 190.9% more than in 2021. The top five countries whose nationals accounted for almost 70% of all illegal border crossings (69.5%) in 2022 were Afghanistan (14,877; 29.4%), Iraq (6,334; 12.5%), Burundi (5,465; 10.8%), Pakistan (4,429; 8.7%), and Turkey (4,110; 8.1%).[24] Compared to 2021, there is a significant increase of Burundi nationals, considering no Burundi nationals illegally crossed the RoC border in 2021. Other top countries of origin remain the same: Afghanistan, Pakistan, and Turkey.

The MoI declared in February 2022 that the Draft Migration Strategy of the RoC will provide an overview of the measures adapted to the needs and characteristics of several target groups of wanted immigrants, including foreign students, researchers, working migrants, Croatian emigrants, and their descendants. After the coordination and consultation process between the MoI and other competent State authorities, the document was sent to further regulation procedures. The deadline for the final adoption of the migration strategy was not specified, and at the time of this writing, the strategy was still not adopted. The government adopted at its session on 16 December 2022 a decision on the establishment of the intersectoral working group (WG) for drafting the immigration policy of the RoC.[25] In 2022, 124,121 permits for the residence and work of aliens were approved. In 2023, this number increased by more than 40% to 174,499. The WG proposed a new mechanism for attracting migrants to Croatia by issuing residence and work permits without a contracted workplace.[26]

3. Access to protection in practice in Croatia

■ *3.1. Expressions of intention and applications for international protection*

According to the MoI, in 2022, 12,872 persons expressed their intention to apply for international protection.[27] This is an exceptional increase compared to the 2021 number of 3,039 people. The top five countries whose nationals expressed their intention to apply for international protection were Iraq (2,434; 18.9%), Russia (2,064; 16%), Burundi (2,051; 15.9%), Turkey (1,572; 12.2%), and Afghanistan (1,390; 10.8%).

24 MoI statistical data [Online]. Available at https://mup.gov.hr/UserDocsImages/statistika/2023/Statisticki_pregled_2022_za_webfinal.pdf (Accessed: 20 July 2023).

25 CLC, 2023, p. 12.

26 Grgas, 2023.

27 MoI statistical data [Online]. Available at https://mup.gov.hr/UserDocsImages/statistika/2023/Statisticki_pregled_2022_za_webfinal.pdf (Accessed: 20 July 2023).

Table 1. Number of asylum applications in the RoC from 2015–2022[28]

Year	Number of asylum applications
2015	211
2016	2,232
2017	1,887
2018	1,086
2019	1,986
2020	1,932
2021	3,039
2022	12,870

The highest number of intentions was expressed at border police stations (10,087; 76%), followed by police stations (2,318; 18%), the reception centre for foreigners (138; 1%), Pleso Airport police station (137; 1%), police administrations (112; 0.80%), Transit Reception Centre Tovarnik (50; 0.38%), and Transit Reception Centre Trilj (30; 0.23 %).[29]

Numerous applicants of international protection left the Croatian territory during the procedure. This reveals that a majority of asylum seekers do not intend to stay in the RoC for a prolonged period, leading to the conclusion that Croatia is still primarily perceived as a transit country. In most cases, their objective is to go to other EU Member States to apply for international protection. Therefore, migrants generally do not want to apply for international protection under the Convention and do not want to hand over their fingerprints to Eurodac. Indeed, there are examples that even those who have been granted international protection in the RoC leave to other EU Member States after some time.[30]

This is a continuation of the trend observed in earlier years, indicating a persistent challenge in managing and processing the influx of asylum seekers. The increasing strain on resources and infrastructure underscores the need for collaborative efforts at both national and international levels to address the root causes of displacement and enhance the effectiveness of the asylum application process.

The RoC has a low percentage of cases in which the MoI issues decisions restricting the freedom of movement of asylum seekers; this percentage has decreased continually, from 3.37% in 2018 to 0.9% in 2021.

28 Ombudswomen's Office, 2023, p. 202.
29 CLC, 2023.
30 Response of the Croatian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its ad hoc visit to Croatia [Online]. Available: https://rm.coe.int/1680a5acfc (Accessed: 24 July 2023).

According to Ombudswomen's reports from 2017–2022, Croatian Ombudswomen received some complaints by migrants and associations pointing to hampered access to international protection and violence against migrants caught in illegal border crossings, with little to no efficient investigations.[31] The Ombudswoman of the RoC also stated in the report that it is unacceptable and unlawful for the MoI to deny the Ombudswoman direct access to the information on actions taken against irregular migrants in its information system, which is the sole source of relevant data; this prevents the Ombudswoman and authorised staff of the office—the National Preventive Mechanism (NPM)—from efficiently exercising the tasks and competences stipulated by the NPM Act, and violates the Ombudsman Act and Data Protection Act.

In the Ombudswomen's report from 2019, 124 States recommended that the relevant authorities and the MoI must process requests for asylum of all migrants in Croatian territory, including when they irregularly crossed the border, in line with international and EU law.[32] In its Annual Report for 2020 and 2021, the Ombudswomen reiterated the former recommendation.[33]

According to the Ombudswomen's report in 2022, the number of complaints in relation to pushbacks decreased, and various civil society organisations that monitor access to the asylum system continue to testify against pushback practices. In the same report, the problematic nature of the decisions for voluntary departure from the European Economic Area was pointed out as a measure to ensure return (issuance of the so-called 7-day papers), considering that numerous migrants do not have personal/travel documents and, as a rule, cannot obtain them due to the absence of diplomatic consular missions. In 2022, the MoI issued 30,595 voluntary return decisions.

Two local government units—Rijeka and Zagreb—organised a humanitarian support station for refugees and migrants in cooperation with the MoI. The humanitarian station serves as a short-term refreshment station and offers a hot meal, hygiene facilities, a heated tent, and showers every day from 8 a.m. to 8 p.m.

In 2022, U.F., a Rohingya child, submitted complaints against Croatia and Slovenia to the UN Child Rights Committee for multiple violations of the Convention on the Rights of the Child. The child spent over a year in Bosnia and Herzegovina from 2020 to 2021. During this time, U.F. stated he was pushed back five times, from Croatia to Bosnia and Herzegovina and subjected to violence. In Slovenia, he was subjected to a 'chain' pushback, forcibly returned first to Croatia by Slovenian

31 The emphasis on safeguarding and advancing the human rights of migrants grew in prominence within the Ombudswoman's office duties as migratory movements intensified along the Balkan route in 2015 and 2016. See Ombudswoman of the Republic of Croatia, 2021.

32 Ombudswomen's Office, 2020, p. 168.

33 Ombudswomen's Office, 2021, p. 190 (recommendation 133); Ombudswomen's Office, 2022, p. 179 (recommendation 138).

authorities, and then onwards to Bosnia and Herzegovina by Croatian authorities. These are the first complaints of their kind against Croatia. The complaints were filed against Croatia and Slovenia with the support of the European Centre for Constitutional and Human Rights and Blindspots. The litigation forms part of the Advancing Child Rights Strategic Litigation Project.[34]

Since 2016, the RoC has encountered impediments regarding the practice of preventing access to the territory and the asylum system, along with reported instances of pushbacks involving forced returns to neighbouring countries. Persistent issues include difficulties in accessing the international protection system and reported incidents of police violence against migrants. These practices were reported by, among others, the following organisations: Danish Refugee Council, Border Violence Monitoring Network, Are You Serious?, 'Welcome!' Initiative, Centre for Peace Studies, and the PRAB Initiative.[35]

In the 2017–2022 period, there were numerous warnings and reports by international and Croatian non-governmental organisations on pushbacks of refugees and migrants from Croatia, coupled with limited access to international protection. The reports stressed that pushbacs was accompanied by violence and degrading treatment by the border police.[36] The responsible MoI denied all accusations and stated that access to asylum was thoroughly respected.[37] Numerous civil society organisations that monitor access to the asylum system continue to testify that pushback practices continue at Croatian borders. According to the Border Monitoring Factsheets published on a monthly basis by the Danish Refugee Council, the total of 3,461 persons reported being pushed back from Croatia to Bosnia and Herzegovina in 2022.[38]

4. Monitoring mechanism

The European Commission proposed a screening regulation on 23 September 2020 which included an obligation for Member States to establish an independent monitoring mechanism.[39] The EU Agency for Fundamental Rights (FRA) prepared general guidance in the light of Article 7(2) of the proposed screening regulation.

34 ECCHR, no date.
35 Protecting Rights at Borders Initiative (PRAB), 2023.
36 Croatian Law Centre (2022) The Croatian Asylum System in 2021 – National Report; Croatian Law Centre (2023) The Croatian Asylum System in 2022–National Report [Online]. Available at: https://www.hpc.hr/wp-content/uploads/2023/06/Croatian-Asylum-System-in-2022-national-report.pdf (Accessed: 10 July 2023).
37 Novak and Giljević, 2022, pp. 117–118.
38 CLC, 2023, p. 14.
39 Proposal for a Regulation of the European parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No. 767/2008, (EU) No. 2017/2226, (EU) No. 2018/1240 and (EU) No. 2019/817.

According to Article 7 of the screening regulation, each Member State shall establish an independent monitoring mechanism: a) to ensure compliance with EU and international law, including the Charter of Fundamental Rights, during the screening; b) where applicable, to ensure compliance with national rules on the detention of the person concerned, particularly regarding the grounds and the duration of the detention; c) to ensure that allegations of non-respect for fundamental rights in relation to the screening, including in relation to access to the asylum procedure and non-compliance with the principle of non-refoulement, are dealt with effectively and without undue delay.

Furthermore, the FRA shall provide assistance to Member States with setting up such national monitoring systems and Member States may request the FRA to support them in developing their national monitoring mechanism.

In October 2022, at the request of the European Commission, the FRA published guidance to assist Member States in setting up national independent mechanisms to monitor fundamental rights compliance at the EU external borders. The FRA organised a follow-up meeting with experts from national human rights institutions, as well as representatives from selected EU entities and international organisations. The experts stressed the need for coherence with other national bodies entrusted with the protection of fundamental rights; underlined the important role of national human rights institutions; and flagged the need to develop protocols for accessing information and data relevant to fundamental rights from surveillance assets.[40]

In June 2021, the Croatian authorities established, as a pilot project, a mechanism to monitor actions by police officers against people having entered Croatia in an irregular manner, to check whether fundamental rights were being respected.[41] During the first year of operations, the monitors concentrated on border police stations, border crossings, and reception facilities, where no irregularities in the rights to asylum or access to asylum procedures were detected. This mechanism coexists with other constitutional bodies aimed at ensuring the protection of human rights in Croatia, such as the Ombudswomen. Its advisory committee, of which the FRA is a member, proposed in 2022 to expand the scope of the mechanism, allowing monitors to make unannounced visits to sections of the border outside the border crossings and providing access to the MoI information systems, while addressing these gaps, at least to some extent; however, monitoring missions had not yet resumed after the end of the pilot in March 2023. This is the only new monitoring mechanism established in an EU Member State.[42]

40 FRA, 2023, p. 13.

41 In the 2020 Annual Report (recommendation 135, p 190.), the Croatian Ombudswoman proposed to the MoI the establishment of an Independent Mechanism of monitoring border procedures.

42 FRA, 2023, p. 13.

The Independent Mechanism for monitoring the actions of MoI police officers in the field of illegal migration and international protection (hereinafter: the Independent Mechanism) was established by the Agreement of 8 June 2021 between the MoI on the one hand and the Croatian Academy of Medical Sciences, the Croatian Academy of Legal Sciences, the Centre for the Culture of Dialogue, the Croatian Red Cross, and Prof. Ph.D. Iris Goldner Lang, on the other. The supervisory activities of the Independent Mechanism, as well as the manner and place of their implementation, are defined by the Agreement. The powers of the Independent Mechanism include observing the behaviour of police officers toward migrants and applicants for international protection in the implementation of regulations governing the monitoring of the state border and the provision of international protection; inspecting files that have been legally finalised following complaints submitted about the alleged illegal treatment of irregular migrants and applicants for international protection; and inspecting the activities and reports of the Police Directorate regarding the alleged illegal treatment of the mentioned categories of persons.

In November 2022, a new Cooperation Agreement was signed, by which the work of the independent monitoring mechanism continued, between the MoI and civil society organisations, to monitor the work of MoI officials in the field of border protection, irregular migration, and international protection.[43] The following organisations are included in the Mechanism: the Croatian Academy of Medical Sciences, the Croatian Academy of Legal Sciences, the Centre for the Culture of Dialogue, the CRC, and one independent expert. Special emphasis is placed on respecting the principle of prohibition of: forced removal or return, collective expulsion, and torture or other forms of ill-treatment. The Annual Report published in July 2022 concludes that ‘based on observations, irregularities regarding the right to seek asylum and access to the asylum procedure were not established in border police stations’ but noted that police officers in isolated cases conducted illicit deterrence in mine-suspected areas. The report made several recommendations to improve the identification of applicants for international protection at the border and enhance training for border guards.[44] The report lists the implemented activities and findings of the Mechanism’s supervision related to the area of irregular migration and international protection, as well as irregularities

43 MoI official webpage, published on 4 November 2022 [Online]. Available at: https://mup.gov.hr/vijesti/potpisan-sporazum-o-suradnji-radi-provedbe-nezavisnog-mehanizma-nadzora-zastite-temeljnih-ljudskih-prava-u-postupanju-policijskih-sluzbenika-ministarstva-unutarnjih-poslova-u-podrucju-zastite-granica-nezakonitih-migracija-i-medjunarodne-zastite/289002 (Accessed: 4 July 2023).

44 Annual report of the Independent Mechanism Oversight for the period from June 2021 to June 2022, published in July 2022 [Online]. Available at: https://www.hck.hr/UserDocsImages/dokumenti/Dokumenti%20uz%20vijesti/Mehanizam/Godisnje%20izvjesce%20Nezavisnog%20mehanizma%20nadzora_1%20srpnja%202022a.pdf?vel=5786027 (Accessed: 17 July 2023).

in the work of police officers and examples of good practice, in addition to the difficulties encountered by irregular migrants themselves.

The establishment of an Independent Mechanism is an important tool for the protection of human rights, and we welcome the decision to create a national mechanism dedicated to monitoring the situation at the Croatian border. Nevertheless, there are several shortcomings in the Independent Mechanism that need addressing.[45]

First, transparency issues arise regarding its establishment, as the selection process and criteria for its members remain unknown. Given the politically sensitive nature of migration and border policies, the independence of these mechanisms, both in their formal structure and functioning, is a prerequisite for effectively monitoring, resolving, and preventing human rights violations at the border. The Commission for Complaints in the MoI and the Council for Civil Supervision over the application of certain police powers are established in accordance with the law (Police Act and Police Duties and Powers Act), with members appointed by the Croatian Parliament through a public call. The establishment and appointment of members to independent bodies foster public trust and transparency in public authorities, ultimately contributing to the promotion of the rule of law.

Second, the competences of the Independent Mechanism overlap with the Commission for Complaints in the MoI, particularly in dealing with complaints about illegal treatment by police officers toward irregular migrants and applicants for international protection (Article 5(1), Item 3 of the Agreement). Despite their overlapping authorities, there is no envisaged mutual collaboration between them. Therefore, incorporating cooperation between the Commission for Complaints within the MoI and the Independent Mechanism is imperative for several reasons. One, both entities share jurisdiction in addressing grievances concerning alleged mistreatment of irregular migrants and applicants for international protection by police officers. Two, the necessity for mutual cooperation between the Commission and the Independent Mechanism arises from the need to bolster the protection of human rights and freedoms and to rely on the input from those with experience and expertise in conducting human rights monitoring. By working together, these entities can contribute to a more robust and effective framework that safeguards the rights of every individual, particularly in the context of police interactions with irregular migrants and those seeking international protection.

45 Similarly, the EU Ombudsman pointed out significant shortcomings in how the monitoring mechanism ensured compliance with fundamental rights. The Ombudsman called on the European Commission to play an active role in overseeing the monitoring process and to request clear and verifiable information from Croatian authorities regarding their actions in investigating reports of collective expulsions and mistreatment of migrants and asylum seekers (Bochenek, 2023, p. 16).

This cooperative approach can enhance the overall integrity of the system and promote a fair and just resolution of complaints.

5. Case law concerning access to Croatian territory and the asylum system

■ *5.1. The Constitutional Court's and Administrative Courts' rulings*

One of the most interesting decisions of the Constitutional Court regarding the detention of migrants is the case of *MAD.H. and Others*,[46] which ended with the judgement of the ECHR (see more in the next chapter).[47]

The applicants took the prosecution before the investigating judge of the Osijek County Court who dismissed the applicants' request in August 2018. The applicants' appeal against this decision was again dismissed in December 2018 by the Osijek County Court appeal panel. In December 2018 and March 2021, the Constitutional Court dismissed two separately lodged constitutional complaints regarding, inter alia, the efficiency of the investigation into the death of *MAD.H.* The Constitutional Court found that there had been no violation of Article 2 of the Convention in its procedural limb (*M.H. and Others*, paras. 24, 27, 139). In July 2019, the Constitutional Court dismissed the applicants' constitutional complaint.

Subsequently, the applicants lodged administrative actions against the decision of the MoI which declared the applicants' requests for international protection inadmissible on the grounds that they return to Serbia, which was considered a safe third country, with the Osijek Administrative Court. In June and July 2018, this court dismissed the applicants' administrative actions and, subsequently, the High Administrative Court dismissed their further appeals. On 4 March 2021, the Constitutional Court quashed the judgements of the High Administrative Court and the Administrative Court and remitted the case. It held that the courts failed to properly examine whether Serbia could be considered a safe third country.

The case law of the Croatian Administrative Courts in terms of the detention of migrants has been analysed on the basis of the decisions available in the Supreme Court's official database.[48] In the analyses of Staničić & Horvat of judicial

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46 U-IIIBi-1385/2018 of 18 December 2018.

47 ECtHR, *M.H. and Others v. Croatia* (Application Nos. 15670/18 and 43115/18), Judgment, 18 November 2021.

48 According to Art. 216 of the Aliens Act against the decision on accommodation in the centre (detention) or on extending the accommodation, an alien can initiate an administrative dispute. The MoI must send a case file on detention to the administrative court immediately after the decision has been issued. The court has to decide whether an alien is to be released from the centre within ten days of the delivery of the case file. The administrative court may annul or confirm the decision on extension of detention, within five days of delivery of the case file.

control of the lawfulness of decisions on placement in detention centres in the RoC from 2012–2020, there were a total of 1,959 decisions on placement in detention centres before administrative courts in Zagreb, Osijek, Rijeka, and Split. Administrative courts have mostly confirmed the decision of the MoI (1,743), representing 88.97%, while 167 were annulled, accounting for 8.52%.[49]

Most of the available case laws relate to the judicial review of the legitimacy of the decision on the detention of migrants.[50] In most cases, the courts have confirmed administrative decisions of the MoI, typically stating that 'the decision-maker correctly established the existence of circumstances indicating the existence of a risk of avoiding the obligation to leave the EEA, that is the RoC.'[51]

In one of the most recent and intriguing decisions on accommodation in the centre (detention), however, the Administrative Court in Zagreb annulled the MoI's administrative decision stating that:

> This court found in cases submitted thereto by the Stara Gradiška Border Police Station that conversations with aliens were always conducted in English, from which it follows that the Stara Gradiška Border Police Station can never find an interpreter for any foreign language, not even by phone, while, evidently, all aliens who are caught for illegal stay in the territory of the Stara Gradiška Border Police Station speak and understand the English language. Bearing in mind that other police stations, which deliver to the court similar cases for judicial control, manage to find suitable translators because not all aliens speak English, the court assesses that in the concrete case, the provision of Article 196 Paragraph 1 of the Aliens Act is violated, according to which a citizen of a TCNs who resides illegally and who does not understand the Croatian language must be ensured a translation into a language he understands.
>
> The court also stated that all records of the hearing of aliens found in illegal stay, that is, illegal crossing of the state border in the area

49 See Staničić and Horvat, 2020, pp. 10–12.

50 The ECHR gives a wide margin of discretion to the States in relation to Art. 5 of European Convention on Human Rights. However, judicial review of the legality of the detention must be guaranteed as a safeguard against the arbitrariness of the measure, including the domestic law upon which it is based. See Đanić Čeko and Held, 2019. Judicial control of administrative acts and measures regarding unlawful residence of foreigners in Croatia in the European context. EU and Comparative Law Issues and Challenges Series (ECLIC), 3, p. 180.

51 Decision No. UsI-3702/18-2 from 18 October 2018; Decision No. Usl I-106/2023-2 of 26 January 2023. In the analyses of Đanić Čeko and Held of judicial control of the lawfulness of movement restrictions by placement in the RoC it is concluded that Administrative Courts have mostly confirmed the decision of the MoI. This is because in individual decisions, circumstances were justifiably determined, which indicated the presence of risk of avoiding the departure of EEA. Đanić Čeko and Held, 2019, pp. 189–190.

> of the Stara Gradiška Border Police Station, contained exactly the same sentences, from the beginning to the end of the record, and only the dates are changed. For example, all records state that 'The alien declares that he does not own real estate in the RoC, he has not registered his stay in the RoC, there is not enough money for accommodation, and neither is there anyone close by nor are there relatives in Croatia, and declares that for this reason, it would suit him to be in the reception centre, if MoI so determines, until the end of the procedure of return. He does not have a travel document or large sums of money as a guaranteed deposit. He does not suffer from infectious diseases and there is no ban on entering other countries. He will not return to Bosnia and Herzegovina, from which he came illegally. He intends to go to Germany'.
> As it is unlikely that all aliens.... declare that they do not have enough money for accommodation and that for this reason, it would suit them to be in the reception centre for aliens until the end of the return procedure, the court took a stand that it could not base its decision on such a record.
> Aliens caught for illegal stay or illegally crossing state borders must be heard by a translator in a language that aliens understand, and it is necessary to enter into the record the exact content of the statements made by the parties, and which content, according to the nature of things, cannot be identical for every alien encountered.
> As a result of the above, and based on the state of the file, the court decided that the relevant decision on accommodation in the reception centre could not be confirmed, as the record was drawn up without a translator and contains identical statements as the previous records submitted by the same police station, which is why the court reasonably suspects that the submitted report contains the exact content of the statements made by the alien in question.[52]

In 2022, the Administrative Court in Zagreb adopted 40 decisions in proceedings to restrict the freedom of movement. Of these, 27 cases were rejected (persons remain detained), 10 were adopted (persons were released from detention), 1 was adopted and referred back to the MoI procedure, while 2 were transferred to another court. The average duration of these procedures was 38 days.[53]

52 Decision No. UsI-216572023-2 from 5 June 2023.
53 CLC, 2023, p. 18.

■ *5.2. Jurisprudence of the European Court for Human Rights*

The ECHR issued two important judgements against Croatia clarifying aspects of the right to life under Article 2 of the ECHR in relation to migrants.[54]

In the first case, in 2017, the applicants, an Afghan family of fourteen, were walking along the train tracks near the Croatian–Serbian border when a train hit one of the children, a six-year-old *MAD.H.*, who died at the scene. The applicants allegedly expressed their wish to seek asylum in Croatia but were denied that possibility by the Croatian police, who ordered them to return to Serbia following the train tracks; subsequently, *MAD.H.* was hit by the train. In December 2017, the applicants' legal representative lodged a criminal complaint against unidentified Croatian border police officers. On 1 June 2018, the competent prosecuting authorities (Office for the Suppression of Corruption and Organised Crime) rejected the applicants' criminal complaint. The applicants took the prosecution before the investigating judge of the Osijek County Court who dismissed the applicants' request in August 2018. The applicants' appeal against this decision was dismissed in December 2018 by the Osijek County Court appeal panel. In December 2018 and March 2021, the Constitutional Court dismissed two separately lodged constitutional complaints regarding, inter alia, the efficiency of the investigation into the death of *MAD.H.* In March 2018, the Croatian police caught the applicants clandestinely crossing the Serbian–Croatian border and on the same day issued decisions in respect of the first to fourth applicants, restricting their freedom of movement and placing them and the applicants' children in the Tovarnik Centre for the purpose of verifying their identities. On the same day, the applicants expressed the intention to seek international protection in Croatia. The applicants challenged the decision restricting their freedom of movement before the Osijek Administrative Court. On 22 May 2018, the Osijek Administrative Court partly allowed the third applicant's administrative action, ordering that she and her two children (seventh and eight applicants) be released from the Tovarnik Centre. Furthermore, on 24 and 25 May 2018, the same court dismissed the remaining applicants' administrative action as unfounded. In the period between October and December 2018, the High Administrative Court dismissed the applicants' appeals, thus upholding the decisions of the first-instance court. Subsequently, in July 2019, the Constitutional Court dismissed the applicants' constitutional complaint. In the meantime, on 28 March 2018, the MoI declared the applicants' requests for international protection inadmissible on the grounds that they should return to Serbia, which was considered a safe third country. The applicants lodged administrative actions against this decision with the Osijek Administrative Court. In June and July 2018, this court dismissed the applicants' administrative actions, and subsequently, the High Administrative Court dismissed their further appeals. Finally, on 4 March 2021, the Constitutional Court quashed the High

54 FRA, 2023.

Administrative Court and the Administrative Court's judgements and remitted the case. It held that the courts had failed to properly examine whether Serbia could be considered a safe third country. In the course of the abovementioned proceedings, the applicants, despite having been appointed a legal representative in December 2017 to represent them in all proceedings before the Croatian authorities, did not have any legal assistance between 21 March and 2 April 2018, and their chosen representative was first able to see them on 7 May 2018. On 4 June 2018, the applicants were transferred to an open-type centre in Kutina, and from there, they clandestinely left Croatia. The ECHR found the following violations of the ECHR: 1) violation of Article 2 in its procedural limb due to the failure of the domestic prosecuting authorities to conduct an effective investigation into the circumstances leading to *MAD.H.*'s death;[55] 2) violation of Article 4 of Protocol No. 4 because the Croatian police officers had returned the first applicant and her six children to Serbia without an examination of their individual situation, which amounted to collective expulsion;[56] 3) violation of Article 3 in its substantive limb in respect of the applicant children (fourth to fourteenth applicants) that stemmed from the failure of the domestic authorities to act with the required expedition to limit, as far as possible, the applicant children's detention in a reception centre with prison-type elements;[57] 4) violation of Article 5(1) due to the failure of the domestic authorities (notably, the MoI and Osijek Administrative Court) to show the necessary diligence in the verification of the applicants' identity and the examination of their applications for international protection. In addition, the applicants were not afforded relevant procedural safeguards, as they had not been apprised of the decisions placing them in the Tovarnik Centre in a language they could understand;[58] 5) violation of Article 34 due to the domestic authorities restricting the applicants' contact with their chosen lawyer.[59]

The second case (*Daraibou v. Croatia*) concerned a Moroccan applicant, Daraibou, who was detained at a border police station together with three other migrants. In March 2015, the border police found the applicant and three other persons, in a truck with Croatian licence plates. It was established that the migrants had entered Croatia clandestinely, avoiding border control. They were taken to the nearest police station in Bajakovo. While waiting for readmission to Serbia, they were placed on the premises for the detention of irregular migrants in the border police station. One of them allegedly set fire to the facility, which caused the death of three migrants and serious injuries to the applicant. The ECHR found a violation of the material and procedural aspect of Article 2 of the ECHR not

55 ECtHR, *M.H. and Others v. Croatia* (Application Nos. 15670/18 and 43115/18), Judgment, 18 November 2021, paras. 153–163.
56 Ibid., para. 304.
57 Ibid., paras. 201–203.
58 Ibid., paras. 255, 257 and 258.
59 Ibid., para. 336.

only because the domestic authorities did not take sufficient measures to protect the life and limb of the applicant but also because of the failure to conduct a sufficiently detailed and effective investigation following the event, according to the conventional standards. The ECHR found that the police station and its personnel were ill-prepared to deal with the fire outbreak and that several questions had been left unanswered, despite a prompt start to the investigation. Furthermore, the authorities did not investigate the very serious allegations of the applicant regarding the adequateness of the premises and any fire precautions implemented. Moreover, no attempt had been made to establish whether there had been broader institutional shortcomings which could have prevented a similar tragedy from reoccurring in the future. The ECHR concluded that there had accordingly been a violation of Article 2 of the ECHR in its procedural aspect.

Furthermore, there are two pending adjudications against Croatia: S.B. against Croatia[60] and two other applications (summary return to Bosnia and Herzegovina in October 2018 and alleged inhuman treatment) as well as *Y.K. v. Croatia*[61] (Turkish Kurd not allowed to seek asylum and allegedly convinced to go back to Serbia).

Between July 2021 and February 2023, the ECHR issued nine judgements finding fundamental rights violations at the EU's land or sea borders. In several of these scenarios, the ECHR concluded that there had been no remedy available to the applicants at the national level.[62]

6. Conclusion

This paper analysed legislation and available practice of Croatian authorities in regard to border management and migration controls in Croatia. In 2022, the RoC experienced a significant increase in the number of persons who applied for international protection. In total, 12,872 persons expressed their intention to apply for international protection, while 21 were granted asylum. Numerous civil society organisations that monitor access to the asylum system continue to testify that pushback practices persist at Croatian borders despite the existence of the independent monitoring mechanism. However, in the RoC, violence seems to have partially calmed in 2022, with a greater ease of transit and a lower proportion of violent pushbacks recorded.[63]

As a result of the *M.H.* case, amendments to the International and Temporary Protection Act were adopted in March of 2023. These precisely stipulate that

60 ECtHR, *S.B. v. Croatia* (Application No. 18810/19), 26 March 2020.
61 ECtHR, *Y.K. v. Croatia* (Application No. 38776/21), 2 December 2021.
62 FRA, 2023, p. 11.
63 Similarly, the PRAB project reported a reduction in the overall number of pushbacks and level of violence. MMC Research Report, 2023, p. 48.

administrative courts will be obliged to review, either *ex officio* or upon the asylum seeker's request, the MoI imposition of restrictions on freedom of movement.

These examinations will have to be conducted on a regular basis at reasonable intervals of time, especially in cases in which the detention lasts for more than a month and in cases in which significant new facts arise that bring into question the lawfulness of detention. If the competent administrative court determines that the restriction of freedom of movement is unlawful, the MoI will be under the obligation to release the asylum seeker immediately. In addition, amendments to the International and Temporary Protection Act for the first time strictly define that in the course of the proceedings for international protection, the authorities are under an obligation to ensure that every child has access not only to leisure activities (including play and recreational activities appropriate to their age within the premises of reception centres) but also to outdoor activities. These amendments will ensure the proper structuring of the children's time in cases where their stay in reception centres may not be avoided and are the RoC's response to the ECtHR's findings in the *M.H* case.

Croatia's legislation complies with the EU and the Schengen *acquis communautaire* and provides various protections for vulnerable migrants. Courts protect the legal order of the RoC, as established by the Constitution and acts of legislature, and provide for the uniform application of laws and equal protection before the law. However, in terms of practice, certain shortcomings have to be addressed. Despite many alleged rights violations, only a few cases were pending in Croatian national courts because of lack of evidence, limited interest on the part of victims in filing a case, difficulties in producing evidence of events occurring during the hours of darkness at the green border, and other factors.[64] It has to be considered that the RoC has had to adjust its administrations to EU requirements in a rather short period, and when deciding between additional safeguards for the protection of the individual or more restrictive border control measures toward ensuring increased national security, the latter would be the preferred choice for decision makers in the RoC.[65] Hence, ensuring effective judicial safeguards for migrants is essential to protect the rights of all individuals, irrespective of their nationality.

64 See similar practices in Greece and Spain, FRA, 2023, p. 11.
65 Novak and Giljević, 2022, p. 121.

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GABRIEL-LIVIU ISPAS*

Romanian Practices of Border Protection in the Case of Persons Crossing the National Border Illegally: From Theory to Practice While Waiting for Admission to the Schengen Area

ABSTRACT: *This study addresses the issue of migration that the European Union has been facing over the past decade. Beginning with the historical evolution of the phenomenon of migration, the current situation in the European Union is presented, as well as the factors that facilitated the emergence thereof. The normative provisions of the European Union are presented, alongside the specific national regulations of Romania regarding asylum and the granting of international protection. Developments in the litigations brought before the Court of Justice are succinctly presented, in addition to the implications of the rulings in the elaboration of new asylum policies, which would expand the participation of European institutions and uniformity in regulation to the detriment of national intervention, according to the principle of subsidiarity.*

THE study presents the penal implications and the crimes that can be committed in connection with the act of crossing the border, but also addresses a sensitive topic, namely that of the Schengen area and the technical fulfilment of admission conditions. In the practical part, empirical aspects of immigration in Romania are presented, as well as the evolution of attempts to cross the border illegally, the evolution caused by the war in Ukraine, and statistics regarding residence permit applications from the past 10 years.

KEYWORDS: Asylum, illegal border crossing, solidarity, sovereignty, Dublin Procedure

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1. Migration, a current problem in the European Union

One of the recurrent themes in public debate in the Member States of the European Union and in the Union institutions is the concept of the migration of people in the European Union. Starting from the reality of a migratory flow directed almost exclusively towards Member States, the public debate has several dimensions: What is the cause of migration? What are the consequences of migration on the comfort and standard of living of the citizens of the destination states? What is the impact of migration on the economy of the Member States and on unemployment? Can illegal migration be a national security risk? How can human rights be protected in a situation of illegal migration? What are the limits of competence of the states and what is the margin of appreciation and disposition of the institutions of the Union? These topics are approached differently depending on the political and institutional positions, as well as the social typology and economic context, but also depending on the cultural traditions and values of the societies in the Member States. The topic of migration is an extremely popular one in public debates in the Member States, especially in the preparation of electoral cycles, and the chimera of stopping/banning migration is strongly supported in political speeches or government measures.

The legal and historical reality is that, looking back, the concept of migration represented in Europe for the last two millennia followed a theme that was cyclically important. Historically, Rome, the eternal city, was conquered and plundered by the Visigoth army led by Alaric in August 410 and, from then until today, European civilisation continued to face such realities, which decisively influenced the juridical-political organisation of the territory of the continent.

Without performing a sociological analysis of the phenomenon of migration in its historical evolution, we can affirm that migration could never be separated from the social, political, and legal context in which it occurred, and the cause that determined the relocation of some communities/peoples or groups of citizens is manifested like a red thread of historical identification by the desire of people to seek a better living, to have access to new resources, to seek new territories, or to live in a better society than the one they come from, one which offers them greater chances and more diverse opportunities.

The development of the supranational construction of the European Union was a factor of interest and attraction for the citizens of third countries, both in terms of access to the internal market and the quality of work and in terms of identifying a suitable space for the development of family life. Freedom of movement and freedom of establishment are today common values of the Member States of the Union for their own citizens, but it should be noted that, at the same time, the success of the internal market has spurred a desire of citizens of third countries

to access this space of freedom, security, and justice through legal means or by trying to force an illegal migration.[1]

In the recent past, there were individual intentions of citizens who wanted to enter the territory of the Member States originating from countries where the conditions for ensuring adequate international protection were not met. However, among the causes that determined the migrations of recent date,[2] we recall the events that started from the Arab Spring, in Tunisia, whereby in the end the dictatorial regimes were removed in both Egypt and Libya. However, the consequences of military confrontations threatened the safety of these nations' citizens, with the safety of their lives, their patrimony, and the political succession dominated by a lack of democratic culture that led to the persecution of those who did not accept the beliefs of those in power. A special approach targets Syria and the civil war in this country, but also the strong flow of migration that manifests itself in the face of the violation of fundamental human rights and freedoms.

Migration has been and is the object of institutional concerns, aimed at respecting human rights in conjunction with the application of national and European legislation on asylum policies.[3] To prevent non-compliant conduct by the states, the Court of Justice of the European Union maximised the legal efficiency of the directive by considering its direct effect a genuine indirect sanction to the states.[4] Any person affected in his legitimate right by the defective or partial implementation or by the non-transposition of the directive into legislation has been afforded the possibility of invoking the direct vertical upward effect of the directive in litigation before a national court.[5]

The migration of citizens coming from third countries is stipulated both in the legislation of the Member States and in the legal regulation of the European Union.[6] Article 2 Paragraph 2 of the Treaty on the Functioning of the European Union (TFEU) lists the area of freedom, security, and justice as being in the shared competence of the Union with the Member States.[7] Respecting the principle of subsidiarity, each national state has its own national legislation in terms of establishing the legal rules of immigration, asylum, and return policies in the country of origin, while at the European institutional level other legal regulations have been implemented. Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application submitted in one of the Member States by a third-country national[8] was

1 Peers, 2014, pp. 788–794.
2 European Commission, no date.
3 Ispas, 2021b, pp. 359–384.
4 Ispas and Panc, 2019, p. 94.
5 Ibid., pp. 95–97.
6 European Commission, 2022, pp. 90–98.
7 Chalmers, Davies and Monti, 2015, pp. 520–522.
8 Published in the OJEU L 50, 25 February 2003, p. 1.

correlated with the provisions of Regulation 1560/2003,[9] supplemented by rules that concerned the common procedures regarding protection and the withdrawal of international protection.[10] Regulation No. 604/2013,[11] also known as the Dublin III Regulation, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection presented in one of the Member States by a third-country national or a stateless person, includes the elements to be considered when establishing the responsibilities for granting international protection to third-country nationals entering the territory of the Union by land, water, or air, regardless of whether they are refugees. Article 13 of the regulation designates as the state responsible for processing the request, the first state in which the petitioner entered.[12]

During the process of illegal migration to the European Union, in 2015, the European Commission proposed directions of action to strengthen the capacity to deter illegal traffic to the European Union on the Mediterranean Sea, operations to capture boats used in illegal human trafficking through international cooperation.[13]

As demonstrated a different occasion,[14] in the face of the huge flow of more than 1.5 million people in 2015 and more than 1.2 million asylum applications in Member States in 2016,[15] the Union activated, through its institutions, the principle of solidarity as the fundamental principle of the Union and of identifying mechanisms for the relocation of migrants from the frontline states to other states, as well as financial support for those directly affected. Two Decisions[16] were issued by a few states concerning the establishment of provisional measures in the field of international protection for the benefit of Italy and Greece, to support these states to better cope with an emergency characterised by a sudden influx of third-country nationals into the respective Member States (Article 1). The Czech Republic, Hungary, the Slovak Republic, and Romania voted against Decision 2015/1601 in the Council, arguing that human rights and primary law norms would be violated, including by affecting the sovereignty of states. The opposition of Hungary and Slovakia led the Commission to launch infringement procedures against the states for non-compliance with the European rules on asylum in the Member States. The

9 Published in OJEU L 222, 5 September 2003, p. 3.
10 Directive 2013/12 EU, published in OJEU L 141/28, p. 1.
11 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
12 Morgese, 2019, pp. 381–408.
13 European Commission, 2015.
14 Ispas, 2021a.
15 European Parliament, 2017.
16 Decision 2015/1523 and Decision 2015/1601.

Slovak[17] and the Hungarian government[18] filed annulment actions before the Court of Justice of the European Union against the two relocation decisions, citing the lack of proportionality of the measures adopted in the decisions. The two actions were connected, and the Court's verdict was announced in September 2017. By the Court's Decision, the two actions were rejected as unfounded, with the reasoning that the two decisions were adopted in compliance with the primary norms of Union law. The responsible state is, in the interpretation of the Court of Justice of the European Union (CJEU):

> The system set up by Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece is based—like the system established by Regulation No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person—on objective criteria rather than on a preference expressed by an applicant for international protection. In particular, the rule concerning the responsibility of the Member State of first entry, laid down in Article 13(1) of that regulation, which is the only rule for determining the responsible Member State laid down in that regulation from which Decision 2015/1601 derogates, is not linked to the applicant's preference for a particular host Member State and does not specifically seek to ensure that there are linguistic, cultural or social ties between the applicant and the responsible Member State.[19]

It should be highlighted that most states supported the application of the principle of solidarity by both institutions and Member States.[20]

The structural modification of FRONTEX and the modification of the Dublin regulations[21] were measures by which the Union reacted to the immigration crisis. We show that through the adoption of Regulation No. 2016/1624, significant improvements were made regarding the management of the Union's external borders. Article 1 of the Regulation stipulates:

17 C-643/15 *Slovak Republic v. Council of the European Union*, Judgment, 6 September 2017, ECLI:EU:C:2017:631.

18 C-647/15 *Hungary v. Council of the European Union*, 3 December 2015, Joined Cases C-643/15 and C-647/15, Judgment, 6 September 2017, ECLI:EU:C:2017:631.

19 Joined Cases C643/15 and C647/15 *Slovak Republic and Hungary v Council of the European Union*, Judgment, 6 September 2017, ECLI:EU:C:2017:631.

20 Wissing, 2019, pp. 45–90.

21 Benkova, 2017.

> This Regulation establishes a European Border and Coast Guard to ensure European integrated border management at the external borders with a view to managing the crossing of the external borders efficiently. This includes addressing migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension, to ensure a high level of internal security within the Union in full respect for fundamental rights, while safeguarding the free movement of persons within it.[22]

Case C-808/18 was also on the CJEU's docket, in which the Commission asked the Court to rule on the action brought, having as its object the finding of non-fulfilment of obligations, formulated based on Article 258 TFEU, against Hungary. By the decision pronounced in the Grand Chamber, the action is admitted in part, and it is noted that:

> Hungary has failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115/EC,[23] under Article 6, Article 24(3), Article 43 and Article 46(5) of Directive 2013/32/EU[24] and under Articles 8, 9 and 11 of Directive 2013/33/EU:[25]
> – in providing those applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke (Hungary) and Tompa (Hungary), while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily;
> – in establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa, without

22 Regulation (EU) No. 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) No. 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16 September 2016, pp. 1–76.

23 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

24 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, *OJ L 180, 29 June 2013, pp. 60–95.*

25 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection *OJ L 180, 29 June 2013, pp. 96–116.*

observing the guarantees provided for in Article 24(3) and Article 43 of Directive 2013/32 and Articles 8, 9 and 11 of Directive 2013/33;
- in allowing the removal of all third-country nationals staying illegally in its territory, except for those of them who are suspected of having committed a criminal offence, without observing the procedures and safeguards laid down in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115;
- in making the exercise by applicants for international protection who fall within the scope of Article 46(5) of Directive 2013/32 of their right to remain in its territory subject to conditions contrary to EU law;[26]

The decision of the CJEU determined a series of academic[27] or jurisdictional[28] reactions, which balanced the need for common rules of the Union, especially when the fundamental values provided for in Article 2 of TEU are involved, with the delimitation of competence between the European Union and the states in a context in which the competences are shared. Romania has consistently positioned itself in the interpretation given by the Court of Justice of the EU, developing procedures to limit illegal migration without violating human rights or international asylum guarantees.

2. National border crossing regulations

The Law No. 122/2006[29] contains the legal provisions relating to the legal regime of foreigners who request international protection in Romania, the legal regime of foreigners who are beneficiaries of international protection in Romania, and the specific procedures for granting, terminating, or cancelling international protection. The law also establishes the rules regarding the designation of the Member State responsible for the analysis of the asylum application, as well as the manner in which the specific activities for temporary protection are carried out (Article 1 of the Law).

In the interpretation of specific terms, Romanian legislation refers to the legislative acts of the Union in particular for the implementation of the criteria

26 C-808/18 *Commission v Hungary*, Judgment, 17 december 2020, ECLI:EU:C:2020:1029, para. 317.

27 Małgorzata, 2022, pp. 151–168. In domestic law and the practice of civil courts, there is consistent jurisprudence regarding the return of persons who are illegally on the territory of the Romanian state. See also Civil Decision No. 145/2018, Constanța Court of Appeal, Civil Decision No. 2753/June 12, 2018, Bucharest Court of Appeal.

28 Constitutional Court of Hungary Decision 32/2021 on the joint exercise of powers [Online]. Available at: https://hunconcourt.hu/decisions/decision-32-2021-on-the-joint-excercise-of-powers/ (Accessed: 29 June 2023).

29 Law 122/2006, published in the Official Gazette, part 1, No. 428 of 26 May 2006.

and mechanisms for determining the Member State responsible for examining an application for international protection presented in one of the Member States by a foreigner – Regulation (EU) No. 604/2013[30] (the Dublin Regulation) and Regulation (EU) No. 603/2013[31] (The Eurodac Regulation).

The concept of mass influx is also defined as 'Arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided' (Law No. 122/2006, Article 2(m)).

The principles underlying asylum policies are access to the asylum procedure, non-discrimination, non-refoulement, family unity, the best interests of the child, prioritisation of those with special needs, confidentiality, non-punishment of those who have received asylum status, and the presumption of good faith.[32]

In practice, the people who cross the border illegally and request a form of international protection are citizens from third countries who, attracted by the mirage of a good standard of living in European countries, seek to leave their home state and try by any means to reach this land of promise. Most of them know, even before leaving their real domicile, that they cannot in legal terms be granted the refugee status that is recognised upon request regarding a foreign citizen who, following a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinions, or belonging to a certain social group; or to persons who are outside their country of origin and who cannot or, because of this fear, do not want to request the protection of that country, as well as a stateless person who, being outside the country of their habitual residence for the previously mentioned reasons, cannot or, because of this fear, do not want to return to that country, and to whom the causes of exclusion from the recognition of refugee status provided by this law do not apply (Article 23 of Law No. 122/2006).

Nor can the subsidiary protection be applied to them which is granted to a foreign citizen or a stateless person who cannot be accepted as a refugee but for

30 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), published in the Official Journal of the European Union, series L, No. 180 of June 29, 2013.

31 Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) published in the Official Journal of the European Union, series L, No. 180 of 29 June 2013.

32 Arts. 4–16 of Law 122/2006.

whom there are serious fears that, in case of return to the country of origin, he will be exposed to a serious risk, materialising in either being sentenced to the death penalty or the execution of such a penalty, torture, inhuman or degrading treatment or punishment, or a serious, individual threat to life or integrity, as defined in Article 26 of the Law.

Refugee status or subsidiary protection applies under the Law equally to family members of those applying for the status.

The provisions of the law are supplemented by the regulation of the Government Emergency Ordinance (GEO) No. 15 of 2022, which regulates the extraordinary situation of foreign citizens or stateless persons coming from the conflict zone in Ukraine,[33] GEO 194 of 2002 regarding the regime of foreigners in Romania,[34] OG No. 44 of 2004 on social integration.[35] At the legislative level, Romania is aligned with the highest international and European standards for ensuring a legal[36] and organisational framework to guarantee the rights of persons seeking asylum or seeking or benefiting from a form of international protection. There were no actions by the European Commission against Romania and there were no referrals to the CJEU to establish that Romania did not fulfil or improperly fulfilled its obligations as a Member State in the matter of asylum.

The border police are organised according to the provisions of GEO 104/2001.[37] Its tasks and responsibilities are stated in Article 21 of the Law: a) it performs supervision and control at the crossing of the state border of Romania and prevents and combats illegal migration and cross-border crime around competence, as well as any other violation of the legal regime of the state border; b) it carries out the control of documents for crossing the state border at crossing points open to international traffic, at the entrance to and exit from the free zones, at the points of low traffic and simplified crossings, or in other places according to the law; c) it supervises, through permanent direct observation, the airspace adjacent to the state border and the territorial sea; d) it ensures the application of

33 Emergency Government Ordinance No. 15 of 2022 regarding the provision of humanitarian support and assistance by the Romanian state to foreign citizens and stateless persons in special situations, originating from the armed conflict zone in Ukraine, published in the Official Gazette, Part I, No. 193 of 27 February 2022, amended and supplemented.

34 Republished in the Official Gazette, part I, No. 421 of 5 June 2008, with amendments.

35 Government Ordinance No. 44 of 29 January 2004, regarding the social integration of foreigners who have acquired international protection or a right of residence in Romania, as well as citizens of the Member States of the European Union, the European Economic Area and citizens of the Swiss Confederation, published in the Official Gazette, Part I , No. 93 of 31 January 2004, with amendments and additions.

36 Constitutional Court of Roumania, 2022, Decision No. 616/2022 regarding the rejection of the exception of unconstitutionality of the provisions of Art. 77(2), of Art. 82(4) and of Art. 83 of the Government Emergency Ordinance No. 194/2002 regarding the regime of foreigners in Romania, published in the Official Gazette, Part I, No. 399 of 9 May 2023 (Accessed: 25 January 2024).

37 Government Emergency Ordinance 104/2001, published in the Official Gazette, part I, No. 351 of 29 June 2001.

the provisions of treaties, agreements, conventions and protocols regarding the state border and border crossing control concluded by Romania with neighbouring states, with other states, and with international or regional organisations; e) it organises and carries out cooperation, in specific fields of activity, with similar bodies of neighbouring states, of other states or communities of states, according to bilateral or multilateral agreements to which Romania is a party; f) it organises actions for the discovery and identification of persons who have violated or about whom data is held that they intend to violate the rules of the legal regime of the state border, as well as other legal provisions established in the competence; g) it participates with border police officers and with technical equipment made available to the Agency in the joint operations/activities organised by the Agency to secure the external borders of the European Union; and h) it carries out activities for the detection of criminal facts and, through the criminal investigation bodies of the judicial police within the Romanian Border Police, carries out investigations in relation to them, according to the law.

3. The provisions of the criminal law regarding crimes aimed at crossing the state border

Considering the specifics of the border activity, we show that, in terms of subject matter, territorial jurisdiction, and criminal procedural norms, the border policeman appointed under the law has the power of a criminal investigation body. In accordance with the provisions of Article 24 of GEO 104/2001, at the state border crossing points, in the border waters, on the inner Danube, the Măcin arm, the maritime Danube, the Danube-Black Sea Canal, the Sulina Canal; in areas located outside the border area, inland maritime waters, and territorial sea, as well as the contiguous area and the exclusive economic zone of Romania in which the Romanian Border Police has jurisdiction, the investigative bodies of the judicial police within the Romanian Border Police carry out the criminal investigation of any crime which is not necessarily given in the competence of other investigative bodies.

The Romanian Penal Code[38] regulates the crimes that may occur upon crossing the state border. Article 262 of the Criminal Code criminalises the fraudulent crossing of the state border, stipulating that entering or leaving the country by illegally crossing the state border of Romania is punishable by imprisonment from 6 months to 3 years or a fine. If the deed was committed either for the purpose of evading criminal liability or from the execution of a punishment or an educational, custodial measure, or by a foreigner declared undesirable or

38 Law 286/2009 published in the Official monitor, Part I, No. 510 of 24 July 2009, with subsequent amendments and additions.

who was prohibited in any way from the right to enter or stay in the country, the penalty is imprisonment from 1 to 5 years. For this crime, the attempt is punished with half of the legal classification of the deed. The law also introduces a cause of non-punishment, in the sense that if the crime is committed by a person who has been a victim of human trafficking, they will not be punished.

Article 263 of the criminal code criminalises the trafficking of migrants, defined as the instructing, guiding, transporting, transferring, or harbouring of individuals for the purposes of fraudulently crossing Romania's state border. The offense shall be punishable by no less than 2 and no more than 7 years of imprisonment, but the punishment shall be no less than 3 and no more than 10 years in a case in which it was committed in one of the following ways: a) to obtain material gain, directly or indirectly; b) using means that endanger the life, integrity, or health of the migrant; of c) by subjecting migrants to inhuman or degrading treatment. An attempt shall also be punishable for this offense.

The phenomenon of migration is often linked to the activity of organised crime. For example, generally taking advantage of the vulnerable situation in which people find themselves (victims of trafficking are overwhelmingly women and children, who come from disadvantaged backgrounds characterised by lack of education, lack of a stable source of income, etc.),[39] traffickers recruit them to then transport them across borders to richer regions to be exploited.

If trafficking is carried out to a significant extent by misleading the victim,[40] the trafficker also benefits from the victim's active cooperation in crossing the border and then not leaving the territory of the host countries, even if they live in marginalised circumstances on the edge of subsistence.

Article 264 of the criminal code regulates the constitutive content of the crime of facilitating illegal stay in Romania, defined as the act of a person who facilitates, by any means, the illegal stay on Romanian territory of a person who is victim of a human trafficking crime or of minors or migrants who do not have Romanian citizenship or domicile in Romania. The crime is punishable by imprisonment from 1 to 5 years and the prohibition of the exercise of certain rights, and if the means used constitute a crime by itself, the rules on the competition of crimes are applied.

The punishment limits are increased from 2 to 7 years if the crime was committed either with the aim of obtaining, directly or indirectly, a patrimonial benefit, or by a public official in the exercise of his duties.

Article 265 of the Criminal Code regulates the crime of evading removal measures from the territory of Romania as punishable by imprisonment from 3 months to 2 years or a fine.

39 Manea and Tiugan, 2021, p. 183.

40 Moreover, in the national criminal law, misleading the victim is also one of the essential requirements necessary to achieve the objective side of the crime of human trafficking. For more details see Manea, 2022, pp. 238–239.

4. Schengen – between the technical fulfilment of the admission conditions and the political decision at the level of the Member States of the Union

The Schengen area is based on the Schengen Agreement, signed on June 14, 1985, between the Federal Republic of Germany, France, Belgium, Luxembourg, and the Netherlands regarding the elimination of border controls between them. On June 19 1990, the Convention implementing the Schengen Agreement was drawn up and signed, through which controls at the internal borders of the signatory states were eliminated and a single external border was created, especially regarding immigration control.

The Schengen area is made up of 27 Member States, the last states to join being the Principality of Liechtenstein (19 December 2011) and Croatia on 1 January, 2023.

The Convention implementing the Schengen Agreement provides for the following provisions, legislated to facilitate the free movement of people: 1) Elimination of internal border controls. 2) Rules that apply to all persons crossing the external borders of the Union. 3) Enhanced cooperation in the police field. 4) Judicial cooperation through a rapid system of extradition and transfer of the execution of criminal judgments. 5) Creation and development of the Schengen Information System, the Schengen II system being in force.

The accession treaty of Romania and Bulgaria to the European Union provides, in protocol I, Article 4(2), that the provisions of the entire Schengen acquis will apply only on the basis of a European decision adopted by the Council in this regard after verifying, in accordance with the Schengen evaluation procedures applicable in the matter,[41] that the conditions necessary for the application of all relevant parts of the acquis have been met on the territory of the respective state.[42] In 2011, it was found that the minimum conditions for membership were met, but the opposition of the Netherlands and Finland blocked admission to the

41 Boicean and Morar, 2023, pp. 36–40.

42 Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union), and the Republic of Bulgaria and Romania concerning the accession of the Republic of Bulgaria and Romania to the European Union. OJ L 157, 21 June 2005, pp. 11–395.

Schengen area.[43] From 2011 until 2022, the admission was postponed, mainly due to the opposition of the two states.

In response to the criticisms and questions of the Netherlands, in October 2022 an independent mission was carried out to verify the fulfilment by Romania and Bulgaria of the conditions and standards for access to the Schengen area. The conclusion of the report was:

> Taking into account all the above the on-site team did not identify any issues as regards the application of the latest developments of the Schengen acquis. This conclusion applies to both Bulgaria and Romania, for the key elements of the Schengen acquis i.e., management of the external borders, police cooperation, return, Schengen Information System, and visa as well as the respect for fundamental rights and the functioning of the authorities that apply the relevant parts of the Schengen acquis. The on-site team therefore considers that Bulgaria and Romania continue to meet the conditions necessary to apply all relevant parts of the Schengen acquis in full.[44]

However, even if the European Parliament and the Commission[45] unreservedly supported Romania's accession to the Schengen area, unanimity was not achieved in the Council because of the negative votes of Austria and the Netherlands.[46]

Without starting polemical discussions on such issues as national political interests or the possession of control levers, especially regarding the maritime access of products in the Schengen area, we show that the principles of solidarity and loyal cooperation are seriously affected by such decisions. At the same time, the passivity of the Romanian and Bulgarian authorities, who did not refer the unjustified and discriminatory vote by the Netherlands and Austria to the CJEU, raises deep questions. The recent decision to admit Romania and Bulgaria to Schengen regarding air and maritime traffic[47] is only a minor step in solving an inequity that has tended to become endemic in the European space. The recent concerns of the European Commission to change the rules of access from third countries and asylum procedures do not enjoy a consensus at the European level, and the strengthening of controls at the borders between states within the Schengen area has generated a feeling of lack of trust in the policies common.

43 Consiliul Uniunii Europene, 2011, pp. 2–8.
44 Services of the Commission, 2022, p. 75.
45 European Commission, 16 November 2022, pp. 2–13.
46 Consiliul Uniunii Europene, 2022.
47 Council Decision (EU) 2024/210 of 30 December 2023 on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania, ST/17132/2023/INIT, OJ L, 2024/210, 4 January 2024.

5. Practical aspects of illegal migration in and from Romania

In 2022, 4,965 Ukrainian citizens were detected when crossing/attempting to cross the border illegally to enter Romania, compared to only 16 situations in 2021. A few of the 4,883 Ukrainian citizens who crossed the border illegally requested international protection, of whom 775 requested asylum and 4,108 requested only temporary protection.[48]

In 2022, due to the increase in human traffic through the border crossing points, 26.2% of the activities were carried out at the border with Hungary. In the same year, 5,272 illegal border crossings or attempted crossings were detected, an increase of about 10% compared to the previous year, and 613 migrant trafficking crimes were identified, down by one third compared to the previous year. Among the criminal acts, one third were found at the external border of the Union with Ukraine.[49]

The reports of the Border Police show that there has been a significant decrease in illegal migration at the Romanian border, the number in 2022 being 43,825 foreigners involved in some form of illegal border crossing, of whom 9,944 were detected on the way in, 63,557 on the way out, and 27,524 whose direction of travel towards the western states was interrupted. This may be compared to the figures for 2014, when 3,256 acts of illegal migration were detected,[50] and for 2018, when 10,551 people were detected in an illegal border crossing action.[51] In 2021, access to Romania was not allowed for a few of 11,232 citizens from third countries, and among criminal acts, those regarding the illegal crossing of the border represented 4,820 acts, an increase of 73% compared to the previous year.[52]

Referring to illegal immigration routes, there are concerns regarding the major increase in the number of those using the Eastern Mediterranean route, with direct implications for the Western Balkans route, which also involves illegal migration in and through Romania. The doubling of the number of those detected in activities crossing the external border of the Union on the Western Balkans route involves concerted activities of the authorities in Romania, Bulgaria, Hungary, and Slovakia, including those specified in the implementation of Regulation 2019/1896 on the Border Police and the Coast Guard.

In relation to access to the territory of Romania, in 2022 there was a significant decrease in the pressure of illegal immigration at the border with Serbia of almost 60% compared to 2021 as a result of enhanced border security measures and of increased response capacity through Frontex activities. The returns to Serbia

48 Poliția de Frontieră Română, 2023, p. 3.
49 Ibid., pp. 5–9.
50 Poliția de Frontieră Română, 2015, pp. 1–4.
51 Poliția de Frontieră Română, 2020, p. 13.
52 Poliția de Frontieră Română, 2022, pp. 7–8.

based on the bilateral agreement continued, thus stopping at the external border the illegal migration attempts of some citizens whose destination countries were Western European states. From the perspective of the procedures, Romania has, according to the asylum law, the following types of procedures: 1) Regular procedure. 2) Prioritised examination. 3) Fast-track processing. 4) Dublin procedure. 5) Admissibility procedure. 6) Border procedure. 7) Accelerated procedure.

The institutions involved in the asylum procedure are the General Inspectorate for Immigration and the courts within the jurisdiction of the Courts of Appeal at the Border points. Romania has regional holding centres in Timișoara, Șomcuta Mare, Rădăuți, București, and Galați, even if the holding conditions are not at an acceptable level of comfort. In most instances a relocation is carried out from the centre of Timișoara to the other centres for reasons related to the capacity of the space and the current overcrowding in the west. The Border Police has powers to prevent and combat border crime, as well as to prevent illegal immigration and people-trafficking. Even if the data are not completely consistent[53] between the relevant institutions, the number of those who were returned to Serbia does not exceed 700 people.

With reference to the Schengen rules for ensuring border security, it should be noted that, according to the Timișoara Border Police, which is responsible for the counties in the west of the country, 6,107 people were prevented from entering the country in 2019, 34,938 in 2020, 75,303 in 2021, and 27,469 in 2022.[54]

6. Statistics regarding requests for international protection and residence permits in Romania

At a statistical level,[55] we note a constant increase in the total number of citizens from third countries who obtained a first residence permit in Romania. Thus, in 2014, the number of those who received a residence permit was 10,294 people, while in 2019, the number increased to 27,103 people. During the pandemic, there was a decrease in the number of those who received a residence permit, 17,844 in 2020 and 44,783 in 2022. In 2023, as of June 23, 24,460 residence permits has been issued. The increase in the number of permits is correlated with employability in the labour market. From the point of view of the citizenship of those who received a residence permit, if in 2014 the first three positions were occupied by Moldova (1,401 people), Turkey (1,129), and China (980), in 2019 the greatest numbers were citizens of Moldova (3,968), Vietnam (3,892), and Turkey (2,955). In 2022, the most third-country nationals who acquired a residence permit come from Nepal (7,188),

53 Asylum Information Database, Country Report: Romania, pp. 19–22.

54 Ibid., pp. 23–24.

55 Data and statistics related to immigration are made available by the General Inspectorate for Immigration through address 103278 of 23 June 2023, non-public.

Sri Lanka (5,403), and Turkey (5,005); and in the first six months of 2023, 5,599 citizens of Nepal, 4,059 of Sri Lanka, and 1,979 of Bangladesh received residence permits.

By age group and sex, in 2014, 2,594 people under 19 received residence permits, of whom 1,190 were women; 7,363 were between 20 and 69, of whom 2,623 were women; and 337 were over 60, of whom 160 were women. Thus, in 2014, among the people who received a residence permit, almost 40% were women. In 2019, 4,336 people under the age of 19, of whom 2,065 were women; 22,307 people between 20 and 69, of whom 4,978 were women; and 460 people over 60, of whom 185 were women, received residence permits. Thus, in 2019, among the people who received a residence permit, almost 27% were women. In 2022, 4,577 people under the age of 19, of whom 2,110 were women; 39,484 people between 20 and 69, of whom 7,388 were women; and 722 people over 60, of whom 292 were women, received residence permits. Thus, in 2022, among the people who received a residence permit, almost 22% were women. There has thus been a significant decrease over time in the number of women who received a residence permit, one motivation being the field of activity in which the persons who benefited from a residence permit were employed (especially in construction and the hospitality industry).

In the period 2014–2023, 47,096 people altogether applied for international protection in Romania, of whom there were 1,545 people in 2014, 1,260 people in 2015, and 4,815 people in 2017; since 2020, the number of applicants has increased exponentially: 6,155 in 2020, 9,585 in 2021, and 12,355 in 2022. From these statistics, we see that Romania was not an important route of migration to western countries during the peak period of illegal immigration, and from 2021, the increase in the number of citizens seeking international protection is a direct consequence of the armed aggression against Ukraine.

In the 2014–2023 period, 20,124 return decisions were issued, of which there were 1,813 in 2014, 2,568 in 2019, and 4,315 in 2022.

As a result of the war in Ukraine, in 2022 6,252,766 Ukrainian citizens were registered at Romania's borders, a three-fold increase from the values of the previous year, of whom 1,305,390 were children.

7. Conclusion

Migration represents one of the Union's major challenges, with a major impact on its and the Member States' public policies, as well as on the delimitation of powers between the Union and the States. The recent initiatives to establish common policies regarding asylum, the establishment of much tighter deadlines for the settlement of requests, and the strengthening of the participation of Union institutions in the mechanisms in which the States have traditionally exercised their competence can represent endurance tests for the parties involved.

On the one hand, migration is necessary for the Union, as the economy still needs workers to support the growth and stability of production in the Member States. The situation of Romania, with over 3 million workers in legal migration to other Member States, but also with a deficit of over 200,000 employees, is emblematic of the whole philosophy of the Union construction. Romania cannot repatriate its citizens in gainful activities, as salaries are not at a level that is competitive with those obtained in more economically developed states. Romania is becoming a destination state for citizens from Asian states with extremely low standards of living. Concurrently, for those who resort to illegal migration, Romania does not represent a destination challenge, as it is constantly bypassed by migration flows on the Western Balkans routes.

On the other hand, the recent decision of the CJEU against Hungary might mark the beginning of a new asylum policy and European strategies on migration by restricting the intervention of Member States in the admission policies of requests for international protection. The challenges will be accentuated by the rise of nationalist political manifestations, and further developments may be unpredictable. The idea of unity and solidarity can be compromised from within, as positions lacking viable arguments regarding the expansion of the Schengen area can have the consequence of decreasing the feeling of loyal cooperation between states. During this time, the Union cannot turn into a fortress with walls at all external borders without losing its openness to citizens and to collaboration with states that face economic and social difficulties.

Having analysed Romania's balanced position of strengthening its border control capabilities and opening up for migrant workers, I conclude that the Romanian model can serve as a reference for common policies regarding asylum and control at external borders.

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Efficiency in Protection of Rights and Frontiers: Hungarian Law and Practice of External Borders Control

ABSTRACT: *Migration of human beings was always an essential activity, a permanent part and changing factor of civilisations. As such, particularly in Europe, migration is to be considered as an activity comprising switching between locations and shifting between historical periods. Moreover, these movements of people have been an important factor of cultural enrichment for all the new periods of European civilisation. However, with the formation of nation-states an important change, at least from a legal and political viewpoint, was revealed: as much as individual rights of persons acquired a constitutional importance, the protection of the state and the nation that is defined also with cultural characteristics became a state-aim: fundamental rights of people should be protected as well as public policy should be maintained and national security safeguarded. Moreover, human rights' protection became increasingly important at a supranational level, and because of the achievement of the Schengen zone, the regulation on the movement of people became a shared competence between the European Union and its Member States. For a country, such as Hungary, having a rich, sometimes tragical historical experience of the protection of its borders that are also first frontiers of Western Europe, in times of globalisation, also with regards to its sovereignty, several questions were raised and discussed for the adoption of legal regulation in application nowadays. Hungary challenged supranational law on the abstract matter of fundamental rights of migrants and on the EU-rules defined by directives in a field of shared competences. When presenting Hungarian regulation, it is to be examined how a special equilibrium can be achieved between rights and state-aims, supranational and national law, a phenomenon of globalisation and the preservation of national sovereignty.*

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■ **KEYWORDS:** migration law, Schengen regulation, fundamental rights of migrants, border control, illegal migration

1. Introductive remarks on the challenges of migration

To obtain a comprehensive understanding on the timely discussion about Hungary's policies on border protection with sufficient complexity and nuances, a longer introduction presents some general challenges on migration policy, and thereafter, specifically applies to a Central European and Hungarian context. The next section presents the Hungarian institutional and legal framework of border control with specific focus on its recent developments according to political decisions. Section 3 presents the supranational legal context as Hungary should and shall react according to decisions, particularly judgements taken in the European supranational law. That is how in law and in practice, the section aims to speak as much about protection of rights as protection of borders, however, selecting the concept of efficiency as a guiding idea for the study.

First, it would be important to highlight some fundamental ideas about migration. As much as the word has been in use, particularly in political discourse, more recently it is often misunderstood. Migration should be defined and placed in a historical and geographical context to obtain a clear view of a common social phenomenon. The first part of the introduction examines migration and the political and legal responses from a historical perspective considering contemporary challenges.[1] The second part presents ideas on the special Central European concept on migration. These elements examine the extent to which the Hungarian migration policy and the legal and institutional framework is established and the challenges for harmonisation with supranational expectations can be contextualised.

■ *1.1. General considerations on migration*

Migration is defined as one of the most common human activities: changing location between two geographical places. It comprises three specific actions: leaving, moving, and arriving. When migration crosses national borders, it is called international or nowadays, transnational migration, which necessitates the control of national borders. Migration is not only between countries, often none of such national borders is crossed, as it can be intranational movement of people. Moreover, it is increasingly common that several national frontiers are crossed during migration as new migration roads are longer.

1 Ritecz and Sallai, 2016, p. 26.

National borders do not mean the same frontiers that existed from the beginning of an international order created by sovereign states. After the second world war, owing to important development of international cooperation, particularly, at a regional level, mostly in Europe, supranational orders were progressively established. One of the aims for the project of a regional integration was to unmake the borders; and such a project of regional integration demanded for the supranational legal order to be realised effectively and efficiently.

However, before reaching the end of historical development, it should be recalled that migration is not only an individual but also a social phenomenon; mostly, it is characterised by the mass movement of people. As such, it has contributed significantly to the development of European civilisation as the migrants bring both their material goods and cultures to their new living place. Moreover, historical periods are often established according to such movements of people as they are precursors of a new era. The Greek civilisation—the mythic origin of the name "Europe" is proof of that—is founded on the cultural heritage of Asia minor. The Roman dominance in Europe did not remove the ancient Greek roots of European civilisation; contrarily, entered into a fecund dialogue with it. The arrival of Christians in many parts of Europe brought a new religion and their different cultural backgrounds. The Barbarians arrived with their own traditions, however, became used to the common European stock of civilisation (ancient Greek culture, roman law, Christianism). The list could be continued including the Arabic occupation of the Mediterranean region for intellectual and cultural life in Europe or one could analyse the civilisational crash after the discovery of other continents by Europeans.

Sometimes on the crossroads between cultures, the newcomers brought more than they could receive, and sometimes, contrarily, they mostly embraced what they found, substituting their own traditions with the new one. Although such processes require several generations, it is clear that some of these interactions were more aggressive than others, slower and more peaceful.

However, four centuries ago, something important changed, in a more general aspect but directly concerning the theme of migration. The rise of capitalism, reform of the Church and discovery of the world by Europeans, led, first, to a European hegemony and thereafter to colonisation. However, to ensure the pacific coexistence of political communities in Europe, the international order appeared, ruled by legal concepts replacing the dogmas of the universal catholic church.

The European community of values became a community based on legal norms. For centuries, Europe became the leader of the international community, and it often forced its own concepts and ways to be accepted in international relation. Alternatively, it promoted the international legal order based no more on religious doctrines but legal principles following progressively the ideas of Enlightenment. One should remember that Grotius questioned the universal

character of religion when defending the possibility of contractual obligations with Indonesian people.

Regarding migration, it is significant to recall the reinforcement of the nation-state that brought to the legal doctrine the strong principle of sovereignty exercised on a determined national territory and a defined population. With respect to the population, the concept of nation became crucial even under a cultural aspect. It should be remembered that even the states following the concept of political citizenship, used education and cultural life to reinforce the same civilisational characteristics for their entire population and even in their colonies from the end of the 19th century.

Prior to that, the identity of citizens was not so closely defined by their nationalities. Although, in ancient Greece, there were specific legal regulations on the status of the person with respect to the state, the polis that the person belongs to, and the legal rules of the polis defined the status of others, sometimes with different layers of relationships to the polis (*meteikos* in Athens, *pereikos* in Sparta); the identity of those people was simply Hellenic. In Rome, particularly, when it became an empire, different identities lived together. Their status was important only politically as the different changes in Roman civic law proves— sometimes considering the citizenship as a privilege, sometimes as a burden depending on the historical context. Finally, for medieval Europe, the identity was religious, and the Church was universal. Moreover, the status of the person depended on its place and role in the feudal structure of the society. The national identity and protection of national civilisation arrived with the nation-states from the beginning of the aforementioned period because of the radical changes already mentioned.

During historical periods, there were always some regulations regarding migration, for example, the *ius pellegrini* from Roman law. During feudalism, the right to leave the region of the lord, was a privilege that could not be easily obtained. The personal relation between persons according to the feudal order meant an obligation to remain on the same geographical location. Thus, for the movement of people, liberalism that appeared during the same historical period, was an important step forward.

Furthermore, states became increasingly protective about their territory and attempted to create a homogenous nation on it; simultaneously, the individual freedom of people could receive legal protection. The free movement became a birthright of citizens who could decide, not without important restrictions, to change their place of living. In the historical context, the development of industry and commerce required people to move freely and the states attempted to attract capital, products and people for their economic development. Until the end of the 19th century, the legal regulations were defined by these conditions.

■ *1.2. The Central European and the Hungarian context*

The circumstances were somehow different for the Central European countries, and for a detailed understanding it is important—to understand, for example, why V4 countries are helping Hungary to protect its borders nowadays and not Frontex—to clearly see these differences. They are owing to two related factors: the specific geographical position of the Central European region and its proper historical development and experience.

Central Europe is a region between East and West also connected to the South of Europe. This geographical position made it more sensitive not as much for migration, but for the consequences that migration can have. The position of Central Europe places the region in between, particularly, in between cultures and civilisations. Sometimes, it is a question of choice, as the region opted to be a part of Western Europe more than one thousand years ago. However, sometimes, it makes the region more receptive to other influences, particularly when those influences are militarily or economically stronger. A complicated effort is required to determine the equilibrium in this in between region, attempting to follow its development according to its proper intentions and under the conditions and the circumstances forced from outside of the region.

It had an important consequence on the political and social vision on migration. However, more importantly, the fact that the region was often under occupation and that the aforementioned historical transition could not be achieved as elsewhere in Europe, affected the development of the region in a way that directly concerns the issue of migration. When other European regions opened to the world, Central Europe attempted to close itself for its own protection. Later, when national culture and traditions were flourishing in Western Europe, their development in Central Europe faced many obstacles: lack of independent state, different states for the same nationalities and different nationalities in the same state, external manoeuvres to weaken the region by misusing nationalism as a political ideology.

However, an important example, the concept of national minority and the need for its protection appeared in Central Europe and became important because of the experience of being governed in multi-ethnic empires. Simultaneously, strong historical nations raised their own demands for sovereignty although such demands were not met for a century. The example of Hungary is one of the most characteristic, maybe with Poland. The concept of nation and state-territory could form in difficult conditions and could not follow the same target of development as in Western Europe.

For those multi-ethnic and multi-religious empires, the movements of people were sometimes restricted to maintain the late feudal order as well as a fragile equilibrium between ethnicities. Contrarily, sometimes, the central empirical power decided to oblige people to move from one region to another, changing sensitively the cultural conditions with a mass movement of people.

These movements were sometimes sustained by the concerned population, whereas during other periods and locations, only a violent order of the state could move those people. Moreover, it should be noted that this type of obligatory movement of people based on their religion or ethnicity was ordered, shamefully, during the middle of the 20th century in Central Europe (moving Germans, but also Hungarians, from their homeland to other different countries).

This historical experience, instead of creating openness and encouraging self-defence, and the lack of nation-state and the fragile orders changed the ethnical equilibrium of different regions, made the Central European approach different to the issue of migration. Some multi-ethnic countries could become a strong nation after the fall of empires, however, mostly the historical conflicts reappeared or reappears even nowadays making the region more reluctant and resilient to the issue of migration.

Finally, for Central Europe, the experience of socialism is an important factor. As much as ideologically, communism argued for universalism and openness owing to the dictatorial and oppressive character of the regime; it was a period of closed and strongly defended borders. The iron curtain was the reality of borders for many central Europeans for half a century; the free movement of people was unimaginable and the control, the protection of the border was one of the most essential tasks of the socialist states. One would say that the border became a fetish for the regime as much as it could become a symbol for freedom and change, when finally, it could be reopened. This experience combined with the unfortunate period of wars in the region (Yugoslavian civil war and now the war in Ukraine) had an important impact on the definition of legal and institutional framework for border protection in the region and in Hungary.

2. The Hungarian legal and institutional framework

This section presents the Hungarian legal and institutional framework of border protection. For the institutional aspects, this section recalls important reforms in the last three decades.[2] First, the Socialist military organised border control became a modern function of the police; thereafter, different measures attempted to reinforce the capacity of Hungary with respect to the demands of new European regulations; and finally, the increasingly important challenge of the appearance of the illegal migration phenomenon at the Southern border of Hungary. From a legal perspective, with every change in its legislation, Hungary attempted to sustain the intention to effectively protect the Hungarian and European borders as its historical heritage also predestines the country. However, owing to the supranational legislation and its interpretation by supranational courts, presented

2 Ritecz, 2017, p. 654.

in detail in Section 3, these legislations should have been changed frequently to ensure efficient protection of borders, the original will expressed by Hungarian political majority, and to respect the requirement of efficient protection of migrant people imposed by supranational institutions and organs. As much as Hungary remains open to a legally regulated migration, from the European countries owing to the free movement of people, and in the framework of the different processes for visa, benefitting third-country nationals, it remains strict when it fights any forms of illegal migration, particularly founded on an abusive exercise of the right to asylum. By ensuring the necessary material and legal conditions, Hungary attempts to avoid the massive influx of migrants who are not eligible for international protection, but are only aiming to enter the Schengen zone.

■ *2.1. Recent changes and development of the bodies controlling Hungarian borders*

After the change of regime, the protection of national borders of Hungary remained the duty of the Hungarian Army. An important body comprising 20,000 soldiers was assigned with the task, however, their number was soon reduced. Moreover, the nature of protection changed with the fall of iron curtain. However, for 17 years, the army continues to be responsible for the border control with the special body of the border guard integrated into the army.

During this period, the first important change was to replace the circumscribed soldiers with professional ones. The reform was applied gradually and became effective from 1998. From this period, only professional soldiers were tasked with guarding the borders of Hungary. The other important reform was to create an independent body for the protection of the borders. In 2004, it was decided to separate the border guard from the army. Regarding the numbers, although the Parliament authorised to recruit 12,000 people to protect the borders, this number could never be achieved.

Hungary became a member of the Schengen zone on 21 December 2007. To achieve this an important preparation was realised in the development of technical and material support and under an institutional and legal aspect to better organise the protection of the borders and the administrative tasks related to the border control. From 1 January 2008, the border guard was integrated into the police which means that the protection of national borders became a function of Hungarian Police after three years of independence of the border-protecting body.

As a consequence of the accession of Hungary to the Schengen area, the national border was divided into two categories: more than half of the national border (1,139 km) became an internal border in the Schengen zone, and the other half (1103,5 km) an external frontier of the zone attaching special importance to and requiring the respect of European standards for its protection. The situation changed when Croatia recently entered the Schengen zone as the 345 km long common border became an internal one.

For the external border of Schengen area, Hungary ensures the protection according to European regulations as implemented in its internal legal order, at three levels of control. The first level of control where the control is at high intensity, is guaranteed by the border guard at the external border of the Schengen area—for the internal borders the same function is conducted by the local police. The second level of control is applied by the departmental police, disposing of special units for border control, deep control, and the administration of foreigners. Finally, as a third level, the rapid intervention police with competence covering the entire national territory, can proceed to deep control. The latter became particularly important after 2016 with a special intensity of those controls.

First, as an answer to the migration crisis,[3] the rapid intervention police was reinforced for the protection of national security and public policy under the new circumstances. When the new directorate of border guard of the rapid intervention police began to work in 2016, it had a personal capital of 2000 policemen. However, despite such an impressive reinforcement, it was difficult to organise the effective control at the southern regions of Hungary.[4]

Finally, the recent establishment of the border-hunters aims to fulfil the need for human resources to ensure the efficient protection of the border. However, the existing units were insufficient in exercising the same intensity of control at the southern border of the country, especially after the war began in Ukraine. First, the army was redirected to the protection of the national borders, and thereafter the establishment of the border-hunter unit was decreed. This new unit should comprise 4,000 policemen, however, in the first step, only 2,208 will be employed – by the end of 2022, more than 1,000 men and women were engaged.

Therefore, the primary functions of Hungarian authorities participating in border protection are defined according to European regulations. However, because of the political choice of Hungary to ensure the protection of its borders according to its proper policies after the crisis of 2015, the Frontex Agency decided to cease its operations in Hungary. Consequently, Hungary requested the help of the V4 countries and Austria to control the southern border of Schengen area in Hungary.

Hence, the protection of the external Schengen border in Hungary is organised according to European legalisation, but in conformity with Hungarian political choices employing the Hungarian police and some representatives of the national authorities of the neighbouring countries. As the Fundamental Law of Hungary states, the Police participates in the fight against illegal migration. According to the Act on Police,[5] the primary functions of the police are the protection of the borders; prevention, investigation, interdiction of the illegal passes on

3 Varga, 2016, p. 97.
4 Varga, 2017.
5 Act XXXIV of 1994 on the Police.

the borders; control of persons, vehicles, and products passing by the borders; organisation of the conversion at the border; insurance of the security of the check points; and organisation of their everyday working methods.

■ *2.2. A continuous legal reform for the efficiency of border control after 2015*

As aforementioned, prior to its accession to the Schengen zone, Hungary prepared its national legislation on the protection of borders in accordance with the European rules. The Act on the National Border[6] and Act on Asylum[7] were adopted in 2007 having the same aim of transposing European directives and ensuring conformity with Hungarian legislation. The institutional and organisational background was ready with the new border guard in the framework of the national police. Therefore, although its techniques had to be developed and equipment renewed, Hungary was able to ensure the protection of external Schengen borders.

However, the events of 2015 made Hungary entirely reinvent the legal background for an efficient protection of its borders.[8] The immigration crisis resulted in a never experienced increase in the number of people arriving at the southern border of Hungary, passing the border by any means with the intention of asking for international protection. Simultaneously, the majority of people coming from Syria, but also from Pakistan, Bangladesh or Afghanistan did not aim to stay in Hungary, but settle down in Western European countries expecting better conditions of life and opportunities after a long and dangerous journey through some already secure third countries outside the Schengen zone.

As the European statistics reflect, more than three-fourth of the incoming migrants asking for international protection, do not receive any form of asylum and are required to leave the Schengen area. However, because of the important number of those people, but particularly as their countries of origin refuse to welcome their citizens back to their homeland, European states face significant difficulty in sending them back or making them leave the Schengen area. This leads to complicated social and human situations.

Hungary decided to use every legal possibility at its disposal to avoid the entrance of people outside its check points and their retention for the administrative procedure to examine their demand for international protection.[9] This task was not easy.[10] First, Hungary had insufficient human resources for better protection of borders. Additionally, it was decided to construct fences at the southern border to help the control. This important investment was realised promptly, at the personal request of the Prime Minister; fences were installed by the beginning of autumn of 2016.

6 Act LXXXIX of 2007 on the State Borders.
7 Act LXXX of 2007 on asylum.
8 Balla, 2017, p. 91.
9 Balla and Kui, 2017, p. 234.
10 Bezerédi, 2018, p. 22.

However, in addition to the reinforcement of human capacities and the technical instruments of protection, the legal framework had to be revisited. In many legal acts, different reforms were applied to constitutionalise some aspects of the fight against illegal migration, to penalise some behaviour in relation with the illegal passes of the national borders, to reorganise the administrative process of the examination of demands for international protection. Moreover, as explained in detail in the next section, the legal reforms—the construction of a legal fence for the borders as the political communication introduced it for the public opinion—had to be in accordance with international engagement of Hungary and the EU law. Hungary continues to receive people under international protection (many Ukrainians fleeing the war received the protection from Hungary), including many third-country nationals with other visa titles (such as students, workers). The only, but statistically the most important category of third-country nationals making Hungarian authorities rethink the legal framework, is the group of people often coming from countries far away from Hungary, but entering the Schengen area through Hungary, willing to apply for international protection.

However, European regulations that proved insufficient to administrate such a situation, appear to be an obstacle for Hungarian legal solutions. Therefore, since 2017, the Hungarian legislation that has been progressively declared, as much as the Hungarian practice considered, as illegal, should be changed. This implies that a continuous reform of the Hungarian legislation was conducted simultaneous to a permanent political and legal discussion at the level of European organisation. The present section does not aim to analyse the political discourse, and the legal disputes are presented in the next section. However, the mention of the supranational reactions is important to understand the rapid development of measures and their abrogation a couple of years after their adoption.

The basic problem was not related to the physical protection of the external borders of Schengen area. Hungarian police with the help of Frontex were able to exercise necessary control. Neither was it related to the visa procedures or other administrative aspects related to the treatment of foreigners in Hungary. Further, for privileged or general categories, for employment or studies, third-country nationals could arrive without any obstacles.

The only category of third-country citizens willing to pass the national borders was refugees, people asking for international protection. As much as in Greece and Italy, in Hungary that is at the southern border of the Schengen area, the administrative handling of such an incoming mass of people represented a significant challenge. However, contrary to Greece or Italy, Hungary attempted to solve the problem at the arrival of people, as the continental and not maritime border allowed Hungary to do so, by stopping the people at the border, and not allowing them to enter before the administrative procedure of the examination of their demands, and refouling them in case of a negative decision.

First, Hungary wanted to ensure that all people arrive legally to its territory. Therefore, it reinforced the protection of the borders, penalised the illegal pass with consequence of refusal to enter the national territory and expulsion, and for those who arrived legally, it organised prompt and efficient procedure for the judgement of the demands at a half-closed zone, the transit zone. Further, Hungary decided to incriminate the action of non-governmental organisations helping migrants cross the border illegally. Finally, it made the administrative process speedy; the judicial structure could pronounce the necessary decisions for retention or expulsion.

The third-country national who wanted to arrive in Schengen zone by passing the Hungarian borders on the Balkan Road, could attempt to pass the border illegally, however, if and when arrested, they were expulsed automatically by the judges despite their demand for international protection, as they cannot remain on national Hungarian territory when they arrive illegally. Those who passed the check points, were obliged to stay in the transit zone that they could not leave in the direction of Hungary, while waiting for the decision of the administrative process related to their demand for international protection; in case of a positive outcome, they could enter Hungary, in case of refusal, they were sent back to Serbia. Once transit zones were closed after the judgement of the Court of Justice, considering those to be a form of illegal retention of people, and condemning Hungary for that, according to a new legislation only those who had already received a positive preliminary response at Hungarian embassies could pass the border to request international protection in Hungary.

Under the framework of the new Hungarian legislation, according to the provisions of the national Act on the transitional rules relating to the end of the state of emergency and on the pandemic crisis, only those people could access the procedure of granting international protection or of making an application for that, who had already initiated a procedure at a Hungarian diplomatic representation. Therefore, because of the pandemic crisis, and even after that, to avoid the massive arrival of third-country nationals in Hungarian territory—simultaneous to the argument on the protection of public health, to maintain public policy and to safeguard national security—making an application for international protection in Hungarian territory, including the borders, is conditioned to such an undergoing procedure initiated, as the relevant government decree states, at Hungarian embassies in Belgrade or in Kyiv, the neighbouring countries that are not members of the European Union. This procedure comprises presenting a declaration of intent in respect of lodging of an asylum application by filling an administrative form at the aforementioned embassies. The declaration is examined by competent authorities who can also conduct remote interviews. In two months, those authorities shall provide a first decision authorising the person with a single-entry travel document issued by the embassies to arrive at Hungary and make its application. When the person arrives at the Hungarian border with

such an authorisation valid for one month, he or she can enter the country, make its application and the procedure will efficiently be followed. For example, the border police has the obligation to conduct the person with such a travel document before the competent authority within 24 hours to enable him or her to make the application for international protection.

However, some categories of people are exempted from these rules and can without such a declaration of intention, demand international protection in Hungarian territory. People who are beneficiary of subsidiary protection, the family members of the refugee or beneficiary of secondary protection or persons subject to coercive measures are not obliged to undergo such a procedure for the presentation of the declaration of intent at Hungarian embassies. Moreover, Ukrainian nationals or legal residents in Ukraine could make their application without such a requirement of the declaration according to the government decree adopted the day after Russia attacked Ukraine. However, those who arrive at the Hungarian borders without filling the form at the embassies and carrying the aforementioned travel document, cannot make an application for international protection, and should return to Belgrade to fulfil the requirement of such a declaration of intent. Further, those who cross the borders irregularly and are captured by Hungarian authorities, are returned to Serbia without the possibility to make an application; they have to make the declaration of intention in Belgrade and come back with the valid travel document to be able to do so.

Such a regulation is founded on the intention to avoid the massive arrival of people to the national territory in a pandemic crisis. The more efficient organisation of their entry owing to the filter and the preparation of their procedure can help to avoid contact between them and the people who are regular residents of Hungary. Moreover, the regulation is motivated by the voluntary choice of Hungary to protect its borders efficiently and the individual rights of the persons applying for international protection or residents in Hungarian territory. Nevertheless, as always, maintaining the public policy and safeguarding the national security remain the primary aim in this regard. Furthermore, Hungary argues its sovereign right, even as a member state of the European Union and the Schengen area, to decide about the conditions to access its national territory in conformity with its international and European engagements. The next section demonstrates that for the Court of Justice of the European Union, such a Hungarian regulation is always in force because of the recent character of the judgement, but is not in conformity with the European law.

3. Hungarian measures with regards to its supranational obligations

Legal reforms in Hungary to determine an efficient solution for the immigration of people requesting international protection—only a small percentage of them

obtain the right to be protected under asylum by the end of the administrative procedure—were not so easily implemented because of two basic difficulties: first, the supranational law of the European Union applies as immigration, visa and asylum are subject to a shared competence of the EU; second, migration closely concerns individual human rights and their violations as pronounced by supranational fora. Thus, Hungarian legislation was abrogated and new rules were adopted.

Particularly, the dispute with European institutions and some of the member states who were not open to radically change the former European legislation, nor to apply it in a more severe way so that the abusive demands for international protection did not lead to a permanent stay of increasingly more people in Schengen zone without any permit or status allowing them to do so, obliged Hungary having a strict position on this subject, to use all the constitutional and legal instruments that it had, to organise the border control as it wanted to.

The present section analyses, not in a chronological but a hierarchical order, the Hungarian legal rules, the equilibrium that they attempted to establish between efficient protection of borders and rights of people, and the way they attempted to protect Hungarian sovereign right to control its borders, particularly the incoming flux of people to its national territory.

The highest level employed was the referendum organised in October 2016. The referendum about migration only concerned the immigrational challenge in an indirect way. The question of Hungarian electors was formulated not on the migration itself but about the competence of the EU to regulate the issue: 'Do you agree to the right of the EU to settle foreigners on national soil without the approval of Hungarian National Assembly?' This question is interesting but dwells on the opposition of Hungary to the idea of relocation of people demanding international protection—the relevant Decision of the Council were attacked by Hungary and Slovakia for annulment before the Court of Justice[11]—by the European Union, and the protection of its sovereignty to decide on such a matter than on the immigration itself. As is well known, the referendum was invalid as majority of the electors were absent from the vote.

The next level was constitutional. The Government introduced the seventh amendment to the Fundamental Law to incorporate into the European clausula of the Hungarian Constitution, the right of Hungary to decide about its population alone. At the time, when it was introduced, the political majority lost its two third of voices in the National Assembly, therefore, the amendment could only be adopted after the legislative elections in 2018, when the same political force obtained the majority required for constitutional reform. The reform also added to the constitutional regulation of asylum that those persons who came from a third secure country were not eligible for such a right.

11 CJEU, C-643/15, C-647/15 joined cases *Slovak Republic and Hungary v. Council of the European Union*, Judgement, 6 September 2017, EU:C:2017:631.

According to the relevant decision of the Constitutional Court of Hungary this latter modification does not imply that someone who arrives in Hungary, cannot obtain asylum in Hungary. Actually, the Constitutional Court of Hungary had to intervene three times on the subject of migration. As a next level of the normative fight on European migration policy, those decisions should be explained.

The first one pronounced by the end of 2016,[12] was adopted on the request for constitutional interpretation by the Hungarian ombudsman who asked several questions about the constitutionality of the eventual application of the Council decision about relocating those who ask for international protection in Greece or in Italy. As it has been explained, Hungarian Government being against the decision organised a referendum not on the decision itself, neither on its consequences, but on the question about sharing competences between national institutions directly representing the nation and the institutions of the European Union.

In this context, simultaneously, the Hungarian ombudsman worried about the constitutionality of the application of such a decision by Hungarian authorities. The Constitution Court decided not to answer on the substantial question whether the application of the decision would not be in conformity with international engagements and constitutional provisions. Rather, it used the case to consider the relationship between national constitutionalism and the legal norms of the EU. It stated that it has, as national constitutional court in cooperation with the Court of Justice of the EU, the competence to control the constitutionality of the application of a decision adopted by European institutions. Further, it summarised what constitutional principles could be an obstacle to the execution of such European acts. However, by avoiding to speak on migration itself, it avoided a direct contradiction with European law.

In the second decision[13] that we already mentioned, it should also pronounce on the merit of the case as it had to provide an interpretation of the newly adopted constitutional provision. The interpretation was created to once again somehow escape a direct contradiction, as a total refusal of demands for international protection would clearly result in non-conformity with European law and that, on the level of the constitutional text. Simultaneously, the Constitutional Court of Hungary used that case as well to reinforce its competences: it said that it was alone responsible for the authentic interpretation of the Hungarian constitution, and that its interpretation is obligatory to any other institutions, including European ones. It is clear that the two statements were required to avoid the third one, an eventual judgement of the Court of Justice concluding to an opposition to the EU law by a constitutional provision of Hungary.

12 Decision of the Constitutional Court of Hungary 22/2016. (XII. 5.).

13 Decision of the Constitutional Court of Hungary 2/2019. (III. 5.).

Thereafter, a third decision[14] was pronounced by the end of 2021 on the question of relocation of migrants. This third decision is also more interesting in its aspects concerning the relations between national constitutional law and the legal order of the EU than on the migration itself, where it is once again creative. The interesting part is about efficiency, and Hungarian Constitutional Court states that if in the field of shared competences, the EU cannot produce an efficient regulation capable to guarantee the respect of fundamental rights then the member states can retake the competences to apply them with more efficiency. The reference is clear when the direct effect and the primacy of EU law, according to the historical jurisprudence of the Court of Justice, is founded on the idea of efficiency of the integration.

Regarding the migration, the Constitutional Court of Hungary provides a special explanation about violation of fundamental rights: it is about the right to human dignity of the Hungarian citizens and Hungarian residents. According to the opinion of the majority of the judges, the determination of the cultural background in which those citizens and residents would like to live, is part of their right to human dignity. Hence, when this background is modified because of the relocation of people with different cultures and traditions, this right would be violated.

As much as the Hungarian Constitutional Court, the Court of Justice also had to pronounce some decisions about Hungarian legislation on migration. One can easily determine that usually those decisions concluded to the non-conformity of Hungarian norms with EU law on migration. It is important to highlight that when sanctioned by the Court of Justice, Hungary always respected the decision and changed its legislation. Simultaneously, Hungary always aimed at the protection of its border against illegal migration with new normative measures.

Before the condemnation of the Hungarian legislation, the first judgement of the Court of Justice on the matter, was about the validity of the Council decision on the relocation of migrants requesting international protection.[15] When Hungary and Slovakia argued for the invalidity of the decision, although at least eleven different legal arguments were presented by those two countries, and Poland that intervened in the case, the Court decided that the decision is valid. However, nowadays, it is evident that this decision was not necessary and proportional and that it had more important consequences than a temporary measure could provide.

14 Decision of the Constitutional Court of Hungary 32/2021. (XII. 20.).

15 CJEU, C-643/15, C-647/15 joined cases *Slovak Republic and Hungary v. Council of the European Union*, Judgement, 6 September 2017, EU:C:2017:631.

Thereafter, in a procedure of preliminary ruling,[16] and later on in a procedure for failure to fulfil obligations,[17] the Court of Justice decided that the Hungarian legalisation obliging the asylum seeker to present their application for asylum exclusively in transit zones which was only accessible for a small number of persons, was not in accordance with European directives nor the practice of Hungarian authorities automatically returning those who stayed illegally in Hungary to a third country.

In the next case produced also in the framework of a procedure for failure to fulfil the obligations, the Court of Justice sanctioned the Hungarian legislation about the criminalisation of the activity of an organisation helping the asylum seeker, when their activity could contribute directly to encourage them to illegally pass the national borders. Although the noxious role of those organisation was denounced several times, it is clear that this type of criminal provisions are risky and particularly, difficult to apply as it is impossible to prove a direct link between the intention of a migrant to illegally cross the border and the activity of a non-governmental organisation.

The latest case when once again for failure to fulfil its obligations, Hungary was condemned by the Court of Justice of the European Union, was about the Hungarian legislation obliging, after the interdiction of transit zones, those who ask for international protection, to make a declaration of intent first in Hungarian embassies in the neighbouring secure third countries and arrive in Hungary already filtered owing to this preapplication approved beforehand by national authorities.[18] The chief aim of this last national legislation, as already mentioned, was to prevent health risk in a pandemic context, owing to illegal immigration, however, not allowing people to arrive by any means in a member state when they would like to apply for asylum, is not possible in a way that would be in conformity with European directives.

To conclude this section, it is evident that Hungary aimed to avoid illegal migration by every possible level of legal regulation. However, it is also clear that it did not succeed to do so, at least, not in a way that would be in conformity with European law. As Hungary always respected the decision of the Court of Justice, it always abrogated its rules. Simultaneously, this dispute between Hungarian government and European institutions resulted in interesting constitutional and European case laws not largely on migration but on the relationship between national constitutional and European legal orders.

16 CJEU, C-924/19 PPU, C-925/19 PPU joined cases *FMS, FMZ, SA, SA junior*, Judgement, 14 May 2020, EU:C:2020:367.

17 CJEU, C-808/18 *Commission v. Hungary*, Judgement, 17 December 2020, EU:C:2020:1029.

18 CJEU, C-823/21 *Commission v. Hungary*, Judgement, 22 June 2023, EU:C:2023:504.

To conclude it is important to recall the chief characteristics of the Hungarian approach to the protection of border. First, it should be highlighted that migration has always been an important phenomenon in Europe on a historical scale. The European civilisation is constructed and enriched by the dialogue created between cultures travelling with people, although that dialogue was not always balanced between the newcomers and the autochthons. An important change intervened several centuries ago offering a new framework. Second, it should be also remembered that Central Europe exactly during the same period of history was detoured of its organic evolution. If the geographical position of the region caused a necessary and continuous manoeuvring between different centres of power, the occupation by empires and their action on migration had an important impact on the approach of the countries of the region to this issue, making them reluctant to open their borders.

Regarding the legal aspects, the first important constate is that despite migration being a social phenomenon, it is on an individual level that the rules are defined which causes many paradoxes. The status of the person passing the border is defined and in modern constitutionality, his or her fundamental rights are protected. The protection of rights of migrant people is in conflict with the aim of the protection of borders of the state based on its constitutional obligation to defend national security and public order. A balance should be found between those rights and national sovereignty exercised when borders are protected. Second, it should also be recalled that the supranational law became increasingly important in the field of border control. The supranational protection of fundamental rights weakened the capacity of the states to act according to their political will. Alternatively, more importantly, the protection of borders is a shared competence between European Union and member states in the Schengen zone.

Concerning Hungary, it has some recent experiences on the protection of its borders. First, because during socialism, the protection of the iron curtain was ensured by Hungarian People's Army. Thereafter, during the same period when the first institutional reforms were realised making national police responsible for the protection of borders, a first refugee crisis concerned Hungary directly. It received about 160,000 refugees from ex-Yugoslavia and at least another 200,000 people arriving in Hungary to escape the war but without asking for international protection. Second, it is already a part of the Schengen area for which Hungary again reorganised its institutional and legal framework on border protection that it entered into owing to the crisis beginning in 2015, and more recently hosted many—their number continues to rise unfortunately, therefore, it would be difficult to provide an exact number—Ukrainians, also coming because of the war in this neighbouring country.

It is clearly the crisis of 2015 and the severe intention of Hungary to determine a solution against illegal migration that made border control the focus of political discussion, law-making and jurisprudence. This political position of

Hungary made it face critics from supranational institutions making migration the primary example for studies on the dynamics of relationships between national and supranational legal orders. However, by all means, Hungary attempted to construct its political approach guiding its migration policies but could not do so because of the frequent sanctions from supranational bodies. It is noteworthy that Hungary always respected the verdict of those courts despite their conclusions being disputable. As part of the Schengen zone, without any help of the organs of the EU, Hungary organises an efficient control of its borders and attempts to ensure the protection of individual rights simultaneously, however, clearly outside of the logics of supranational acts. The conflict remains open and the political discussions as much as the legal disputes continue providing more material to study on the matter. It is expected that when participating in such discussions and disputes, the chief political and judicial actors will approach the cases with sufficient understanding of the complexity and information on the nuances of the Hungarian situation.

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GORANKA LALIĆ NOVAK*

Return Policies for Irregular Migrants and Rejected Asylum Seekers in Croatia

ABSTRACT: *Croatia acceded to the European Union in 2013 and the Schengen Area in 2023; it is located on the EU's external border and the so-called Western Balkans irregular migration route, one of the main corridors for migrants travelling to the EU. Over the years, Croatian authorities have developed national immigration policies, including various measures to prevent irregular migration on Croatian territory and protect state borders. Nonetheless, Croatia is still perceived as a transit country and a point of entry into the EU by many irregular migrants and refugees. This paper provides an overview of measures for the return of irregular migrants and rejected asylum seekers in Croatia. In addition to discussing the most relevant legislation regulating return policies, the paper presents available statistical data on the work of the relevant Croatian authorities (the Ministry of Interior and courts). It analyses current practices of administrative and constitutional courts, as well as some actions taken by the European Court of Human Rights against Croatia. It concludes with some general comments on Croatia's return policy. The analyses of legislation, mainly the Aliens Act and to some extent, the International and Temporary Protection Act, shows that Croatia has regulated in detail different measures within its return policies. This legislation aligns with the EU and Schengen acquis communautaire, and provides different safeguards for vulnerable groups of migrants. Legal remedies and judicial protection are guaranteed by the relevant law. However, in practice there are certain shortcomings that need to be addressed.*

KEYWORDS: return policies, irregular migrants, rejected asylum seekers, judicial practice, Croatia

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1. Introduction

The Republic of Croatia (RoC hereinafter) is located in Central and Southeast Europe; due to its geostrategic position between Central Europe, the Mediterranean, and the Balkans, it has been exposed to migration for centuries.

Croatia acceded to the EU in 2013 and the Schengen Area in 2023, and is situated on the external EU border and the so-called Western Balkans irregular migration route, one of the key corridors for migrants heading for the EU. According to Frontex, between January and April 2023 the Western Balkans route (which passes through Serbia and Bosnia, the main transit countries to Hungary and Croatia), was the second most active, with more than 22,500 detections, down 21 per cent from 2022.[1]

Over the years, Croatian authorities have formulated national immigration policies that encompass diverse measures aimed at preventing irregular migration within Croatian territory and safeguarding state borders.[2] However, for many irregular migrants and refugees, Croatia is still perceived as a transit country and an entry point to the EU and, more recently, the Schengen area. Accordingly, the number of asylum seekers is on the rise: in 2022, 12,872 people expressed their intention to apply for international protection, representing a dramatic increase compared to the 2021 figure of 3,039 people.[3] At the same time, between 2017 and 2022, there were many warnings and reports of international and national non-governmental organisations and other actors on push-backs of refugees and migrants from Croatia coupled with limited access to international protection.

Croatian legislation concerning migration and asylum has been developed following the EU and Schengen *acquis communautaire*; it is also based on the Constitution of the RoC.[4] According to Art. 26 of the Constitution, aliens are equal to Croatian citizens before the courts, governmental agencies, and other bodies vested with public authority. The Aliens Act is the main legislation that regulates penalties against irregular entry or stay of third-country nationals (TCNs hereinafter) in the RoC.[5] The asylum system is regulated by the International and Temporary Protection Act.[6]

1 Frontex: Detections in Central Mediterranean at record level and all the available bibliographical data, 2023.
2 See Lalić Novak and Giljević, 2022; Lalić Novak, 2022.
3 CLC, 2023, p. 16.
4 Constitution of the RoC, Official Gazette, Nos. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010 – consolidated text, 5/2014.
5 Aliens Act, Official Gazette, Nos. 133/2020, 114/2022, 151/2022.
6 International and Temporary Protection Act, Official Gazette, Nos. 70/2015, 127/2017, 33/2023.

The main authority for the overall implementation of migration and asylum policies is the Ministry of the Interior (MoI hereinafter).[7] It consists of the headquarters (the central level administration), the police administration (the regional level), and the police station (the local level). It is, however, a unified hierarchical organisation; lower organisational units are strictly subordinate towards the higher organisational units and the centralised organisation. The territorial organisation of the MoI is based on the so-called divergent organisational structure model, in which organisational units cover a particular territory; together, they cover the entire RoC territory. The MoI is in charge of implementing measures stipulated in the return policies related to irregular migrants and rejected asylum seekers.

Following an appeal to the High Administrative Court, the decisions made in the MoI's administrative procedures can be the subject of judicial review by one of the administrative courts established in 2012 in Zagreb, Split, Rijeka, and Osijek. If an administrative procedure is found to violate the constitutional rights of the individual, a constitutional complaint can be filed with the Constitutional Court.

This paper provides an overview of measures for the return of irregular migrants and rejected asylum seekers in Croatia. In addition to discussing the most relevant legislation that regulates return policies, the paper presents available statistical data about the work of relevant Croatian authorities (i.e. the MoI and courts). It analyses current practices of the administrative courts and Constitutional Court, as well as some actions taken by the European Court for Human Rights against Croatia. In its final part, the paper offers some concluding remarks regarding return policies in Croatia.

2. Legislation with regard to return policies and available statistical data

According to the Aliens Act, offences committed by a TCN with respect to irregular entry or stay in the RoC can be categorised into two groups depending on their severity. Offences are considered as either relatively minor, for which the fine is monetary, or more serious, for which the penalty is either a monetary fine or detention. A specific regime is in place for European Economic Area (EEA hereinafter) citizens and TCNs who are EU Blue Card holders and their family members.

In 2020, 2021, and 2022, there were 29,094, 17,404, and 50,624 cases, respectively, in which actions were taken against people who illegally crossed the state

7 For the development of civilian oversight of law enforcement from 2011 onwards, see Giljević, 2022.

border.[8] The top three countries of origin in 2021 were Afghanistan, whose nationals accounted for 28 per cent of all illegal border crossings, followed by Pakistan and Turkey.[9]

The Criminal Code[10] does not recognise criminal offences that explicitly address unlawful entry or stay of TCNs in Croatia. The Code, however, contains the offence of unlawful entry into, movement, or residence in the RoC, another EU Member State, or signatory of the Schengen Agreement, which refers to assisting in illegally entering, moving, or residing. There is no criminal offence if an individual (without any assistance) illegally enters, leaves, moves, or stays in the RoC, but it is a misdemeanour for which the person will be held accountable, as described previously.[11]

In 2021, a total of 957 criminal offences (relating to 885 offenders) were recorded under Art. 326 of the Criminal Code. The number of criminal offences in 2021 increased by 37.1 per cent compared to 2020, as a consequence of ending measures introduced to combat COVID-19. Most of the perpetrators were citizens of the RoC, followed by Bosnia and Herzegovina, Italy, Serbia, Ukraine, and Romania.[12]

TCNs who have no legal basis to stay in Croatia are considered to be staying illegally and must leave the country without delay.[13] The measures for compelling someone to leave the RoC include voluntary departure, a ban on entering and staying, the restriction of freedom of movement (detention) and less coercive measures, forced removal, and other measures prescribed by the Aliens Act. However, these measures do not apply to TCNs detected near the external state border during or immediately after unlawful entry, TCNs who are denied entry at a border crossing, or TCNs who are to be extradited on the basis of an international treaty.[14]

When measures are taken to compel an individual to leave Croatia, several safeguards must be respected. These include protection of the best interest of minors and the needs of other vulnerable persons (persons with disability; older adults; pregnant women; single parents with minor children; victims of trafficking; victims of torture, rape or other serious forms of psychological, physical, or sexual violence, including, for instance, victims of female genital mutilation; and

8 MoI statistical data, [Online] Available: https://mup.gov.hr/otvoreni-podaci/287522 (Accessed: 1 June 2023).
9 EMN, 2022.
10 Criminal Code, Official Gazette, Nos. 125/2011; 144/2012; 56/2015; 61/2015; 101/2017; 118/2018; 126/2019; 84/2021; 114/2022.
11 Art. 326.
12 EMN, 2021.
13 Art. 183, para. 2, Aliens Act.
14 Art. 181, paras. 1, 3, Aliens Act.

people with mental disabilities). TCNs' family circumstances and health are also considered.[15]

In the case of a TCN illegally residing in Croatia or whose legal stay is to be terminated by a decision of the national body, the MoI issues a decision on return with the following elements: a statement that the TCN is illegally residing or will cease to legally reside in Croatia, a time limit for leaving the EEA (voluntary departure), announcement of forced removal if the TCN does not voluntarily leave the EEA, and an obligation to report at the border crossing when he or she leaves Croatia or at the diplomatic mission or consular post of the RoC after leaving the EEA.[16] The MoI is not obliged to issue a return decision in the following cases: if there is a risk of absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, if the TCN may be forcibly deported to another EEA Member State on the basis of a readmission agreement entered into force before 13 January 2009, or if the TCN poses a risk to public order or national security.[17] In these cases, the TCN will be expelled from Croatia. However, TCNs can also be expelled for illegally staying and crossing or attempting to cross the state border for other reasons.[18] The MoI may also issue a decision on the return or expulsion of TCNs illegally residing in the RoC or who have illegally crossed or attempted to cross the state border without conducting a misdemeanour procedure.[19]

There are two situations in which a TCN can be subjected to an expulsion order: illegal stay or increased social danger.[20] In the expulsion decision,[21] the MoI determines that a TCN is illegally residing or will cease to legally reside in Croatia, that he or she is required to leave the EEA, and the length of the ban on entry and stay in the EEA (such a ban on the grounds of illegal stay cannot be shorter than three months or longer than five years).[22] When deciding on expulsion, the MoI has to take into account vulnerability, length of residence in Croatia, age, health, family and economic connections, the level of social and cultural integration in Croatia, and ties to the country of origin.[23]

The structure and content of the form of the decisions on expulsion and return is stipulated by the Ordinance on the treatment of TCNs.[24] The forms are printed in Croatian, English, and at least five other languages most frequently

15 Art. 182, paras. 1, 2, Aliens Act.
16 Art. 184, Aliens Act.
17 Art. 185, para. 1, Aliens Act.
18 Art. 190, para. 1, Aliens Act.
19 Art. 186, para. 3, Aliens Act.
20 Art. 188 and 189, Aliens Act.
21 Art. 192, para. 1, Aliens Act.
22 In the case of expulsion on grounds of a threat to public policy, national security, and public health, the ban can be longer than 20 years (Art. 192, para. 5, Aliens Act).
23 Art. 191, para. 1, Aliens Act.
24 Ordinance on the treatment of TCNs, Official Gazette, No. 136/2021.

understood by TCNs staying illegally (to date, this has included Albanian, Arabic, Bengali, English, Farsi, French, Hindi, Pashto, Russian, Somalian, Spanish, Turkish, and Urdu). TCNs can be informed about the return procedure in the form of a written notice explaining the relevant information in a language he or she understands.

Voluntary departure, as a return measure, means compliance with the obligation to return within the time limit fixed for that purpose in the return decision. The length of the period for voluntary departure may not be shorter than seven days or longer than 30 days; it is determined with due regard to the specific circumstances of the individual case, taking into account, in particular, the prospect of return. The length of the period for voluntary departure might be shorter than seven days if there is a risk of absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the TCN poses a risk to public order or national security.[25] In justified cases, the length of the period for voluntary return could be longer than 30 days but not longer than a year.[26]

Under certain conditions, the entry and stay ban may be revoked, or the period may be shortened if the grounds for expulsion ceased to exist, for humanitarian or national security reasons, or if it is in the interest of the RoC. If a TCN has expressed the intention to seek asylum, the decision on expulsion remains valid but will not be enforced until his or her status has been determined.[27]

Forced removal means the enforcement of the obligation to return, the deportation from Croatia under police supervision, regardless of the TCN's willingness to leave. The TCN will be deported in two situations: if he or she failed to leave the EEA or RoC within the deadline set out by a decision, or if the MoI is not obliged to issue a return decision. Deportation will be carried out to the TCN's country of origin, to the country of transit from which he or she arrived in Croatia, to another third country with his or her consent, or to another EEA Member State on the basis of a readmission agreement that entered into force before 13 January, 2009 or under the Dublin procedure. If a decision on return contains a voluntary return period, the TCN will not be deported before the expiry of that period, unless it is established that at the time of the enforcement of the decision, there was a risk of absconding or that such a risk emerged after the decision was issued. TCNs who are caught at the external border during or immediately after illegal entry will be returned to the country from which he or she came to Croatia.[28] The deportation procedure is also envisaged for TCNs against whom an EEA Member State has issued a legally effective decision on expulsion and/or

25 Art. 184 and 185, para. 1, Aliens Act.
26 Art. 188, Aliens Act.
27 Art. 194, Aliens Act.
28 Art. 203, Aliens Act.

return.[29] In Art. 207, the Aliens Act also proscribes safeguards regarding forced removal (prohibition against refoulement and specific procedures in the case of an unaccompanied minor, who can be deported only if it has been established that he or she shall be returned to a member of his or her family, a nominated guardian, or adequate reception facilities in the state of return). In both cases, deportation will be postponed; this also occurs if the court has postponed the enforcement of a decision on return or expulsion. Forced removal can be temporarily postponed if a TCN's identity has not been established, if transportation is impossible, if during execution serious difficulties would arise due to the TCN's health condition, or for any other reasons making it impossible to forcibly remove the TCN. Forced removal can be postponed for a maximum of one year.[30]

The RoC has more than 30 readmission agreements in place, including with the countries at its external borders on the so-called Western Balkans route. Official MoI data about the number of returns based on readmission agreements is not publicly available. However, according to available reports, 290 and 380 people were readmitted to Bosnia and Herzegovina in 2020 and 2021, respectively. The reason for the low number of returns is that Bosnia does not recognise records and notes containing statements of migrants and officials as evidence of irregular border crossing; it only accepts as evidence documents issued by the Bosnian authorities (e.g. certificates of expressed intention to seek asylum, entry stamp), which are difficult to collect. Accordingly, Bosnian authorities reject a number of requests for summary readmission (in which the deadline for acceptance is within 24 hours of receiving the request). This practice can be observed even in cases with 'indisputable evidence that migrants had stayed in Bosnia and Herzegovina before illegally crossing the border and arriving in the RoC, were found immediately after illegally crossing the border by mixed Croatian and Bosnian police patrols'. In such cases, migrants must be detained, 'which represents a risk for the possibility of return'. Similarly, Serbia does not accept migrants in relation to the summary readmission procedure.[31]

Detention is generally justified based on the fact that aliens have broken the law, either by entering the state's territory without authorisation or staying after they have been ordered to leave. A TCN may be arrested and detained for up to 48 hours if it is necessary to establish his or her identity, to establish the circumstances of his or her illegal crossing of the state border or illegal stay, to

29 Art. 205, Aliens Act.

30 Art. 224, Aliens Act.

31 *Annual Report of the Independent Mechanism of Monitoring the Actions of Police Officers of the Ministry of the Interior in the Area of Illegal Migration and International Protection, June 2021 – June 2022.* (July 2022) p. 34. [Online] Available at: https://www.hck.hr/UserDocsImages/dokumenti/Azil,%20migracije,%20trgovanje%20ljudima/Godisnje%20izvjesce%20Nezavisnog%20mehanizma%20nadzora_1%20srpnja%202022.pdf?vel=2086968 (Accessed: 7 June 2023).

carry out forced removal, or if there is a risk that the TCN may abscond. Under certain circumstances, detention can be extended for a maximum of 24 hours.[32]

TCNs can only be held in a reception centre for aliens (closed centre) for as short a period as possible and only as long as removal arrangements are in progress and have been executed with due diligence.[33] TCNs can be detained for up to six months if there is a risk they may not comply with the obligation to leave the EEA or the RoC and only if the same purpose cannot be achieved by applying less coercive measures. Detention may be extended by not more than 12 months if the TCN has refused to provide personal or other information and documents required for forced removal, has provided false information, has prevented or in some other way delayed forced removal, or if it is justifiably expected to receive travel and other documents required for forced removal which were requested from another state.[34] The legislation allows for the detention of children, including unaccompanied children, as a measure of last resort and for the shortest possible time.

In 2022, a total of 905 aliens were detained in the Reception Centre for Aliens in Ježevo.[35] The most frequent countries of origin included Turkey (490), Afghanistan (71), India (64), Burundi (45), and China (41).[36] According to the 2019 report of the Special Representative on Migration and Refugees, TCNs detained in Ježevo lacked access to legal assistance or interpreters and had not been apprised of the reason for their detention. Detainees were not aware of their rights to have a lawyer or to appeal to a court against the detention decision.[37]

In order to enforce return, the MoI can impose less coercive measures than detention, including deposit of travel documents, travel papers, and travel tickets; deposit of certain financial funds; imposing an obligation to stay at particular address of accommodation; and requiring regular reporting to a police station at a particular time.[38] Although there are no absolute maximum time limits foreseen for the application of less coercive measures in the Aliens Act, it can be concluded that such measures may be imposed as long as and to the extent that they can still be considered a 'necessary measure' to enforce return.

In regard to asylum seekers, the MoI may grant a person asylum or subsidiary protection. It may also reject an application if the asylum seeker does not meet the conditions for asylum or subsidiary protection, if the conditions are met for exclusion, or as manifestly unfounded if the asylum seeker clearly does not meet

32 Art. 211, Aliens Act.
33 Art. 212, Aliens Act.
34 Art. 215, Aliens Act.
35 The Reception Centre for Aliens in Ježevo is used essentially as a pre-removal detention facility. In addition, two transit centres for irregular migrants were opened in Trilj and Tovarnik in 2017, close to the Serbian and Bosnian borders.
36 MoI statistical data, https://mup.gov.hr/otvoreni-podaci/287522 (Accessed: 1 June 2023).
37 Council of Europe, 2019, p. 33.
38 Art. 213, Aliens Act.

the conditions for asylum or subsidiary protection; there are also circumstances in which the MoI can make an accelerated decision.[39] Following a decision to reject an application or on the cessation or revocation of international protection, a subsequent decision will be rendered regarding a measure to ensure return pursuant to the provisions of the Aliens Act. When prescribing measures to ensure return of rejected asylum seekers, priority should be given to voluntary departure, unless the application was dismissed as clearly unfounded or if a subsequent application is dismissed as inadmissible.[40] If a rejected asylum seeker does not comply with the return decision, he or she will be considered an alien residing illegally in the RoC.

The freedom of movement of asylum seekers and aliens in transit is guaranteed by the International and Temporary Protection Act. According to Art. 54, freedom of movement can be restricted if, on the basis of all the facts and circumstances of the specific case, such restriction is deemed to be necessary for the purpose of: (1) establishing the facts and circumstances on which the application for international protection is based, and which cannot be established without restriction of movement, in particular if there is deemed a risk of flight; (2) establishing and verifying identity or citizenship; (3) protecting national security or public order; or (4) preventing abuse of the asylum procedure.[41]

3. Legal remedies in the case of expulsion and detention

Decisions of competent authorities concerning the refusal of the right of aliens to enter, stay, or reside are, by their legal nature, administrative acts and therefore fall under the scope of the General Administrative Procedure Act[42] (a general law applicable to all administrative proceedings). Specialised laws may regulate some procedural issues differently from the Act, but only under strictly regulated conditions. Only particular issues of administrative procedure can be regulated differently, and specific regulation is necessary for proceedings in a particular administrative area; such regulation cannot be contrary to the basic provisions and purpose of the General Administrative Procedure Act.[43] Therefore, the General Administrative Procedure Act must be respected and used as a subsidiary source

39 Art. 38, International and Temporary Protection Act.

40 Art. 37, International and Temporary Protection Act.

41 The following measures can be applied: (1) prohibition of movement outside the Reception Centre for asylum seekers, (2) prohibition of movement outside a specific area, (3) appearance in person at the Reception Centre at a specific time, (4) handing over travel documents or tickets for deposit at the Reception Centre, and (5) accommodation in the reception centre for aliens (Art. 54, para. 5, International and Temporary Protection Act).

42 General Administrative Procedure Act, Official Gazette, Nos. 47/2009; 110/2021.

43 Art. 3, para. 1.

of law in all issues which are not regulated by specialised legislation in the field of migration and asylum.

The right to legal remedy is one of the basic legal principles of the General Administrative Procedure Act, which stipulates the appeal and the complaint as the main legal remedies in relation to administrative procedure.[44] An appeal may be filed against a decision on the complaint made by the first instance body, whilst an administrative dispute may be instituted against a decision on the complaint made by the body of the second instance. If there is no second instance body, an administrative dispute may be instituted against the decision on the complaint.[45]

In cases in which there is no appeal against the administrative decision, it is possible to initiate an administrative dispute before the administrative court. Such a claim will postpone the enforcement of the administrative decision (though only if prescribed by the relevant legislation). In addition, the court may decide that the claim will postpone the enforcement of the decision if its enforcement would cause damage to a claimant that could be difficult to repair and if the postponement is not contrary to the public interest.[46]

Any breaches of human rights guaranteed by the Croatian Constitution fall under the jurisdiction of the Constitutional Court. With regards to constitutional complaints against individual decisions of state bodies, the Court decides whether these decisions violate human rights and fundamental freedoms. Citizens and legal entities may initiate a proceeding before the Constitutional Court only after exhausting ordinary legal remedies in the allotted period of 30 days.

No appeal is allowed against decisions on return or expulsion, but TCNs can initiate an administrative dispute;[47] this also applies to decisions on

44 Art. 12.

45 For more about extraordinary legal remedies (*ex officio* interventions), see Koprić et al. 2016. Art. 122, para. 4.

46 Art. 26, Administrative Disputes Act; Official Gazette, Nos. 20/2010; 143/2012; 152/2014; 94/2016; 29/2017; 110/2021.

47 The Aliens Act also stipulates that an administrative dispute can be initiated in the following cases: against a ban on entry and stay or the revocation of a ban on entry and stay if the TCN has a residence permit in another EEA Member State and a decision on expulsion has been issued (Art. 192, para. 4); in response to a negative decision on an application for revocation or shortening of the period of a ban on entry and stay (Art. 194, para. 4); on the forced removal of a TCN who has been granted international protection in another EEA Member State, or forced removal before the expiration of the period for voluntary departure (Art. 203, para. 8); if an EEA Member State has issued a legally effective decision on expulsion against the TCN (Art. 205); and in relation to extending the time limit for voluntary return (Art. 188). Under certain conditions, a TCN is granted the right to free legal assistance (legal advice and assistance in drafting a legal action and representation before the administrative court), but this assistance is limited to TCNs born in the RoC, TCNs staying in the RoC for an uninterrupted period of at least one year, TCNs who have a close family member with long-term residence or permanent stay in the RoC (or who is a Croatian citizen), and TCNs who are vulnerable people (Art. 198). Art. 187 and 193, Aliens Act.

accommodation in the centre (detention) and on extending such detention. The MoI must send a case file on detention to the administrative court immediately after the decision has been issued. The court must decide whether an alien is to be released from the centre within ten days from the delivery of the case file. The administrative court may annul or confirm the decision on extension of detention within five days of delivery of the case file. The obligation of the court to hold an oral hearing with the TCN has been narrowed and now only applies to minors.[48] An appeal against the decision to the High Administrative Court of the RoC is allowed. The appeal postpones the execution of the contested verdict. An administrative dispute can be initiated against the decision to apply less coercive measures.[49] An additional safeguard is provided in the form of regular *ex officio* judicial review of the lawfulness of extension of detention decisions. The MoI has to deliver to the administrative court the case file on detention at the latest ten days before the expiration of the first detention and every three months from the day of extension of detention. The administrative court has to decide, within ten days of delivery of the case file, whether an alien is to be released from the centre.[50]

In these cases, as the dispute was initiated by the delivery of the case files by the MoI to the administrative court, rather than by the filing of a lawsuit, it is considered a quasi-administrative dispute.[51] This form of judicial control over the work of the administration differs from a standard administrative dispute as follows:

(1) it is initiated *ex officio,* without a lawsuit, i.e. the addressee of the act cannot challenge the act independently, but the body that adopted the act only initiates the procedure for assessing its legality; (2) there are no parties (plaintiff, defendant and interested persons); (3) as a rule, there is no oral hearing (except in the case of minors); (4) a number of rules of the General Administrative Procedure Act[52] do not apply (on the submission of a claim to an answer, the principle of a party's statement, the principle of helping an ignorant party, the party's right to representation, etc.) and (5) it is not possible to challenge the court's decision.[53]

In 2022, the judicial review of decisions on restrictions of the freedom of movement of applicants for international protection and aliens in transfer was carried out by the Administrative Court in Zagreb, which assessed 40 decisions; 27 cases were rejected (subject remained detained), ten were adopted (subject was released from detention), one was adopted and referred back to the MoI procedure,

48 Art. 216, Aliens Act.
49 Art. 213, para. 4, Aliens Act.
50 Art. 216, paras. 5 and 8, Aliens Act.
51 This opinion is agreed upon by prominent authors in the field of administrative law; see: Šikić, 2019; Staničić, Britvić Vetma, and Horvat, 2017; Staničić and Horvat, 2020; Čeko Đanić and Held, 2019.
52 General Administrative Procedure Act, Official Gazette, Nos. 47/2009; 110/2021.
53 Staničić and Horvat, 2020, p. 17.

while two cases were transferred to another court. The average duration of these procedures was 38 days. In four cases, the High Administrative Court decided on appeals against administrative court decisions in the procedure of restriction of movement by accommodation in detention centres. In all cases, the appeals were rejected.[54]

A similar situation was observed in previous years. According to available analysis, between 2012 and 2020 there were a total of 1,959 decisions on detention by all (first instance) administrative courts, of which 1,743 (88.97%) confirmed the MoI decision.[55]

4. Practice of courts with respect to return policies in Croatia

■ *4.1. Practice of administrative courts*

In this paper, the practice of Croatian administrative courts with respect to return policies are analysed based on the available decisions in the official database of the Supreme Court.[56] Due to the fact that not all decisions are publicly available, quantitative analysis cannot be performed. Instead, typical decisions are presented to see how courts decide in cases of expulsion and the detention of migrants.

This paper's database research was conducted using the key legislation (the Aliens Act) and the relevant articles that regulate the possibility of initiating administrative disputes against the MoI's administrative decisions on expulsion or detention (described in the previous section). According to the research, there were no available decisions relating to return,[57] application for revocation or shortening of the period of the ban on entry and stay,[58] or on extending the time limit for voluntary return.[59]

A decision was available regarding a dispute against a decision on expulsion[60] and a ban on entry and stay.[61] The Administrative Court in Rijeka confirmed the MoI's administrative decision stating that:

> Since the decisive facts are not in dispute, the court did not consider further evidence in the dispute, including the evidence proposed by the plaintiff in the lawsuit about the circumstances of his life in RoC

54 CLC, 2023.
55 Staničić and Horvat, 2020, p. 18.
56 For the judicial practice, see the database available at https://sudskapraksa.csp.vsrh.hr/overview (Accessed 20 May 2023).
57 Art. 187.
58 Art. 194.
59 Art. 188.
60 Art. 193.
61 Art. 192.

> because the facts that could be determined by this evidence are not decisive for making a decision in this dispute...
> Therefore, contrary to the plaintiff's claims, the requirements set forth in the Aliens Act for expelling the plaintiff were met because he did not leave the EEA or RoC within the deadline set by the decision, and in addition, the plaintiff in the meantime did not obtain a decision granting him a possible legal stay in the RoC.[62]

In the same case, the plaintiff submitted a proposal for determining the delayed effect of the lawsuit until the finalization of the administrative dispute, based on the following claims: he has no family in the country of origin, his entire family was living in EEA territory, he had established a trading company in the RoC where he had lived for the last two years, and he had a justified fear for his life in case of deportation to the country of origin.

Most of the available court practices refer to judicial reviews of the legality of decisions on the detention of migrants. In most cases, the courts confirmed the MoI's administrative decisions, typically stating that 'the decision maker correctly established the existence of circumstances that indicate the existence of a risk of avoiding the obligation to leave the EEA, that is, the RoC'.[63]

The following explanation was given in one of the analysed decisions of the Administrative Court in Osijek.

> Based on the analysis of the file, there is a risk of avoiding forced removal, which is indicated by the established circumstances ... and which the alien himself expressly confirms in his statement. In addition, it cannot be convincingly concluded from the alien's behaviour that he would comply with less coercive measures, because he undoubtedly has no registered residence in Croatia, he crossed the state border illegally, and he himself declares that his intention is to go to France. From this follows a justified fear that he would try to illegally cross the state border again, since his goal is not to stay in Croatia but to achieve his ultimate goal of arriving in France by any means, without complying with legal procedures. The specific period of detention in which activities for the purpose of forced removal must be carried out with due care is considered by the court to be appropriate to the circumstances of the specific case and in accordance with the provisions of Article ...[64]

62 Administrative Court in Rijeka, Decision No. Us I-259/2021-5 of 22 September 2021.
63 Administrative Court in Osijek, Decision No. Us I-106/2023-2 of 26 January 2023.
64 Administrative Court in Osijek, Decision No. Us I-188/2023-2 of 8 February 2023.

In another case, the same court confirmed a decision about detention, but disputed its length (up to six months):

> However, with regard to accommodation in the Centre, the Court considers that the duration of detention is too strict and vaguely determined, and that the principle of proportionality was not respected. The decision must determine the length of detention for the shortest possible time ... and the length of detention is set for a duration that must be determined and which, in light of all the circumstances, does not necessarily exceed the necessary time of detention. The shortest term of detention encourages the police service to act promptly and thus reduces the restriction of fundamental freedoms to the shortest possible time.[65]

In this and several similar cases, the Court determined the length of detention to be a maximum of two months, reserving that if subsequently, due to some new circumstances, it turned out that this period was insufficient, the MoI could extend the period of detention.

■ *4.2. Practice of the Constitutional Court*

This paper analyses the practice of the Constitutional Court with respect to return policies based on publicly available decisions in the official database of the Court.[66] According to a database search based on the key legislation (Aliens Act), the Court made four decisions in which it decided on the conformity of certain articles of the Act with the Constitution.

In one case,[67] the People's Ombudsman and two other applicants challenged Art. 5, para. 2 of the (valid at the time) Aliens Act[68] with respect to the Constitution. According to the Act, any explanation of a decision rejecting or terminating the residence of or expelling an alien on national security grounds will only specify legal provisions, and will not elaborate on the national security grounds that informed the decision (which in practice means that the Security and Intelligence Agency does not provide the MoI with a report on the security check

65 Administrative Court in Osijek, Decision No. Us I-157/2023-2 of 6 February 2023. See a similar explanation in, e.g. decisions of the Administrative Court in Osijek: Us I-67/2023-2; Us I-70/2023-2; Us I-65/2023-2 of 13 January 2023 and Us I-51/2023-2 of 10 January 2023.

66 https://sljeme.usud.hr/usud/praksaw.nsf (Accessed 29 May 2023).

67 Constitutional Court, Decision U-I-1007/2012 of 24 June 2020.

68 Aliens Ac, Official Gazette, Nos. 130/2011; 74/2013; 69/2017; 46/2018; 66/2019; 53/2020. The claim also challenged Art. 41 of the Security Vetting Act according to which the Security and Intelligence Agency, when performing security vetting for aliens who will reside or currently reside in the RoC or for people who are to gain Croatian citizenship, will submit only the opinion on the existence of any security impediments to the authority which submitted the request (Security Vetting Act, Official Gazette, Nos. 85/2008; 86/2012).

conducted with respect to an alien). With dissenting opinions of two judges, the Court rejected a request on its merits and found the proposal not granted, with the following reasoning:[69]

> [...] The very fact that a particular legal or individual measure implies limitations of a fundamental right enshrined in the Constitution does not automatically mean that this measure is also inconsistent with the Constitution. The Constitution explicitly allows for limitations of fundamental rights which meet the general condition of proportionality.
> The measure provided for in Article 5, para. 2 of the Aliens Act does not represent a violation of the fundamental right to effective legal or judicial protection, provided that the competent authorities in their procedures respect the specific requirements of proportionality with regard to the right of parties to effective legal protection. [...]
> The current legal framework, viewed as whole, guarantees courts the necessary powers to assess the legality and justifiability of the adopted opinion on the existence of a security impediment, and thus, within specific administrative disputes, ensures effective judicial protection to persons to whom administrative decisions on the right to stay in the territory of the RoC and the EU apply.[70]

In the second case,[71] the applicant considered that the provision of the Aliens Act was against the Constitution. Namely, that it was unconstitutional for the MoI, that is, the executive body and not the court, to decide to restrict the freedom of movement of a non-Croatian citizen (including detention measures in a closed centre). The Constitutional Court rejected the application.

The third case[72] disputed the conditions for temporary stay for a TCN who was the majority owner of a commercial company in the RoC; the Court rejected the request on its merits. The fourth case[73] was dismissed.

We now analyse the decision of the Constitutional Court relating to a return decision of the MoI and judicial review by administrative courts.[74] The MoI issued a return decision to an applicant from Sierra Leone stating (I) that he was obliged

69 This provision has been slightly changed in the Aliens Act currently in force, which states that decisions issued on the basis of the security check for reasons of national security will contain the legal provision and *any data which can be disclosed without jeopardising national security interests* (Art. 5, para. 2, Aliens Act).

70 In conformity with the recent case law of the Constitutional Court (U-III-2086/2016 from 13 March 2018 and U-I-1007/2012 and others from 24 June 2020)

71 Constitutional Court, Decision U-I-5695/2014 of 24 June 2020.

72 Constitutional Court, Decision No. U-I-6111/2012 of 9 October 2019.

73 Constitutional Court, Decision No. U-I-1067/2017 of 19 December 2017.

74 Constitutional Court, Decision No. U-III-2132/2018 of 19 September 2018.

to leave the EEA within 30 days, (II) that he was obliged to hand over the decision to the police officer at the border crossing when leaving the RoC, and (III) that if he did not comply with the decision, he would be forcibly removed. The Administrative Court in Zagreb and the High Administrative Court confirmed the MoI's decision. The applicant stated that the administrative procedure was conducted in contravention of his right to a fair trial, primarily in relation to the violation of his right to use his own language in the examination procedure, i.e. to use the free assistance of an interpreter in police proceedings. As the applicant had the opportunity to present his case before the Administrative Court in the presence of the attorney-at-law and an English-language interpreter, the Constitutional Court rejected the complaint with the following explanation:

> [...] taking it as undisputed that the MoI's decision, as well as the challenged judgments, expressly refers to relevant legal provisions and contains clear and well-argued reasons to issue a decision ordering the applicant, as an alien residing illegally in the RoC, to leave the EEA, the Constitutional Court determines that there are no reasons, especially not of a constitutional nature, which would call into question the decision and the judgments.

An interesting example of a decision[75] of the Constitutional Court regarding detention is found in the case M.H. and Others that ended with a judgement by the European Court of Human Rights[76] (see more in the next section). The applicants lodged two constitutional complaints in which they complained, inter alia, of the unlawfulness, disproportionality, and inadequate conditions of their placement in the Transit detention centre close to the border with Serbia, and that they had not been able to challenge their detention, while the Administrative Court had decided on their case only after they had already spent two months in detention. The Constitutional Court held that the conditions of their placement in the Tovarnik Centre had not been in breach of Art. 3 of the European Convention on Human Rights, as it had been equipped for accommodating families. Even though the applicants had suffered as a result of certain stressful events, their placement in the Centre could not have caused them additional stress with particularly traumatic consequences. The Constitutional Court further held that there had been no breach of Art. 5 of the Convention. The Court held that although the applicants had been deprived of their liberty during the proceedings to establish their identity and citizenship, the circumstances on which they had based their application for international protection could not have otherwise been established, in particular with regard to the risk of flight. The applicants had been informed about the reasons for the

75 Constitutional Court, U-IIIBi-1385/2018 of 18 December 2018.

76 *M.H. and Others v. Croatia,* Application Nos. 15670/18 and 43115/18, 18 November 2021.

deprivation of their liberty and had been represented by a lawyer. The Administrative Court and the High Administrative Court had provided relevant and sufficient reasons for their decisions upholding the applicants' first, second, and fourth deprivation of liberty.[77]

■ *4.3. Practice of the European Court for Human Rights against Croatia*

The European Court for Human Rights made two interesting decisions that went against Croatia; the abovementioned *M.H. and Others v. Croatia* and *Daraibou v. Croatia*.[78]

The first case involved the death of an Afghan six-year-old child who was hit by a train after being ordered by the Croatian authorities to return to Serbia via a railway track after allegedly being refused asylum. It also concerned, in particular, the detention of applicants who had sought international protection. The Court found that the investigation into the death was ineffective, that the detention of the children of the applicants was a form of ill-treatment, and that the decision on the detention of the applicants had not been dealt with diligently. It also argued that some of the applicants had been collectively expelled from Croatia and that the State had hindered the effective exercise of an applicants right to apply as an individual; this included restricting access to his lawyer. As the detention of children had lasted for a protracted period due to the domestic authorities' failure to act with the required expedition, it must have been perceived by the children as a never-ending situation, and could thus be sufficiently severe to engage Art. 3 of the European Convention on Human Rights. The European Court also found that Art. 5 had been violated, in regard to the possibility of using a less coercive alternative measure than detention; it criticised the protracted length of proceedings before the Administrative Courts concerning the applicants' asylum application and review of the lawfulness of their detention. The European Court also questioned the diligence of the authorities in this case and found that they had failed to take all the necessary steps to limit, as far as possible, the detention of the applicant's family.[79]

The second case involved a Moroccan migrant who, together with three other migrants, was detained at a police station in the vicinity of the border with Serbia. Another migrant was believed to have started a fire, killing three migrants and seriously injuring the applicant. Two police officers were responsible for surveillance and one was subjected to disciplinary sanctions, but no criminal proceedings were initiated. However, criminal proceedings against the applicant were initiated, which were stopped when the applicant was expelled to Morocco. The applicant complained of violations of Art. 2 of the European

77 Para. 46, *M.H. and Others v. Croatia.*

78 *Daraibou v. Croatia*, Application No. 84523/17, 17 January 2023.

79 For an analysis of the judgement in relation to the work of the border police, access to territory, and the collective expulsion of aliens see Staničić, 2022.

Convention, stating that Croatia had not prevented the outbreak of the fire that caused serious life-threatening injuries and there had been no effective investigation of the incident. The Court found that the police station and its staff were clearly ill-prepared for fires and that, despite prompt investigation, some questions remained unanswered. In particular, there were shortcomings in the search and monitoring of detainees, who apparently managed to maintain possession of a cigarette lighter and burn their mattresses when they were left unsupervised. Furthermore, the authorities did not investigate the very serious allegations of the applicant regarding the adequateness of the premises and any fire precautions implemented. Moreover, they stated that no attempt had been made to determine whether a broader institutional failure was to blame; addressing such a failure could prevent similar tragedies from happening again in the future.

5. Conclusion

This paper has analysed legislation and available practices of Croatian authorities in regard to return policies targeting migrants and rejected asylum seekers who are determined to be present in the RoC illegally.

The analyses of legislation, mainly the Aliens Act and to some extent the International and Temporary Protection Act, has shown that Croatia has regulated in detail different measures within its return policies. The legislation is aligned with the EU and Schengen *acquis communautaire*. The legislation provides different safeguards for vulnerable groups of migrants. Legal remedies and judicial protection are guaranteed by the relevant law.

In terms of actual practices, the following shortcomings need to be addressed:

First, there is a lack of transparency in regard to the work of the MoI, as the main authority preventing irregular crossing of the state border and illegal stay in the country. The MoI should establish and regularly update a publicly available database with reliable, up-to-date, and comprehensive migration and border-protection statistics that would include the number of detected irregular crossings, the number of individuals that have been returned or expelled in accordance with the Aliens Act or based on readmission agreements with third states, information about the grounds for detention including its length, the number of less coercive measures used, etc.

Second, there is a question about access to legal remedies for TCNs in relation to the return procedure. It is extremely difficult for individuals without legal knowledge or who cannot understand Croatian to bring direct action before the courts. Access to free legal aid is limited to very few categories of TCNs. In addition, the available reports pointed out that detained people were not informed

about their right to a lawyer or to appeal the detention decision before the administrative court.

Third, based on the available data, it can be seen that administrative courts repeatedly confirm the decisions of the MoI regarding return, expulsion, or detention of irregular migrants. Given that they are insulated from democratic pressure and are ostensibly devoted to safeguarding fundamental rights and constitutional guarantees, courts should question the legitimacy and challenge the enforcement of migration policies.[80] Otherwise, public authorities may face little or no substantive pressure to adhere to human rights requirements.[81] Effective judicial protection of migrants and refugees is therefore of huge importance.

80 Passalacqua, 2022.
81 Posner, 2014.

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IOAN LAZĂR*

Some Considerations on the Practical Issues Related to Illegal Migration in Romania

ABSTRACT: *After the peak of migration caused by the Syrian War in 2015, the Russian invasion of Ukraine has increased the challenges for European countries in the domain of migration. EU countries need to ensure efficient control at the external borders of the EU and identify, at the national level, proper mechanisms for tackling illegal migration and and finding a solution to the problem of rejected asylum seekers. The objectives of EU and national immigration policies are to maintain security and stability in the European Area, protect EU external borders, and control organized crime. This paper examines some practical issues related to migration in Romania, a country situated at the intersection of migration routes (one coming from Russia to Hungary, The Western Balkan Route and the Southern Migration Route). It presents the challenges related to asylum, integration, labour market demands, and security risks this country faces. Adopting effective immigration policies and integration measures is essential in managing migration and ensuring the protection of fundamental rights for those seeking international protection, strengthening the asylum system, raising public awareness, and addressing security concerns. The paper highlights the issues the Romanian national authorities faced in their efforts to ensure the security of EU external borders.*

KEYWORDS: asylum policy, migration, migration crisis, EU external border protection, illegal migration, illegal push-backs, readmission agreements

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1. Introduction

Since 2015, the intensification of migration in Europe has increased the pressure on decision-makers to adopt proper administrative and financial measures to tackle the challenges raised by the increasing numbers of refugees and immigrants in EU member states.[1] The objective of the EU-wide and national immigration policies[2] is to maintain a climate of security and stability in the European Area and to ensure protection for the EU's external borders and proper control of the activity of organised crime groups.

The actions of the EU institutions adopted in recent years had the objective of creating and adapting a proper legislative framework regarding asylum to ensure protection for immigrants transiting the Member State's territory or remaining there, good institutional coordination, regional security, and the protection of the external borders of the EU.

In Europe, several routes of migration can be identified:[3]

The Eastern Mediterranean route[4] refers to illegal migration to Greece, Cyprus, and Bulgaria, especially by Syrian immigrants. Irregular migration was tackled by common measures adopted with Turkey and by a 6-billion-euro EU funding allocated for joint coordination mechanisms and refugee support.

The Western Mediterranean route[5] tackles illegal migration flows to Spain, which illegal migrants from Africa use by transiting through Algeria and Morocco. Migration flows from this route have been reduced in recent years because of the excellent collaboration between Spain and Morrocco with the help of the FRONTEX and Team Europe Initiatives[6] (a cooperation mechanism to tackle illegal migration on the Western Mediterranean and Western African routes).

The Western African route[7] refers to illegal arrivals to the Canary Islands via the Atlantic Ocean from Western African countries, such as Morocco, Senegal, Gambia, Mauritania, and Western Sahara.

1 Denisenko et al., 2020, p. 176.

2 See for more details Bodvarsssson and Van den Berg, 2013, p. 370.

3 See for more details Bonifazi, 2008, pp. 107–129.

4 European Council (no date) *Migration flows on the Eastern Mediterranean route* [Online]. Available at: https://www.consilium.europa.eu/en/policies/eu-migration-policy/eastern-mediterranean-route/ (Accessed: 23 October 2023).

5 [Online]. Available at: https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/migratory-routes/ (Accessed: 12 September 2023).

6 European Union (no date) *Team Europe Initiatives and Joint Programming Tracker* [Online]. Available at: https://capacity4dev.europa.eu/resources/team-europe-tracker (Accessed: 10 September 2023).

7 [Online]. Available at: https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/migratory-routes/ (Accessed: 09 October 2023).

The Central Mediterranean route[8] refers to illegal arrivals across the Mediterranean Sea from Africa, Turkey, Italy, and Malta.

The Western Balkan route[9] refers to illegal arrivals to the EU, mainly in Bulgaria, Croatia, Hungary, and Romania, by crossing with Albania, Bosnia, Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia. The importance of this route has increased significantly since the Russian invasion. This is one of the main migratory pathways in Europe. Considering the increasing importance of this migration route, an EU action plan for the Western Balkans was presented on the 5th of December 2022. For Balkan countries with statutes of actual or potential candidate countries, the Instrument for Pre-Accession Assistance permits reforms and provides technical assistance.

2. The Romanian National Strategy Regarding Immigration for 2020-2023[10]

This recently adopted strategy aims to establish principles and guidelines for various aspects of immigration in Romania. These aspects include regulating policies on workforce admission, residence and immigration, combating illegal immigration, managing the departure of foreigners from the territory, providing specific types of protection to those in need, and facilitating the integration of immigrants into Romanian society.

To implement the outlined directions of action, a specific Action Plan for the implementation of the National Strategy on Immigration has been developed for the years 2021 and 2022. The strategy's overall aim and action plans are likely to strike a balance between meeting the labour market demands and addressing the challenges posed by immigration while ensuring the fair and appropriate treatment of immigrants. It also emphasises the importance of respecting human rights, providing humanitarian aid to those in need, and facilitating the integration of immigrants into Romanian society.

Efforts made by institutions in Romania aim to create an immigration system that brings cultural, social, and economic benefits to the country while also addressing illegal immigration. The focus is on striking a balance between safeguarding the fundamental rights and freedoms of all individuals, regardless

8 [Online]. Available at: https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/migratory-routes/ (Accessed: 30 September 2023).

9 [Online]. Available at: https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/migratory-routes/ (Accessed: 27 September 2023).

10 Official Gazette of Romania, Part I, No. 839 bis/2.09.2021 [Online]. Available at: https://igi.mai.gov.ro/wp-content/uploads/2022/01/National-Strategy-on-Immigration-2021-–-2024.pdf (Accessed: 03 October 2023).

of their backgrounds, and allowing the state to have control over its domestic policy on legislation related to foreigners and their legal status.

One of the key components of this immigration system is ensuring *legal immigration channels*. By aligning with the country's current and future socio-economic needs, legal immigration can help meet labour market demands while reducing illegal immigration. Cooperation with third countries of origin and the transit of immigrants can provide safe and legal alternatives for people who wish to immigrate to Romania and help fill labour market gaps.

This return issue aims to establish an efficient return policy. This includes investing in mobilising various actors involved in return procedures and coordinating their actions to manage individual return cases effectively. This may involve detaining individuals who have received a return decision and show signs of non-compliance, shortening appeal deadlines, issuing return decisions without expiration dates, and combining the termination of legal residence with the issuance of a return decision. Additionally, efforts will be made to disseminate information on voluntary returns and reintegration programmes.

It is also fundamentally important to integrate third-country nationals into Romanian society. The rapid and successful integration of immigrants is beneficial for developing host communities and the labour market. The involvement of local authorities, deconcentrated services, social partners, and non-governmental organisations in the integration process is encouraged to create a partnership mechanism that effectively supports newcomers.

Romania promotes equal treatment and an appropriate standard of living for asylum seekers, respecting fundamental human rights. Therefore, particular attention should be paid to individuals with special acceptance needs to ensure they receive appropriate reception and assistance.

The objectives of the National Immigration Strategy for the period 2021–2024 are categorized under four general objectives: promoting the conditions of entry, residence, and exit from Romania (Objective A); consolidating the national asylum system and ensuring compliance with European and international standards (Objective B); unitary and integrated management of actions carried out under a crisis (Objective C); and the creation of sustained capabilities necessary for implementing policies in the field of migration, asylum, and integration of foreigners (Objective D). Each objective aims to achieve specific results, and the direction of action describes the measures taken to achieve these results.

Objective A.1. – Promoting the conditions of entry, residence in and exit from Romania

The major aim is to ensure better information on legal migration, by: 1. Informing foreigners, employers, authorities and other relevant parties in Romania about the country's immigration legislation. 2. They are informing citizens of their countries of origin about Romania's immigration legislation, either

directly or through liaison officers (ILO) or Romanian diplomatic missions and emigration authorities.

Objective A.2. – Simplifying the access of foreigners to Romania for employment/relocation purposes and developing the system enabling the access of investors from third countries to the Romanian market. The objective is to reduce the labour market deficit and to increase the number of investors, by: 1. Regularly analysing the current labour market by competent institutions and establishing annual quotas of newly admitted workers based on identified needs. 2. Negotiating bilateral agreements with interested third countries to allow their citizens to be admitted to the Romanian labour market. 3. Encourage employers to hire third-country nationals who have completed their studies in Romania. 4. Grant facilities include exemptions from certain conditions for granting long-stay visas and/or extensions of the right of residence for foreigners conducting commercial activities.

Objective A.3. – Effective prevention and combating of illegal migration, illegal migration associated with terrorism, immigrant trafficking, and labor exploitation of foreign employees. The aim is to ensure a safer space for citizens, via: 1. Enhancing collaboration among competent Romanian authorities to prevent and combat illegal immigration, immigrant trafficking, and the undeclared work of foreigners. 2. Increased efficiency and capacity to detect, transport, accommodate, and return illegal immigrants. 3. Prevent labour exploitation of foreign employees. 4. Identifying, isolating, and separating operatives/former members of terrorist organisations within illegal migration flows and implementing specific prevention measures. 5. Preventing actions threatening national security that may be carried out by immigrants involved in terrorist activities, such as self-radicalisation, jihadist propaganda, support for terrorist organisations, or violent actions.

The second major objective, namely, Consolidating the national asylum system and ensuring compliance with European and international standards, can be realised by emphasising the following objectives and specific actions.

Objective B.1. – The efficient processing of asylum requests in compliance with applicable national, European, and international legal standards. To obtain an efficient national asylum system compliant with applicable national and international standards by providing interpreting, counselling, and legal support services to asylum seekers; strengthening the quality control mechanism of the asylum procedure; updating operational work procedures; enhancing dialogue among decision-makers in the asylum procedure; adapting the national legal framework based on changes in the European acquis; and limiting abuses in the asylum procedure.

Objective B.2. – Streamlining the process of determining the member state responsible for analysing the international protection application to fulfil

Romania's obligations under the Dublin system and strengthen bilateral cooperation with member states participating in the Dublin system.

Specific Objective B.3. – Ensuring reception and assistance facilities for asylum seeker, by providing them with an adequate standard of life established at the European level.

Specific Objective B.4. – Consolidating the mechanism of social integration of individuals with a form of protection in Romania and those with legal residence, via the development of integration programs for individuals with a form of protection in Romania and those with legal residence and promoting education favouring social inclusion by adapting the legal framework to the specifics of migrant students and removing obstacles against the participation of minor third-country nationals in pre-school and school education.

Objective B.5. – Relocating refugees and asylum seekers and the temporary evacuation of people urgently needing protection in Romania and the subsequent relocation thereof

Objective B.6. – Develop cooperation with the European organism responsible for managing asylum-related issues and other European and international bodies to manage asylum-related issues in compliance with the attributes of the competent European body and other European and international bodies.

The third major objective of the national strategy, named Prior preparations and the unitary and integrated management of actions carried out under a crisis (Objective C), is to increase the population safety level as follows: 1. Improving knowledge on managing crises generated by an influx of immigrants. 2. Strengthening the interinstitutional cooperation mechanisms for crises generated by an influx of immigrants that might include members/adepts of terrorist organisations. 3. Equipping the General Immigration Inspectorate with necessary equipment and travel means and improving the physical infrastructure to manage crises generated by an influx of immigrants.

These specific objectives and their associated action directions focused on strengthening Romania's response capacity to an influx of immigrants along its borders. They emphasised the efficient processing of asylum requests, ensuring reception facilities and integration measures for those seeking protection, and fulfilling obligations regarding the relocation and temporary evacuation of refugees and asylum seekers.

The last general objective mentioned in the national strategy (Objective D) focuses on creating the necessary capabilities to implement strategies related to immigration by putting the accent on developing/updating the physical and IT infrastructure of national institutions and authorities, ensuring sufficient and well-trained human and financial resources; accessing non-reimbursable external funds and enhanced dialogue with the civil society and non-state international actors. The objectives and directions of action mentioned above aim to strengthen

the capabilities of the Romanian State to effectively implement policies related to the migration, asylum, and integration of foreigners.

3. Public authorities involved in migration matters[11]

Table 1. Romanian Authorities having competence in Immigration matters[12]

Stage of the procedure	Competent authority (EN)
Application	General Inspectorate for Immigration – Directorate for Asylum and Integration (IGI-DAI)
Dublin	General Inspectorate for Immigration – Directorate for Asylum and Integration (IGI-DAI)
Refugee status determination	General Inspectorate for Immigration – Directorate for Asylum and Integration (IGI-DAI)
First appeal	Regional Court (Judecatorie Sectia Civila, materie: Contencios Administrativsi Fiscal)
Onward appeal	County Tribunal Administrative Litigation Section (Tribunal Sectia de ContenciosAdministrativsi Fiscal)
Subsequent application	General Inspectorate for Immigration – Directorate for Asylum and Integration (IGI-DAI)

The General Inspectorate for Immigration (GII)[13] in Romania handles the asylum procedure through the Directorate of Asylum and Integration (DAI). This includes operating reception centres for asylum seekers and specially designed closed spaces within these centres. The GII-DAI, as the competent authority, makes decisions regarding asylum applications in the first instance.

The leadership of the GII, including the general inspector and two deputy general inspectors, is appointed through a selection process organised by the GII by the relevant laws and regulations. The GII-DAI also consists of a director and one deputy whose positions are filled through exams, reassignments, or direct designation, as per Law 360/2002 on the status of police officers.

Government Decision No. 639 of 20 June 2007 prescribed the institutional structure and mandate of the GII.[14] The GII-DAI operates six centres for asylum seekers' accommodation and legal procedures at the regional level. Each regional centre has a director, a deputy director, and officers responsible for different tasks related to asylum procedures.

11 [Online]. Available at: https://www.pragueprocess.eu/en/countries/898-romania (Accessed: 12 September 2023).
12 Source: AIDA Report, 2021, p. 16.
13 [Online]. Available at: https://igi.mai.gov.ro/en/ (Accessed: 11 September 2023).
14 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument/83157 (Accessed: 09 September 2023).

As of 2022,[15] there were 29 case officers in the GII-DAI, compared to 23 case officers in 2020, with an additional 16 officers responsible for the preliminary interviews 2020. Case officers receive specific training through seminars, guideline processing, ad hoc meetings, monitoring visits, and quality assessments, among other methods.

In addition to the information provided in individual cases, case officers receive regular information through the specialised department within the GII-DAI and materials developed by organisations such as the United Nations High Commissioner for Refugees (UNHCR) and the European Union Agency for Asylum (EUAA). These measures ensure the proper handling of asylum applications and adherence to relevant guidelines and standards.

The Ministry of Internal Affairs[16] is responsible for the General Inspectorate of the Romanian Police, the gendarmerie, the border police, the General Directorate for Internal Protection, and the Directorate General for Anti-Corruption.

The General Directorate for Internal Protection[17] is responsible for intelligence gathering, counterintelligence, and preventing and combatting vulnerabilities and risks that could seriously disrupt public order or target the Ministry of Internal Affairs operations. The directorate reports to the Interior Minister.

The Romanian Intelligence Service,[18] a domestic security agency, investigates terrorism and national security threats. This service was reported to the Supreme Council of National Defense. Civilian authorities maintained effective control over intelligence services and security agencies reported to the Ministry of Internal Affairs.

The United Nations High Commissioner for Refugees in Romania.[19] The UNHCR plays a significant role in supporting and monitoring asylum-related issues in collaboration with Romanian authorities, and monitors asylum procedures carried out by the government. Thus, UNHCR ensures the Romanian government adheres to international refugee law standards. Legal statements may be drafted to address concerns related to the asylum framework. The institution advocates timely access to fair and efficient asylum procedures but does not have direct influence over the authorities' proceedings. The organisation also actively raises awareness of refugee-related topics and collaborates with various stakeholders, including NGOs, academia, and the media. However, the UNHCR does not perform certain tasks, such as registering asylum seekers, examining asylum applications, and issuing refugee or protection documents in Romania. These responsibilities

15 AIDA Report, 2021, p. 17.

16 [Online]. Available at: https://www.mai.gov.ro/ (Accessed: 08 September 2023).

17 [Online]. Available at: https://dgpi.ro/documente/2017/05/mfn/acasa-eng.html (Accessed: 07 September 2023).

18 [Online]. Available at: https://www.sri.ro/en (Accessed: 07 September 2023).

19 [Online]. Available at: https://www.unhcr.org/countries/romania (Accessed: 07 September 2023).

fell under the purview of the Romanian government. If individuals wish to seek advice and information about the asylum procedure or know more about the available services, they can contact the UNHCR for assistance. Overall, the UNHCR's role in Romania focuses on supporting the government's efforts to protect and assist refugees while monitoring and advocating compliance with international refugee law and standards.

Commission for Immigration Management (hereinafter 'Commission'), which operates under the Government Decision No. 572/2008 on the organisation of the Commission for Immigration Management.[20] The main attributes of the Commission, and therefore of the Territorial Structures, are drafting the National Strategy on Immigration (SNI) project and the corresponding action plans, as well as supporting their passing and monitoring their implementation.

4. Particularities of national asylum granting procedure

■ *4.1. The ordinary procedure*

4.1.1. Initiation of the asylum procedure – registering the Asylum request

According to Article 34 Paragraph 1 of the Asylum Act, a person is considered an asylum seeker from the moment of the manifestation of the will, expressed in writing or orally, in front of competent authorities, from which it follows that they request the protection of the Romanian state.

The following authorities can receive the asylum request:[21] 1. The National Office for Refugees and its territorial structures; 2. the structures of the Romanian Border Police; 3. the structures of the Authority for Foreigners; 4. the structures of the Romanian Police; 5. the structures of the National Administration of Penitentiaries within the Ministry of Justice.

The asylum applications can only be on the state territory or at the state border[22] as soon as the applicant presents themselves at a control point to cross the state border or enter the territory of Romania. Competent authorities cannot refuse an asylum application because it was submitted late.[23]

Asylum applications need to be made in Romanian or another language spoken by the applicant individually[24] and submitted personally by the applicant or, as the case may be, by the curator or legal representative.

20 Published in the Official Gazette No. 439 from 11 June 2008.
21 Art. 35 of the Asylum Act.
22 According to Art. 36(2) of the Asylum Act, asylum applications submitted outside the territory of Romania are not accepted.
23 Art. 36(3) of the Asylum Act.
24 According to Art. 37(3) of the Asylum Act, collective asylum applications are not accepted.

Suppose the asylum application is submitted to the territorial bodies of the structures of the Ministry of Administration and Internal Affairs. In that case, the applicant must present themselves at the National Office for Refugees or, as the case may be, at one of its territorial structures. Suppose the asylum application was submitted to a territorial body of the Romanian Border Police from a control point for crossing the state border. In that case, the applicant who received access to the territory by the decision of the National Office for Refugees is informed with regarding the fact that they must present themselves at the National Office for Refugees or, as the case may be, at a territorial structure thereof. Usually, the asylum seeker bears the expenses caused by transport to the National Office for Refugees or, as the case may be, to one of its territorial structures. In exceptional situations in which the applicant does not have the necessary amount to cover transportation expenses, this amount is borne by the National Office for Refugees.

Asylum applications submitted at a control point for crossing the state border, to the Authority for Foreigners, and the bodies of the National Penitentiary Administration within the Ministry of Justice are registered in special registers.[25]

4.1.1.1. Asylum requests made by minors

According to Article 39(1), in the case of a minor asylum seeker, his/her interests are defended by a legal representative. A legal representative makes the asylum request of minor foreigners aged under 14 years. Minors who have reached the age of 14 years can submit an asylum application personally, in writing, or orally before the competent authorities. Suppose the unaccompanied minor foreigners have expressed their will to obtain asylum in writing or orally before the competent authorities other than the National Office for Refugees. In that case, the territorial body of the specialised structure of the Ministry of Administration and Interior or the Ministry of Justice, which has been notified, will immediately inform the National Office for Refugees, which ensures the applicant's transport to the competent structure to analyse the asylum application.[26]

After registration of the unaccompanied minor foreigners as asylum seekers, the National Office for Refugees will immediately notify the competent authority for child protection within whose territorial competence the accommodation centre where the asylum application is to be submitted is located in order to initiate the procedure of appointment of a legal representative.[27] In a situation where the unaccompanied minor cannot prove their age, and there are serious doubts about their minority, the National Office for Refugees requests the

25 Art. 38(5) of the Asylum Act.
26 Art. 39(4) of the Asylum Act.
27 Art. 40(1) of the Asylum Act.

performance of medico-legal experts to assess the age of the applicant, with the prior written consent of the minor and their legal representative. Suppose the asylum seeker and/or legal representative refuses to perform the medico-legal age assessment, and no conclusive evidence is provided regarding their age. In that case, they will be considered an adult, and it is considered that the person in question has reached the age of 18 on the date of submission of the asylum application.

The asylum application should be made within a maximum of three working days if the application is made in front of the National Immigration Office or within a maximum of six working days if the application is made in front of another competent authority.

4.1.2. Subsequent procedures after registering the asylum request

Asylum seekers are photographed, fingerprinted, and issued with a temporary identity document, which includes a personal numeric code The temporary identity document is extended periodically.

After registering the asylum application at the National Office for Refugees or its territorial formations, the applicant completes a questionnaire to establish personal data regarding asylum seekers and their family members, information about the route travelled from the country of origin to Romania, data related to possible asylum applications submitted in other third countries or in an EU member state, and the identity or travel documents in the applicant's possession.[28]

Once the asylum application is submitted, the National Office for Refugees or other competent authorities take the fingerprints of all asylum seekers who, according to their declarations, have reached 14 years of age. All data obtained will be transmitted and stored in paper format in the National Office for Refugees files and in electronic format in the AFCS national database (Automated Fingerprint Comparison System).[29] The transmission and collection of asylum seekers' fingerprints comply with provisions related to the principle of confidentiality and protection of personal data, and the person in question must be informed in writing about this fact. Starting with the date of Romania's accession to the European Union, the fingerprints taken were transmitted and stored in the European database EURODAC (European System for Automatic Identification of Fingerprints).

Asylum seekers are interviewed[30] to determine the form of international protection they can benefit from. The interview is recorded in writing and concerns the necessary information to process the asylum application, namely, the identification data of the applicant, the name of the official designated to carry

28 See Art. 43 of the Asylum Act.
29 Art. 44 of the Asylum Act.
30 Arts. 45–46 of the Asylum Act.

out the interview; the name of the interpreter and, as the case may be, of the legal representative, the curator and/or of the lawyer who assists the applicant; the language in which the interview is conducted; the reasons for asylum; and the applicant's statement showing that all the data and information presented in the interview are real. Where it is reasonably assumed that the asylum seeker knows another language they can communicate, interviews may be conducted in that language. The asylum seeker could not refuse the interview because of the absence of a lawyer. Rescheduling the interview because of the lawyer's absence is possible only once and only if there are valid reasons to justify this absence. The reasons for their refusal were recorded if the applicant refused to sign the interview notes. The applicants' refusal to sign the interview note did not prevent the National Office for Refugees from deciding on the asylum application.

Interviews with minor asylum seekers were conducted with their legal representatives. The legal representative informs the minor asylum seeker about the purpose and possible consequences of the personal interview and undertakes the necessary steps to prepare the minor for the interview according to its degree of intellectual development and maturity.

4.1.3. Solving asylum applications – the administrative phase

The asylum application is resolved based on the existing documents in the applicant's file and the reasons cited by the applicant, which are analysed to the exact situation in the country of origin and the applicant's credibility. The decision to close the file is communicated immediately, in writing, to the applicant by direct communication with the National Office for Refugees representatives or by sending it by post to the applicant's last declared residence.

Suppose the applicant renounces the asylum application at the administrative stage. In that case, they must leave Romania after 15 days from the end of the asylum procedure, except that the applicant has the right of residence regulated according to the legislation on the legal regime of foreigners.

The decision regarding the asylum request should be issued in 30 working days and can have the following finalities:[31] 1. the recognition of the refugee status; 2. granting of subsidiary protection; 3. rejection the asylum application.

The decision to grant subsidiary protection also includes reasons for not granting refugee status. The decision to reject the asylum application includes appropriate reasons and mentions the obligation to leave Romania's territory. Foreigners must leave the territory of Romania within 15 days of the completion of the asylum procedure unless the asylum request is rejected as obviously unfounded following its resolution within the accelerated procedures, in which case the foreigners are obliged to leave the territory of the Romanian state as soon as the asylum procedure has been completed. The admission or rejection of the asylum

31 See Art. 53 of the Asylum Act.

application is made by a decision that is communicated immediately, in writing, to the applicant, by direct communication with the National Office for Refugees representatives, or by postal delivery to their last declared residence.[32]

The Asylum Act provides for an accelerated procedure[33] for manifestly unfounded applications, namely asylum applications of persons who, through their activity or membership in a particular group, threaten national security or public order in Romania and asylum applications of persons coming from a safe country of origin. A decision is issued within three days of the start of the accelerated procedure. A negative decision in the accelerated procedure may be appealed within seven days of the notification of the decision. If an appeal was filed within the deadline, it had an automatic suspension effect.

4.1.4. Contesting the decision – the Regional Court phase

In the event of a negative decision, the applicant may appeal, with a suspensive effect, to the Regional Court within ten days of communicating the decision.[34] In case of a complaint submitted at term, the applicant has the right to remain in Romania during the settlement of the case.

Complaints are submitted only to the National Office for Refugees or, as the case may be, to the territorial structure that issued the decision to reject the asylum application and will be accompanied by a copy of the decision to reject the asylum application, the reasons for the complaint and documents, or any other elements that supported the complaint. The complaint was submitted immediately to the competent court.

The complaints of minors aged under 16 years are submitted by their legal representatives. A minor who has reached the age of 16 can submit a complaint in their name.

The content of the complaint[35] will contain the factual and legal grounds on which the complaint is based, evidence, and the applicant's signature. Debates take place in front of the court in secret sessions and in compliance with principles of confidentiality.

The reception[36] made by the authority which issued the contested decision will include procedural exceptions that the respondent raises to the complaint formulated by the petitioner, answers to all factual and legal aspects, and the evidence with which they defend themselves against each end of the complaint.

32 Art. 54 of the Asylum Act.
33 Art. 75(1) of the Asylum Act.
34 Art. 55 of the Asylum Act.
35 See Art. 57 of the Asylum Act.
36 Art. 61 of the Asylum Act.

The appeals are resolved within 30 days.[37] The court resolved the complaint, whose territorial jurisdiction was within the competent structure of the National Office for Refugees that issued the decision.

4.1.5. Contesting the decision – the Appeal Court phase

According to the provisions of Article 66, against the court's decision, the appellant or the National Office for Refugees can file an appeal within five days of the ruling. In the case of minor asylum seekers under 16, the appeal is declared by their legal representative.

If the appeal is declared within the legal terms, the applicant can remain in Romania during its resolution. The appeal will be judged within 30 days of its registration by the court (the administrative litigation section), in which jurisdiction is the court whose decision is appealed.[38]

If the appeal is made outside legal terms, the applicant may request suspension of executing the order to leave Romania's territory. The request for suspension is resolved within seven days of its registration by the competent court, which pronounces it in the council chamber without summoning the parties through an irrevocable conclusion. Until the request to suspend the execution of the order to leave Romania is settled, foreigners cannot be removed from the Romanian state.[39]

4.1.6. Completion of the asylum procedure and the disposition to leave the territory of Romania

If foreigners have not obtained a form of protection after completing the asylum procedure, the Authority for Foreigners, based on the provisions of Article 53 Paragraph 3 and Article 51 Paragraph 6 of the Asylum Act, issues and implements an order to leave Romania's territory.

The asylum procedure is considered completed within seven days from the moment of communication of the decision to close the file, from the date of expiry of the legal deadline for submitting the complaint or, as the case may be, the appeal, or from the date of the pronouncement of the rejection decision to the court of appeal.[40]

If, for objective reasons, foreigners cannot leave the territory of Romania in the legal terms mentioned in the Asylum Act, the competent authorities permit them to stay in the territory of Romania under the conditions provided by the legal regulations regarding the regime of foreigners in Romania.

37 Art. 64 of the Asylum Act.
38 See Art. 67 of the Asylum Act.
39 Art. 69 of the Asylum Act.
40 Art. 70 of the Asylum Act.

■ *4.2. Special asylum procedures*

4.2.1. The Dublin Procedure

The primary goal of the Dublin Procedure is to determine the EU Member State responsible for examining an asylum request presented by a third-country national or stateless person. It is applicable when an asylum seeker requests international protection in Romania, and, after background checks, it is found that they have already requested another Member State, were seized for illegal entry in another Member State, or possessed a visa/residence document legally issued by another Member State that allowed them to enter the EU, even if those documents were not effectively used.

Once a Member State takes responsibility for the asylum seeker, the individual is transferred to the state where international procedures are applied. The transfer period ranged from 6 to 18 months.

Table 2. The Application of Dublin Procedures in Romania in 2022[41]

Dublin statistics: 2022 Outgoing procedure			Incoming procedure		
Requests		Transfers	Requests		Transfers
Total	551	11	Total	5,754	306
Bulgaria	205	2	Germany	1,376	90
Greece	73	0	Austria	1,366	93
Germany	5	4	France	1,100	42
Cyprus	4	0	Italy	457	0
Spain	2	0	Slovakia	109	17
Poland	2	1	Netherlands	102	11

Regarding the implementation of the Dublin Regulation in Romania in 2022, we can retain that in 2022, Romania had issued 551 requests under the Dublin Regulation, which decreased, compared to 815 requests in 2021 and 231 in 2020.

In addition 2022, Romania received 5,754 requests under the Dublin Regulation, a decrease from 9,493 requests in 2021 and 3,221 in 2020.

In Romania, asylum seekers are not required to present original documents or undergo DNA tests to prove family links for family reunification. Instead, they generally provide copies of the family book, birth certificate, residence permit of the relative with whom they want to be reunited and, in the case of unaccompanied children, a written expression of the relative's desire to be reunited with the child. Family unity is the most frequently applied criterion in practice for Dublin Regulation cases in Romania, with most cases involving reuniting with family members residing in other EU Member States. The cases in which the family criterion was

41 Source: AIDA Report, 2021, p. 53.

applied to 2–3 unaccompanied children with relatives in other EU Member States resulted in transfers to Germany and the Netherlands. Additionally, transfers were carried out to Bulgaria, Greece, Croatia, and Cyprus from other centres.

All asylum seekers were fingerprinted, photographed, and checked against the Eurodac database, which contained the fingerprints of asylum seekers and irregular border crossers in the EU. Refusal to be fingerprinted may result in the application of measures of constraint. The Dublin interview was conducted during or after the preliminary interview, depending on the regional centre. It is generally conducted faster than the regular asylum procedure and sometimes on the same day as a preliminary interview.

The Romanian Dublin Unit does not seek individualised guarantees before transferring an asylum seeker to another Member State. However, an asylum seeker subject to the Dublin procedure has the same rights and obligations as an asylum seeker in the regular procedure until the transfer is carried out effectively. The GII-DAI has the authority to reduce or withdraw the material reception conditions for asylum seekers, including those subjected to the Dublin procedure. This decision can be challenged in court. An asylum seeker subject to the Dublin procedure can appeal a decision that rejects access to the asylum procedure in Romania and orders a transfer within five days of communication. The appeal does not have an automatic suspensive effect, but the asylum seeker can request suspension of the transfer decision when the appeal is pending.

The average duration of the Dublin procedure, from the issuance of a request to transfer, was approximately 2–3 months. The average duration between accepting responsibility and the actual transfer was one month.

Asylum seekers subject to the Dublin procedure may be subject to various restrictive measures, including the obligation to report to the Immigration and Asylum General Inspectorate, designation of their residence in a Regional Centre of Procedures for Asylum Seekers, and in some cases, placement in public custody (detention). However, in general, asylum seekers subjected to the Dublin procedure are not placed in detention.

The Act includes provisions for express and tacit withdrawal cases of asylum applications. Tacit withdrawal occurs when the applicant is absent from the scheduled interview without valid reasons. If an applicant makes an asylum claim within nine months of the decision to close the file because of tacit withdrawal, the asylum procedure may continue.

If an applicant's asylum application was discontinued due to explicit withdrawal or leaving the territory for at least three months and they returned to Romania and lodged a new asylum claim, it was considered a subsequent application and not a continuation of the previous procedure.

4.2.2. Tolerance procedure

The tolerance procedure, as regulated by Emergency Decree No. 194/2002, provides a special mechanism for individuals who are not Romanian citizens or citizens of an EU/EEA Member State and cannot leave Romania for objective reasons. These objective reasons can include various situations, such as being criminally charged with a ban on leaving the city or country, the end of a period of public custody, suspension of the obligation to return, and the temporary presence required for important public interests.

To be eligible for the tolerance procedure, applicants must submit a written request to the GII and provide relevant documents as proof of the objective reasons preventing them from leaving the country. If the authorities find the applicant's reasons valid, they may grant tolerance, allowing the individual to stay in Romanian territory despite not being a Romanian citizen or a citizen of an EU/EEA Member State.

Tolerance is temporary and ceases to be applicable once the objective reasons for which it was granted no longer exist. If an applicant's request for tolerance is not granted, they have the right to contest the decision within five days of receiving the communication. Appeals should be made in the Territorial Court of Appeals. The Territorial Court of Appeals reviewed the case and issued a rule within 30 d. The court's decision was considered final, and there was no further appeal after the ruling.

4.2.3. Accelerated procedure

The accelerated procedure for assessing asylum applications in Romania is designed to handle cases that are manifestly unfounded, involve applicants who may threaten national security or come from a Safe Country of Origin.[42]

An application is considered manifestly unfounded if the applicant lacks a well-founded fear of persecution or serious harm in their country of origin and their statements lack credibility and coherence or are inconsistent with the situation in their home country. It also includes instances where the applicant has misled the authorities or filed an application in bad faith.

In 2022, many asylum applications will be assessed using an accelerated procedure across various regional centres in Romania. Nationals from Bangladesh, India, Pakistan, Morocco, Algeria, Sri Lanka, Tunisia, Egypt, Turkey, and Nepal were among those whose applications were processed using an accelerated procedure.[43]

The responsibility for making decisions on asylum applications in the accelerated procedure lies with the General Inspectorate for Immigration–Directorate for Asylum and Integration (GII-DAI). As part of the accelerated procedure,

42 Art. 75 of the Asylum Act.

43 AIDA Report, 2021, pp. 64–67.

applicants underwent personal interviews by the GII-DAI. The same rules and guidelines as in the regular procedure were applied to the personal interviews. Applicants have the right to appeal a negative decision in the accelerated procedure within seven days of the notification of the decision. If an appeal was filed within the deadline, it had an automatic suspension effect.

Asylum seekers have access to free legal assistance during the accelerated procedure subject to the same conditions as those in the regular procedure. However, if applicants are detained in one of the two detention centres (Arad and Otopeni), there might not be permanent access to legal counselling.

5. Practical issues related to illegal migration – National practices and statistical data related to illegal pushbacks

as a Member State of the EU and the Council of Europe, Romania generally respects major provisions in human rights matters. The latest reports on Human Rights Practices by the US Department of State and the European Union Agency for Asylum revealed relevant national practices regarding respect for human rights in immigration matters.

In Romania, the internal movement of the beneficiaries of international protection measures and stateless people is generally unrestricted. However, the free movement of asylum seekers can be subject to restrictions under specific circumstances. The General Inspectorate for Immigration designates a specific place of residence for asylum seekers. National authorities may adopt restrictive measures, subject to approval by the prosecutor's office, that amount to administrative detention in so-called 'specially arranged closed areas.' Statistically 2022, one asylum applicant was placed under such restrictive measures, whereas in 2021, there were no practical cases to apply such measures.

The so called 'tolerated status' can be granted to persons who do not meet the requirements for refugee status or subsidiary protection, but who cannot be returned to their home countries for different reasons (e.g. stateless persons not accepted by their former country of habitual residence, risks related to the physical integrity of persons or life-related threats etc. Persons with 'tolerated status' can work on the Romanian territory and move freely in a specific region without having the right to receive any social protection and inclusion measures. In 2022, the status above was granted to 172 individuals, whereas in 2021, no such measures were taken.[44]

44 U.S. Department of State (no date) *2021 Country Reports on Human Rights Practices: Romania* [Online]. Available at: https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/romania/ (Accessed: 20 September 2023).

Regarding the protection ensured for refugees, Romanian governmental authorities cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR) and other humanitarian organisations to ensure proper protection and assistance for refugees, returning refugees, and asylum seekers. As previously mentioned, asylum procedures are available to foreign nationals and stateless people who express their desire for protection. Refugees are granted protection, either in the form of official refugee status or subsidiary protection measures.

As we said before, the general non-refoulement principle applies in Romania. However, exceptions from the general principle are applicable in the case of the so-called 'undesirable' persons—for example, when classified information or 'well-founded indications' suggest that a foreigner (asylum seeker or person with refugee status) intends to commit terrorist acts or favour terrorism, or in situations where other national security grounds are in matter. Against such persons, custody measures can be taken until the finalisation of their asylum procedure, or the measure of deportation can be deployed in case of the final denial of granting refugee status.

According to the US Department of State's Report, from 2020 to 2022 several incidents of harassment, discrimination, abuse against refugees and migrants, pushbacks, and deviations from asylum procedures in border areas occurred,[45] although most incidents were not reported because of fear, lack of information, inadequate support services, and inefficient redress mechanisms.

■ *5.1. Border violence case studies 2020-2022*

14th of October 14 2022[46] five Syrian citizens, aged between 18 and 33, were pushed back from Romania to Serbia, around road DJ682, located at the crossing point between the Hungary-Romania-Serbia border (near the border locality of Maidan), at 7 am. The Romanian Police Officers addressed Syrian citizens with verbal injuries while sending them back to Serbia. The border police officer reported physical violence against the transit group of immigrants (by kicking down people on the ground), cell phone destruction, and the theft of 1200 euros.

21st of June 2022[47] three men and one unaccompanied minor were apprehended in Hungary and pushed back to Romania and, then, to Serbia. The immigrant group crossed the border between Serbia and Romania at approximately 5 pm. After walking into Hungary, the group was pushed back into Romania by five Romanian border officers with their dogs. Officers were accused of several forms of physical violence against immigrants (e.g. kicking, pushing people to

45 AIDA Report, 2021, p. 17.
46 Border Violence Monitoring Network (BVMN), 2022c.
47 Border Violence Monitoring Network (BVMN), 2022a.

the ground, insulting, dog attacks). Immigrants were forced to walk back to the Serbian territory.

26th of November 2021[48] – Four Romanian border police officers engaged in physical violence, abuse (threatening with a gun), and theft against four Syrian citizens, aged 38 years, near the Romanian border locality Beba Veche.

26th of October 2021 – ten Romanian border police officers performed physical violence, humiliating behaviour, and torture (undressing, keeping in cold temperatures without food and water, refusing to provide medical assistance, and refusing translation services) against a group of 15 Afghan citizens (the majority of them being minors). The group was then pushed back to the Serbian border near Setschan.

3rd of March 2021[49] a group of 32 Afghanistan citizens were victims of physical violence and abuse (kicking, threatening with guns, destruction of personal belongings, theft of personal belongings, and reckless driving) exercised by 12 Romanian border police officers near the Romanian border locality Comlosu Mare. Violence was not used in the presence of controlling FRONTEX Officers. Immigrants feared asking for asylum because of physical violence. All group members were transported back to the Serbian border.

1st of April 2021[50] – a group of seven minor Afghanistan immigrants were victims of theft, physical violence, and abuse by 13 border police officers near Moravita village from the Romanian-Serbian border.

23rd of February 2021 a boat of the Ministry of Internal Affairs was reported to have blocked a migrant boat in the Aegean Sea to help Greek authorities push back migrant boats into Turkish Waters.[51]

21st of January 2021[52] – a group of 30 Afghanistan citizens aged 16-25 was the victim of physical violence (beating with batons/hands/other), insulting, destruction and theft of personal belongings by 7 Romanian border police officers, near to Moravița.

13th of June 2020[53] – a group of 16 adults and six children with Syrian and Palestinian citizenship were caught by Romanian police officers in a forest near Timișoara. The personal belongings of the group members were destroyed, and the group was transported back to the Serbian border. The claims were made by a Palestinian man born in Germany but stateless because of the lack of family reunification claims made by his parents, who were immigrants in Germany before moving to Lebanon, Palestine.

48 Border Violence Monitoring Network (BVMN), 2022b.
49 Border Violence Monitoring Network (BVMN), 2021a.
50 Border Violence Monitoring Network (BVMN), 2021b.
51 Nielsen, 2021.
52 Border Violence Monitoring Network (BVMN), 2021c.
53 Border Violence Monitoring Network (BVMN), 2020a.

28th of June 2020[54] – a group of 30 Palestinian and Syrian citizens aged–2-26 years were caught at the river border between Serbia and Romania and pushed back to Serbia. The personal belongings of the group were destroyed, and several men of the group suffered serious physical injuries (bruises and broken noses).

17th of February 2020[55] – a group of 27 (4 minors and 23 adults) Syrian, Irakian, and Iranian police officers near Arad at the Romanian-Hungarian field border was caught. The group had a translator, but was not informed about the content of the signed documents, and immigrants who refused to sign were supposed to be physically violent. The request of the group to apply for asylum in Romania was refused, and the group was victims of insults and physical violence. The group was kept in improper conditions without food or medical care (two pregnant women and one chronically ill person who had their medicine confiscated). According to the report, group members were kept for several days in a camp under poor hygienic conditions. At their release, the group members refused to sign the interdictions regarding their return to Romania for one and a half years. The papers were signed with fake signatures by the police border officers.

July 2020 – November 2021 – the Serbian ONG KlikAktiv had documented more than 3700 illegal push-backs of the Romanian Border Police applying physical violence (beating with rubber sticks) and other humiliating and degrading treatments (people sent back on barefoot during wintertime to the Serbian territory).[56]

According to newspapers, international news platforms, and reports of credible international organisations (e.g. Lighthouse Reports, Group for Social Initiatives, etc.), several EU countries, such as Croatia, Romania, and Greece, have applied physical violence against asylum seekers and prioritised the objective of protecting the external borders of the EU before granting the internationally recognised right to seek asylum. Incidents similar to those mentioned previously were mentioned as an example in Croatia, where nearly 189 illegal immigrants were pushed back (in 11 operations of the Croatian border police[57]) from the borders of the country without having their circumstances evaluated as part of the national strategy for immigration matters. The same source reported that 635 immigrants were pushed back illegally by Greece's border police in 2020. National authorities' orders regarding the repelling of illegal immigrants were given orally to avoid incriminating the national authorities involved in such practices. In Romania, Lighthouse Reports employed remote, motion-activated cameras to document instances in which uniform border guards were seen forcing individuals into neighbouring Serbia on three distinct occasions. Immigrants alleged that they had experienced physical assaults during these incidents. Additionally, two border

54 Border Violence Monitoring Network (BVMN), 2020b.
55 Border Violence Monitoring Network (BVMN), 2020c.
56 KlikAktiv, 2022b, pp. 5–8.
57 Child, 2021.

guards, who chose to remain anonymous, disclosed to the Lighthouse Reports that Romanian police frequently engage in pushbacks against Serbia.

Some representatives had expressed their concern related to the EU authority's complicity in illegal pushbacks of immigrants and the systemic character of the refusal to grant asylum rights at the level of EU Member States situated at the external border of the EU, the unofficial strategy being 'to prevent immigrant's arrival, regardless of costs and consequences.'[58] According to Lighthouse reports, EU Member States from the external borders of the EU use masked men as part of special police units to deter asylum seekers from entering the country and escape accountability for violent pushback actions.[59] Regarding the abuses mentioned, the international journalistic community asks for action from the European Commission regarding the suspension of EU financing instruments for countries using abuse and violence at the EU's external borders and asks FRONTEX to carry out extensive investigations on the subject.[60]

Unfortunately, a recent report published by the Serbian ONG published by KlikAktiv[61] contains several testimonies regarding FRONTEX's alleged involvement in push-backs at the Romanian-Serbian border, which raises serious concerns about human rights violations and the treatment of individuals seeking international protection. These testimonies provide firsthand accounts of encounters with FRONTEX officers during pushback incidents. 1. The testimonies contained in the report describe an incident in Romanian territory in which three Syrian men were caught by FRONTEX officers and subsequently handed over to the Romanian police, who handed them over to the Serbian police. Men reported that the Serbian police did not show any concern for their well-being. 2. Subsequent testimonies collected in November 2021 from a group of 30 men from Syria indicated FRONTEX's involvement in several pushbacks. Men reported varying treatment by FRONTEX officers, with some claiming to have experienced physical violence.

The individuals in the testimonies identified the officers as belonging to FRONTEX based on visual cues such as the officers' appearance and the 'FRONTEX' label on their vehicles. Official information from FRONTEX's website and media articles indicate the deployment of FRONTEX officers at the Romanian-Serbian border. Reports suggest the presence of 50 border guards in Romania and 20 officers at the Romanian-Serbian border. FRONTEX launched its operation in Serbia, titled 'Joint Operation Serbia – Land 2021,' starting on 16 June 2021. The operation initially involved 44 standing corps officers deployed on the Serbian-Bulgarian border, with plans to increase the number of officers in Serbia.

58 See for example C. Woolard's opinion as head of the European Council of Refugees and Exiles.
59 Christides et al., 2021.
60 Gall, 2022.
61 KlikAktiv, 2022b, p. 11.

These testimonies raise serious concerns about the treatment of individuals during pushbacks and the alleged involvement of FRONTEX officers. Any reports of violence, mistreatment, or human rights violations by law enforcement and border control authorities must be thoroughly investigated, and appropriate measures should be taken to address and rectify the situation.

It is essential for all parties involved, including FRONTEX, national authorities, and relevant international organisations, to adhere to international law and human rights principles when dealing with people on the move. These include respecting the rights of individuals seeking international protection, ensuring access to asylum procedures, and prohibiting violence or abuse during border control.

According to official information provided by Romanian Border Police. Migrants arrive in Romania through different land borders, with the southwestern border with Serbia, the southern border with Bulgaria,[62] and the northern border with Ukraine being the primary entry points. Additionally, by 2022, there will be instances of migrants intercepted by the Romanian Coast Guard in the Black Sea, with 157 people rescued.[63]

In conflict with the information published by the Border Violence Monitoring Network, official statistics do not contain any references regarding ill treatment applied to immigrants by representatives of the border police.

In the following, we analyse the statistical data regarding illegal migration presented in the latest AIDA report.

Asylum seekers arrive in Romania mainly through its southwestern border with Serbia, southern border with Bulgaria, and northern border with Ukraine.

According to the statistical data offered by the Border Police, 4,966 persons were appointed for irregular entry in 2022, compared to 9,053 in 2021, 6,658 in 2020, and 2,048 in 2019.

Recent statistics show a significant decrease in the migratory pressure at the Serbian border, explained as a result of securing vulnerable border areas and increasing response capacity, including FRONTEX support (374 representatives, of whom 239 operated on the ground and the rest on the Danube River), acting in collaboration with Serbian border authorities to prevent the illegal migration. In 2022, 27,524 people were prevented from entering the country, the indicator decreasing by 63.6% compared to 2021.

62 Migrants apprehended at the Bulgarian border were taken over by the Bulgarian Border Police, according to the Romanian-Bulgarian Readmission agreement. On the 17th of March 2023, the two neighbouring countries had launched a pilot project of cooperation regarding repatriation, border management and international cooperation in asylum related matters. See for more details: Directorate-General for Migration and Home Affairs, 2023.

63 JRS Romania, no date; Nica, 2021.

Table 3. Border regions where persons were apprehended for irregular entry in 2022[64]

Border	Number
Serbia	1,591
Bulgaria	504
Ukraine	4,871
Moldova	56
Hungary	41
Air border	80
Maritime border	196
Total	7,339

On the other hand, the Border Police prevented entry into the country of 11,232 persons, compared to 9,053 persons in 2021, 6,658 persons in 2020 and 2,048 persons in 2019. Foreign citizens were not allowed to enter Romania because they did not fulfil the legal entry conditions (lack of documentation to justify the purpose and conditions of stay, lack of a valid visa, valid residence permit, etc.)

Regarding illegal pushbacks at the border in 2022, UNHCR Serbia reported 1,232 pushbacks from Romania compared to 13,409 reported in 2020 for foreign citizens collectively expelled from Romania to Serbia.

Regarding refusals to enter Romania, in 2022 were reported in 9,044 cases, compared to 11,232 cases in 2021, 12,684 cases in 2020 and 7,640 cases in 2019.

Table 4. Refusals to entry in Romania in 2022[65]

Country	Number
Moldova	2,949
Ukraine	1,615
Turkey	736
Russia	501
Turkmenistan	216
Total	9,044

When the Border Police decides to refuse entry, it is immediately communicated in Romanian and English to the person concerned using a specific form provided in Part B of Annex V of the Schengen Borders Code.

The Aliens Act does not provide a special remedy for the decision to refuse entry. Therefore, the person concerned may lodge an action against the decision

64 Source: JRS Romania, no date.
65 Source: Nica, 2021; JRS Romania, no date.

before the Administrative Court with territorial jurisdiction over the area where the issuing body of the contested administrative act is located. Before appealing to the Administrative Court, the person must appeal to the issuing public authority within 30 days if they believe their rights have been breached. The complaint should be addressed to a hierarchically superior body, if applicable. The appeals were assessed within 30 days. Failure to fulfil this prior procedural step will make the appeal inadmissible. However, the complaint and appeal to the Administrative Court had no suspensive effect, indicating that the decision to refuse entry remained in force during the appeal process.

Foreigners against whom the decision to refuse entry has been made can voluntarily leave the border-crossing point within 24 hours. After 24 hours, if foreigners have not left voluntarily, the decision to refuse entry is enforced by the Border Police. The person is sent to the country of origin or another destination accepted by the person and the third state concerned, except Romania.

If foreigners declare to the Border Police authorities that they would be endangered or subjected to torture, inhuman, or degrading treatment in a state, they would have to go to after refusing entry, and they do not submit an asylum application, a special procedure is followed. The Border Police must immediately inform the GII-DAI, which will analyse the situation and determine whether the declaration is well-founded. If the declaration is well founded, removal under an escort enforces the decision to refuse entry.

Statistical data offered by the latest AIDA report show that in 2022, four appeals against the decision to refuse entry into Romania were processed at the level of the General Inspectorate of Border Police (IGPF).

6. International cooperation in order to fight illegal migration

Romania strongly emphasises collaboration with other European Union member states in law enforcement to ensure the security of the European area and its citizens and to counter cross-border crime and illegal migration effectively. The Romanian Border Police, as a specialised institution under the Ministry of Administration and Interior, is dedicated to enhancing international police cooperation within Europe and beyond.

To achieve rapid and efficient countering of illicit activities committed across multiple states, the Romanian Border Police recognise the importance of operational data and information exchange and participating in joint operations for complex cases. They fully apply European provisions for police cooperation to prevent and counter cross-border crimes efficiently.

The international police cooperation channels used by the Romanian Border Police include:[66]

Exchange of Information through contact points and centres at the border, the latter serving as communication hubs for exchanging information between law enforcement authorities at the borders.
Exchange of Information through Liaison Officers / Home Affairs Attachés, which facilitate direct communication and cooperation between Romania and other countries.
Exchange of Information through the International Police Cooperation Center, which acts as an agency to facilitate information exchange and cooperation.
Exchange of Information through FRONTEX, the European Border and Coast Guard Agency, as a key partner in enhancing border security and information sharing.
Exchange of Information with Similar Structures in other States based on bilateral documents and protocols, which lays out the framework for cooperation.

Periodic reunions among the chiefs of border police structures from neighbouring states are organised to further strengthen cooperation and security at common borders. These meetings, visits, and experience exchanges at the expert level helped improve collaboration and knowledge sharing.

The main legal instruments for cooperation are:

International Treaties and Conventions, that promote law enforcement cooperation and information sharing.

Border Treaties related to border management and security play a role in enhancing cooperation with neighbouring countries.
Documents for International Operational Cooperation, establishing cooperation plans to fight cross-border and organised crime at the bilateral and multilateral levels.

FRONTEX,[67] the European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union, was established in 2005 under the provisions of Article 2 of EU Council Regulation No. 2007/2004. The agency has been operational since its inception and is tasked with several key objectives, such as

66 Consult in this regard information: Romanian Border Police (no date) *International Collaboration*.
67 Available at: https://frontex.europa.eu/ (Accessed: 23 October 2023).

Operational Coordination ensures operational coordination between the EU member states when managing their external borders. Coordination is essential for addressing common challenges and effectively managing border security.
Assistance in Border Policemen Training includes establishing common training standards to enhance the professionalism and effectiveness of border security personnel.
Risk Analysis, in order to identify potential threats and vulnerabilities at the external borders in order to take proactive measures to address emerging challenges;
Research & development concerning the control and surveillance of external borders, by staying informed about the latest advancements in border security technology and methods, allows Member States to make informed decisions and adopt best practices.
Support for Joint Operations involves collaboration between multiple countries to address specific border security issues effectively.

By fulfilling these objectives, FRONTEX enhances the capacity of European Union member states to manage their external borders efficiently, address cross-border challenges, and ensure the safety and security of Europe and its citizens. The agency acts as a valuable platform for information exchange, collaboration, and coordination among EU countries on border management and security matters.

As mentioned previously, collaboration between liaison officers and home affairs attachments plays a crucial role in promoting and expediting cooperation between Romania and other states, particularly concerning criminality and border security issues. These officers are sent on missions to facilitate assistance in various areas as follows: (1) Exchange of Data and Information between Romania and other states to prevent and counter criminal activities effectively, identify potential threats, and coordinate efforts to address criminality across borders. (2) Police and Judiciary Assistance in criminal matters, including cooperation in investigations, extradition requests, and other law enforcement-related matters that require international collaboration. (3) Border Surveillance Responsibilities related to border security and management to prevent unauthorised border crossings and other border-related crimes.

The liaison officers[68] are primarily tasked with providing consultancy and assistance rather than carrying out concrete actions in preventing and countering

68 For more information, please consult: Romanian Border Police (no date) *International Collaboration* [Online]. Available at: https://www.politiadefrontiera.ro/en/main/pg-international-collaboration-103.html (Accessed: 23 October 2023).

criminality. They acted according to instructions from the competent authorities in their respective countries.

The Romanian Border Police engages in permanent cooperation with two types of liaison officers: (1) Romanian M.A.I. Liaison Officers Abroad (Romanian officials stationed in other countries to represent the interests of the Romanian Ministry of Administration and the Interior and facilitate cooperation with foreign law enforcement and security agencies). (2) Foreign Liaison Officers in Romania (working on accredited diplomatic missions and representing their respective countries' interests).

Cooperation between Romania and liaison officers primarily focuses on exchanging intelligence in critical areas, such as illegal migration, human trafficking, and cross-border criminality.

Romania has international collaboration and readmission agreements with the following countries:[69] Austria (since 2004), Bosnia and Herzegovina (since 2005), Bulgaria (since 2006), the Czech Republic (since 2002), Croatia (since 2000), France (since 2002), Germany (since 2006), United Kingdom (since 1995), Greece (since 1992), Hungary (since 2005), North Macedonia (since 2003), Italy (since 1991), Moldova (since 2006), Montenegro (since 2006), the Netherlands (since 2004), Poland (since 1993), Russia (since 2002), Serbia (since 2004), Slovakia (since 2005), Slovenia (since 2001), Switzerland (since 2003), Turkey (since 1998), Ukraine (since 1997) and the USA (since 2002).

7. The Practical Problem of "formalized push-back" operations or using readmission agreements in order to escape the effective granting of asylum rights

▪ *7.1. Case study: Serbia*[70]

According to a recent study published by the international ONG KlikAktiv,[71] there are serious concerns about the practice of readmissions of third-country nationals from Romania to Serbia, based on the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorization.[72] The readmission agreement allows for the legal return of third-country nationals and stateless persons from EU member states to Serbia.

69 Ibid.

70 For more details see KlikAktiv, 2022a.

71 KlikAktiv is a grass-roots Serbian NGO which provides free legal and psychosocial support to people on the move, asylum seekers and refugees in Serbia. KlikAktiv is based in Belgrade, but conducts regular field visits to informal squats in border areas where hundreds of people on the move are forced to reside while they are trying to reach the European Union (EU).

72 OJ *L 334, 19 December 2007, pp. 46–64.*

However, how the agreement has been applied in practice raises human rights issues and violates principles related to asylum and non-refoulement.

The mentioned report signals several problems related to the practical application of the readmission agreement between Serbia and Romania/EU as follows:

Deportation from EU member states to Romania based on the Dublin Regulation, where asylum seekers were deported from several EU member states (Austria, Germany, Belgium, and Slovakia) to Romania based on the Dublin Regulation., followed by deportation from Romania to Serbia, based on the readmission agreement signed between the two countries.

Lack of effective assessment of protection needs or asylum claims: Protection seekers deported to Romania did not have access to an effective asylum procedure in Romania even though they tried to request asylum. Instead, they were deported back to Serbia without their protection needs being adequate assessment.

Denial of access to the asylum procedure in Serbia: Protection seekers were denied access to the asylum procedure upon readmission. Instead, they were forced to reside in informal settlements (squats) on northern Serbian borders without proper documentation or basic necessities such as accommodation, food, and clothes.

Violating the right to seek asylum and the principle of non-refoulement by ‘formalized push-backs’ between Romania and Serbia violates the protection seekers’ right to seek asylum and the principle of non-refoulement.

The practices in the report raise significant human rights concerns and highlight the need for proper protection of and respect for the rights of individuals seeking asylum and international protection.

7.1.1. The procedure of readmission according to readmission agreements between Serbia and EU/Romania

It should be noted that the readmission agreement includes a non-affection clause stating that the agreement should not prejudice the rights, obligations, and responsibilities of EU Member States and Serbia arising from international law, including the Convention on the Status of Refugees and its protocol. This clause emphasises that individuals seeking international protection in an EU Member State cannot be readmitted to Serbia until the member state’s authorities properly assess their asylum claims.[73]

The criterion for readmission included proving that the concerned person had entered the requesting Member State from Serbia. The member states’ authorities can use various means to establish this fact, such as testimonies, border police reports, and material evidence found among the concerned person’s belongings.

73 Art. 17 of the EU-Serbia Readmission Agreement.

Once the request for readmission is submitted, the Serbian authorities have ten days to respond; if there is no reply, the transfer is deemed acceptable. The actual transfer must occur within three months after the request is approved.

Since many individuals on the move do not possess national travel documents, the Member State issues a European travel document for the return of illegally staying Third Country nationals. This document allowed them to cross borders legally and enter Serbia. However, this document is valid only for a single crossing and cannot be reused.

Individual protocols between Serbia and each EU member state accompany the agreement on readmission between the EU and Serbia. The protocol between Serbia and Romania specifies airport and land border-crossing points through which third-country nationals can be readmitted.[74] It also states that the requesting state (in this case, Romania) will cover all costs related to readmission.

The Report published by KlikAktiv highlights significant challenges and human rights concerns related to the asylum procedure and treatment of people on the move in Serbia. It sheds light on the difficulties those seeking international protection face and how certain practices exacerbate their vulnerability.

Many people on the move did not have access to asylum procedures in Serbia. Police stations in northern cities, where most people reside after readmission, refuse to register them as asylum seekers and ignore their asylum claims. This denial of access to the asylum procedure leaves individuals without a proper legal status and exposes them to various risks, including falling prey to smuggling networks, human trafficking, and exploitation.

Lack of access to necessities, such as food, heating, and clothing, forces people in need of international protection to stay in transit camps or informal settlements run by smugglers. These living conditions are often poor and can exacerbate the vulnerability of individuals seeking protection.

The Serbian police initiate a return procedure for people readmitted from EU member states by issuing decisions on returns. These decisions require individuals to leave Serbia voluntarily within 30 days. If they failed, a forced removal procedure was performed. Such decisions hinder individuals from applying for asylum in Serbia and prevent them from accessing the limited shelters available to asylum applicants. The lack of access to asylum procedures and exclusion from shelters leaves individuals with no other choice but to attempt re-entry into the EU. This practice puts them at risk of potential chain pushbacks to third countries or their countries of origin during the return process.

74 The protocol proclaims that a readmission of third country nationals can be done through the airports 'Henri Coandă' in Bucharest and 'Traian Vuia' in Timișoara, from the Romanian side and 'Nikola Tesla' Airport in Belgrade from the Serbian side. Besides airports, third country nationals can be returned on one of the following land border crossing points: 'Portile de Fier I – Djerdap I', 'Naidas – Kaludjerovo', 'Stamora Moravița – Vatin' and 'Jimbolia – Srpska Crnja.'

These practices raise serious concerns about individuals' protection and human rights, particularly those seeking international protection. Denying access to asylum procedures and proper legal status can expose them to exploitation and abuse, further violating their rights.

Examples regarding abusive use of readmission procedures in the period July 2020 – May 2022.

August 2020 – The case of a Syrian family (a father, his 10-year-old son, and the father's cousin), where the Romanian Police had issued a European travel document for the return of illegally staying third-country nationals to be readmitted to Serbia, based on the readmission agreement. The family, caught by Romanian border police, asked for asylum, but their requests were ignored. People did not have access to legal aid or interpretation of the language that they could understand. The family spent six hours at the Romanian border police office and was handed over to the Serbian border police.

March 2021 – The case of a 26 year old man from Afghanistan caught by the Romanian border police near Timișoara. The person had access to the asylum procedure in Romania, obtained an ID card, and was later readmitted to Serbia in May 2021. The person was subjected to an accelerated procedure in Romania and did not have access to legal aid or any assistance from an interpretation, even though he did not speak English or Romanian. The person was subject only to a brief interview and did not have the real possibility of explaining their situation and reasons for living in Afghanistan. The asylum was then removed. The person was unaware of the possibility of contesting the solution in court because of language barriers. The Serbian Border Police refused to ensure the right to seek asylum and refused access to an asylum camp, even with a decision regarding its readmission to Serbia. Afghan citizens tried several times to enter Hungary illegally but were pushed back every time.

January 2021 – The case of an Afghan citizen caught by Romanian border police after a five-day detention in a Romanian asylum camp deported back to Serbia. The person had declared that, in Romania, they did not benefit from the right to seek asylum, and he had only the possibility to choose from being deported back to Afghanistan or back to Serbia after a short interview.

May 2021 – The case of a Syrian citizen residing in harsh conditions in a transit camp in Sombor (bad living conditions and forced labour in exchange for a place in the transit camp, food shortage, diseases, etc.). The person had reached Austria through Romania and Hungary, where they did not request asylum rights. After receiving official asylum-seeker documents from the Austrian authorities, the person was readmitted to Romania according to the provisions of the Dublin Regulation in January 2021. After a short interview without legal assistance or interpreter services, the person was placed in COVID-19 quarantine near Bucharest airport and readmitted to Serbia in February 2021. The person did not have

access to asylum proceedings in Serbia and was ordered to leave the territory within 30 days.

September 2021 – An Afghan citizen was deported from Belgium to Romania according to Dublin procedures and then readmitted back to Serbia.

The cases documented by KlikAktiv shed light on the challenges and the risks asylum seekers encounter when attempting to re-enter the EU through different routes. Most people on the move do not have material proof of their readmission procedures. Some lost documents during their journeys, while others deliberately destroyed documents to avoid potential problems if found by the police. This lack of documentation makes it challenging for individuals to confirm their previous readmission statuses. The fear of potential consequences or difficulties with the police may lead some individuals to destroy or discard their readmitted documents. This fear reflects the vulnerability of people on the move and highlights the risks they face when navigating migration routes and border controls.

It is essential to recognise the difficulties and complexities faced by people on the move and their vulnerability to exploitation, abuse, and human rights violations. The lack of material proof and fear of authorities underscore the need for proper legal protection and support mechanisms for individuals seeking international protection.

These documented cases highlight the broader issues of migration management, border control practices, and ensuring that individuals' rights and safety are respected at all stages of their journey. International cooperation and adherence to human rights principles are crucial for addressing the challenges people face on the move and providing them with the necessary protection and support.

8. Conclusions

Migration is a complex and multifaceted phenomenon driven by various factors, such as seeking better economic or educational opportunities, family reunification, climate change, and disasters. Irregular migration can lead to serious problems, including migrant deaths, smuggling, and human trafficking. However, properly managed migration can bring significant benefits and drive sustainable development for migrants and their host communities.

Romania, as a state situated at the confluence of several regional migration routes and an EU Member State situated at the external borders of the EU, meets several challenges related to properly administrating the migration crisis.

Tackling and controlling illegal migration, especially on the Western Balkans Route, is one of the major objectives Romania has to fulfil to obtain the support of EU Member States regarding its access to the Schengen Area.

In this regard, Romania has to control illegal pushbacks and renounce the mechanism of using readmission agreements to mask illegal refusal to grant asylum rights. Among the actions Romania has to undertake together with its neighbours, we can mention the strengthening of border management, increasing the reception capacity and living conditions in regional reception centres, combatting migrant smuggling, further enhancing readmission cooperation and returns, and reducing bureaucracy in visa policies.

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ALINA-LIVIA NICU[*]

The Practice of the Constitutional Court of Romania Concerning Migration and Refugee Affairs

■ **ABSTRACT:** *This study analyses the jurisprudence of the Constitutional Court of Romania regarding the legal norms of legislation concerning the status and regime of refugees in Romania. The paper aims at (1) presenting the opinions expressed by the Constitutional Court of Romania in its jurisprudence regarding migration and asylum; (2) assessing whether the jurisprudence of the Constitutional Court of Romania on migration and asylum is drawn up about the limits of the competences of the European Union and member states; and (3) exploring whether the Constitutional Court of Romania linked the problems of migration or asylum to the problem of constitutional identity. The concept of constitutional identity and its presence within the activities of the Romanian Constitutional Court are briefly outlined. THE number of notifications to the Constitutional Court of Romania with the object of derogation from the unconstitutionality of certain provisions of the legislation concerning the status and regime of refugees in Romania was minimal from 22 December 1989 to 30 June 2023. Consequently, only a few laws exist in this area. There was only one referral to the Constitutional Court after Romania joined the European Union, which was completed in 2019 with the adoption of the admission decision.*

■ **KEYWORDS:** Constitutional Court of Romania, jurisprudence, emigrants, refugees, asylum, legislation

1. Introduction

The most important traits of Romanians are hospitality, generosity, and kindness in a hierarchy that includes dignity and courage. Romanians emphasise being friendly and generous with their peers in times of joy and trouble. The closest

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tragic event that activated the potential energy of the Romanian people happened on 6 February 2023, when an earthquake of 7.8° on the Richter scale shook southern and central Turkey, respectively northern and western Syria. On that occasion, the Romanian people mobilised to help the people who suddenly lost everything and acquired, independent of their will, the status of victims. The press wrote, 'Mobilization of forces for the victims of Turkey and Syria. Romania is sending tons of aid to those affected by the earthquakes.'[1]

The evolution of social relations in Romania after 22 December 1989 brought new topics to the fore. Thus, the departure of some Romanians to work abroad, with or without the intention of settling in their respective countries, generated a reduction in the labour force and the need to bring in workers from other countries. Consequently, regulations regarding the status of foreigners in Romania have become a topic of interest for Romanian and foreign entrepreneurs as well as the national legislature. In addition, the tragic events that took place on the Romanian border starting on 24 February 2022 gave Romanians the opportunity to prove their hospitality and humanity to Ukrainian refugee citizens. On 25 February 2022, the media informed us[2] that 'Waves of Ukrainian refugees continue to enter Romania at various border crossing points.' At Siret Customs, the refugees were welcomed by volunteers with food, fruits, sweets, water, and warm doughnuts prepared by nuns from Putna Monastery. On 4 March 2023, under the title 'Refugee in Romania. How do the people and the authorities still help the Ukrainians after a year of war' the media specified,[3] 'More than 3 million refugees from Ukraine transited Romania to reach other European countries. In February 2023, over 109 thousand were settled in Romania. The refugees are helped both by civil society, volunteers and the authorities.' Supporting Ukrainian refugees continues to be a reality that proves that both citizens and the Romanian state know how to behave with friendship and respect towards any citizen of the world. The regulations regarding the status and regime of refugees in Romania have transformed from potential energy to kinetic energy, defining the portrait of social relations and demonstrating the wisdom of the popular author who synthesized the essence of friendship in the verb: 'A friend in need is a friend indeed.'

Since it concerned new aspects of social practice, the regulations had to be aligned with the new demands of objective reality. Consequently, it appears to be an objective necessity to present the evolution of the legal framework regarding migration and asylum in Romania between 22 December 1989 and June 2023. Although it may seem too broad, this presentation is necessary to understand why there are so few cases of referral to the Constitutional Court regarding exceptions

1 Niculae and Mîrza, 2023.
2 Angel, 2022.
3 Horșia, 2023.

to the legal rules of normative acts that regulate migration and the status of foreigners in Romania.

2. The evolution of the legal framework regarding migration and asylum in Romania from 22 December 1989 – June 2023

17 July 1991 constituted an important moment in the evolution of Romanian regulations regarding migration and asylum. It was published in the Official Monitor of Romania[4] Law No. 46/1991 for Romania's accession to the Convention on the Status of Refugees, as well as to the Protocol on the Status of Refugees. Romania's accession to international normative acts has generated a series of obligations for the country. The adoption of certain legislative acts aimed at harmonising relevant domestic law with international law has been the first step in fulfilling these obligations. The first normative act was adopted by the Government of Romania because of the first attempt to implement Law No. 46/1991 and was published in the Official Monitor of Romania, Part I, No. 39 on 11 February 1994. It is about Government Decision No. 28 of 27 January 1994 regarding the schooling of asylum seekers and refugees in Romania, whose role was to regulate the aspects regarding the schooling 'during pre-university studies' of the two categories of persons 'Until the adoption of the law on the status and regime of refugees in Romania.'[5]

1996 is the year in which the legislature fulfilled its obligation to adopt a law regarding the status and regime of refugees in Romania. This is about Law No. 15 of 2 April 1996 regarding the status and regime of refugees in Romania.[6] The Romanian government decided to facilitate the implementation of Law No. 15/23/1996. Decision No. 1.182 of 13 November 1996, for the application of Law No. 15/1996 regarding the status and regime of refugees in Romania.[7] Social practice required that the law be adopted the year before being amended by the Emergency Ordinance of the Romanian Government No. 47 of 2 September 1997 to remove the link between the level of salary, insurance, or social assistance rights and the gross minimum basic salary per country.[8] Thus, Article 15 Paragraph 1, which regulated the rights of refugees, was modified in the sense that the reimbursable aid, regulated in letter i) for the case that 'for objective reasons,' the refugee 'is deprived of the necessary means of subsistence,' was resized to the level of '172,500 lei per month, which is indexed with the indexation coefficients established for wages on the whole economy, after September 30, 1997,' previously this aid was

4 Official Monitor of Romania, Part I, No. 148.
5 Art. 1 of the G.D. No. 28/1994.
6 Published in the Official Monitor of Romania, Part I, No. 69 of April 5, 1996.
7 Published in the Official Monitor of Romania, Part I, No. 307 of November 26, 1996.
8 Published in the Official Monitor of Romania, Part I, No. 231 of September 4, 1997.

of only a ‘minimum wage.’ This regulation was intended to improve the quality of life of refugees in Romania.

Decision of the Government of Romania No. 1,182 of 13 November 1996 was amended by Decision No. 322 of 20 April 2000 regarding the amendment and completion of Government Decision No. 1.182/1996 for the application of Law No. 15/1996 on the status and regime of refugees in Romania,[9] three articles being introduced,[10] articles by which the right of the refugee status applicant who ‘does not have any material means’ to benefit ‘within the limits of existing possibilities’ of ‘meals and accommodation in a reception, sorting and accommodation centre’ was regulated, specifying that

> The reception, sorting and accommodation centres will also be able to accommodate people who have acquired refugee status, in special situations, such as incapacity to work, families with many minor children, the elderly, etc. The accommodation will be done by charging rent at the level established for living spaces and property of the state.

These new regulations were intended to improve the quality of life of refugees in Romania.

The year 2000 brought the repeal of Law No. 15/1996 regarding the status and regime of refugees in Romania by Government Ordinance No. 102 of 31 August 2000.[11] This Regulation was amended by five legislative acts due to the evolution of social relations. As a result of this important change, on 1 December 2004, the text of Government Ordinance No. 102/2000 on the status and regime of refugees in Romania was republished in the Official Monitor of Romania, Part I, No. 1136.

In 2006, the Government Ordinance No. 102 of 31 August 2000 was repealed because of the adoption of Law No. 122 of 4 May 2006 on asylum in Romania[12] by the Romanian Parliament. It thus returned to the state of normality, in the sense that

> the legal regime of foreigners who request international protection in Romania, the legal regime of foreigners who are beneficiaries of international protection in Romania, the procedure for granting, termination and cancellation of international protection in Romania, the procedure for establishing of the member state responsible for analysing the asylum application, as well as the conditions for granting, excluding and terminating temporary protection

9 Published in the Official Monitor of Romania, Part I, No. 179 of April 25, 2000.
10 Arts. 6(1), (2) and (3).
11 Published in the Official Monitor of Romania, Part I, No. 436 of September 3, 2000.
12 Published in the Official Monitor of Romania, Part I, No. 428 of May 18, 2006.

are regulated by legal rules adopted by the legislative body, not the executive body, which previously enacted through ordinances based on the legislative delegation according to the provisions of Article 115 from the Constitution of Romania.[13] Law No. 122 of 4 May 2006 is the normative act through which the provisions of the community regulations relating to asylum[14] were transposed into

13 Regarding the ability of the Government to legislate through acts with the legal force of law, Art. 115 of the Constitution of Romania Available at: https://www.ccr.ro/en/legal-basis/ (official translation), specifies:
'Art. 115 – Legislative delegation
(1) Parliament can pass a special law enabling the Government to issue ordinances in domains outside the scope of organic laws. (2) The enabling law shall expressly establish the domain and the date up to which ordinances may be issued. (3) If the enabling law so requests, ordinances shall be submitted to Parliament for approval, according to the legislative procedure, until the expiry of the enabling time limit. Failure to observe such limits entails discontinuation of the effects of the ordinance. (4) The Government can adopt urgency ordinances only in exceptional cases, the regulation of which cannot be postponed, and have the obligation to set forth the reasons for that urgency within their contents. (5) Urgency ordinances shall come into force only after their tabling for debate in an urgency procedure to the Chamber having the competence to be notified, and after it has been published in the Official Gazette of Romania. If not in session, the Chambers shall be convened within 5 days after tabling, or after forwarding. If within 30 days at the most after the tabling date, the Chamber thus referred has failed to decide on the ordinance, the latter shall be deemed approved and shall be sent to the other Chamber, which shall also decide in an urgent procedure. An urgent ordinance containing norms of the same kind as the organic law must be approved by a majority as stipulated under Art. 76(1) and (6) Urgency ordinances cannot be adopted in the field of constitutional laws, nor affect the status of fundamental institutions of the State, the rights, freedoms, and duties stipulated in the Constitution, the electoral rights, and cannot envisage any measures for the forcible transfer of assets into public property. (7) Ordinances referred to the Parliament are approved or rejected through a law which must also contain the ordinances that ceased to be effective according to paras. (3) and (8) Such law on approval or rejection shall regulate if such is the case, any necessary measures concerning the legal effects caused while the ordinance was in force.'

14 Following the legislative process on the website [Online]. Available at: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=7044 (Accessed: 24 August 2023) it can be seen from the 'Explanation of reasons' document that through the drafting of the Law No. 122 of May 4, 2006 regarding asylum in Romania, the fulfillment of the commitment assumed by Romania regarding the alignment of Romanian legislation with the acquis communautaire in the field of asylum was pursued, being specified that the new normative act takes into account the need to transpose the following community acts into national legislation: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0055 (official translation); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003L0009 (official translation); Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [Online]. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32003L0086 (official translation); Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international

Romanian law and, simultaneously, the provisions of the legal norms of international law relating to the protection of refugees, also desiring to harmonise the legislation in the field in Romania with the provisions contained in the community acquis, taking into account the mechanisms established by the revised Dublin Regulation and the EURODAC system. As shown in the specialised literature,[15] citing the text of the law, 'We note, first of all, that the solution of the common applicable regulation was also chosen in Romania both asylum applications and refugee status, between which no distinction is made.' However, in the case of the legal standards set out in Law No. 122 of 4 May 2006, the evolution of social relations and problems to be solved in the field of social practice led to instability. Thus, from the moment of entry into force until now, the law has been modified by the government of Romania because it exercised the prerogatives resulting from the legislative delegation through five emergency ordinances and three simple ordinances. The Parliament itself considered it necessary to intervene with changes to the legal norms on asylum in Romania contained in Law No. 122 of 4 May 2006 and other regulations on migration and asylum through seven normative acts.[16]

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protection and the content of the protection granted [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083 (official translation). Also, in the 'Explanation of reasons' document, it is specified that the draft normative act is also carried out with the aim of creating the necessary legal framework i.e. establishing inter-institutional cooperation relations for the implementation of three community acts that 'do not require transposition:' Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000R2725 (official translation); Council Regulation (EC) No. 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No. 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0407 (official translation); Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0343 (official translation).

15 Vergatti, 2009, p. 178.

16 Law No. 347 of December 3, 2007 for the approval of Government Emergency Ordinance No. 55/2007 regarding the establishment of the Romanian Immigration Office through the reorganization of the Authority for Foreigners and the National Office for Refugees, as well as the modification and completion of some normative acts, published in the Official Monitor of Romania, Part I, No. 851 of December 12, 2007; Law No. 280 of December 24, 2010 for the amendment and completion of Law No. 122/2006 regarding asylum in Romania, published in the Official Monitor of Romania, Part I, No. 888 of December 30, 2010; Law No. 187 of October 24, 2012 for the implementation of Law No. 286/2009 regarding the Criminal Code, published in the Official Monitor of Romania, Part I, No. 757 of November 12, 2012; Law No. 18 of March 4, 2013 for the amendment of Law No. 122/2006 regarding asylum in Romania, published in the Official Monitor of Romania, Part I, No. 122 of March 5, 2013 ; Law No. 376 of December 19, 2013 for the modification and completion of some normative

All these regulatory measures of the Romanian Parliament and the Government prove, on the one hand, the permanent concern for a legal framework by practical needs, which allows the development of social relations in which people apply for refugee status and those who obtain this status feel comfortable, protected, supported, and safe; on the other hand, the permanent concern for the respective legal norms to be consistent with international law and European Union law in the field.

For the sake of scientific rigour, it is necessary to mention that in Romania, there has always been legislation on the regime of foreigners, alongside the legal framework on migration and asylum.[17]

3. National constitutional identity and the Constitutional Court of Romania

The concept of national constitutional identity is complex and important for social practice at both the European Union and national levels. This concept is particularly important for all persons who are residents of a member state of the European Union, given their rights and obligations arising from the quality of an EU citizen as well as those derived from Europe's citizenship, which complements national citizenship. Therefore, it is necessary to understand the content fully.

This need is not easy to satisfy because

> the national constitutional identity is a relatively new concept in the legal landscape of constitutional law, being at the centre of scientific

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acts in the field of migration and asylum, published in the Official Monitor of Romania, Part I, No. 826 of December 23, 2013; Law No. 137 of October 15, 2014 regarding the approval of Government Ordinance No. 1/2014 for the amendment and completion of Law No. 122/2006 regarding asylum in Romania and Government Ordinance No. 44/2004 regarding the social integration of foreigners who have acquired a form of protection or a right of residence in Romania, as well as citizens of the member states of the European Union and the European Economic Area, published in the Official Monitor of Romania, Part I, No. 753 of October 16, 2014; Law No. 331 of December 16, 2015 for the amendment and completion of some normative acts in the field of foreigners, published in the Official Monitor of Romania, Part I, No. 944 of December 21, 2015.

17 Thus, after the events of December 1989, Law No. 25 of December 17, 1969, regarding the regime of foreigners in the Socialist Republic of Romania (published in the Bulletin Official No. 146 of December 17, 1969, and republish in the Bulletin Official No. 57 of May 18, 1972) by Law No. 123 of April 2, 2001, regarding the regime of foreigners in Romania (Published in the Official Monitor of Romania, Part I, No. 168 of April 3, 2001), repealed in turn by Emergency Ordinance No. 194 of December 12, 2002, regarding the regime of foreigners in Romania (published in the Official Monitor of Romania, Part I, No. 955 of December 27, 2002, republished, due to frequent changes, in the Official Monitor of Romania, Part I, No. 201 of March 8, 2004, and in the Official Monitor of Romania, Part I, No. 421 of June 5, 2008), which is in force, although it has undergone many changes.

> and doctrinal debates, being also present in the jurisprudence of the supreme courts, of the constitutional courts and in the judicial dialogue of them from different states[18]

and, as a result of

> this sustained dialogue between the constitutional courts as well as between them and the Court of Justice of the European Union (CJEU), the content, meaning and significance of the notion of constitutional identity is in full formation and continues to be affirmed, demanding a recognition and both jurisprudential and doctrinal consecration.[19]

An example of dialogue having as its subject the content of the concept of constitutional identity is the organization in Romania, on 12 April 2019, of the International Conference 'The National Constitutional Identity in the Context of European Law,' organized by the Constitutional Court of Romania, a conference attended by judges from the Constitutional Court of Austria, the Constitutional Court of Hungary, the Constitutional Court of Germany, the Constitutional Court of the Czech Republic, the Constitutional Court of Croatia, the Constitutional Court of Slovenia and the Constitutional Court of Romania. The debate started from the reality that the constitutional identity acquired, due to the existence of the European Union, 'a double perspective: the national one, specific to each member state of the European Union and the European one, established in the European Union treaties.'[20] On this occasion, the practitioners pointed out synthetically and expressively the social importance of the constitutional courts:[21]

> Only constitutional justice makes the Constitution a legal norm in the proper sense of the term, that is, a regulation with binding legal force. On the other hand, if it were not for constitutional justice, a Constitution would be nothing more than a simple recommendation

a constitutional court being the one that ensures that democracy is functional and does not turn into a dictatorship of the majority, the role of watching materialising in that

> when a constitutional court exercises control over the constitutionality of laws, it acts not only as a supreme guardian of the Constitution

18 Varga, 2019, p. 20.
19 Varga, 2019, p. 20.
20 Dorneanu and Krupenschi, 2019, p. 3.
21 Bierlein, 2019, p. 13.

> but also as a guardian of democracy. Constitutional control is therefore not only a legal function but also a democratic one.[22]

There is also another level of concern towards the concept of constitutional identity, namely, the relationship between constitutional identity and the commitments freely assumed by constitutional states by concluding international treaties, such as the United Nations Charter, the European Convention on Human Rights, or the Treaty regarding the European Union and more definite treaties, such as conventions for the avoidance of double taxation.[23]

To be able to analyse the concept of national constitutional identity and the role of the Constitutional Court of Romania in the process of defining this concept, it is necessary to specify that in Romania, the Constitutional Court does not have the competence to refer itself to carry out a preventive control of constitutionality within the procedure of ratifying a European treaty.[24] Thus, neither the Treaty of Romania's accession to the EU (2005) nor the Treaty of Lisbon (2007) was subject to a constitutionality check by the CCR. Therefore, the latter was deprived of the legal framework that other European constitutional courts had, which was necessary to carry out a constitutionality check from the perspective of the national constitutional identity.[25]

Reading the text of Article 4.2, the European Union Treaty, the question arises, also formulated in specialised literature,[26] who has the prerogative to determine the content of the concept of national constitutional identity? The response highlighted two possible approaches:[27] if this concept is considered as 'an autonomous legal concept, belonging to the European legal order', its interpretation would be the competence of the Court of Justice of the European Union, and if the concept is 'a legal concept integrated into national constitutional orders,' then each national constitutional court will have the prerogative to rule. The "open and continuous dialogue" of national constitutional courts with the Court of Justice of the European Union to reach a mutually agreed interpretation of the content of the national Constitutional identity, appears to be the only solution likely to prevent social blockage.[28] This solution is also foreshadowed by the interpretation[29] that Article 4.2 of the European Union Treaty would represent a reduction in the level of insistence and rigidity with which, before it entered into force, the European Union affirmed and imposed the concept of European constitutional identity. Regarding the constitutional identity of Romania, it is defined with the help of the

22 Bierlein, 2019, p. 14.
23 Paulus, 2019, p. 29.
24 Tănăsescu, 2010, p. 153.
25 Guțan, 2015, p. 181.
26 Varga, 2019, p. 21.
27 Guțan, 2015, pp. 175–176.
28 Mayer, 2009, p. 423.
29 Besselink, 2010, p. 48.

identity clause,[30] the eternity clause[31] and the integration clause,[32] which includes in its content 'subsidiarily a compliance clause.'[33]

The concept of national constitutional identity is used in several decisions without being expressly defined but none of the decisions related to legal norms regulating migration or asylum. From the point of view of its jurisprudence, it was stated that[34]

> The Constitutional Court of Romania has not succeeded, so far,[35] to capitalize, to the extent of potential and possibilities, the concept of national constitutional identity, among other things, and to prove

30 *Stricto sensu,* the identity clause is defined by the provisions of Art. 1(3) from the Constitution: 'Romania is a state of law, democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and ideals Revolution of December 1989, and they are guaranteed.' [Online]. Available at: https://www.ccr.ro/en/legal-basis/ (official translation). *Lato sensu,* the content of the identity clause can include all the articles of Title I of the Constitution, the title called 'General Principles' and which includes articles from 1 to 14, Art. 61, which regulates the bicameral parliament, the articles relating to the executive power, and Art. 115 regarding legislative delegation, Art. 114 regarding the institution of government liability and the rules governing the way justice is organized and operated.

31 The eternity clause is defined by the provisions of Art. 152 of the Constitution: 'Art. 152 – Limits of revision
(1) The provisions of this Constitution regarding the national, independent, unitary, and indivisible character of the Romanian state, the republican form of government, the integrity of the territory, the independence of the judiciary, political pluralism, and the official language cannot be subject to revision. (2) Likewise, no revision can be made if it results in the suppression of the fundamental rights and freedoms of citizens or their guarantees. (3) The Constitution cannot be revised during the state of siege or the state of emergency, nor in time of war.'

32 The integration clause is provided for by Art. 148 of the Constitution: 'Art. 148 – Integration into the European Union
(1) Romania's accession to the constitutive treaties of the European Union, to transfer some powers to the community institutions, as well as to jointly exercise with the other member states the powers provided for in these treaties, is done by a law adopted in the joint session of the Chamber of Deputies and Senate, with a two-thirds majority of the number of deputies and senators. (2) As a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations, have priority over the contrary provisions of the internal laws, in compliance with the provisions of the act of accession. (3) The provisions of paras. (1) and (2) shall apply, accordingly, also for the accession to the revision acts of the constitutive treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority guarantee the fulfillment of the obligations resulting from the act of accession and the provisions of para. (2). (5) The Government submits to the two Chambers of the Parliament the drafts of binding acts before they are submitted to the approval of the institutions of the European Union.'

33 Varga, 2019, p. 24.

34 Ibid., p. 25.

35 The year 2019, when the claim was made.

> the unconditional acceptance of European law of the values, of the principles established by the European legal order.

A few decisions can be mentioned in which the problem of the relationship between European Community law and national law is present. Thus, in a decision[36] The Constitutional Court itself held that

> through the acts of transfer of some attributions to the structures of the European Union, they do not acquire, through its capacity, a «super-competence», a sovereignty of their own. EU member states have decided to jointly exercise certain powers that traditionally belong to the field of national sovereignty. In the current era of globalisation of humanity's problems, interstate developments, and inter-individual communication on a planetary scale, the concept of national sovereignty can no longer be conceived as absolute and indivisible without the risk of unacceptable isolation.

In another decision[37] The Court held that

> The essence of the Union is the assignment by the member states of some competences for the achievement of their common objectives, of course, without affecting, in the end, through this assignment of competences, the national constitutional identity – *Verfassungsidentitat*[38] (...). Therefore, the member states maintain powers to preserve their constitutional identity and the transfer of powers, as well as rethinking the establishment of new guidelines within the already transferred powers belonging to the constitutional margin of appreciation of the member states.

In Paragraph 81 of another decision,[39] the Court held, regarding

36 Decision No. 148 of April 16, 2003, published in the Official Monitor of Romania, Part I, No. 317 of May 12, 2003.

37 Point II.1, Decision No. 683 of June 27, 2012, on the legal conflict of a constitutional nature between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other, published in the Official Monitor of Romania, Part I, No. 479 of July 12, 2012.

38 The Court referred to the Decision of the German Constitutional Court of June 30, 2009, pronounced in Case 2 BvE 2/08, regarding the constitutionality of the Treaty of Lisbon.

39 Decision No. 104/2018 regarding the objection of unconstitutionality of the provisions of the Law amending Law No. 161/2003 regarding some measures to ensure transparency in the exercise of public dignities, public functions, and in the business environment, prevention and sanctioning of corruption published in the Official Monitor of Romania, Part I, No. 446 of May 29, 2018.

> the invocation of the provisions of Article 148 (4) of the Constitution, by reference to Decision 2006/928/EC of the European Commission of 13 December 2006 it shall establish, by joining the European Union, a mechanism for cooperation and verification of Romania's progress in meeting specific reference objectives on reforms to the judiciary and combating corruption

Romania accepted that, in the fields in which the exclusive competence belongs to the European Union, regardless of the concluded international treaties, the implementation of the resulted obligations, should be subject to the rules of the European Union, so that 'Romania cannot adopt a normative act contrary to the obligations to which it has committed itself as a member state,'[40] with a single constitutional limit, expressed in what the Court qualified as 'national constitutional identity.'[41] Another decision[42] discussed the issue of national constitutional identity. Thus, the authors of the referral requested the Court, before solving the request with which it was vested, to formulate four preliminary questions to address the Court of Justice of the EU, questions which, in summary, expressed the desire to specify whether the Mechanism of Cooperation and Verification (MCV) established by Decision 2006/928/EC of the European Commission is an act adopted by an EU institution within the meaning of Article 267 TFEU, which can be subject to the interpretation of the CJEU and if the requirements of this mechanism are mandatory for the Romanian state. In Paragraph 75 of the final sentence, the Court held that

> such an act, even mandatory for the state to which it is addressed, cannot have constitutional relevance, since it neither develops a constitutional norm, being circumscribed to the existing ones nor does it fill a gap in the national Law.

In Paragraph 77 of the same decision, it is stated regarding the reports of the MCV that 'Considering the lack of constitutional relevance of Decision 2006/928/EC, a European binding act on the Romanian state, the constitutional relevance of the reports can be retained even less issued within the M.C.V.', they refer more

40 According to what was retained by the Court in para. 75 of Decision No. 887 of December 15, 2015, published in the Official Monitor of Romania, Part I, No. 191 of March 15, 2016.

41 The Court itself cited Decision No. 683 of 27 June 2012, published in the Official Monitor of Romania, Part I, No. 479 of 12 July 2012, and Decision No. 64 of 24 February 2015, published in the Official Monitor of Romania, Part I, No. 286 of April 28, 2015.

42 Decision No. 137/2019 regarding the objection of unconstitutionality of the provisions of the Law for the approval of the Government Emergency Ordinance No. 90/2018 regarding some measures for the operationalization of the Section for the investigation of crimes in the judiciary, published in the Official Monitor of Romania, Part I, No. 295 of April 17, 2019.

to 'opportunity aspects of legislation.'[43] In Paragraph 456 of another decision,[44] the Court ruled that

> the Constitution is the expression of the will of the people, which means that it cannot lose its binding force just by the existence of an inconsistency between its provisions and the European ones. Also, joining the European Union cannot affect the supremacy of the Constitution over the entire legal order.[45]

Through a decision from 2015,[46] the Court referred to its jurisprudence in which it defined the concept of 'national constitutional identity.'[47] On this occasion, the Court stated:

> Therefore, by joining the legal order of the European Union, Romania accepted that, in the fields where the exclusive competence belongs to the European Union, regardless of the international treaties it has concluded, the implementation of the resulted obligations to be subject to the rules of the European Union. Otherwise, it would lead to an undesirable situation in which, through the international obligations assumed bilaterally or multilaterally, the member state would seriously affect the competence of the union and, practically, substitute it in the mentioned fields. For this reason, in the field of competition, any State aid falls under the purview of the European Commission, and the procedures for contesting it belong to the union's jurisdiction. Therefore, the application of Article 11(1) and Article 148(2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the act of accession, not interfering with the exclusive competence of the European Union, and, as established in its jurisprudence, under the compliance clause included in the text of Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it committed itself as a member state. Of course, all the previously

43 Varga, 2019, p. 27.

44 Decision No. 80 of February 16, 2014, on the legislative proposal regarding the revision of the Romanian Constitution, published in the Official Monitor of Romania, Part I, No. 246 of April 7, 2014.

45 The Court referred to the Decision of May 11, 2005, K 18/04, issued by the Constitutional Court of the Republic of Poland.

46 Decision No. 887 of December 15, 2015, published in the Official Monitor No. 191 of March 15, 2016.

47 Decision No. 683 of June 27, 2012, published in the Official Monitor of Romania, Part I, No. 479 of July 12, 2012, and Decision No. 64 of February 24, 2015, published in the Official Monitor of Romania, Part I, No. 286 of April 28, 2015.

shown to have a constitutional limit, expressed in what the Court qualified as «national constitutional identity».

These are landmark decisions; however, none of them dealt with migration and asylum regulations. On the one hand, the current situation is since Romanian legislation on the matter is modern and harmonised with community and international norms; on the other hand, because there is no possibility of self-referral in the case of the Constitutional Court of Romania. No litigants have brought issues before the Court that would generate discussions regarding national constitutional identity or the sharing of competencies between the European Union and its member states of the European Union.

4. The jurisprudence of the Constitutional Court of Romania on migration and asylum

Given the concern of the Romanian legislator—the Parliament—and the Government, as an entity empowered to legislate in situations expressly specified by Article 115 of the Constitution, to create a legal framework regarding migration and asylum corresponding to the requirements of the addressees and beneficiaries of the respective legal norms, in a small number of cases, the Constitutional Court of Romania is empowered to solve exceptions of unconstitutionality regarding legal norms from the legislation on the status and regime of refugees in Romania in terms of asylum.

Thus, four admission decisions have been issued by the Constitutional Court of Romania since its establishment and until the date of writing this paper.[48] The first three decisions contain findings related to the faulty drafting of certain legal norms that regulate aspects of migration and asylum. Through their

48 Decision No. 106 of April 11, 2001, regarding the exception of unconstitutionality of the provisions of Art. 27(1), (2) and (3) and of Art. 28 of Law No. 25/1969 on the regime of foreigners in Romania, republished, published in the Official Monitor No. 416 of 26 July 2001 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/29845; Decision No. 176 of May 29, 2001 regarding the exceptions of the unconstitutionality of provisions of Art. 13(1) letter a), Art. 17(1) and (2) and Arts. 18–22 of Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor No. 374 of 11 July 2001 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/29474; Decision No. 604 of 20 May 2008 regarding the exception of unconstitutionality of provisions of Art. 121 of Law No. 122/2006 on asylum in Romania, published in the Official Monitor No. 469 of 25 June 2008 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/94752; Decision No. 214 of April 9, 2019, regarding the objection of unconstitutionality of the provisions of the Law for the amendment and completion of the Emergency Government Ordinance No. 75/2018 for the amendment and completion of some normative acts in the field of environmental protection and the regime of foreigners, as well as the Ordinance of the Government emergency No. 75/2018 in its entirety, published in the Official Monitor No. 435 of 03 June 2019 [Online].

wording, the respective texts violated the right to free movement and the principle of proportionality in restricting the exercise of certain rights or freedoms, the right to defence, which is guaranteed in Romania, or free access to justice. The fourth decision was pronounced because of the creation of a file starting from the approach of a group of 27 Romanian senators who formulated criticisms of extrinsic and intrinsic unconstitutionality. Regarding extrinsic unconstitutionality, they showed that it was regulated by the government through an emergency ordinance, although none of the legislative solutions contained in the criticised normative act were based on the existence of an exceptional situation whose regulation could not be postponed, which the court found to be true. In Decision No. 604 of 20 May 2008, regarding the exception of unconstitutionality of the provisions of Article 121 of Law No. 122/2006 on asylum in Romania, the Court referred to the legislation of the European Union in the field[49] and to the jurisprudence of the ECHR.[50]

In the Court's jurisprudence, seven decisions rejected the exceptions of unconstitutionality regarding legal norms related to migration and asylum.[51]

Available at: https://www.ccr.ro/en/admission-decisions/?anul_postului=2019&_page=7 (official translation).

49 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (official translation).

50 ECtHR, *Rotaru v. Romania* (Application No. 28341/95), Decision, 4 May 2000, ECLI:CE:ECHR:2000:0504JUD002834195; ECtHR, *Times Newspapers LTD. and others against United Kingdom* (Application No. 64367/14), Decision, 13 November 2018.

51 Decision No. 209/2001 regarding the exceptions of unconstitutionality of the provisions of Art. 13(1) letter a), of Art. 17(1) and (2), of Arts. 18–20 and of Art. 22 of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, approved with modifications through Law No. 323/2001, published in the Official Monitor, Part I No. 674 of October 25, 2001 [Online]. Available at: https://lege5.ro/Gratuit/gmydomzv/decizia-nr-209-2001-referitoare-la-exceptiile-de-neconstitutionalitate-a-prevederilor-art-13-alin-1-lit-a-ale-art-17-alin-1-si-2-ale-art-18-20-si-ale-art-22-din-ordonanta-guvernului-nr-102-2000-privin?d=2023-06-19; Decision No. 330/2002 regarding the rejection of the exception of unconstitutionality of the provisions of Art. 20(5) and of Art. 21(6) of Government Ordinance No. 102/2000 regarding the status and regime refugees in the Romania, approved and modified through Law No. 323/2001, published in the Official Monitor, Part I No. 893 of December 10, 2002 [Online]. Available at: https://lege5.ro/Gratuit/heztaojx/decizia-nr-330-2002-referitoare-la-respingerea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-20-alin-5-si-ale-art-21-alin-6-din-ordonanta-guvernului-nr-102-2000-privind-statutul-si-regimul-re?d=2023-06-19; Decision No. 503 of 4 October 2005 regarding the exceptions of unconstitutionality of the provisions of Art. 16(7) of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 986 of 7 November 2005 [Online]. Available at: https://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=67617; Decision no 407 of 16 May 2006 regarding the exceptions of unconstitutionality of the provisions of Art. 17(1) of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 493 of 7 June 2006 [Online]. Available at: https://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=73245; Decision No. 288 of 3 July 2003 regarding the exceptions of unconstitutionality of the provisions of Arts. 17, 18, 19 and 20 of the Government Ordinance No. 102/2000 regarding the status and regime of

The Constitutional Court issued its first admission decision in 2001.[52] This is the result of the deliberation of the Constitutional Court because of the promotion of an exception to unconstitutionality by the applicant in a case pending before the Administrative Litigation Section of the Supreme Court of Justice of Romania. The author considered that the provisions of Article 27 Paragraphs 1, 2 and 3 and Article 28 of Law No. 25/1969[53] — Administrative litigation section, i.e.: 'are contrary to the provisions of Article 23 of the Constitution regarding individual freedom, as well as Article 4 of the Universal Declaration of Human Rights.' The procedure for solving the exception of unconstitutionality includes the stage in which the 'Conclusion by which the Court was notified is communicated' to the president of the Senate, the president of the Chamber of Deputies, the Government, and the People's Advocate (only if the author of the exception of unconstitutionality is not the People's Advocate), specifying the date until which these authorities must send their point of view regarding the exception to the court. During this stage, the government argued that it was necessary to admit the exception because the criticised legal texts violated the right to free movement and the proportionality principle of restricting the exercise of certain rights or freedoms. Through this

refugees in Romania, approved and modified through Law No. 323/2001, with subsequent amendments, published in the Official Monitor, Part I No. 560 of 5 August 2003 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/45429; Decision No. 231 of 25 May 2004 regarding the exceptions of unconstitutionality of the provisions of Art. 15(3), (5), (7) and (8) of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, approved with modifications by Law No. 323/2001, as amended by Government Ordinance No. 43/2004, published in the Official Monitor, Part I No. 561 of 24 June 2004 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/52943; Decision No. 406/2006 regarding the rejection of the exceptions of unconstitutionality of the provisions of Art. 5 point 2 of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 511 of 13 June 2006 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument/72576.

52 Decision No. 106 of April 11, 2001.

53 The judicial court that occupies the highest position in the hierarchy of courts in Romania has been called 'Supreme Court of Justice' until October 2003. Its name was then changed to 'High Court of Cassation and Justice.' To understand the disposition of the decision, it is useful to specify that the texts whose constitutionality was verified by the Court had the following wording:
Art. 27 of the Law No. 25/1969: 'The blamed foreigner or accused in a criminal case can only leave the country after being removed from prosecution, termination of criminal prosecution, termination of criminal proceedings or acquittal, and in case of conviction, only after the execution of the sentence.
If the conviction was pronounced with a suspension of imposition or execution of sentence, the foreigner can leave the country after the decision has become final.
The foreigner who does not have his residence in Romania and is accused or indicted in a criminal case may leave the country even without fulfilling the conditions provided in para. 1 if he applied for immigration bail provided by law.'
Art. 28 of the Law No. 25/1969: 'In the cases provided for in Art. 27, the competent authorities or interested parties will notify the Ministry of Internal Affairs about the obligations of the foreigner, also providing the supporting documents.'

decision, the Court ordered that the exception be admitted, with the respective legal texts being unconstitutional to the extent that the restriction of the right to free movement was not ordered by the magistrate.[54]

With this decision, the Court had to solve a preliminary problem. It is about the fact that the legal texts considered by the authors of the exception to be unconstitutional were part of a law that entered into force in 1969, long before the entry into force of the current Romanian Constitution at the time of the settlement of the case. The Court called it 'pre-constitutional' in the text of the decision. To solve this problem, the Court applied the provisions of Article 150(1) of the Constitution, which stated that the provisions of such a law '[...] remain in force, insofar as they do not contravene this Constitution.' The Court also held in the considerations of the decision that

> to the same extent, the criticised legal texts also violate the provisions of Article 25(1) of the Constitution, according to which «The right to free movement, in the country and abroad, is guaranteed. The law establishes the conditions for the exercise of this right», as well as those of Article 2 point 2 of Protocol No. 4 additional to the Convention for the Protection of Human Rights and Fundamental Freedoms, provisions according to which «Any person is free to leave any country, including on his own».

It is also useful to specify that the authors of the unconstitutionality exception invoked the fact that Article 27 Paragraphs 1, 2 and 3 and Article 28 of Law No. 25/1969 violated the provisions of Article 23 of the Constitution regarding individual freedom. The authors of the exception of unconstitutionality stated that the provisions of Article 27 Paragraphs 1, 2 and 3 and Article 28 of the Law No. 25/1969 also violated the provisions of Article 4 of the Universal Declaration of Human Rights, which stated that 'No one shall be held in slavery or servitude; slavery and the slave trade are prohibited in all their forms.'

A second decision was made in 2001.[55] This was a solution to the partial admission of the request with which the court was vested. The Constitutional Court of Romania ordered the connection of two files, File No. 65C/2001 and File No. 64C/2001. Of the several legal grounds considered by the authors of the exceptions to contradict constitutional legal norms, the Court found unconstitutionality only

54 'Admits the exception of unconstitutionality of the provisions of Art. 27(1), (2) and (3), as well as of Art. 28 of the Law No. 25/1969 on the regime of foreigners in Romania, republished (...). It is found that these legal provisions are unconstitutional to the extent that the restriction of the exercise of the right to free movement, is provided for in Art. 25(1) of the Constitution, of the foreigner accused, indicted, or convicted in a criminal case is not ordered by a magistrate and the provisions of Arts. 23 and 49 of the Constitution are not respected.'

55 Decision No. 176 of May 29, 2001.

in two provisions. Thus, they contradicted the provisions of Article 24(1) of the Romanian Constitution, which states that 'the right to defence is guaranteed,' the provisions of Article 20(5) of Government Ordinance No. 102/2000, which specifies that "The final decision is legally enforceable" and the provisions of Article 21(6) sentence one of the same ordinance, which provides: 'In the case provided for in paragraph (5) letter, a) the decision is reasoned, final and enforceable by the law […].' The unconstitutionality, in the Court's opinion, resulted from the fact that these two texts 'do not ensure an effective protection of the rights of refugee status applicants,' violating the right to defence regulated by Article 24(1) of the Romanian Constitution: The violation results from the fact that, in the two texts of Government Ordinance No. 102/2000, the definitive and executory nature of the decision of the first instance is established, with the consequence that the decision can be applied immediately. So, a possible applicant, dissatisfied with the fact that the first court rejected his request, who would have promoted an appeal because the appeal was not suspensive of execution, could no longer benefit in real terms from the 'right to defend himself before the court of appeal.'

To make this decision, the Constitutional Court considered international legislation.[56] Regarding the rights of refugees, the 1951 Convention states that they enjoy the treatment generally granted to foreigners (Article 7(1) of the Convention). These rights are also regulated by Romanian law (Articles 23–25 of the ordinance), in close compliance with international regulations, namely those contained in Articles 12–31 of the Convention.

The third decision was made in 2008.[57] This decision is the result of the approach of a foreign citizen who invoked the exception in a civil litigation whose object was 'the complaint against the decision of the Romanian Immigration Office by which his application for access to the asylum procedure was rejected and by which the transfer of the applicant to Bulgaria was ordered.' The Court found that the provisions of Article 121 Paragraphs 1 and 3 of Law No. 122/2006 on asylum in Romania are unconstitutional, violating the provisions of Article 21 of the Constitution and that the provisions of Article 121(2) from the same law are unconstitutional 'to the extent that they do not provide for the possibility that the complaint can be submitted directly to the court nor the possibility of submitting the complaint also through a representative,' thus violating the provisions of Article 21 of the Constitution. It should be noted that in this case, the Government of Romania and the People's Advocate also expressed points of view in favour of admitting the exception. The government considered that the provisions of

56 The provisions of the 1951 Convention, supplemented by the 1967 Additional Protocol, acts adopted under the auspices of the UN, to which Romania acceded in 1991.
57 Decision No. 604 of 20 May 2008.

Paragraphs 1 and 2 of Article 121 of Law No. 122/2006[58] violated the provisions of Article 21 of the Constitution, an Article entitled 'Free access to justice.'[59] The People's Advocate testified to the court that he supported the unconstitutionality of the provisions of Paragraphs 2 and 3 of Law No. 122/2006 on asylum in Romania because they were contrary to the provisions of Article 21 of the Constitution, which established the principle of free access to justice.

In justifying the decision, the Court also referred to Regulation of the Council of the European Union No. 343/2003,[60] published in the Official Journal of the European Communities L 199, 31 July 2007, p. 0023-0029, and to the jurisprudence of the European Court of Human Rights,[61] which clarifies the defining aspects of the concept of 'foreseeable rule'.

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58 To understand the device of the decision, it is necessary and useful to state the legal text considered unconstitutional by the author of the exception. Thus, Art. 121 of Law No. 122/2006 provided: 'Art. 121 - Appeal
(1) Against the decision provided for in Art. 120(3) 'a complaint can be made within two days from the date of receipt of the proof of communication or the document by which it is established that the applicant is not at the last declared residence. The introduction of the complaint within the said term does not suspend the execution of the transfer provision in the responsible Member State. (2) The complaint is submitted in person to the National Office for Refugees and will be accompanied by a copy of the decision rejecting access to the asylum procedure in Romania. (3) The complaint is submitted immediately to the court in whose territorial jurisdiction is located the competent structure of the National Office for Refugees that issued the decision (…).'

59 Art. according to which '(1) Any person may the address of justice for the defense of his rights, freedoms, and legitimate interests. (2) No law can limit the exercise of this right. (3) The parties have the right to a fair trial and to the resolution of cases within a reasonable time. (4) Special administrative jurisdictions are optional and free of charge.'

60 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0343. The Court held that: 'It is true that Regulation of the Council of the European Union No. 343/2003, published in the Official Journal of the European Communities L 199, 31 July 2007, p. 0023-0029, establishing the criteria and mechanisms for determining the responsible member states for the examination of applications submitted in one of the member states by a citizen of a third country, provides, in Art. 19(2), that the implementation of the transfer is not suspended in the event of the introduction of an appeal, in this case, the complaint. But this is not an imperative rule but allows either the domestic legislation or the national courts to assess, on a case-by-case basis, the need to suspend the execution of the transfer order to another state.'

61 ECtHR, *Rotaru v. Romania* (Application No. 28341/95), Decision, 4 May 2000, ECLI:CE:ECHR:2000:0504JUD002834195; ECtHR, *Times Newspapers LTD. and others against United Kingdom* (Application No. 64367/14), Decision, 13 November 2018. Regarding the jurisprudence mentioned previously, in order to deliberate, the Court noted that: 'Regarding this aspect, the European Court of Human Rights ruled, in its jurisprudence, that a rule is "foreseeable" only when it is drafted with sufficient precision, in such a way as to allow any person – who, if necessary, can turn to specialist advice – to correct his conduct' (Rotaru case against Romania, 2000), and in the Sunday Times case against the United Kingdom, 1979, he decided that '[…] the citizen must have sufficient information on the legal norms applicable in a given case and be able to foresee, to a reasonable extent, the consequences that may

The fourth decision was made in 2019.[62] By this decision, the Court admitted the exception and found that

> the Law for the approval of the Government's Emergency Ordinance No. 75/2018 for the amendment and completion of some normative acts in the field of environmental protection and the regime of foreigners, as well as the Emergency Ordinance of the Government No. 75/2018, are unconstitutional, in their entirety.

The decision was based on the creation of a file using the approach of 27 Romanian senators. They criticised extrinsic and intrinsic unconstitutionality. Regarding the extrinsic unconstitutionality, they showed that it was regulated by the Government through an emergency ordinance, although 'none of the legislative solutions contained in GEO No. 75/2018 are based on the existence of an exceptional situation whose regulation cannot be postponed,' which means that the conditions of Article 115(4) of the Constitution was not met, which stipulates that 'the Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to justify the urgency within their content.'

Emergency Government Ordinance No. 75/2018 brought changes to the legislation on the regime of foreigners by amending Government Ordinance No. 25/2014 regarding the employment and detachment of foreigners in Romania and for the modification and completion of some normative acts regarding the regime of foreigners in Romania, approved by Law No. 14/2016, with subsequent amendments and additions. To evaluate the criticisms of extrinsic unconstitutionality, the Court had to verify the fulfilment of the conditions of Article 115(4) of the Constitution, both for the field of environmental protection and the field of the regime of foreigners. In doing so, the Court relied on a judgment. To evaluate the criticisms of extrinsic unconstitutionality, the Court had to verify the fulfilment of the conditions of Article 115(4) of the Constitution, both for the field of environmental protection and the field of the regime of foreigners. In doing so, the Court relied on its judgments. On the other hand, it relates to decision No. 109 of 9 February 2010, by which the Constitutional Court stated that an emergency measure may be adopted.

The Court found that it had carried out an assessment concerning doubts about the unconstitutionality of legal norms relating to the rule of foreigners, which were raised by both parties. The Government justified the need to amend the provisions of Government Ordinance No. 25/2014 regarding the employment

arise from a determined act. In short, the law must be, at the same time, accessible and predictable.'

62 Decision of the Constitutional Court of Romania No. 214 of April 9, 2019.

and posting of foreigners on the territory of Romania and for the amendment and completion of some normative acts regarding the regime of foreigners in Romania, in the sense of establishing a term of 6 months as a period in which the employer has not been sanctioned, noting that,

> considering that we are in the middle of the summer season, a season in which the main activities in the field of tourism and construction, important areas of the Romanian economy, are in full swing, it is necessary that this legislative approach be adopted as an emergency in support of economic operators active in these fields

but without identifying an extraordinary situation whose regulation could not be postponed. In the reasoning 40 of the Decision,[63] the Court even noted that 'the Government has not even made the effort to identify elements of the necessity of legislation, let alone demonstrate the existence of an extraordinary situation whose regulation cannot be postponed,' which led to the conclusion that the criticisms of extrinsic unconstitutionality are well-founded. In the same reasoning 40, the Constitutional Court also referred to the Government's non-compliance with the provisions of Article 6(1) of Law No. 24/2000 regarding the rules of legislative technique for the elaboration of normative acts, which, at the time of the resolution of the case, provided that the formulations contained in the normative act must be thoroughly grounded, considering the social interest, the legislative policy of the Romanian state, and the requirements of correlation with the set of internal regulations and the harmonisation of national legislation with community legislation and international treaties to which Romania is a party, as well as with the jurisprudence of the European Court of Human Rights.

5. Conclusions

This study aimed at (a) clarifying and summarising the Constitutional Court of Romania's views on migration and asylum in its jurisprudence, (b) providing an assessment of whether such jurisprudence is drawn about the limits of the competencies of the European Union and its member states, and (c) assessing if the solutions of the Constitutional Court of Romania connect the issues of migration and asylum with state identity.

Ad a) The Constitutional Court of Romania was entrusted, in the period from the beginning of its activity until the date of writing this paper, through a small number of referrals, to rule on the constitutionality of some legal norms that regulated the fields of migration and asylum. This deliberative activity resulted in

63 Decision No. 214 of April 9, 2019.

four decisions, except for unconstitutionality. Two decisions were made in 2001, that is, during the period when the public authorities in Romania took steps for Romania's accession to the European Union, but there was no fixed date for this event (it is known that the date of Romania's accession to the European Union was 1st of January 2007 the date proposed at the Thessaloniki Summit in 2003 and confirmed in Brussels on 18 June 2004). The third and fourth decisions were made in 2008 and 2019, respectively. These clarifications are of particular interest for achieving the objective of 'specifying whether the jurisprudence of the Constitutional Court of Romania regarding migration and asylum is drawn up about the limits of the powers of the European Union and of the member states.'

Regarding the seven rejected decisions, it is necessary to state that they are the result of an appeal concerning the unconstitutionality of certain legal grounds on which the Court of Justice has already ruled or which are no longer in force. Regarding the seven rejected decisions, it is necessary to state that they are the result of an appeal concerning the unconstitutionality of certain legal grounds on which the Court of Justice has already ruled or which are no longer in force. It is necessary to point out that aspects other than those already referred to the Court by other foreign nationals and analysed in admission decisions have not been criticised as unconstitutional.

Thus, a decision pronounced in 2001[64] contained a rejection solution argued as follows:

1. Regarding the unconstitutionality of the provisions of Article 20(5) and Article 21(6) Government Ordinance No. 102/2000. The Court had already ruled[65], establishing that the legal norms were unconstitutional, so new referrals regarding the unconstitutionality of the same legal grounds were inadmissible.
2. On the date of the pronoun of the decision para. 5 for Article 20 and para. 6 of Article 21 of the Government Ordinance No. 102/2000, in the form criticised by the authors of the exceptions of unconstitutionality, was no longer in force because, as a result of the pronouncement of another decision[66] of the Constitutional Court to fulfil the constitutional obligation to harmonise the legal norm declared unconstitutional with the constitutional norm, the Parliament had adopted Law No. 323 of 27 June 2001 for the approval of Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania[67]. In this case, the court applied the provisions of Article 23(1) Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court, republished, specified that the Constitutional

64 Decision No. 209/2001.
65 By Decision No. 176 of May 29, 2001.
66 Decision No. 176 of May 29, 2001.
67 Published in the Official Monitor of Romania, Part I, No. 342 of June 27, 2001.

Court could only rule on the legal norms contained in a law or an ordinance in force.

3. Regarding the exceptions of unconstitutionality in the provisions of Article 13(1) letter a) of Article 17 Paragraphs 1 and 2, of Articles 18, 19, 20(1)-(4), and Article 22 of Government Ordinance No. 102/2000, approved with amendments by Law No. 323/2001, the Court found that they have been analysed before and responded to, making it unnecessary to reanalyse the exceptions.[68]

The decision rendered in 2002[69] includes a solution regarding the exception of the unconstitutionality of the provisions of Article 20(5) and Article 21(6) from Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, approved and amended by Law No. 323/2001. The Court based the rejection solution on the following arguments: the court also analysed the constitutionality of the two legal texts, finding their constitutionality because

> the amendments made to Article 20(5) and Article 21(6) Government Ordinance No. 102/2000 through points 1 and 3 of the single Art. of Law No. 323/2001 have nothing to do with the right to defend and do not limit the exercise of this right.

The fact that the court's decision was final and irrevocable does not mean that the author of the exception was deprived of the right to defend himself. According to the constitutional provisions of Article 128, appeals can be exercised by the interested party and the Public Ministry only under the conditions of the law, with the legislator being able to establish special rules of procedure in consideration of special situations (such as the situation of refugees in Romania).

The exemption was refused for two reasons in the 2003 decision.[70] First, the Court found that 'some of the cited reasons do not represent matters of constitutionality subject to the control of the Constitutional Court, but of the interpretation of the law,' the court being the one called to apply the provisions of Article 20(2) of the Constitution, which establishes that if there are inconsistencies between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, the international regulations have priority. The Court invoked the provisions of Article 2(3) from Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court, republished.[71] Secondly,

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68 Because 'no new elements have intervened to justify the change of the solution of rejection of the exceptions of unconstitutionality.'

69 Decision No. 330/2002.

70 Decision No. 288/2003.

71 Which states: '[...] in its interpretation and application of the law, the Constitutional Court shall decide only on grounds or contrary to the Constitution.'

the Court specified that in its jurisprudence,[72] it 'also ruled on the compliance of the accelerated procedure regulated in Articles 17–20 of Government Ordinance No. 102/2000' with the provisions of Article 49 of the Constitution, stating that 'the criticised legal texts do not contain special restrictions on the exercise of certain rights for foreigners who follow the procedure of granting a form of protection from the Romanian state.'

Regarding the decision made in 2004,[73] the exception was rejected by the Court because it was the attribution reserved for the legislator to establish the competence of the courts and the court procedure, respectively, the exercise of appeals, considering, mainly, the nature of the cases.[74] The Court also invoked its previous jurisprudence regarding the provisions of Article 15(3), (5), (7) and (8) from Government Ordinance No. 102/2000.

By the decision of 2005,[75] the exception was rejected because the court found that the criticised legal text had been modified by Article I point 12 to Government Ordinance No. 43/2004.

According to the decision of 2006,[76] the exception was rejected because the procedure for granting a form of humanitarian protection, that is, refugee

72 Decision No. 209 of June 28, 2001, published in the Official Monitor, Part I, No. 674 of October 25, 2001.

73 Decision No. 231/2004.

74 '… the criticized texts of Ordinance No. 102/2000 regarding the status and regime of refugees in Romania regulates a special procedure, namely that of solving the complaint that the foreign applicant for refugee status makes against the decision to reject the request, given by the National Refugee Office. This complaint resolution procedure is established for a special category of people and regarding a certain category of requests involving an obvious urgency. Based on a rational criterion, such a regulation is justified, different from that of the administrative litigation procedure, as well as from other procedures provided by law. On the other hand, considering the provisions of Art. 126(2) and of Art. 129 of the Constitution, republished, the Court considers that the legislator is the one who establishes the competence of the courts and the court procedure, respectively the exercise of appeals, considering, mainly, the nature of the cases. The setting of shorter deadlines for the resolution of cases, as well as a certain regulation of appeals, justified by the specifics of the respective processes, within a special procedure, established constitutionally, by law, or by Government ordinance, which has the same legal force as and the law, is not likely to constitute discrimination either, as it applies to all persons in the respective category (respectively foreigners applying for refugee status).' '…the Court has in mind its constant jurisprudence, in full agreement with that of the European Court of Human Rights, in the sense that the principle of equal rights and non-discrimination does not mean the introduction of uniformity in terms of the legal treatment applicable to legal subjects. On the contrary, according to this jurisprudence, the difference in legal treatment for different situations is admissible, when it is rationally and objectively justified. Moreover, the Constitution provides, in Art. 18, regarding foreigners and stateless persons, that they enjoy the general protection of persons and assets, guaranteed by the Constitution and other laws, and the right of asylum is granted and withdrawn under the conditions of the law, in compliance with international treaties and conventions to which Romania is a party.'

75 Decision No. 503/2005.

76 Decision No. 407/2006.

status, meets the requirements of the right of access to the court, the right to defence, or the right to an effective appeal, as they are regulated in Romanian and international legislation.

Another decision issued in 2006[77] regarding the rejection of the exceptions of unconstitutionality of the provisions of Article 5 point 2 of Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 511 of 13 June 2006 was rejected because the reported aspects had already been analysed by the Court.

Regarding the admission decisions, as already shown, they concerned the following aspects:

1. The regulation by legislation related to emigration and asylum of certain procedures in such a way as to consider the fact that ‘restriction of the exercise of the right to free movement, provided for in Article 25(1) of the Constitution, foreigners accused, indicted, or convicted in a criminal case’ can only exist if the respective measure is ordered by a magistrate and if the provisions of Article 23 and Article 49 of the Romanian Constitution are respected.
2. Respect the right to defend refugee status applicants, a right guaranteed to any person by the Romanian Constitution. 3. The procedure for promoting the complaint against the decision of the Romanian Immigration Office, by which the request for access to the asylum procedure of an applicant was rejected and by which the transfer of the applicant to another state was ordered, the Constitutional Court found that the regulations regarding asylum in Romania were unconstitutional

   > in the extent to which they do not provide for the possibility that the complaint can be submitted directly to the court, nor the possibility of submitting the complaint through a representative, thus violating the provisions of Article 21 of the Constitution which established the principle of free access to justice.

The extrinsic unconstitutionality of an emergency ordinance, a normative act adopted by the Government through the mechanism of legislative delegation, the unconstitutionality being generated by the fact that ‘none of the legislative solutions’ was based on the ‘existence of an exceptional situation whose regulation cannot be postponed,’ which had the meaning that the conditions of Article 115(4) of the Constitution were not met, which provides that ‘the Government can adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to justify the emergency in their content.’

77 Decision No. 406/2006.

Ad b) The jurisprudence of the Constitutional Court of Romania regarding migration and asylum, even before joining the European Union, was drafted considering the norms of international law. We have highlighted that Decision No. 604 of 20 May 2008, regarding the exception of unconstitutionality of the provisions of Article 121 of Law No. 122/2006 on asylum in Romania, the Court referred to the legislation of the European Union in the field — Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national—and to the jurisprudence of the ECHR—Case of *Rotaru v. Romania*, Judgment of the European Court of Human Rights of 4 May 2000 in the case of *Rotaru v. Romania* and *TIMES NEWSPAPERS LTD. and others against United Kingdom*. In Decision No. 106 of April 11, 2001, the Court referred to the provisions of the Article 2 point 2 of Protocol No. 4 additional to the Convention for the Protection of Human Rights and Fundamental Freedoms. In Decision No. 176 of May 29, 2001 to make this decision, the Constitutional Court considered the provisions of the 1951 Convention, supplemented by the 1967 Additional Protocol, acts adopted under the auspices of the UN, to which Romania acceded in 1991.

Ad c) The issue of constitutional identity has concerned Romanian researchers, judges from the Constitutional Court of Romania, and the plenary session of the Constitutional Court. Tănăsescu expressed that[78] ‘The notion of constitutional identity is susceptible to several meanings, sometimes being simply contested.’ The author emphasises the differences between the acceptance of the concept in Europe and the United States of America. Mr. Valer Dorneanu, President of the Constitutional Court of Romania, analysing the importance of the concept of constitutional identity, stated that[79] ‘national constitutions and the legal order of the EU complement each other and, therefore, are perfect—although not in an unconditional way—capable of coexistence and harmonious development.’

With regard to the jurisprudence of the Constitutional Court of Romania regarding migration or asylum issues, it can be easily ascertained from the presentation of jurisprudence, presented in detail in heading 4 of this paper, that the exceptions of unconstitutionality were not characterised by a high degree of complexity, and there was no need to analyse the competence of the relevant national structures in opposition to the competence of the European Union institutions. Therefore, it was not necessary for the Court to link the issues of migration or asylum with the issue of constitutional identity in arguing the solutions. Regarding the role of the Constitutional Court of Romania in terms of migration, asylum, and refugee issues, it was exercised by the Court’s mission according to the Romanian Constitution. In practice, one cannot talk about the presence in

78 Tănăsescu, 2017, p. 1.
79 Dorneanu, 2019, p. 8.

the Court's jurisprudence of a position of the Constitutional Court in the matter of migration and asylum, about the limits of the competencies of the EU and the member states, or about a connection of issues related to migration or asylum with the issue of constitutional identity. On the one hand, the current situation is since the Romanian legislation on the matter is modern and harmonised with community and international norms, and on the other hand, because there is no possibility of self-referral in the case of the Constitutional Court of Romania. No litigant has been formulated before the court issues that would generate discussions regarding the national constitutional identity or the sharing of competencies between the European Union and its member states of the European Union.

De lege ferenda, it is necessary to define the concept of constitutional identity both at the national and community levels to abandon this difficult working mechanism, which is the dialogue between the Court of Justice of the European Union and the national constitutional courts. Perhaps even the text of Article 4(2) of the TUE could be the framework for such a clarification.

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ŠIMON OTTA*

Border Defence and Migration in the Czech Republic

ABSTRACT: *The Czech Republic, as a member state of the European Union, applies the so-called "zero" regime of state border protection, which is based on the abolition of internal border protection and border controls when crossing internal borders. However, this does not apply to Third-Country nationals. Although the strong influence of European legislation is also evident in this area, the Czech Republic has legislation regulating the defence of its national borders and protecting against illegal migration. This paper focuses on such legislation. The introduction presents the constitutional regulation of Czech state borders and the concretisation of these constitutional norms at the statutory level through two basic acts: State Borders and Protection of the State Borders. Furthermore, attention has been paid to protecting the Czech Republic against illegal migration, mainly contained in the Act on the Residence of Foreigners and partly in the Asylum Act, where emphasis is on the de facto protection mechanism and administrative expulsion. The second part of the paper presents criminal law regulations for protecting the Czech Republic against illegal migration. The article concludes with a statistical overview of illegal migration for 2022.*

KEYWORDS: Czech Republic, border defence, migration, administrative expulsion, criminal law

1. Introduction

In this paper, I present the border defence of the Czech Republic in connection with the migration of foreigners. This paper provides a comprehensive presentation regarding protecting state borders (in terms of constitutional, administrative,

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and criminal laws). It is based on Czech legislation, leaving aside the European legal norms. In addition, this article presents statistical data on illegal migration in the Czech Republic for the last year (2022).

A few known facts should be kept in mind while reading the paper. The Czech Republic has been a member state of the European Union since 1 May 2004 and,[1] more importantly, from the point of view of the focus of this paper, has been part of the Schengen area[2] since 21 December 2007.[3] Therefore, the protection of state borders has European and national legal frameworks. Given the focus of this paper, attention will be focused exclusively on the national (i.e. Czech) legal framework. However, all the Czech legislation cited here is significantly influenced by European legislation and, to some extent, constitutes secondary legislation, as directly applicable European legal acts already regulate many rules.

2. On the Czech border regulation

■ *2.1. Constitutional level*

Before proceeding to analyse the protection of Czech state borders in connection with migration and refugees, it is appropriate to introduce legal regulations for the borders of the Czech Republic itself.

Legal regulations on the borders of the Czech Republic are enshrined at the constitutional level. According to Article 11 of the Constitution of the Czech Republic,[4] 'the territory of the Czech Republic constitutes an indivisible whole, the state borders of which may be changed only by constitutional act.'[5] This provi-

1 Cf. Constitutional Act No. 515/2002 Coll., on the referendum on the accession of the Czech Republic to the European Union. In the vote held on 13–14 June 2003, 77.33 % of the eligible voters approved the Czech Republic's accession to the European Union. The official results of the referendum are [Online]. Available at: https://volby.cz/pls/ref2003/re13?xjazyk=CZ (Accessed: 14 January 2024).

2 On the Schengen area, see [Online]. Available at: https://www.consilium.europa.eu/en/policies/schengen-area/ (Accessed: 14 January 2024).

3 With regard to the legal basis for the Czech Republic's accession to the Schengen area, cf. the EU Council Decision on the full application of the provisions of the Schengen acquis in the Czech Republic and several other States, most of which have only recently become EU members (2007/801/ES). This Decision was implemented nationally by Act No. 379/2007 Coll., which amended Act No. 326/1999 Coll., on the Residence of Foreigners on the Territory of the Czech Republic, Act No. 325/1999 Coll., on asylum and (at that time) Act No. 283/1991 Coll., on the Police of the Czech Republic. For more details on this topic, see e.g. Pikna, 2005, or Zoubek, 2008, pp. 349 et seq.

4 Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.

5 The second reference to state borders is contained in Art. 112(1) of the Constitution of the Czech Republic, according to which 'the constitutional order of the Czech Republic consists of this Constitution, the Charter of Fundamental Rights and Freedoms, constitutional laws adopted pursuant to this Constitution and constitutional laws of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic and the Czech National Council regulating the state borders of the Czech Republic and

sion, which expresses the principle of indivisibility of the state unit, also makes any change in state borders conditional on adopting a constitutional act.[6] This provision corresponds to the Czech (Czechoslovak) constitutional tradition as it has been essentially unchanged since the first Czechoslovak constitution.[7] The constitutional regulation of changes to state borders respects that state borders are one of the basic attributes of statehood and simultaneously express the continuity of Czech statehood. The formulation that the territory of the Czech Republic constitutes an indivisible whole confirms that it is a unitary state, that is, a state which, unlike a federal-type state, has a single and unified system of state bodies (legislative, executive, and judicial powers) and does not divide into territorial units which have the character of a state.[8, 9]

The borders of the modern state (previously called "Czechoslovakia") were first regulated mainly by the peace treaties of the so-called Versailles system in 1919 and 1920 (Versailles, St. Germain, Trianon, and Sévres) and subsequently by other acts.[10] Traditionally, all legal predecessors of the Czech Republic since the beginning of the modern state on the territory of the Czech lands have constitutionally enshrine the rule that a change of state borders can only be made by a constitutional act (cf. Articles 3 and 64(1) Constitution 1920,[11] Article 166 Constitution 1948[12] and Article 107(2) Constitution 1960[13]). Over the years, several constitutional acts have been gradually adopted, which (mostly only slightly) have modified the borders of the territory of the Czech Republic or Czechoslovakia. More than ten such norms regulating the delimitation of the border with neighbouring states are in force. Changes to state borders have two aspects: international and national. Negotiating a bilateral international treaty with the relevant state regularly precedes adopting a constitutional act on the change of state borders. The Constitutional Act effectively approves of this treaty. Border adjustments with the Republic

constitutional laws of the Czech National Council adopted after 6 June 1992.' Constitutional order in the Czech Republic refers to a set of legal regulations of constitutional legal force.

6 Mikeš, 2018, p. 4.

7 Cf. Art. 3(1) of the Constitutional Act No. 121/1920 Coll., Constitutional Charter of the Czechoslovak Republic, which read: The territory of the Czechoslovak Republic shall form a single and indivisible whole, the borders of which may be altered only by constitutional act.

8 Sládeček et al., 2016, pp. 172–173.

9 The unity of the state excludes the division of the Czech Republic into units with the power of the state; it does exclude the division into other territorial-administrative or territorial-self-governing divisions of the Czech Republic. In this regard, cf. in particular Art. 8 of the Constitution of the Czech Republic, which guarantees self-government of local self-government units and which is further developed in Title 7 of the Constitution, entitled Territorial Self-Government. Cf. also Act No. 51/2020 Coll., on the territorial administrative division of the State.

10 For this cf. e.g. Gronský, 2005, p. 43.

11 Constitutional Act No. 12/1920 Coll., Constitution of the Czechoslovak Republic.

12 Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic.

13 Constitutional Act No. 100/1960 Coll., Constitution of the Czechoslovak Socialistic Republic.

of Austria (Constitutional Act No. 76/2004 Coll.) were preceded by negotiating an international treaty published under No 85/2004 Coll. IT.[14]

For completeness, it should be added that territorial indivisibility is further mentioned at the constitutional level, in addition to the abovementioned Constitution, in the Constitutional Act on the Security of the Czech Republic,[15] which allows the Parliament[16] to declare a state of national emergency[17] upon the proposal of the government. A state of national emergency can be declared, among other situations, in the event of a threat to the territorial indivisibility of the Czech Republic and can be declared for limited or the entire territory of the state.[18] During a state of national emergency, for example, deliberations on draft laws can be curtailed, the president cannot exercise veto power, elections can be postponed, and selected entities (e.g. the government, ministries, or the Czech National Bank) can take emergency or extraordinary measures in their fields of competence.

■ *2.2. Act level*

2.2.1. Act on State Borders

At the act level, the Czech Republic's state borders are regulated by two basic laws: Act No. 312/2001 Coll. on State Borders and Act No. 191/2016 Coll. on the Protection of State Borders of the Czech Republic. This Act replaced the only act regulating state borders from the beginning of the independent (Czechoslovak) state (Act No. 245/1921 Coll. on state borders). By nature, it is primarily an organic piece of legislation, the subject of which is the regulation of the exercise of state administration and the rights and obligations of natural and legal persons in matters of the state borders of the Czech Republic.[19] According to its systematics, the Act can be divided into four parts: defining basic concepts; the course and marking of state borders; regulation of state border administration, which the Act entrusts primarily to the Ministry of the Interior;[20] and regulation of the rights and obligations of natural or legal persons in connection with state border administration.

14 In the Czech Republic, legislation is published in the Collection of Laws (hereinafter referred to as Coll.), while international treaties are published in the Collection of International Treaties, for which the abbreviation 'Coll. IT' was used. For details, cf. Act No. 309/1999 Coll., on the Collection of Laws and the Collection of International Treaties.

15 Constitutional Act No. 110/1998 Coll, on the Security of the Czech Republic.

16 The Parliament of the Czech Republic is bicameral and consists of the Chamber of Deputies and the Senate – cf. Art. 15(2) of the Constitution. of the Czech Republic. The adoption of a resolution declaring a state of national emergency requires the consent of an overall majority of all deputies and the consent of an overall majority of all senators – cf. Art. 7(2) of the Constitutional Act on the Security of the Czech Republic.

17 Art. 2(1) and Art. 7(1) of the Constitutional Act on the Security of the Czech Republic.

18 Art. 2(2) of the Constitutional Act on the Security of the Czech Republic.

19 Para. 1(1) of the Act on State Borders.

20 The competence of the Ministry of the Interior in the field of state borders generally stems from the provisions of Art. 12(1)(j) of Act No. 2/1969 Coll., on the Establishment of

The Act also regulates several offences in its conclusion,[21] but these are not related to illegal migration or any other topic that is the primary focus of this paper. The offences in this act are associated with destruction, damage, or other negative interference with the course of the state border or negative interference with the management of the state border. These offences are punishable with fines of up to CZK 500 000.

2.2.2. Act on the Protection of the State Borders

As mentioned above, the Act on State Borders is primarily an organic legal regulation, the subject of which is the exercise of state administration and the regulation of the rights and obligations of natural and legal persons in matters of the Czech Republic's state borders. The object of the second Act, the Act on the Protection of the State Borders of the Czech Republic,[22] regulates the protection of the state borders of the Czech Republic against illegal crossing and defines the competencies of the Ministry of the Interior and the Police of the Czech Republic in this area of state administration, by European Union law.[23]

It is necessary to elaborate on what was stated at the beginning of this paper. The introduction to the paper emphasised that the issue of state borders and their protection is significantly influenced by European law thanks to the Czech Republic's membership in the European Union and the Schengen area. It should be added that the Czech Republic, by its geographical location, is a state at the heart of the European Union. Therefore, according to European law, no land border in the Czech Republic is external.[24] In contrast, all the land borders of the Czech Republic are internal, since the Czech Republic borders the Federal Republic of Germany, the Republic of Poland, the Slovak Republic and the Republic of Austria—other Member States of the European Union—all of which are also members of the Schengen area.

The Act on the Protection of the State Borders of the Czech Republic distinguishes between standard and nonstandard regimes. The standard regime is not expressly provided for in the Act, as it is based on the fact mentioned above

Ministries and Other Central Bodies of State Administration of the Czech Republic (the Competence Act). According to the above provision, the Ministry of the Interior is the central state administration authority for internal affairs, inter alia, for state borders, their demarcation, maintenance and the keeping of documentary work.

21 Art. 18 of the Act on State Borders.

22 Art. 1 of the Act on the Protection of the State Borders of the Czech Republic.

23 In particular the Schengen Borders Code (Directive EU 2016/399) and the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

24 Cf. the definition of 'internal' and 'external' borders in Art. 2(1) and (2) of the Schengen Borders Code. The Czech Republic's external borders are located only at its international airports – e.g. [Online]. Available at: https://www.mvcr.cz/migrace/clanek/schengenska-spoluprace-schengenska-spoluprace.aspx (Accessed: 14 January 2024).

that the Czech Republic is a Member State of the European Union, a member of the Schengen area, and borders only with other such states, and its land borders are therefore internal borders in the sense of European law. The standard regime is therefore conceived under the act as 'zero,' based on the abolition of internal border protection and the abolition of border controls when crossing internal borders.

Non-standard regimes are collectively referred to by the act as 'Temporary Reintroduction of Internal Border Protection,' which are distinguished into two types, depending on the entity that can introduce them. In the first type, the government is empowered to take such steps through a government decree; in the second type, the Ministry of the Interior is empowered by means of emergency measures.[25] In the case of the temporary reintroduction of internal border protection, the police provide border protection.[26] In principle, the law confers three powers on the police to border protection during the temporary reintroduction of border protection: carrying out checks at the nearest appropriate place from the border (in particular, checks on means of transport within a distance of 10 kilometres from the internal border; police officers are authorised to enter land other than publicly accessible land, within a distance of 50 meters from the internal border; and police are authorised to use technical means to prevent illegal crossing of the internal border using transport.[27]

3. On migration and refugeeism

▪ *3.1. Administrative law means*

In connection with the focus of the paper, the issue of migration, border protection and refugeeism is regulated in the Czech Republic primarily by two acts, which are the Asylum Act[28] and the Act on the Residence of Foreigners on the Territory of the Czech Republic (hereinafter referred to as 'the Act on the Residence of Foreigners').[29]

The initial act in this area was the Act on the Residence of Foreigners. Its subject of regulation follows a directly applicable regulation of the European Union[30] to regulate the conditions of entry of foreigners into the territory of the Czech Republic and departure of foreigners from the territory, to establish the conditions of stay of foreigners in the territory, and to define the competence of

25 Art. 12(1) of the Act on the Protection of the State Borders of the Czech Republic.
26 All the above is enshrined in Art. 14 and 15 of the Act on the Protection of the State Borders of the Czech Republic.
27 Art. 14 and 15 of the Act on the Protection of the State Borders of the Czech Republic.
28 Act No. 325/1999 Coll., Asylum Act.
29 Act. No. 326/1999 Coll., on the Residence of Foreigners on the Territory of the Czech Republic.
30 The aforementioned Schengen Borders Code.

the Police of the Czech Republic, the Ministry of the Interior, and the Ministry of Foreign Affairs in this area of state administration.[31] As already mentioned in the introduction to this chapter, this act supplements the Asylum Act, the subject of which is to regulate the conditions of entry and stay of a foreigner who has applied to the Czech Republic for international protection on the territory of the Czech Republic and the stay of an asylum seeker or a person enjoying subsidiary protection on the territory, international protection proceedings and other proceedings conducted under this act, the rights and obligations of an applicant for international protection, an asylum seeker, a person enjoying subsidiary protection in the territory and a foreigner covered by this act, the competence of the Ministry of the Interior and the Police of the Czech Republic in this area of state administration, the state integration programme and asylum facilities.[32] The duality of the two acts is expressed primarily in Article 2 of the Act on the Residence of Foreigners, which states that this act does not apply to a foreigner who is an applicant for international protection, a foreigner who is tolerated in the territory, an asylum seeker or a person enjoying subsidiary protection, unless this act or a special legal regulation provides otherwise, or has applied to the Czech Republic for a residence permit to grant temporary protection in the territory, and a foreigner who is staying in the territory based on a residence permit granted for temporary protection unless this act or a special legal regulation provides otherwise. In such cases, the Asylum Act applies by the application rule lex specialis derogat legi generali.

The definition of foreigners in the Czech Republic is again included in the Act on the Residence of Foreigners, which defines foreigners as natural persons who are not citizens of the Czech Republic,[33] including citizens of the European Union.[34] It should be noted that the Act on the Residence of Foreigners distinguishes three types of subjects: foreigners, citizens of the European Union, and family members of citizens of the European Union who are not themselves citizens of the European Union. Considering the topic of this article, the article will focus on the first group, namely foreigners, and it can be concluded that foreigners logically have the strictest conditions for entering the territory of the Czech Republic, followed by family members of EU citizens, and the least requirements are imposed on EU citizens.

31 Art. 1(1) of the Act on the Residence of Foreigners.

32 Art. 1 of the Asylum Act.

33 The Act on the Residence of Foreigners refers here to Act No. 186/2013 Coll., on the State Citizenship of the Czech Republic.

34 The Residence of Foreigners Act refers here to the Treaty on the Functioning of the European Union.

3.1.1. Entry into the Czech Republic

When entering the Czech Republic, foreigners must comply with the conditions set out in the Schengen Border Code. Furthermore, upon request, foreigners are obliged to fill in and sign a state border-crossing report[35] or submit to the verification of the authenticity of the travel document and their identity utilizing the personal data entered in the travel document or a comparison of the biometric data processed in the data carrier using a technical device enabling the comparison of the currently displayed biometric data of foreigners with the biometric data processed in the data carrier of the travel document, if it is a travel document containing a data carrier with biometric data.[36]

The Act on the Residence of Foreigners, Article 9, regulates situations where police refuse foreign entry into Czech Republic territory. This can happen if the foreigner does not have a valid travel document, presents a forged or altered travel document, visa or residence permit, does not present a visa if the foreigner is subject to a visa requirement or residence permit, does not present documents proving the purpose and security of the conditions of stay in the territory, does not have sufficient means to stay in the territory and to leave the territory, is an undesirable person,[37] is included in the information system[38] set up by States bound by international treaties on the elimination of controls at common borders for the purpose of obtaining an overview of foreigners who cannot be allowed to enter the territory of the Contracting States, there is a reasonable risk that the foreigner, while staying in the territory, could endanger the security of the state, seriously disturb public order or endanger the international relations of the Czech Republic, there is a reasonable risk, that the foreigner, while staying in the territory of another Contracting State, could endanger the security of the state or seriously disturb public order therein or endanger the international relations of the Contracting States, or does not meet the requirements set out in the measure of the Ministry of Health against the introduction of an infectious disease from abroad pursuant to the Act on the Protection of Public Health.

35 Pursuant to Art. 14 of the Act on the Residence of Foreigners, a State Border Crossing Report is a registration document containing data on the first and last name, day, month and year of birth of the foreigner and fellow foreigners under 15 years of age, the series and number of the foreigner's travel document, their nationality and gender. The border pass shall also contain the visa number, the make of the vehicle with which foreigner enters the territory, the international registration number and the national registration number of that vehicle and its colour, the date and place of entry into the territory and the date of departure from the territory, the purpose and place of stay in the territory.

36 In summary Art. 5 of the Act on the Residence of Foreigners.

37 Pursuant to Art. 154(1) of the Act on the Residence of Foreigners, an undesirable person is an foreigner who is not allowed to enter the territory on the grounds that the foreigner's stay in the territory can endanger the security of the state, seriously disturb public order, endanger public health or the protection of the rights and freedoms of others, or a similar interest protected under an obligation arising from an international treaty.

38 Here the act refers to the Schengen Information System II.

3.1.2. Departure of a foreigner from the territory of the Czech Republic in case of refusal of entry

The Act on the Residence of Foreigners is based on the basic rule that foreigners who refuse to enter the territory must return abroad without delay unless otherwise provided.[39] If foreigners who have refused entry into the territory at an international airport cannot be immediately transported back to the foreign country, the police arrange for them to be transported to another international airport, from which they will be immediately transported back to the foreign country. If foreigners cannot be transported immediately back abroad from another international airport and if no room for persons who refused entry into the territory is provided at the international airport where they refused entry into the territory by the Act on the Protection of State Borders, the police shall arrange for foreigners to be transported to another suitable international airport where such a room is provided and, where appropriate, for their departure from the territory to an international airport from which they will be transported back abroad. Such foreigners shall be entitled to remain in the territory only for the time strictly necessary; remaining in the territory shall not be deemed a stay under the Act on the Residence of Foreigners. For the transfer of foreigners to an international airport and the scope of the police authority, such foreigners shall be regarded as foreigners detained under Title XI of the Act.[40]

However, the Act on the Residence of Foreigners also regulates situations in which foreigners refusing entry into the territory are not obliged to travel abroad. This is the case when a foreigners' life is in imminent danger due to an accident or sudden illness, failure to provide foreigners with urgent medical care causes permanent medical changes, or it is necessary to provide foreigners with urgent medical care in connection with childbirth. These were followed by other provisions governing specific procedures of the authorities involved. For example, if the health condition of foreigners not subject to the obligation to travel requires an immediate transfer to a health service provider, the police will arrange for the foreigners to be transported to a health service provider in the territory. Foreigners who are not subject to the obligation to travel are entitled to stay in the territory only for a strictly necessary period; staying in the territory is not considered a stay under the Act on the Residence of Foreigners. For medical care and the scope of police authority, such foreigners shall be treated as foreigners, again detained under Title XI of the Act. If foreigners are admitted to a healthcare provider providing inpatient care, the police may waive the need to guard foreigners during hospitalisation. The police shall transport foreigners to the border-crossing point to return to the foreign country as soon as they can travel.[41]

39 Art. 9(5) of the Act on the Residence of Foreigners.

40 Title XI of the Act contains special measures for the purpose of removal of the foreigner from the territory and detention of the foreigner.

41 In summary Art. 10 of the of the Act on the Residence of Foreigners.

This is followed by Article 92 of the Act on the Residence of Foreigners, which regulates the refusal of departure from the territory of the Czech Republic by a foreigner accompanied by their child under the age of 15. Thus, the Act on the Residence of Foreigners provides that the police, by a decision issued on the spot, shall refuse to allow foreigners to leave the territory if they leave a foreigner under the age of 15 of whom they are the legal guardian, unless they present at the border control a document, certified by the police, that the foreigner under the age of 15 is staying in the territory with a travel document and has been granted a visa, if it is a condition of stay in the territory, and that a natural person over the age of 18 or a legal person has undertaken to cover the costs of the foreigners' subsistence, accommodation, and medical treatment for the period of stay in the territory until departure and the costs incurred by the police in connection with any decision on administrative expulsion, or a certificate from a health care provider that the foreign under the age of 15 are hospitalised. The police shall authorise departure from the territory even in the absence of a certificate from the health care provider, if the legal representative signs an affidavit stating that their departure is not contrary to the interests of the foreigner they are keeping in the territory.

Finally, under Article 171 Paragraph 1 b) of the Act on the Residence of Foreigners, decisions to refuse a foreigner's entry and decisions on an application for a new assessment of the grounds for refusal of entry are excluded from judicial review. The exclusion from judicial review has been repeatedly confirmed by case law, both at the level of the Supreme Administrative Court[42] and the Constitutional Court.[43] All cited decisions are based on similar conclusions. Their basic premise is that exclusion from judicial review is not contrary to the Charter of Fundamental Rights and Freedoms of the Czech Republic,[44] as it does not concern decisions that affect fundamental rights and freedoms. None of the rights listed in the Charter entitle foreigners to enter or reside in the territory of the Czech Republic; such a right is granted only to citizens of the Czech Republic[45] and after the Czech Republic accedes to the EU, as well as EU citizens and their family members who are not EU citizens themselves.

42 In particular, the judgments of the Supreme Administrative Court of 16 October 2003, No. 2 As 29/2003-36, published under No. 224/2004 Coll.; of 15 January 2004, No. 2 As 67/2003-63; of 29 January 2004, No. 2 Azs 89/2003-49; of 17 March 2004, No. 2006, No. 8 Azs 137/2005-79; and of 10 September 2009, No. 9 As 95/2008-45, published under No. 1955/2009 Coll.; the case law of the Supreme Administrative Court cited here is available at https://www.nssoud.cz/.

43 See the resolutions of the Constitutional Court of 19 December 2000, file No. II ÚS 345/2000; of 29 April 2004, file No. III ÚS 99/04; of 13 May 2004, file No. IV ÚS 85/04; of 12 July 2005, file No. I ÚS 38/04; of 8 November 2006, file No. I ÚS 394/06 and of 18 March 2010, file No. III ÚS 2909/2009; the case law of the Constitutional Court cited here is available at https://nalus.usoud.cz/Search/Search.aspx.

44 Constitutional Act No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms.

45 Art. 14(4) of the Czech Republic.

3.1.3. Obligations of particular subjects in the field of protection against illegal migration

Although this paper primarily focuses on the procedures of the police, the prosecutor's office, and the courts, it is relevant to mention that the Act on the Residence of Foreigners requires the cooperation of several other entities, as specified in Article 107. For example, everyone is obliged to immediately hand over the foreigners' document found to the police, a university or a higher vocational school is obliged to inform about various facts (in particular, the commencement, interruption, and termination) concerning the foreigners' studies, or the foreigners' employer is obliged to inform about the termination of the foreigners' employment. The obligations of other state administration bodies are regulated by the previous Article 106 of the on the Residence of Foreigners, which sets out the obligations of regional branches of the Labour Office, the Trade Licensing Office, the Material Needs Assistance Authority, the General Directorate of the Labour Office, the District Social Security Administration and the State Labour Inspection Office. Finally, Article 107 Paragraph 7 of the act sets out the obligations of the Ministry of Education.

It is also worth mentioning Article 104 of the Act on the Residence of Foreigners, which is aimed at establishing obligations for air carriers and, operators of water transport and operators of regular bus routes. An air carrier may not transport foreigners who do not have a travel document or visa from the territory of a non-contracting state[46] to the territory if it is necessary given the purpose and destination of the journey or if it is a condition for staying in the transit area of an international airport in the territory. The operator of water transport and the operator of regular bus services shall not transport foreigners who do not have a travel document or visa from the territory of a State which is not a Contracting State into the territory if the purpose and destination of the journey make it necessary. The carrier is obliged, based on instruction from the police, to arrange, by directly applicable European Community legislation,[47] for the transport of a foreign country if the foreign country has refused entry into the territory. The obligation to transport the foreigner abroad also applies to the air carrier who has transported the foreigner to the territory if the foreigner does not present a travel document or an airport transit visa if the condition for staying in the transit area of an international airport in the territory, has transported the foreigner to

46 By Contracting States, the Act on the Residence of Foreigners refers to States that are bound by international treaties on the abolition of controls at common borders, by which the Act means Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders and Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

47 Here again, the act refers to the Schengen Borders Code.

the territory. This or another carrier has refused to transport the foreigner to the state of destination or has transported the foreigner through the territory if the foreigner has been refused entry to the territory of another state. If the carrier is a water or land transport operator, it must arrange transport abroad within 48 hours of receipt of the police instruction; if it is an air carrier, it must provide transport within seven days. The time limit is suspended for the duration of the proceedings for granting international protection under a special legal regulation or for the duration of the foreigner's stay with a health care provider under Article 10. The air carrier that transports the foreigner to the territory is also obliged, based on an instruction from the police, to arrange for the foreigner's transport abroad if the foreigner's airport transit visa has been revoked. The foreigner refuses to continue their journey to another state, or if the foreigner is staying in the transit area of an international airport and refuses to continue their journey to another state. Certain grounds for refusing the foreigner entry to the territory of the Czech Republic referred to in Article 9 of the Act on the Residence of Foreigners are established.[48] The carrier is obliged to bear the costs associated with the stay of foreigners in the territory or the transit area of the international airport in the territory until they are transported abroad by the Schengen Borders Code.

The most relevant provision of the Act on the Residence of Foreigners is its Article 105, which sets out the obligations for courts, detention centres,[49] remand prisons and prisons. A court that has decided on the conviction of a foreigner, on the restriction of the foreigners' legal capacity, on the declaration of foreigners as dead or missing, on divorce, on the dissolution of a registered partnership or on the nullity or non-existence of a marriage or partnership in cases where a foreigner is a party to the proceedings, on the appointment of a guardian for a minor foreigner, where the guardian or the spouse of the guardian is an foreigner, or on the entrustment of a minor foreigner to the substitute family care of an foreigner with the right to reside in the territory or their spouse, informs the competent police department according to the place of the foreigner's registered residence. The security detention centre, detention centre, or prison shall immediately inform the police department locally competent according to the seat of the security detention centre, detention centre, or prison of the decision to release foreigners from security detention, custody or to terminate foreigners' imprisonment.

However, it is insufficient to determine the powers of individual authorities involved in the Act on the Residence of Foreigners. About the powers of the police,

48 Art. 9(1) f), g), h) or i).

49 A detention centre is a type of protective measure in the Czech Republic (protective measures are a type of criminal sanctions imposed for criminal offences in addition to penalties – cf. Art. 36 of the Criminal Code), which is carried out in special institutions where various psychological, therapeutic, pedagogical and other programmes are implemented for persons placed there who are dangerous to society. These institutions are guarded by the prison service.

it is necessary to draw primarily on Act No. 273/2008 Coll., on the Police of the Czech Republic. Regarding the role of the courts and judicial review, it is necessary to draw primarily on Act No. 150/2002 Coll., the Administrative Procedure Code, which constitutes the basic legal regulation governing administrative justice in the Czech Republic, and Act No. 141/1961 Coll., the Criminal Procedure Code, which governs criminal proceedings in the Czech Republic.

3.1.4. Administrative expulsion

The 'informal' or '*de facto*' forms of protecting the Czech Republic against migration, consisting of refusing entry to the territory and deporting the foreigner from the territory, have already been described above; now it is necessary to introduce the basic 'formal' instrument used to protect the borders and to intervene against illegal migration. In the Czech Republic, this was administrative expulsion. Its regulation is laid down in Title X of the Act on the Residence of Foreigners, namely in Article 118 et seq.

Administrative expulsion refers to the termination of foreigners' stay in the territory, which is associated with the setting of a period for departure from the territory of the Member States of the European Union and a time during which foreigners cannot be allowed to enter the territory of the Member States of the European Union. The period during which foreigners may not be allowed to enter the territory of the member states of the European Union shall be determined by the police in the decision on the administrative expulsion of foreigners. In justified cases, the decision may provide a border-crossing point for departure from the territory. The period of departure is normally set between seven and 60 days. It is important to note that the law prohibits collective administrative expulsion of foreigners based on a single decision. Therefore, each case must be assessed on a strict individual basis.[50] The period during which a foreigner may not be allowed to enter the territory of the Member States of the European Union may be a maximum of 10 years. However, in the case of illegal migration, the most common period is a maximum of 5 years.[51]

The police must request a binding opinion of the Ministry of the Interior as to whether the foreigner' departure is possible when deciding on administrative

50 In summary, Art. 118 of the Act on the Residence of Foreigners.

51 Cf. Art. 119(1) b), (3), (4), (5), (6) or (7) of the Act on the Residence of Foreigners, according to which the police shall issue a decision on administrative expulsion,
(3) if the foreigner stays in the territory without a valid travel document, although they are not entitled to do so,
(4) if the foreigner stays in the territory without a valid residence permit, although they are not entitled to do so,
(5) if the foreigner fails to submit to border control at the request of the police,
(6) if the foreigner crosses the state border in hiding or attempts to do so,
(7) if the foreigner crosses the state border outside the border crossing point.

expulsion.[52] This does not apply if the police decide on administrative expulsion when the foreigner is deported at a border crossing point and the foreigner explicitly states that their departure is possible or if the foreigner comes from a safe country of origin according to another legal regulation and has not stated facts indicating that they may be exposed to real danger according to Article 179. Suppose reasons preventing foreigners' departure arise after the date of entry into force of the expulsion decision. In that case, the police shall issue a new decision only on whether the foreigners' departure is possible, by a special legal regulation, after a request, and based on a new binding opinion of the Ministry. If the foreigners' departure is not possible, the police shall state this fact in the decision on administrative expulsion, and the Ministry shall grant the foreigners a visa for a stay exceeding 90 days to tolerate their stay in the territory. If the reasons preventing foreigners' departure are no longer applicable, the police shall issue a new decision only on setting a new deadline for departure by a special legal regulation after requesting and based on a new binding opinion of the Ministry. On the date of entry into force of this decision, the visa issued under Article 33 Paragraph 3 or the long-term residence permit to stay in the territory shall expire; the police shall issue an exit order to the foreigner.

Foreigners whose deportation is impossible are entitled to apply for international protection under the Asylum Act immediately after the decision on administrative expulsion is issued. If foreigners do not apply within two months from the date of entry into force of the decision on administrative expulsion, the right to apply for international protection shall expire. The right to apply does not expire if reasons beyond the foreigners' control prevent the application and the foreigners apply within three days after the expiry of such reasons. The validity of

52 The Act on the Residence of Foreigners refers here to its Art. 179, which regulates the grounds preventing departure of foreginer. Departure of a foreigner is not possible if there is a reasonable apprehension that the foreigner would be in real danger if returned to the State of their nationality or, if he/she is a stateless person, to the State of their last permanent residence. Under the act, actual danger is deemed to be a return in violation of Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, the foregoing shall not apply if there are reasonable grounds for suspecting that the foreigner (a) has committed a crime against peace, a war crime or a crime against humanity within the meaning of international instruments containing provisions on such crimes, (b) has committed a particularly serious crime, (c) has committed acts contrary to the principles and objectives of the United Nations, or (d) constitutes a danger to the security of the State, and further, if the foreigner (a) incites or participates in the commission of the acts referred to in paragraph 3, or (b) has committed one or more offences outside the territory other than those referred to in para. 3, if they have left the State of which the foreigner is a citizen or, in the case of a stateless person, the State of their last permanent residence, with the aim of avoiding prosecution for those offences, provided that the offences are punishable by imprisonment in the Czech Republic. In such a case, the foreigner shall be allowed to seek admission in another State within a maximum of 60 days. If the foreigner proves that they have not obtained admission in another State, the police shall allow them to apply for a visa.

the decision on administrative expulsion expires if foreigners are granted asylum. In the case of an administrative expulsion decision under Article 119(1)(a), the administrative expulsion decision shall cease to be valid if the decision granting asylum is valid for some time equal to the period specified in the administrative expulsion decision for the restriction of the foreigner's entry into the territory. Furthermore, the validity of a decision on administrative expulsion shall be extinguished if the decision granting subsidiary protection or authorising long-term residence to tolerate stay in the territory is valid for a period (a) equal to the period laid down in the decision on administrative expulsion for restricting the foreigner's entry into the territory, if it is a decision under Article 119(1)(a) of the Act on Administrative Expulsion. (b) equal to one and a half times the period set out in the decision on administrative expulsion to restrict foreign entry into the territory if the decision is under Article 119(1)c) or Article 120(1)(c). If another state consents to the admission of a stateless person, they may be expelled to that state based on an administrative expulsion order.[53]

At the request of the foreigner, the police may issue a new decision cancelling the validity of the administrative expulsion decision or reducing the period for which the foreigner cannot be allowed to enter the territory of the Member States of the European Union, as specified in the administrative expulsion decision, by at least one-third of that period, if the reasons for issuing it have ceased to exist and half of the period during which the foreigner cannot be allowed to enter the territory has elapsed the reasons for which it was issued, or the foreigner is a foreigner placed in foster care (Article 87) who has reached the age of 18 and, according to the statement of the child welfare authority, the foreigner is showing a desire to integrate into the territory. At the request of foreigners who have become citizens of another Member State of the European Union after the decision on administrative expulsion has become final, the police shall issue a new decision revoking the administrative expulsion unless there is a risk that they might endanger the security of the state, seriously disturb public order, or endanger public health during their stay in the territory. Similarly, the police proceed in

53 As an addition to this paragraph, attention should be drawn to a recent judgment of the Court of Justice, which was issued on the basis of a Czech preliminary question, in which the Court held that EU law precludes the adoption of a return decision against a third-country national after he or she has lodged an application for international protection but before that application has been decided at first instance, irrespective of the period of stay to which that return decision relates (judgment of the Court of Justice of 9 November 2023, CD v Ministry of the Interior of the Czech Republic, C 257/22). In doing so, the Court contradicted the case-law of the Czech Supreme Administrative Court, which, only a month before the Court's judgment, had reached the opposite conclusion that an administrative authority may initiate proceedings for the administrative expulsion of a foreigner even after that foreigner has applied for international protection, but that the expulsion decision cannot become enforceable during the asylum proceedings (Czech Supreme Administrative Court decision of 3 October 2023, No. 5 Azs 50/2021 33).

the case of foreigners who, following a final decision on administrative expulsion, become family members of citizens of the European Union.

Finally, it should be noted that the Act on the Residence of Foreigners also provides special measures for departing foreigners from the territory and detaining foreigners. The special measures include the obligation of the foreigner to notify the police of the address of the place of residence, to stay there, to notify the police of any change thereof on the following working day and to stay at the address of the place of residence to carry out a residence check within a specified period, and the deposit of funds in freely convertible currency in the amount of the estimated costs of administrative expulsion by the foreigner subject to the special measure for deportation; the funds may be deposited on behalf of the foreigner by a citizen of the Czech Republic or a foreigner with a long-term or permanent residence permit in the territory, the foreigner's obligation to report in person to the police at the time specified by the police, or the foreigner's obligation to stay at the place specified by the police and to be present at that place at the time specified in order to carry out the residence control. A special measure may be imposed if there is a reasonable risk that the foreigner may obstruct or impede the proceedings for their removal by failing to prove their identity or address of their residence, refusing to provide such information, or appearing when summoned by the police. Furthermore, a special measure for departure may be imposed if there is a reasonable risk that an foreigner will not leave within the period specified in the decision subject to their departure. The police decide the type and manner of execution of special measures for departure.[54]

The police are authorised to detain a foreigner over 15 years of age who has been served with a notice of initiation of administrative expulsion proceedings or whose administrative expulsion has already been finally decided or who has been subject to an entry ban imposed by another Member State of the European Union and valid for the territory of the Member States of the European Union and the imposition of a special measure for the purpose of departure is not sufficient, if there is a danger that the foreigner could endanger the security of the state or seriously disturb public order, that the foreigner could obstruct or hinder the execution of the decision on administrative expulsion, in particular by providing false information in the proceedings concerning their identity, place of residence, refusing to provide such information or expressing an intention not to leave the territory or if such intention is evident from their actions, the foreigner has not left the territory within the time limit set in the decision on administrative expulsion, the foreigner has seriously violated an obligation imposed on him/her by the decision on the imposition of a special measure for the purpose of departure, or the foreigner is registered in the information system of the Contracting States. In the decision on detention, the police shall determine the duration of the detention,

54 Art. 123b of the Act on the Residence of Foreigners.

taking into account the expected complexity of the preparation for administrative expulsion. When determining the duration of detention, the police are obliged to consider cases involving unaccompanied minors, families, or other persons with children. If this is necessary to continue preparations for administrative expulsion, the police are entitled to extend the duration of detention, even repeatedly. The police shall issue a new decision on detention if the Ministry has not decided under the Asylum Act in the case of an foreigner—detained under this Act, who has applied for international protection. There are reasonable grounds for believing that, although they could have applied for international protection earlier, they have applied for international protection to avoid or delay the threat of expulsion, extradition, or transfer for prosecution abroad. The police will issue a new detention decision within three days of the Ministry making the detention decision. The police shall inform the detained foreigners of their right to submit a request to the police for release from the facility and of their right to file a lawsuit in the administrative courts against the detention decision or the extension of the detention period. In the case of an unaccompanied foreigner minor or an foreigner minor in a similar situation, the police shall inform the guardians of these rights.[55]

The period of detention should not exceed 180 days and should be calculated from the time of the restriction of personal liberty. In the case of foreigners under 18 or a family with minor children, the period of detention may not exceed 90 days. The police are entitled to extend the period of detention according to and beyond the time limit, provided that the expulsion of the foreigner is feasible within the period of detention. Suppose the foreigner has obstructed the execution of the administrative expulsion or deportation during the detention. In that case, the foreigner provides false information necessary for securing a replacement travel document or refuses to provide it, or in the course of obtaining the necessary documents for the execution of the administrative expulsion, there is a delay on the part of third countries despite the efforts of the police.[56]

■ *3.2. Criminal law means*

The penultimate section of this paper focuses on criminal law that protects against illegal migration. The central legal norm of substantive criminal law in the Czech Republic is Act No. 40/2009 Coll., Criminal Code. About the topic of this article, its part two—special part, Title X—crimes against public order, Part 4—other interference with the activity of a public authority—Articles 335–351 is relevant. The Criminal Code regulates four offences related to illegal migration.

The first offence is the violent crossing of the state border, enshrined in Article 339. This offence consists in the fact that whoever crosses the state border using violence or threat of imminent violence shall be punished by imprisonment

55 Art. 124 et seq. of the Act on the Residence of Foreigners.
56 In summary, Art. 125 of the Act on the Residence of Foreigners.

for one to five years. Imprisonment for three to ten years or confiscation of property shall be imposed if the perpetrator (a) organises the act referred to in subsection 1, (b) commits such an act with a weapon or with at least two persons, (c) commits such an act to conceal or facilitate another offence, (d) causes serious bodily injury by such an act, (e) causes substantial damage by such an act, or (f) commits such an act in a state of national emergency or war. The perpetrator shall be punished by imprisonment for a term of eight to 15 years, or, in addition to this punishment, by forfeiture of property, if they (a) cause death by the act referred to in subsection 1, (b) cause grievous bodily harm to at least two persons by such an act, (c) cause damage to a great extent by such an act, or (d) commit such an act as a soldier in a state of national emergency or war. It should be added that the preparation of this offence is already punishable. Finally, it should be noted that this offence (the only one related to illegal migration listed here) cannot be committed by a legal person in addition to a natural person.[57]

The second offence is the organisation and facilitation of the illegal crossing of state borders, enshrined in Article 340 of the Criminal Code. This criminal offence consists of the fact that whoever organises for another the illegal crossing of the state border, enables or assists another to cross the state border illegally, enables or assists another to cross the territory of the Czech Republic after the illegal crossing of the state border, or organises such a crossing shall be punished by imprisonment for up to two years or by prohibition of activity. The perpetrator shall be liable for imprisonment for a term between six months and five years, forfeiture of property, or a fine if (a) they commit the act referred to in subsection 1 as a member of an organised group, (b) they subject another to inhuman or degrading treatment by such an act, (c) they commit such an act in return for payment, (d) they commit such an act repeatedly, or (e) they commit such an act to conceal or facilitate another offence. The perpetrator shall be liable to imprisonment for a term of two to eight years or to forfeiture of property if they (a) commit the act referred to in subsection 1 as a member of an organised group and for pecuniary gain; (b) place another in danger of death by such an act; (c) if by such an act they cause serious bodily injury; (d) if by such an act, they obtain a substantial benefit for himself or another; (e) if they commit such an act with a weapon; or (f) if they commit such an act in a state of national emergency or war. The perpetrator shall be punished by imprisonment for five to twelve years, or, in addition to this punishment, by forfeiture of property, if (a) the act referred to in subsection 1 causes death, (b) the act causes serious injury to at least two persons, (c) the act confers a large benefit on himself or another, or (d) the act is committed as a soldier in a state of national emergency or war. Here, too, mere preparation

57 Cf. Art. 418/2011 Coll., on Criminal Liability of Legal Persons and Proceedings Against Them, which contains an enumerative list of offences that cannot be committed by a legal person.

for the offence is punishable. In connection with this offence, it is appropriate to add that the police may, in detecting it and if a terrorist group commits it, make use of the activities of an agent who is not criminally liable for such an offence if they have committed such an offence to detect or prevent the commission of a crime committed by members of a terrorist group, in association with a terrorist group, or for the benefit of a terrorist group.[58]

Furthermore, Article 341 of the Criminal Code regulates the offence of aiding and abetting an unauthorised stay in the territory of the Republic. This offence consists of the fact that whoever, to obtain an unjustified property or other benefit, assists another to stay illegally in the territory of the Czech Republic, shall be punished by imprisonment for up to one year or by prohibition of activity. The perpetrator shall be liable to imprisonment for up to three years if they (a) organise the act referred to in subsection 1, (b) commit such an act as a member of an organised group, (c) commit such an act repeatedly, or (d) commit such an act to conceal or facilitate another offence. The perpetrator shall be liable to imprisonment for a term between six months and five years, forfeiture of property, or a fine if they (a) obtain a substantial benefit for himself or another by the act referred to in subsection 1 or (b) commit such an act in a state of national emergency or war. The perpetrator shall be liable to imprisonment for a term of two to eight years or, in addition to this penalty, to forfeiture of property, if (a) they obtain a large benefit for himself or another by the act referred to in subsection 1 or (b) they commit such an act as a soldier in a state of national emergency or war.

Finally, Article 343 of the Criminal Code establishes the offence of violating regulations on international flights. This consists of the fact that whoever violates the laws on international flights by entering the territory of the Czech Republic by means of air transport shall be imprisoned for six months to three years. The regulations on international flights within Article 343 of the Criminal Code are primarily the Convention on International Civil Aviation—Decree No. 147/1947 Coll.—and the rules of flying issued by the International Civil Aviation Organization (ICAO), Decree No. 29/1957 Coll.[59]

From the procedural perspective, we are in the realm of criminal law. While the administrative expulsion referred to in the previous chapter is within the competence of the police and its review is ensured by the Czech administrative courts, in this area, the police, the prosecutor's office, and the criminal courts as criminal authorities clash[60] (or build on each other). First, it is important to note that the offences mentioned above can, in principle, be committed by anyone else. The Criminal Code does not distinguish certain groups of foreigners

58 Art. 312c(2) of the Criminal Code.

59 For a more detailed analysis of all these offences, cf. in particular Šámal et al., 2012.

60 Art. 12(1) of the Criminal Procedure Code.

according to their nationality.[61] Neither does the Criminal Procedure Code (i.e., as already mentioned, the law governing criminal proceedings in the Czech Republic) provide for any comprehensive special regulation of prosecution for the offences mentioned above. Therefore, from a procedural point of view, the standard criminal procedure, which in the Czech Republic follows the following procedure, applies in principle: Criminal proceedings can be divided into two basic stages: (a) preparatory proceedings and (b) proceedings before the court. Preparatory proceedings are the pretrial stage of the proceedings, the purpose of which is to prepare the grounds for the trial. It is a private proceeding in which the prosecuting authorities investigate suspicions that a crime has been committed; obtain the grounds for bringing charges, that is, determine whether the suspicion of a crime against a particular person is justified to the extent that charges should be brought and the case referred to court, or whether there is a case for a different decision and a different course of action; and seek and secure evidence to clarify all the basic facts relevant to the assessment of the case, including the perpetrator and the consequences of the crime. The police conducted these activities. Its activities are supervised by the public prosecutor, who decides whether to bring charges to court.

Pre-trial proceedings also consist of two basic phases: the examination phase (the procedure before prosecution is initiated) and the investigation phase (the procedure after prosecution is initiated). The investigation phase: In this phase, facts indicating that a crime had been committed are clarified and investigated. The investigation includes providing explanations, obtaining documents, examining the crime scene, examining objects, obtaining expert opinions, and securing traces (e.g. fingerprints and carrying out urgent and non-repeatable actions). At the end of this phase, the law enforcement authority initiated criminal prosecution, followed by an investigation phase. It does not initiate criminal prosecution on the grounds of referral of the case to the competent authority, for example, for the investigation of an offence or other administrative offence, for disciplinary or disciplinary proceedings adjournment of the case for inadmissibility or impracticability of the prosecution, or for failure to establish a fact justifying the initiation of criminal proceedings (a complaint may be lodged against the order of adjournment), or for temporary adjournment of the case if necessary for clarification.

The investigation phase begins with an order for prosecution. Police authorities seek evidence to clarify crimes. This phase included interviewing

61 According to Art. 22 of the Criminal Code, the perpetrator of a criminal offence is the person who, by their conduct, has fulfilled the elements of the offence or its attempt or preparation, if it is punishable. For the perpetrator to be criminally liable, the Criminal Code requires them to be over 15 years of age (Art. 25) and of sound mind (Art. 26). Between the ages of 15 and 18 years, the perpetrator is a juvenile, and criminal proceedings against such a person are different under Act No. 218/2003 Coll. on Juvenile Justice.

witnesses, providing explanations, examining objects, obtaining expert opinions, and other acts. It is unnecessary to repeat acts carried out before the prosecution was initiated. At the end of this phase, at the suggestion of the police authority, the prosecutor files the indictment, followed by the trial stage of the proceedings, namely, the main trial or preliminary hearing, diversion (e.g. opening of plea bargaining, conditional discontinuance of prosecution, etc.), referral of the case to another authority (e.g. for consideration of a misdemeanour or other administrative offence, or disciplinary or disciplinary proceedings), or discontinuation of criminal prosecution (e.g. on the grounds of failure to prove that the act occurred or that the accused committed it or on the grounds of inadmissibility of the prosecution due to the death of the perpetrator, lack of age, etc., if the criminality of the act has ceased or the accused was not criminally responsible at the time of the act due to insanity).

The legislature chose relatively low penalties for all four offences concerning illegal migration. For the offence of forcible crossing of the state border, imprisonment for a maximum of one to five years; for the offence of organising and facilitating the illegal crossing of the state border, imprisonment for a maximum of two years; for the offence of aiding and abetting an unauthorised stay in the territory of the Republic, imprisonment for up to one year; and for the offence of violating regulations on international flights, imprisonment for six months to three years. Owing to the relatively low criminal penalties, it is possible to proceed with an abbreviated pre-trial procedure for these offences, to bring the perpetrator to trial as soon as possible. This may occur if the following conditions are met: the offence is a crime for which the district court has jurisdiction in the first instance, the maximum penalty does not exceed five years of imprisonment, the suspect was caught in the act or immediately after that, or facts have been established in the course of the investigation which otherwise justifies the initiation of criminal proceedings; it can be expected that the suspect can be brought to trial within two weeks. In summary proceedings, the suspect has the same rights as the accused (Articles 33 Paragraphs 1 and 2). The detained suspect has the right to choose defense counsel and to consult with him without the presence of a third person during detention. The suspect must be informed of this before interrogating and allowed to exercise their rights. At the beginning of the questioning, the suspected offender shall be questioned and told at the latest what offence they are suspected of having committed. The authorities conducting the summary pretrial procedure recorded this act. A copy of the record shall be delivered to the suspect and their defense counsel; the police authority shall also send a copy to the public prosecutor within 48 hours. The Provisions on Questioning the Accused shall apply mutatis mutandis to the procedure of questioning the suspect. The summary pretrial procedure shall be concluded within two weeks of the date on which the police authority has informed the suspect of the act they are suspected of having committed and the offence they are suspected of having committed.

In the event of an indictment by a prosecutor, the investigation phase is followed by proceedings before the court. The proceedings before the court included a preliminary hearing of the indictment (not necessarily), the main trial and, if necessary, an appeal. The main trial decides on the main issue of the criminal proceedings, the guilt of the defendant, and the sentence, and where appropriate, on protective proceedings and compensation for damages ('adhesion proceedings'). The main trial comprises the following: the beginning of the main trial, including, among other things, the announcement of the case to be heard; the determination of whether the persons who have been summoned or notified have appeared; the presentation of the indictment; and the determination of whether the victim proposes that the offender be ordered to pay compensation for damages. Taking of evidence, including the taking of evidence, for example, examination of the accused, witnesses, and experts, reading of records of previous testimony, production of reports, reports, other documents, and physical evidence. Conclusion of the main trial includes the presentation of closing arguments or an order to supplement the evidence. The victim's attorney made a closing argument. Court decision: The court may decide to return the case to the prosecutor, discontinue prosecution, conditionally discontinue prosecution and approve a settlement, discontinue prosecution, or decide by judgment.

The previous section described the standard course of criminal proceedings in the Czech Republic. However, at the same time, it is necessary to describe the differences from the standard course, which results from the fact that criminal proceedings related to illegal migration are very often conducted with foreigners. Therefore, anyone who declares they do not know the Czech language is entitled to use their mother tongue or the language they claim to know before law enforcement authorities.[62] This also entails that such an accused shall be appointed a lawyer who, according to the information on the waiting list, shall provide his services in the language in which the accused has declared that they are proficient in the language of the nationality of the accused, in the official language of the state in which the accused is a citizen, or, if the accused is a stateless person, in the official language of the state where the accused is permanently resident, or which is his state of origin.[63] If the content of a document, statement or other procedural act needs to be interpreted or if the accused makes use of the right referred to in Article 2 Paragraph 14, an interpreter shall be engaged; the same shall apply if it is necessary to provide an interpreter for a person who cannot be communicated with otherwise than utilizing one of the communication systems of deaf-blind persons. The interpreter may also have been a recorder. If the accused does not indicate the language they know or indicate a language or dialect that is not their national language or the state's official language, they are citizens. No person

62 Art. 2(14) of the Criminal Procedure Code.

63 Art. 39(4) of the Criminal Procedure Code.

is registered on the list of interpreters for such a language or dialect; the law enforcement authority shall appoint an interpreter for his national language or the official language of the state of which they are citizens. For a stateless person, this refers to the state of their permanent residence or origin. If the accused uses the right referred to in Article 2 Paragraph 14, the assigned interpreter shall, at their request, also interpret their consultation with their defence counsel directly related to the procedural acts and the consultation during the procedural acts.[64] It is, therefore, apparent from the above that in criminal proceedings, the emphasis is primarily on foreigners being able to understand all relevant facts and proceedings. The cited provisions have legal effects on Article 37 Paragraph 4 of the Charter of Fundamental Rights and Freedoms, according to which 'anyone who declares that he or she does not know the language in which the proceedings are conducted has the right to an interpreter.'[65]

In addition to the linguistic specifics mentioned above, another significant difference concerns the proceedings against a fugitive provided for in Articles 302 et seq. of the Code of Criminal Procedure. Such proceedings may be brought against someone who evades criminal proceedings by staying abroad or hiding. In such proceedings, the criminally accused must have defense counsel from the outset and, in principle, all communication from the criminal law enforcement authorities takes place with that counsel, who has the same rights as the accused. If the reasons for proceedings against the fugitive are overlooked, criminal proceedings will continue by the general provisions. If the accused requests, the evidence taken in the previous proceedings shall be retaken in the proceedings before the court, where its nature permits or where no other compelling factor prevents its repetition; otherwise, the accused shall be read out the reports of the taking of such evidence or be shown video and audio recordings of the acts carried out by videoconferencing equipment, and shall be allowed to comment on them. The proceedings against the fugitive ended with a final conviction and the grounds on which the proceedings were conducted have ceased to exist. The court of first instance shall, on application by the convicted person lodged within eight days of the delivery of the judgment, set aside such judgment and, to the extent provided for in Paragraph 1, conduct the main hearing afresh. The right to move to set aside a final conviction shall be notified to the convicted person in service of the judgment. The Court proceeds accordingly if an international treaty to which the Czech Republic is bound is required. The period from the legal force of the conviction until its revocation under Article 2 shall not be counted as part of the limitation period. The decision may not change to the accused's detriment in the new proceedings.

64 Art. 28(1) of the Criminal Procedure Code.

65 For more details on this article, including extensive citation of relevant case law of the Czech Constitutional Court and the European Court of Human Rights, cf. Husseini et al., 2021, pp. 1173–1181.

4. Statistical data

In the final section of this paper, additional statistics are presented. The Czech Republic Foreign Police Service provided these. This paper mentions the most up-to-date comprehensive statistics summarising illegal migration in the Czech Republic from 1 January 2022 to 31 December 2022.[66]

From 1 January 2022 to 31 December 2022 a total of 29,235 people were detected illegally migrating to the Czech Republic. Since the beginning of 2022, the police have faced a significant year-on-year increase in illegal migration through the territory of the Czech Republic. Compared with 2021, there has been an increase of 18,065 people (i.e. + 161.7%). The fundamental influence on the increase in illegal migration in 2022 was the migration wave, especially of Syrian refugees, for whom, given the current internal political and security situation in their home country, there is an obstacle to their departure; that is, international law does not allow their return to their home country. Most were third-country nationals heading to Europe, mainly from Western Balkan countries. Although the number of irregular migrants in transit has increased by several hundred percent annually, this has not yet been reflected in crime statistics. The Czech Republic remains a transit country, not a destination country. Migrants rarely used the possibility of applying for international protection in the territory of the Czech Republic.

Of the total number, 29,034 persons (99.3%) were detected during illegal stays, and 201 (0.7%) were detected during illegal migration across the external Schengen border of the Czech Republic.[67] In terms of nationality, illegal migration was most frequently committed by citizens of Syria (20,981 persons, 71.8%), Ukraine (2,850 persons, 9.7%), Moldova (1,010 persons, 3.5%), Turkey (772 persons, 2.6%), and Georgia (309 persons, 1%).

A total of 259 persons were found to be illegally staying with irregular travel documents, 44 fewer than in the same period in 2021. The most common citizens were from Syria (131), Moldova (47), and Ukraine (23).

Simultaneously, the number of decisions on administrative expulsion from the territory of the Czech Republic increased to 6,449 (an increase of 1,462 cases) compared to 2021. The most frequent cases were still citizens of Ukraine (1,960 persons), followed by citizens of Syria (1,382 persons) and Moldova (991 persons).

21,852 people were detected in transit, illegally migrating through the Czech Republic, with a high increase of 20,522 people (i.e. + 1,643%) per year.

66 Policie České republiky – Služba cizinecké policie (2023) Policie České republiky, 23 January 2023. [Online]. Available at: https://www.policie.cz/docDetail.aspx?docid=22776535&doctype=ART&prev=true (Accessed: 14 January 2024).

67 On the external borders of the Czech Republic, cf. footnote 24 of this paper.

21,639 persons (99%) were detected in connection with the land border, and 213 persons with an air border. The highest number of detections was for citizens of Syria (20,387 persons, 38.6%), Turkey (487 persons, 29.6%), and Afghanistan (224 persons, 10%). The most frequent means of transport were trains (2,830 persons), followed by vans and minibuses (1,658 persons) and cars (1,144 persons). It should be mentioned that for many people, the mode of transport could not be ascertained.

For 2022, 277 people who facilitated illegal migration, including smuggling,[68] were examined. Compared to 2021, there is a significant increase of 225 persons (i.e. + 432.7%). This increase was mainly due to the high number of illegal migrations in transit and the corresponding number of detected smugglers. The detection of criminal activities (smuggling) continues to be emphasised, among other things, because of the threat to the lives of smuggled persons when transported, for example, in vans and trucks where more than 30 persons are in one vehicle.

5. Conclusions

As mentioned in the Introduction, this paper aims to present the overall border defence of the Czech Republic. Therefore, this study focuses on constitutional, administrative, and criminal legislation. As can be seen, no single piece of legislation in the Czech Republic contains the legal regulation of border defence, but legal regulation is instead spread over several acts, mainly in administrative and criminal law. The most important legislation is the Act on the Residence of Foreigners (supplemented by the Asylum Act) and the Criminal Code. The asylum procedure takes precedence over the use of mechanisms involving the return of foreigners from Czech Republic territory. Thus, foreigners are left in the territory of the Czech Republic until the asylum procedure is finally concluded, and their return from the territory occurs only after the asylum procedure is concluded. About the relationship between administrative and criminal law instruments, it is necessary to bear in mind the principle of subsidiarity of criminal repression, according to which the criminal liability of the perpetrator and the criminal law consequences associated with it may be applied only in socially harmful cases in which the application of liability under another legal provision is not sufficient.[69] Thus, in most cases, only administrative legal remedies are used against irregular migrants without criminal prosecution.

The fact that foreigners are in an administrative or criminal law regime determines judicial review. In the administrative law regime, foreigners undergo

68 A 'smuggling' is referred to as an offence under Art. 340 of the Criminal Code. Cf. p. 12 and 13 of the paper.

69 Art. 12(2) of the Criminal Code.

a two-stage administrative procedure. They are subsequently guaranteed a two-stage judicial review (except for the abovementioned exception of the exclusion from judicial review in the case of a decision on refusal of entry and a decision on a request for a new assessment of the grounds for refusal of entry)[70] in the administrative justice system, in the criminal law regime which foreigners fall within the criminal justice system, where they are also guaranteed a two-stage judicial procedure with the subsequent possibility of filing an extraordinary appeal–an appeal to the Supreme Court. All procedural proceedings (administrative proceedings, administrative court proceedings, and criminal proceedings) emphasize foreigners' understanding of the proceedings and, thus, their ability to exercise their rights effectively.

70 Cf. 3.1.3. point.

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MATEUSZ TCHÓRZEWSKI*

Legal Status of Irregular Migrants in Chosen Central European States With Special Consideration for Migration Crises

ABSTRACT: *This study discusses specific international and European Union laws that regulate the status of irregular migrants in the context of selected examples of migration crises, namely, the European refugee-migrant crisis of 2015 and the artificial refugee crisis at the European Union-Belarus border, the latter being an example of coercive engineered migration. The problem of externalisation of the Union's migration governance to third countries is also considered from the point of view of effective protection of the human rights of migrants who cannot reach the territory of the states where they can benefit from such protection. The study attempts a general evaluation of the relevant legal framework from the perspective of its adequacy in addressing challenges stemming from particular types of migration crises. The scope of the study is limited to selected Central European states, as a number of them are affected by coercive engineered migration and (or) the refugee-migrant crisis. Selected relevant legal issues (statutory law, judgements of the Court of Justice of the European Union, and the European Court of Human Rights) in chosen states (Hungary, Poland, Romania, and Serbia) are also considered.*

KEYWORDS: irregular migrants, migrations in Central Europe, migration crises, rights of migrants

1. Introduction

This study seeks to analyse certain determinants of the legal status of irregular migrants, with special consideration of the circumstances of migration crises

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and Central European countries. Doing so, it proposes a partial evaluation of the legal framework that determines this status and the circumstances under which it operates. In this context, it is paramount to consider both the rights and interests of the affected persons and those of the affected states.

History seems to provide numerous examples of migrations that were beneficial or even very beneficial for the societies (states and nations) receiving migrants. To highlight some of those examples, one can point out, among others, the medieval migrations of Jews into Poland.[1] In this context, newcomers could enjoy special protection from the authorities[2] and bring significant impulses for the development of trade, monetisation of the economy, and access to credit.[3] Another positive example of medieval migration with a significantly positive economic effect was the migration from Western Europe (mostly German lands) into Poland. This migration was connected to the modernisation of cities, the reorganisation of the rural economy and had significant and beneficial effects on economic development.[4] However, it should be noted that the latter wave of migration also had controversial long-term effects, causing acute social and political tensions.[5] Another, more recent example of beneficial migration can be identified in France, where from 1921 to 1931, a significant increase in the number of migrants (from 1,5 million to 2,7 million) was observed, including Italians, Poles, Spaniards, Belgians, and Algerians.[6]

The examples above can be contrasted with the perhaps most impactful and vivid historical example of European migration, an exemplary crisis of extreme character, namely, the migration of Germanic peoples into the Roman Empire in the fifth century. Historians interpret these events in many ways. The causes and reasons for their transpiration in a particular manner and the characteristics of their results are very complex and cannot be discussed in detail here. It can be stated, however, that these migrations played a very significant role in the complete disintegration of the Western Roman State. This disintegration is connected to a significant, long-term regression in economic, social, technical, and cultural development in the early Middle Ages. Among the different interpretations of these processes and their results, one that attracts the most adherents is connected to contemporaries' accounts that almost uniformly attribute defeats to the

1 Nowak, 2015, pp. 174–177.

2 Such as serious penalties for disrespecting Jewish cemeteries or murder (confiscation of entire property) and fines for not coming to aid of a Jew who is in distress.

3 Nowak, 2015, p. 175.

4 Nowak, 2015, pp. 163–192.

5 It appears that social tensions, in this context, could have been attributed mostly to long-term difficulties in cultural assimilation. Political tensions seemed to be more permanent as they have led, in some cases, to pervading long term ethnic changes in the character of certain regions.

6 The integration process was gradual and differed for different groups, longer for Poles due to the high concentration of their households. The integration of these newcomers was difficult, due to the scale of these migrations, and was connected to cases of discrimination and xenophobia. See Petitfils, 2018, pp. 763–765.

inefficiencies of the authorities, who seem to have had an objective means to deal with the challenges at their disposal.[7] These migrations are considered to have been largely inevitable, mainly because of depopulation. However, how they have taken place is not regarded as inevitable. They may have transpired in another way, later, in a more gradual manner, and with less violence.[8] In other words, they did not necessarily have to lead to political, societal, or economic collapses.

Care should be taken not to succumb to the temptation of drawing easy parallels between historical examples and current situations, as the former have occurred in very specific circumstances. However, intensive migration can have very profound and long-lasting effects; therefore, managing and regulating it rationally and efficiently is crucial. Certain patterns (regularities) can be cautiously identified. It appears that migrations controlled by receiving states will, as a rule, be more beneficial and less dangerous (problematic) from the perspective of the receiving state (society). Another relevant issue is the characteristics of migration, that is, its scale, speed, and length. Large-scale, intensive migrations that happen rapidly in a sustained manner are likely to be more difficult from the point of view of the receiving state. It takes time to integrate incoming migrants and to accustom the inhabitants to the presence of migrants. Cultural differences between migrants and inhabitants also play a role; the more pronounced they are, the more difficult the integration process is likely to be. It should also be noted that migration can be created artificially and used as a foreign policy tool to exert pressure on states. Finally, migrants' rights should always be considered in these contexts.

2. Notion of irregular migrants

The multiple definitions of migration depend on the perspectives considered. Among these definitions, the following can be pointed out: a) The flow of means of production, investment in the efficacy of human resources (economics); b) A phenomenon which shapes the demographic structure of a given population (demographics); c) The movement of persons between states (politology); d) A natural part of a person's life path (sociology); e) A particular form of crisis connected with a psychological state (psychology);[9] f) Migration can also be defined

7 See Encyclopedia Britannica, no date.
8 Bury, 1923, p. 313.
9 Przytuła, 2017 cited in Młynek, Pasternak and Komenda, 2022, p. 371.

as territorial relocation connected to a relatively long-term change in place of residence.[10]

Numerous studies have addressed the legal status of irregular migrants.[11] Different forms of irregular stays may include the following: a) Persons using forged documents or persons using real documents but assuming false identities; b) Persons with apparent legal temporary residential status; c) Persons, who lose their residence status because they no longer satisfy the appropriate conditions; d) Persons who at no point in time had regular status, as they entered illegally, and were unable to find means of regularising their status; e) Persons who enter illegally but are registered with public authorities as they have been denied protection after filing an asylum application; f) Tolerated persons without regular status. This phenomenon is connected to situations in which the removal of illegally residing persons or return to the country of origin is not possible because there is no agreement with the country of origin or transit, or establishing the nationality of the migrant is not possible; g) Children born to parents who are unlawfully residing in a given state.[12]

3. Examples of acute migration crises

▪ *3.1. European refugee-migrant crisis of 2015*

Refugee and migrant crises have been described as one of the most significant and divisive issues in recent European history. While the 2015 crisis is often identified as a pure migrant crisis, as it started in 2011 and intensified severely in 2015, it is being argued that it should be considered a refugee-migrant crisis.[13] The migrants did not constitute a homogenous or single group; therefore, the terms 'mixed migration' and 'irregular migration' are argued to be more accurate than 'illegal migration' in this context.[14] It is worth pointing out that the European Union (EU), particularly Germany, have put significant trust in the European Union-Turkey Agreement to deal with this issue.[15] At the same time, the aforementioned crisis created friction between certain EU member states with respect to relocation schemes. Finally, refugee and migrant pressures were asymmetrical in character.

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10 In this context, migrations can be further broken down into permanent (connected to permanent change of the place of residence); temporary (connected to a non-permanent or seasonal change of the place of residence); internal (taking place within one state); external (between states and/or continents); spontaneous; planned; legal; illegal; voluntary; non-voluntary; economic; familial; connected to tourism. See Encyklopedia PWN, no date. See also Scholten, 2022.

11 See *inter alia* Bade, 2004; Bogusz et al., 2004; Düvel, 2011, pp. 275–295; Markiewicz-Stanny, 2015, p. 58; Morehouse and Blomfield, 2011; Sadowski, 2016; Spencer and Triandafyllidou, 2020.

12 Spencer and Triandafyllidou, 2020, p. 16.

13 Karolewski and Benedikter, 2018, p. 98.

14 Hammond, 2015, p. 3.

15 Karolewski and Benedikter, 2018, p. 118.

In the context of Central Europe Hungary was the most affected country (as measured by the number of applications in 2015), Slovakia was the least affected, and Poland was in the middle. This asymmetry is identified here as a significant cause of the diverse interests of different EU countries; hence, implementing a coherent EU policy is particularly difficult.[16] In this context, the guarantees of EU law regarding the protection of migrants' fundamental rights remain irrefutable and constitute a safety buffer for migrants in the legal regulations passed by national legislators in member states. This view is connected to a prediction that the shaping of the rules in the area of protection of Member States' particular interests will belong to the EU. Simultaneously, the effective implementation of these regulations will be the responsibility of the Member States.[17]

It is worth pointing out that the very notion of a 'migration crisis' is somewhat controversial. The perception of 'crisis' is argued to have been one of the key drivers of the backlash against multiculturalism in Europe.[18]

■ *3.2. Artificial refugee crisis at the EU-Belarus border*

The humanitarian crisis at the border between the EU and Belarus began in the summer of 2021. Belarusian authorities threatened to stop Belarus from preventing migrants from irregularly crossing the border between Belarus and EU member states.[19]

An attempt to evaluate the existing legal protection framework for irregular migrants in the context of migration crises must consider their particular type, which can be described here as a *sui generis* artificial migration crisis. In this context, the term 'artificial' is understood as the result of an intentional policy on behalf of a hostile state designed to create political and social pressure in a state that is to be a victim of such a crisis (policy). Assuming that the ability of any country to receive migration is limited, artificial migration, if not regulated, may result in political and social tensions and, in acute variants, significant disruptions in the functioning of the state. The latter result may be more likely if artificial migration is combined with other forms of hostile activities designed to exacerbate the associated difficulties. This phenomenon is especially problematic because it may be assumed that a state that conducts such a hostile policy is, by default, undemocratic and does not provide protection for human rights comparable to that existing within the EU framework. As a rule, the decision-makers of undemocratic states can be considered hostile to democracy as it undermines their legitimacy and the perspective of long-term rule (succession). This makes safeguarding the capabilities to address such hostile policies vital from the standpoint of not only

16 Ibid., p. 113.
17 Kosińska, 2021, pp. 75–76.
18 Scholten and van Nispen, 2015, p. 3.
19 Grześkowiak, 2023, p. 21.

safeguarding but also promoting democracy[20] and protecting human rights. The negative effects of uncontrolled migration may also be used as an argument for the inherent ineffectiveness of the democratic system of government and undermine the credibility of democracy, especially in states where it is relatively fragile.

This type of migration is defined in the literature as 'coercive engineered migration'. This term refers to cross-border population movements which are purposefully created or manipulated in order to induce political, military, and/or economic concessions from a target state (states). In this context, doubts arise regarding the receiving state's rights under jus ad bellum and parallel obligations under international human rights law (obligations relating to nonrefoulment and the collective expulsion of aliens). It may be argued that coercive engineered migration may amount to the use of force, and in such a situation, to draw a balance between the state's rights and the human rights of asylum-seekers, the receiving state should be able to derogate from its collective obligations related to expulsion.[21] Such operations can be categorised as hybrid threats, which exploit international law, undermine the multilateral legal protection of human rights, and increase tension.[22] This issue should be considered in the broader context of the severe security threats faced by EU member states that share borders with Belarus and (or) Russia.

The European Commission's response to the artificial migrant crisis on the Poland-Belarus border in recent years has been characterised as tolerant of push-back practices and other activities contrary to the non-refoulment principle enacted by EU member states.[23]

20 It is important to highlight the relationship between notions of human rights and democracy. Human rights and democracy are often being conflated. In the literature it is being pointed out that in fact democracy can come into conflict with human rights as majority rule is not always consistent with protection of rights of minorities. Hence, democratic states are also susceptible to breaking human rights. Democracy, however, is being identified as a *sine qua non* condition of the very existence of human rights. It argued that it is not possible for human rights to function outside the democratic system. See Barcik and Srogosz, 2019, pp. 363–364. It may be debatable whether human rights cannot function outside a democratic system. This problem is very complex and is connected to the exact meaning of human rights and, in particular, democracy. The questions of suffrage and societal values seem to be crucial factors in that regard. Historically, there existed states which could be considered democracies, whose policies could be seen as questionable from the point of view of human rights. Further analysis of this very complicated issue is not feasible within the scope of this paper. However, it seems possible to state that, at a minimum, democracy, with sufficient suffrage, is particularly conducive to the functioning (existence) of human rights.

21 See Huttunen, 2022.

22 Łubiński, 2022, p. 52.

23 Grześkowiak, 2023, p. 45.

4. Overview of relevant international law and EU law

■ *4.1. Universal international law*

Laws regulating the status of irregular migrants have several interconnected dimensions. At least four can be identified: universal international law, regional international law, EU law, and national law. The scope of this study does not allow an in-depth analysis of the content of their specific cornerstones or the complicated ways in which they influence each other. However, a brief overview of the cornerstones is in order. In terms of universal international law, the following merit particular attention: a) United Nations Charter of 1945; b) Universal Declaration of Human Rights of 1948 (UDHR);[24] c) Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol; d) International Covenant on Civil and Political Rights of 1966;[25] e) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

■ *4.2. Regional international law*

In addition to universal conventions, international agreements have been concluded between the states of a given region. They serve as a basis for regional human rights protection systems and are intended to complement universal human rights protection systems. The question of regional systems of human rights protection is connected to the content of the notion of human rights. It is being pointed out in the literature that cultural differences constitute a major obstacle to developing a uniform understanding of the notion of human rights. Hence, it may be more feasible to reach an understanding, in terms of regulating questions related to human rights, at the regional level among states that often share common cultural values.[26] This view is associated with the issue of the universal nature of human rights.[27] It may be argued that substantial disagreements

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24 It is important to note that the Universal Declaration of Human Rights was not designed as a formal catalog of legally binding rights. It was instead to serve as guidelines for conducting national policies in terms of human rights and was intended as a starting point for developing a binding international agreement that was to regulate human rights. However, it evolved into customary international law (at least some of its stipulations such as prohibition of torture) and can be seen as an expression of general principles of law acknowledged by civilized nations. See Barcik and Srogosz, 2019, pp. 372–373. See also Alfredsson and Eide, 1999; Banaszak et al., 2003; Kretzmer and Klein, 2002; Nickel, 1987; Wieruszewski, 1991.

25 The Covenant, together with the International Covenant on Economic, Social and Cultural Rights develop rights included in the UDHR. However, they do not take into consideration three rights included therein (right to property, right to asylum, right to citizenship).

26 See Barcik and Srogosz, 2019, pp. 365–385.

27 The basis for the argument for universally binding human rights should be seen in the context of international custom. See Simma and Alston, 1992, cited in Barcik and Srogosz, 2019, p. 365.

occur regarding their precise understanding, even within regional human rights protection systems.

From the perspective of this study and the European human rights protection system, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) and its protocols are of particular importance,[28] especially from the perspective of the EU becoming a party to the ECHR.

■ *4.3. European Union law*

The Charter of Fundamental Rights of the EU (CFR)[29] needs to be highlighted in this context. It is important to point out that, in accordance with Article 51 of the CFR, its provisions are addressed to the institutions, bodies, offices and agencies of the EU with due regard to the principle of subsidiarity and the Member States only when implementing Union law.

Article 78 of the Treaty on the Functioning of the European Union (TFEU)[30] states that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of 'non-refoulement'. The TFEU further states that this policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties. According to Article 79 TFEU, the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of and enhanced measures to combat, illegal immigration and trafficking in human beings... It is being pointed out that the general setup of the EU's immigration *acquis* is based on a strict disjunction between policies of inclusion for regular migrants and policies of exclusion for persons with irregular immigration status.[31]

In terms of secondary law, the following legal acts should also be noted in the context of this study: a) Dublin Regulation;[32] b) Regulation on the European

28 Other relevant components of the system include the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987.
29 Charter of Fundamental Rights of the European Union, OJ C 326/391, 26 October 2012.
30 The Treaty on the Functioning of the European Union, OJ C 326/47, 26 October 2012.
31 Gilardoni, D'Odorico and Carrillo, 2015, cited in Spencer and Triandafyllidou, 2020, p. 76.
32 Regulation (EU) No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31, 29 June 2013.

Border and Coast Guard;[33] c) Schengen Borders Code;[34] d) Asylum Procedures Directive;[35] e) Qualification Directive;[36] f) Reception Conditions Directive;[37] g) Return Directive.[38]

Notably, in 2020, the European Commission released a new Pact on Migration and Asylum, initiating a set of legislative proposals for reforming the Common European Asylum System. The Pact on Migration and Asylum retained its focus on border intensification through pre-screening, continued to put pressure on the periphery, and pursued externalisation (through return sponsorship).[39]

■ *4.4. Externalisation of the European Union's migration governance to third countries*

The overview of some relevant acts of international and EU law acts must be accompanied by a brief description of the problem of externalization of the EU's migration governance to third countries.

It is highlighted in the literature that the increased perception of migration as an issue in Europe has resulted in the externalisation of the EU's migration governance to third countries. The European Union-Turkey and European Union-Libya cooperation frameworks on migration were established in the wake of the 2015 migration crisis.[40] These agreements were criticised from the perspective of poor protection of human rights through the management practices mentioned above. It should also be noted that the externalisation of migration management

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33 Regulation (EU) No. 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) No. 2016/1624, OJ L 295/1, 14 November 2019.

34 Regulation (EU) No. 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1, 23 March 2016.

35 Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/31, 29 June 2013.

36 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 337/9, 20 December 2011.

37 Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180/96, 29 June 2013. The final form of these reforms is still unknown. See European Council, 2023.

38 Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008. The objective of the Return Directive is to ensure that the return of third-country nationals without legal grounds to stay in the European Union takes place in an efficient manner through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. The fundamental rights obligations under primary and secondary European Union law (including under the CFR) and international law include, in particular, the principle of non-refoulement; the right to an effective remedy; the prohibition on collective expulsion; the right to liberty; and the right to the protection of personal data. See Eisele, Majcher and Provera, 2020, p. 1.

39 Karageorgiou and Noll, 2022, pp. 132–131.

40 Thevenin, 2021, p. 464.

outside the EU's borders was developed before the 2015 migration crisis, particularly since the 2000s, when migration was increasingly perceived as a security issue. The agreements mentioned above were aimed at reducing the number of people irregularly entering the EU (therefore, they are relevant from the point of view of the subject matter of this study). As already mentioned, these policies were subject to severe criticism that focused on the lack of protection and respect for human rights in both Turkey (issues connected with the state of democracy are also highlighted here) and Libya. In the context of Libya, the criticism at times went so far as to call European countries 'complicit' regarding the slave trade in that country.[41]

The literature indicates that the need for efficient migration management sometimes conflicts with the EU's obligation to protect human rights.[42] Therefore, the issue of externalisation of the EU's migration policy should be considered particularly important when evaluating the existing legal framework for irregular migrants. Legal guarantees put in place to safeguard the rights of migrants can be made ineffective if, as a result of EU policy, migrants cannot reach territories where these rights are protected. A situation in which migrants enjoy extensive rights once they reach the EU, but are prevented from reaching it because of EU policy, may be seen as evidence of the significant ineffectiveness and inadequacy of the EU and regional systems of protection of the human rights. Arguably, making the appropriate related legal standards more adequate and flexible may lay in the interests of affected migrants. Those fortunate enough to reach the EU enjoy extensive protection of their rights, while those who cannot do so, which can arguably be attributed to a significant degree to the inadequacy of the EU's policy, may find themselves deprived of even basic protection of their rights and exposed to considerable harm. It may also be stated that the EU's system of protection of migrants' rights may to a certain degree attract migrants and, at the same time, inhibit them from reaching the said territory. This may put migrants in situations where they are threatened with treatment which is a violation of their human rights. These violations may include unlawful killing, slavery, and rape. Hence, an inflexible system of protecting migrants' rights, which is inadequate in terms of effectively addressing changing external circumstances, may *de facto* indirectly contribute to serious violations of migrants' human rights.

41 Thevenin, 2021, pp. 464–465.
42 Thevenin, 2021, p. 467.

5. Overview of the legal status of irregular migrants in chosen Central European countries

■ *5.1. Hungary*

Relevant pieces of Hungarian legislation include Law I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence;[43] Law II of 2007 on the Admission and Right of Residence of Third-Country Nationals;[44] Law LXXX of 2007 on Asylum;[45] the Government Decree on the Implementation of the Law on Asylum,[46] and Law LVIII of 2020 on the Transitional Rules Relating to the End of the State of Emergency and the Pandemic Crisis.[47]

The Court of Justice of the European Union (CJEU), in the judgement of 22 June 2023,[48] has ruled that

> Forcing third-country nationals or stateless persons, who reside in Hungary or who present themselves at the borders of that Member State, to go to the embassy of that Member State (…) in order to be able, subsequently, to return to Hungary in order to make an application for international protection there constitutes a manifestly disproportionate interference with the right of those persons to make an application for international protection upon their arrival at a Hungarian border, as enshrined in Article 6 of Directive 2013/32, and their right to be able, in principle, to remain in the territory of that Member State during the examination of their application, in accordance with Article 9(1) of that directive.

It was also stated that

43 Law I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence, 1 July 2007 [Online]. Available at: https://www.refworld.org/docid/4979ca2e2.html (Accessed: 20 July 2023).

44 Law II of 2007 on the Admission and Right of Residence of Third-Country Nationals, 1 July 2007 [Online]. Available at: https://www.refworld.org/docid/4979cae12.html (Accessed: 17 July 2023).

45 Law LXXX of 2007 on Asylum, 1 January 2008. [Online]. Available at: https://www.refworld.org/docid/4979cc072.html (Accessed:17 July 2023).

46 Government Decree No. 301/2007 (XI. 9.) On the Implementation of the Act on Asylum, 1 January 2008. [Online]. Available at: https://www.refworld.org/docid/524544c44.html (Accessed: 17 July 2023).

47 Law LVIII of 2020 on the Transitional Rules Relating to the End of the State of Emergency and the Pandemic Crisis, officially published: Magyar Közlöny, 2020/144, p. 3653.

48 CJEU, C-823/21 *Commission v Hungary,* Judgement, 22 June 2023, ECLI:EU:C:2023:504.

> Although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of EU law. As the Court has held, only in clearly defined cases does the FEU Treaty expressly provide for derogations applicable in situations which may affect law and order or public security. It cannot be inferred that the FEU Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law (…).

Furthermore,

> In the context of the present action, Hungary merely invoked, in a general manner, the risk of threats to public policy and internal security in order to justify the compatibility of the Law of 2020 with EU law, without demonstrating that it was necessary for it to derogate specifically from the requirements arising from Article 6 of Directive 2013/32, in view of the situation prevailing in its territory on the expiry of the period laid down in the reasoned opinion (…) by making the possibility, for certain third-country nationals or stateless persons present in the territory of Hungary or at the borders of that Member State, of making an application for international protection subject to the prior lodging of a declaration of intent at a Hungarian embassy located in a third country and to the granting of a travel document enabling them to enter Hungarian territory, Hungary has failed to fulfil its obligations under Article 6 of Directive 2013/32.

■ *5.2. Poland*

Several pieces of legislation regulate the legal status of migrants. The Constitution of the Republic of Poland[49] includes a number of stipulations relevant from the point of view of the subject matter. Article 56 states that foreigners have a right of asylum in Poland in accordance with specific principles specified by statute. Foreigners seeking protection from persecution may be granted refugee status in accordance with international agreements to which the Republic of Poland is a party. Article 87 of the Polish Constitution specifies the sources of universally binding law. These include ratified international agreements. According to Article 91(1) of the Polish Constitution, after its promulgation, a ratified international agreement constitutes part of the domestic legal order and is applied directly unless its application depends on the enactment of a statute. It is noteworthy that

49 Constitution of the Republic of Poland of 1997, Journal of laws of 1997, No. 78, item 483 as amended.

an international agreement ratified upon prior consent by statute has precedence over statutes if their stipulations are irreconcilable [Article 91(2)]. Finally, if an agreement ratified by the Republic of Poland establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence over statutes in the event of a conflict of laws [Article 91(3)]. Furthermore, Article 9 of the Polish Constitution states that the Republic of Poland respects international law binding upon it.[50]

From the point of view of relevant statutory law, the Act of 12 December 2013 on Foreigners[51] and the Act of 13 June 2003 on Granting Protection to Foreigners within the Territory of the Republic of Poland[52] merit particular attention. Other relevant legislation includes the Code of Administrative Proceedings,[53] the Act of 12 October 1990 on the Protection of the State Border,[54] and the Decree of the Minister of Internal Affairs and Administration of 13 March 2020 on the Temporary Suspension or Restriction of Border Traffic at Certain Border Crossing Points.[55]

From the point of view of the subject matter, two issues should be considered in terms of the internal legal determinants of the legal status of irregular migrants in Poland, namely, the institutional conflict within the Polish Court system and specific legal and practical matters relating to the treatment of migrants. High levels of controversy, complexity, and dynamism characterise the first issue. The scope of this study only allows a brief synthesis and outline of its two basic dimensions, which are particularly relevant from the perspective of the subject matter. The first dimension involves controversies related to the functioning and composition of the Polish Constitutional Court and its prerogatives. The second dimension is connected to the system of nominating judges and the question of the validity of judgements issued with the participation of judges whose nominations are subject to controversy. These controversies add to the complexity and uncertainty of the legal status of irregular migrants in Poland in terms of internal law, EU law, and international law. The second issue is directly related to the problem

50 This article is placed in the chapter I of the Polish Constitution (entitled The Republic) and has a full normative value that is characteristic for other main constitutional principles. As a consequence, Poland abiding by the binding international law is not only a constitutional duty but also one of the principles of the legal system and the system of government. See Safjan and Bosek, 2016, marginal number 9.

51 Act of 12 December 2013 on Foreigners, Journal of Laws 2013, item 1650 as amended.

52 Act of 13 June 2003 on Granting Protection to Foreigners Within the Territory of the Republic of Poland, Journal of Laws 2003, No. 128, item 1176 as amended.

53 Code of Administrative Proceedings of 1960, Journal of Laws 2023, item 775, consolidated text.

54 Act of 12 October 1990 on the Protection of the State Border, Journal of Laws 2022, item 295, consolidated text.

55 Decree of the Minister of Internal Affairs and Administration of 13 March 2020 on the Temporary Suspension or Restriction of Border Traffic at Certain Border Crossing Points, Journal of Laws 2020, item 435 as amended.

of controversies regarding specific legal reforms implemented to address the artificial migration crisis created by Belarusian authorities.

From this perspective, the judgement of the European Court of Human Rights (ECtHR) of 8 July 2021[56] merits particular attention.[57] This case concerned the alleged push-back of applicants on the Polish-Belarusian border. The applicants alleged that Poland's authorities had repeatedly denied the possibility of lodging applications for international protection, thus breaching Article 3 of the ECHR. The applicants additionally relied on Article 4 of Protocol Number 4 to the ECHR, alleging that their situation had not been reviewed individually and that they were victims of a general policy followed by the Polish authorities. The applicants stated that under Article 13, in conjunction with Article 3 of the ECHR and Article 4 of Protocol No. 4 to the ECHR, lodging an appeal against a decision denying entry into Poland did not constitute an effective remedy for asylum-seekers as it would have no suspensive effect. The applicants also argued that the interim measure granted to them by the ECtHR was not respected. The Court has stated that

> (…) the provisions of European Union law, including the Schengen Borders Code and Directive 2013/32/EU, clearly embrace the principle of non-refoulement, as guaranteed by the Geneva Convention, and also apply it to persons who are subjected to border checks before being admitted to the territory of one of the member States (…) Those provisions (i) are clearly aimed at providing all asylum-seekers effective access to the proper procedure by which their claims for international protection may be reviewed (…) oblige the State to ensure that individuals who lodge applications for international protection are allowed to remain in the State in question until their applications are reviewed.

The Court also held that an appeal against the refusal of entry and a further appeal to the administrative courts were not effective remedies in this context, as they did not have an automatic suspensive effect. It was also highlighted that

> (…) it is not open to a Contracting State to substitute its own judgment for that of the Court in verifying whether or not there existed a real risk of immediate and irreparable damage to an applicant at the time when the interim measure was indicated. It is for the Court to verify compliance with the interim measure, while a State which considers

56 Judgement of the ECtHR of 8 July 2021, Application No. 51246/17.

57 Other judgements of ECtHR, which are relevant in this context, include the judgement of 23 July 2020, Application No. 40503/17.

> that it is in possession of material capable of convincing the Court to annul the interim measure should inform the Court accordingly.

As a result, it was held that violations of specific articles of the ECHR and Protocol Number 4 the ECHR had taken place.

■ *5.3. Romania*

Relevant Romanian legislation includes the Law on Asylum in Romania[58] and the Government Emergency Ordinance on the Regime of Aliens in Romania.[59]

In the judgement of 15 October 2020,[60] the ECtHR stated that

> Before those courts, in view of the very limited and general information available to them, the applicants could only base their defense on suppositions and on general aspects of their student life or financial situation (…) without being able specifically to challenge an accusation of conduct that allegedly endangered national security. In the Court's view, faced with a situation such as this, the extent of the scrutiny applied by the national courts as to the well-foundedness of the requested expulsion should be all the more comprehensive…

Moreover,

> The Court thus accepts that the examination of the case by an independent judicial authority is a very weighty safeguard in terms of counterbalancing any limitation of an applicant's procedural rights. However, as in the present case, such a safeguard does not suffice in itself to compensate for the limitation of procedural rights if the nature and the degree of scrutiny applied by the independent authorities do not transpire, at least summarily, from the reasoning of their decisions.

The Court found that a violation of Article 1 of Protocol No. 7 to the Convention has taken place.

The Constitutional Court of Romania has taken a position on the relationship between Romanian law and EU law. Judgement No. 148 of 16 April 2003[61]

58 Law No. 122/2006 on Asylum in Romania, 2006 [Online]. Available at: https://www.refworld.org/docid/44ace1424.html (Accessed: 20 July 2023).

59 Government Emergency Ordinance No. 194/2002 on the regime of aliens in Romania, 2002 [Online]. Available at: https://www.refworld.org/docid/544676df4.html (Accessed: 20 July 2023).

60 Judgement of the ECtHR of 15 October 2020, Application No. 80982/12.

61 Published in the Official Monitor of Romania, Part I, No. 317 of 12 May 2003.

stated that the EU member states have decided to exercise specific powers, which traditionally were ascribed to the area of national sovereignty, jointly. It was described as obvious that in an era of globalisation, national sovereignty cannot be seen as absolute without risking unacceptable isolation.

■ *5.4. Serbia*

In the context of Serbia, the following pieces of legislation merit particular attention: the Law on Foreigners of 2018[62] and the Law on Asylum and Temporary Protection of 2018.[63]

ECtHR, in a judgement of 11 July 2023,[64] has stated that

> For the purposes of Article 2 of Protocol No. 4, application of restrictions in any individual case must be based on clear legal grounds and only reasons relating to the permissible aims referred to in the third paragraph constitute, where applicable, lawful grounds for the application of any restriction. However, the Court reiterates that the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also that the domestic law be compatible with the rule of law (...), it being one of the fundamental principles of a democratic society inherent in all the Articles of the Convention (...) The principle of legality, which is one of the principles stemming from the rule of law, requires the State authorities, at all levels of public power, to adopt any subsidiary regulations as required by primary legislation, by the set deadline or in a timely manner, as appropriate.

Moreover,

> The corresponding obligations incumbent on the Serbian authorities to provide a travel document for refugees were triggered by the expression of the State's decision to grant refugee status and after the acquisition of lawful residence by the applicant, in order to enable him to exercise his fundamental freedom of movement.

It was also stated that

> Court considers that the Government cannot justify the State's inaction in this regard by relying on a lack of available resources or

62 Zakon o strancima, Sl. Glasnik RS, No. 24/2018 and 31/2019.
63 Zakon o azilu i privremenoj zaštiti, Sl. Glasnik RS, No. 24/2018.
64 Judgement of the ECtHR of 11 July 2023, Application No. 61365/16.

> technical solutions, as the competent authorities should have overseen national budget allocations and ensured timely and adequate technical support in managing this task (…) this case is clearly distinguishable from other cases where it has examined the insufficiency of resources in the context of States' prolonged confrontation with a sudden and quantitatively significant influx of refugees and disproportionate pressure on their asylum systems (…).

International law has a very strong basis within the legal system of Serbia due to its constitutional provisions. According to Article 16(2) of the Constitution of the Republic of Serbia,[65] 'Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.' Furthermore, Article 194 of the Serbian Constitution states that 'Ratified international treaties and generally accepted rules of the international law shall be part of the legal system of the Republic of Serbia. Ratified international treaties may not be in noncompliance with the Constitution.' Additionally, 'Laws and other general acts enacted in the Republic of Serbia may not be in noncompliance with the ratified international treaties and generally accepted rules of the International Law.' The Serbian Constitution also highlights the relevance of international law in the context of Court decisions. It includes a provision according to which

> (…) Courts shall be separated and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts.

At the same time, according to Article 145 of the Serbian Constitution, 'Court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law.' It should be noted in this context that although the ECHR has been assigned a strong position within the hierarchy of Serbian law (right below the Constitution), its practical application has been characterized as insufficient.[66] The judgements in which Serbian courts directly invoked international norms due to the lack of national norms were described as nearly non-existent.[67] Simultaneously, domestic courts seemed, in a certain number of decisions, to invoke the ECHR as a matter of principle without pointing out which particular articles had been violated in a given case.[68]

65 Declared on 8 November 2006.
66 Krstić, 2016, p. 93.
67 Ibid., p. 94.
68 Ibid., p. 98.

6. Conclusions

Migrations pose both opportunities and challenges for receiving states. At the same time, they are connected with the need to balance the rights and interests of migrants with those of the receiving states. Different types of migration should be regulated to adequately address their idiosyncrasies. It appears that the existing EU legal framework struggles to fulfil this role. This issue is exemplified *inter alia* by the problem of the externalisation of the EU's migration governance to third countries in the context of intensified migration, which poses a significant threat to *de facto* protection of the human rights of migrants. Another issue is the need for legal instruments that enable EU member states to address artificial migrations (coercive engineered migrations), which are part of broader hostile activities conducted by certain states as part of a deliberate policy.

If the EU and regional legal frameworks fail to effectively address the issues mentioned above, severe security challenges may arise in member states bordering states that conduct openly hostile policies and use migration as a tool of such policies. These member states should not be faced with a dilemma where they *de facto* must choose between protecting their basic, vital interests (in the context of a broader conflict with a substantial military dimension) and abiding by international and EU law. At the same time, these failings seem to be to the detriment of the long-term, effective, and non-selective (in terms of persons who can benefit from the protection) protection of the human rights of migrants. These aspects should be considered when changing existing regulations and interpreting the law in specific countries facing different types of migration crises.

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Migration Crime Structure in Poland

ABSTRACT: *Crime is a negative phenomenon present in every country that poses a threat to the existing legal order. It encompasses a variety of behaviours, goals, and motives of those involved in it and the consequences thereof. The basis for crime is the social layer of the state, where people commit crimes by violating the existing legal order. Crime can be considered from various perspectives, such as its extent, intensity, variability, structure, and dynamics, as well as the characteristics and background of those involved. Crime is a challenge for society, and effective prevention requires an understanding of the diversity of crimes and the different motivations of perpetrators. Research on foreigners' crimes is particularly important in the context of increasing migration from Poland's eastern border. Knowledge of this topic can aid in the development of appropriate migration management strategies and effective prevention and integration measures. It is important to continue research on crime to better understand its causes and effects and to develop effective methods to reduce and combat it.*

KEYWORDS: crime, law and order, crime structure, foreigners, migration

1. Introduction

Crime is undoubtedly a grossly negative phenomenon emerging in the functioning of any state. It appears for a variety of reasons and takes a variety of forms and variants.[1] This evident negativity of crime manifests itself, for example, in the fact that crime *in statu esse* is always at the heart of threats to the existing legal

1 Gruszczyńska et al., 2021, p. 7.

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order. The people involved in the phenomenon of crime are characterised by a diversity of behaviours, objectives, and motives for action and suffer a diversity of consequences for their actions. Therefore, crime can be considered in terms of its extent, intensity, variability, structure, or dynamics or in terms of the characteristics and backgrounds of the persons involved.[2] In each of these cases, the basis for criminality is the social layer of the state.[3] It is the people in a certain territory who, by committing crimes, violate the accepted legal order in that territory, creating crime.[4]

In this context, the conceptual scope of criminality can be presented in very general terms as, first, a set of acts defined by the state that are prohibited under penalty, under the applicable law within the territory of the state. In this context, these are acts that are prohibited as criminal offences and located most often in the state's basic act of criminal law, i.e. the Criminal Code. Second, in a more proactive sense, criminality is any act—as indicated earlier —prohibited in the state that has already been committed. Thus, it comprises a group of crimes already committed under specific conditions, for a specific purpose, according to a specific behaviour, by specific people. Expanding on this thought, the concept of criminality in the first variant therefore includes the behaviours statutorily designated as crimes (prohibited acts); we then should consider the preventive meaning of the term. It is preventive because the legislator immediately indicates which behaviours are unacceptable, under which the community of this state should not commit them in order to function in accordance with the established legal order. In this sense, the legislator includes a certain category of acts as a category of prohibited acts, i.e. offences, additionally providing a sanction in case they are committed. The aforementioned prevention is then classically understood in connection with prevention and deterrence. On the other hand, the second variant of 'criminality' also includes a set of acts, but ones already committed by persons, who are then often commonly referred to as criminals. It is assumed that crime is expressed in the increase in the number of people who have committed crimes relative to the total population, although there is also a dark number of crimes, i.e. those which have not been recorded.[5] In the simplest terms, therefore, crime can be defined as a set of harmful events, whether committed in the past or future, which are referred to as crimes.[6]

Hence, there is no longer any doubt that crime is a phenomenon directly linked in the first instance to the social structure in any state. An important answer

2 Błachut, 2007 p. 11; Pływaczewski, 2021, p. 387.
3 Gaberle, 2003, p. 7.
4 Sztompka, 2002, pp. 29 et seq. As an aside, we might mention cybercrime, which manifests its own peculiarities (see Karski and Oręziak, 2021, pp. 55–69; Oręziak, 2020, pp. 187–196; Oręziak, 2019).
5 Mikołajczyk and Reszke, 2017, p. 114.
6 Lisowska-Kierepka, 2020, p. 268.

here is the action of that state encapsulated in the broadly defined state criminal policy, which can be defined as a segment of legislation and actions taken by the state or other entities aimed at combating, preventing, weakening, and reducing precisely the phenomenon of crime.[7] In a broad sense, criminal policy includes activities related to criminal legislation, the adjudication and enforcement of sanctions, and the prevention and prosecution of crime.[8] It is 'a system of diverse and interrelated state and social measures directed at preventing crime, removing the causes and conducive circumstances of crime and, under given conditions, reducing as far as possible the possibility of criminogenic factors of all kinds.'[9]

Criminal policy, therefore, concerns not only the citizens of a state, but all persons residing in the state. It concerns both citizens and foreigners arriving and operating in the country. Therefore, it is advantageous to determine the general structure of crime in Poland, and in particular the characteristics of the structure of foreigners' crime in Poland.

2. Terminological clarification: immigrant – emigrant – refugee – foreigner – foreign national

For the sake of clarity in analysis, it is worth first indicating the terminological basis covering the basic concepts related to the title of the study.[10]

First is the term 'immigration,' which means the arrival of persons from abroad for the purpose of settlement (permanent residence) or temporary residence. Therefore, in terms of meaning, immigrants are persons arriving from abroad in a country for the purpose of settlement (permanent residence) or temporary residence.[11]

The dictionary meaning of the word 'emigrant,' on the other hand, is a person going abroad to settle (live permanently) or for a temporary stay. Hence, 'emigration' is going abroad to settle (live permanently) or for a temporary stay.[12]

The above-mentioned terms are common and have a semantic basis directly recorded in dictionaries. On the other hand, it is worth noting that in the legal field these two terms also have a well-defined meaning. Among other legal acts, on the basis of Regulation No. 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No. 311/76 on the compilation of statistics on foreign workers, the legal concepts of 'immigration' and 'emigration'

7 Niewiadomska, 2007, p. 10.
8 Rzeplińska, 2016, p. 5.
9 Krukowski, 1982, p. 94; Jaroch, 2012, p. 49; Szymanowski, 2010, p. 215.
10 Lesińska–Staszczuk, 2019, p. 14.
11 Skorupka, Auderska and Łempicka, 1968, p. 232.
12 Skorupka, Auderska and Łempicka, 1968, p. 163.

were introduced. According to this Regulation, 'immigration' means the action by which a person establishes his or her residence in the territory of a Member State for a period that is, or is expected to be, of at least twelve months, having previously been resident in another Member State or a third country. In contrast, 'emigration' means the action by which a person, formerly resident in the territory of a Member State, ceases to have his or her habitual residence in that Member State for a period that is, or is expected to be, of at least twelve months.

A related term will also be the notion of a 'refugee,' which must be understood in the Polish legal system according to the definition in the Geneva Convention of 28 July 1951 and the 1967 Protocol Relating to the Status of Refugees. Generally, on the basis of these international legal acts, a refugee is a person who resides outside his country of origin or the country whose citizenship he holds or in which he has resided on a permanent basis; who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion and who, owing to that fear, cannot or does not wish to avail himself of the protection of his country of origin; and who is not subject to exclusion clauses.[13]

However, it seems that from the point of view of the Polish legal order, all these concepts are united by the term 'foreigner.' This term combines two concepts that are important for this analysis, i.e. a migrant and a refugee, as both concepts fall under the term 'foreigner.' If a migrant or refugee is found on the territory of Poland, he/she will be counted as a foreigner or alien.

It is interesting to note that the term 'foreigner' has a corresponding legal content. The term 'foreigner' means a citizen of a foreign country—in other words, a foreigner, i.e. a person who does not have the citizenship of the country in which he or she resides. Foreigners permanently residing in Poland are counted as part of the Polish population, while others (irrespective of their period of residence) are treated as immigrants temporarily residing in Poland (they are not counted as part of the Polish population).[14] Hence, while there is no law in the legal system in Poland regulating issues such as immigration, the basis for defining a foreigner in Poland is the Act of 12 December 2013 on foreigners.[15] According to this Act, based on Article 3, a foreigner is any person who does not have Polish citizenship. The rule is closely related to the provisions of the Polish Constitution, as, according to Article 37(1) of the Polish Constitution, everyone 'who is under the authority of the Republic of Poland enjoys the freedoms and rights provided for in the Constitution.' In this context, a foreigner who is a citizen of two or more states is treated as a citizen of the state whose travel document formed the basis for entry into the territory of the Republic of Poland. There are, of course, exceptions to this

13 Wierzbicki, 1993, p. 9; Pluta, 2008, p. 35.
14 Czerniejewska and Main, 2008.
15 Law of December 12, 2013 on foreigners (Journal of Laws 2013 item 1650).

regarding, for example, the performance of certain functions in the state which one cannot perform while being a foreigner.

Very similar to the term 'foreigner' is the term 'foreign national.' In Poland, it is generally accepted that 'foreigner' and 'foreign national' are synonyms for a person who is not a citizen (resident) of a given country. For Poles, foreigners or foreign nationals are people of other nationalities and residents of other countries—both those who live (or only stay for a short period of time) in Poland and those who have never crossed the borders of our country. Therefore, the 'immigrant' in question is a foreigner who has settled in a given country.[16]

On the basis of the terminological presentation above, it can therefore be assumed that the term 'foreigner' is synonymous with the term 'foreign national' and is an umbrella term for a person who does not have the nationality of the state in which he or she resides, and thus also includes in its content an immigrant or refugee.

3. Application of the Criminal Code to a foreigner in Poland

Crime is a phenomenon related, inter alia, to criminal law regulations. Therefore, in order to analyse crime, it is first necessary to establish what the grounds for criminal liability in Poland are. In the system of criminal law in Poland, the basic act in this respect is mainly the Act of 6 June 1997, the Criminal Code,[17] which provides for the basic rules of incurring criminal liability of individuals, including, inter alia, the description of the crime, circumstances excluding the unlawfulness of the act, principles of the penalty, and issues related to the statute of limitations of incurring criminal liability, as well as a catalogue of penalties and penal measures, etc.

The general rules for incurring criminal liability in Poland boil down to a few basic rules set out in the initial provisions of this code.

Thus, in accordance with the Criminal Code, first, only a person who commits an act prohibited by the law in force at the time of its commission is subject to criminal liability; second, a criminal act whose social harm is negligible does not constitute a criminal offence; third, a perpetrator of a criminal act does not commit a criminal offence if no guilt can be attributed to him/her at the time of the act; and fourth, a person who commits a criminal act after the age of 17 is liable under the terms of this Code. All criminal measures and penalties provided for in this Code shall be applied taking into account the principles of humanity, and in particular respect for human dignity.

16 Kłosińska, K. (2019) *Cudzoziemiec, obcokrajowiec, immigrant,* 5 December 2019. [Online]. Available at: https://sjp.pwn.pl/poradnia/haslo/Cudzoziemiec-obcokrajowiec-imigrant;19832.html (Accessed: 20 June 2023).

17 Law of June 6, 1997 – Criminal Code (Journal of Laws 1997 No. 88 item 553).

Next, in the Polish criminal legal order, a crime is either a crime or a misdemeanour. A crime is a prohibited act punishable by imprisonment for a term not shorter than 3 years or by a more severe punishment. A misdemeanour, on the other hand, is a criminal offence punishable by a fine of more than 30 daily rates or more than PLN 5,000, a restriction of liberty exceeding one month, or a deprivation of liberty exceeding one month.

The above rules are the pillars of the attribution of criminal liability to a person. Although there is a principle of subjective nationality in Poland, according to which the Polish criminal law applies to a Polish citizen who has committed a crime abroad, there are also separate regulations in this Criminal Code for the case of a crime committed by a foreigner.

The main provision here is Article 110 et seq. of the Criminal Code. This is a group of regulations defining the principles of criminal liability of a foreigner in Poland.[18] According to these regulations, the Polish Penal Law—i.e. the Criminal Code—is applied to a foreigner who has committed a prohibited act abroad directed against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organisational unit without legal personality, or a foreigner who has committed a terrorist offence abroad. The Polish Criminal Law shall be applied when a foreigner has committed a criminal offence abroad other than those listed above if the offence is punishable under the Polish Criminal Law by a penalty exceeding 2 years' imprisonment and the perpetrator is staying on the territory of the Republic of Poland and no decision has been made to extradite him.[19]

Irrespective of the provisions in force at the place where the offence is committed, the Polish Criminal Law shall be applied to a Polish citizen and to a foreigner in the event of the commission of: 1) an offence against the internal or external security of the Republic of Poland; 2) an offence against Polish public offices or public officials and an offence of extorting an attestation of untruth from a Polish public official or other person authorised under Polish law to issue a document; 3) an offence against important Polish economic interests; 4) an offence of false testimony, making a false statement, opinion, or translation, using a document stating the identity of another person, or certifying untruth or false against a Polish office; or 5) an offence from which financial gain, even indirectly, was obtained in the territory of the Republic of Poland.

In addition, irrespective of the provisions in force at the place where the offence was committed, the Polish Criminal Law shall apply to a Polish citizen and to a foreigner who has not been ordered to be surrendered, if he or she commits an offence abroad which the Republic of Poland is obliged to prosecute under

18 Szczygieł, 2009, p. 194.
19 Guzik-Makaruk, 2007, p. 161.

an international agreement, or an offence specified in the Rome Statute of the International Criminal Court, drawn up in Rome on 17 July 1998.[20]

4. Application of the Code of Criminal Procedure to a foreigner

A foreigner who commits a crime in Poland will be subject to the conditions of criminal liability outlined above. He/she will also be a participant in criminal proceedings.[21]

In Poland, the primary source of criminal proceedings is the Act of 6 June 1997, the Code of Criminal Procedure.[22] This legal act regulates the principles of proceedings of public authorities in criminal cases, the principles of their initiation and conduct, and the procedure and forms of carrying out particular procedural actions, providing also for a catalogue of powers and duties of procedural authorities, defining a catalogue of procedural parties together with their rights and duties, and a catalogue of procedural authorities and other participants of criminal proceedings, and, moreover, providing for the principles of collecting, recording, and introducing into criminal proceedings the evidence collected in the case.

A foreigner who has committed a crime will appear in criminal proceedings as the perpetrator of the act. He/she will then first be a suspect and later—depending on the findings of the criminal proceedings—may finally become an accused. In principle, the procedural position of the suspect and the accused is very similar in Polish criminal proceedings, though with certain exceptions. At different stages of criminal proceedings, the potential perpetrator of a crime will either be a 'suspect' (pre-trial proceedings) or an 'accused' (court proceedings). Nevertheless, the model of a fair criminal trial must take into account the guarantees that are provided for these very specific procedural roles.

Thus, according to Article 74 of the Code of Criminal Procedure, a foreigner, like any suspect or accused person, is not obliged to prove his innocence or provide evidence against him. Nevertheless, as long as he is an accused, he is obliged to undergo, inter alia, first, external examination of the body and other examinations that do not affect the integrity of the body; in particular, the accused may also be imprinted, photographed and shown to other persons for identification purposes; second, psychological and psychiatric examinations and examinations that involve physical examinations, other than surgical examinations, provided that they are carried out by a competent medical practitioner in accordance with medical requirements and do not jeopardise the health of the accused if it is

20 Rome Statute of the International Criminal Court, drawn up in Rome on 17 July 1998 (Journal of Laws 2003, item 708 and 2018, item 1753).

21 Wąsek, 2000, p. 31.

22 Law of June 6, 1997 – Code of Criminal Procedure (Official Gazette of 1997, No. 89, item 555.).

necessary to carry out such examinations; in particular, the accused is obliged to submit to the taking of blood, hair, or bodily secretions under these conditions; and third, the taking of a cheek swab by a police officer if this is indispensable and there is no fear that this would endanger the health of the accused or other persons. In the event of refusal to submit to these obligations, the accused may be detained and forcibly led away, and physical force or technical means of incapacitation may be used against them to the extent necessary to carry out the activity in question.

In addition, a foreigner as a suspect/accused is obliged to notify the authority conducting the proceedings of any change in his/her place of residence or stay lasting longer than 7 days, including due to deprivation of liberty in another case, as well as of any change in contact details. As a suspect/accused person, a foreigner is furthermore obliged to attend every summons in the course of criminal proceedings. The accused should be warned of these obligations at the first interrogation.

A foreign national, in addition to a number of obligations, also has a number of rights throughout the criminal proceedings. Like any suspect or accused person, he/she has the right to give an explanation; however, he/she may refuse to answer specific questions or refuse to give an explanation without giving reasons. He must be advised of this right. It is his absolute right to remain silent and he cannot be compelled to answer any question. The foreign defendant who is present at the taking of evidence has the right to give explanations on any evidence. Another right of the foreigner is the right of access to the case file, including making copies and photocopies thereof. He or she also has the right to apply for any admissible evidence in the course of criminal proceedings.

It is a cardinal right of a foreigner as a defendant to be guaranteed freedom of communication. Hence, he or she should be provided with free access to an interpreter. This is a very important right for a foreigner appearing in criminal proceedings. In Poland, the violation or partial or total deprivation of a foreign suspect of the assistance of an interpreter is a gross violation of the right to defence, which if committed would even make it necessary to conduct the entire criminal proceedings again from the very beginning.

5. Structure of crime in Poland: general analysis

Against this background of the basic assumptions of the concept of crime and the principles of criminal law and criminal procedure, which also apply to a foreigner, it is worth presenting and analysing the general structure of crime in Poland. This analysis will form an overview vis-à-vis the general view of foreigners’ crime in Poland.

In Poland, the basic data helpful in analysing the phenomenon of crime are mainly data collected by the General Police Headquarters. It is data from this source that will be the basis for the following analysis of the structure of crime, both in general and in relation to foreigners.

Looking at the data below (Table 1), one can see an initial drop in crime in Poland—starting in 2013—and then observe from 2017 a slight increase in crime. Attention is certainly merited for the year 2020, where crime fell, but it should be mentioned here that this was the year of the COVID-19 pandemic.[23] This time of global isolation was not conducive to committing crimes due to, for example, the restrictions prevailing at that time, hence their number must have been significantly lower. On the other hand, during the most recent period, in particular according to the 2022 data, the number of offences recorded was 5% higher than in the previous year, 2021.

Table 1. Statutory crimes in Poland, 2013–2022[24]

Year	in absolute figures
2013	992,978
2014	867,855
2015	799,779
2016	748,459
2017	753,963
2018	768,049
2019	796,557
2020	765,408
2021	820,846
2022	862,992

Overall, therefore, according to the Polish Police, there were approximately 862,992 crimes in 2022.

It was noted in the previous section that the basis of criminal liability in Poland is the provisions of the Criminal Code. It is there that the majority of acts that are criminal offences are regulated. It is worth adding, however, that apart from the Criminal Code, there is also the so-called extra-codex criminal law, which is constituted by acts separate from the Criminal Code and containing relevant criminal provisions. Extracode criminal law in Poland includes, among others, the Act of 21 August 1997 on the protection of animals,[25] the Act of 27 April

23 Ostaszewski, Klimczak and Włodarczyk-Madejska, 2021, p. 27.

24 Source: data from Police Headquarters.

25 Law of August 21, 1997 on the protection of animals. (Journal of Laws of 1997 No. 111 item 724).

2001—Environmental Protection Law,[26] and the Act of 29 August 1997—Banking Law.[27] All of these exemplary legal acts classified as extra-code criminal law contain, in the first instance, regulations dedicated to the title areas, but in addition, they also contain relevant *strictly criminal* provisions establishing particular types of offences independently of the provisions of the Criminal Code. The offences established in these acts are, of course, linked to the title of the respective act. For example, the above-mentioned Banking Act provides for criminal liability for conducting banking activities contrary to the provisions of the Banking Act.[28] However, we note that the data presented show that the vast majority—as many as 89% of all offences committed in Poland—are acts regulated as offences in the Criminal Code.

The data presented next show (Table 2) that the first group of offences most frequently committed in Poland in the last year (2022) were offences against property, i.e. offences located in Chapter XXXV of the Criminal Code. This is a group of offences covering such acts as, inter alia, theft, burglary, robbery, aggravated robbery, extortion, misappropriation, fraud, computer fraud, destruction or damage to property, taking someone else's motor vehicle for short use, forestry theft, and fencing. This is a total of 425,753 property crimes committed, which represents, against the background of other acts, more than 55% of all crimes. This group of offences has invariably remained at the highest level for years, making up roughly half of all crime in Poland.

The second group of crimes most frequently committed in Poland are acts against the credibility of documents. This group of offences is specified in Chapter XXXIV of the Criminal Code and includes: counterfeiting or alteration of a document, as well as using such a document, certification of untruth in a document, extortion of certification of untruth in a document and use of such a document, sale of an identity document, use, theft, or appropriation of another person's document, and destruction or concealment of a document.[29] This is a total of 84,285 offences, which is 10.99% of the total.

The third group of offences most frequently committed are offences against traffic safety. This group, in turn, comprises offences located in Chapter XXI of the Criminal Code and includes such acts as causing a catastrophe, bringing about the

26 Law of April 27, 2001, Environmental Protection Law (Journal of Laws of 2001, No. 62, item 627).

27 Announcement by the Speaker of the Sejm of the Republic of Poland of December 21, 2021 on the announcement of the uniform text of the Banking Law Act (Journal of Laws of 2021, item 2439).

28 Among others, Art. 171(1) of the Banking Law: Whoever, without a licence, carries out the activity of accumulating funds of other natural persons, legal persons or non-corporate organisational units for the purpose of granting credits, money loans or otherwise encumbering the risk of such funds, shall be subject to a fine of up to PLN 20,000,000 and imprisonment for up to 5 years.

29 Perkowska, 2018, p. 128.

danger of a catastrophe, traffic accident, driving while intoxicated or under the influence of an intoxicant, dispatcher's responsibility, and undertaking professional activities while intoxicated. Here it will be 74,975 offences, representing 9.77% of all criminal acts.

It is also worth noting that since 2017, an increasing number of acts in the group of offences against the family and care can be noted. There were approximately 47,972 such acts, which represents, as can be seen, 6.25% of the total offences. It seems that this can be linked to the new wording of Article 209 of the Criminal Code providing for the so-called offence of non-alimony. The difference lies in the fact that in the previous wording of this provision, one of the prerequisites for the attribution of criminal responsibility was the determination of persistence in the non-payment of alimony; now, however, this prerequisite has been eliminated, which has significantly facilitated the prosecution of this crime and naturally increased the scale of the commission of this offence.

Also noteworthy is the percentage of crimes against life and health, which has remained for years at a similar level of about 1–2% of crime in Poland. Nevertheless, the number of these acts is slightly decreasing, as, for comparison, in 2019 there were 16,581 versus 13,303 in 2022, so there has been a significant decrease of 20%.

Table 2. Offences stated in 2022 (from the Act of 6 June 1997 – Criminal Code)[30]

Category of offences	Number	%
Property crime (Arts. 278–295.)	425,753	55.50
Falsification of documents (Arts. 270–277.)	84,285	10.99
Against road safety (Arts. 173–180.)	74,975	9.77
Against the family and guardianship (Arts. 206–211.)	47,972	6.25
Against freedom (Arts. 189–193.)	26,539	3.46
Against the administration of justice (Arts. 232–247.)	26,000	3.39
Against the activities of state institutions and local self-government (Arts. 222–231.)	24,763	3.23
Against life and health (Arts. 148–162.)	13,303	1.73
Against the protection of information (Arts. 265–269b.)	8,447	1.10
Against sexual freedom and morality (Arts. 197–205.)	7,794	1.02
Against public order (Arts. 252–264a.)	6,796	0.89
Economic offences (Arts. 296–309.)	6,125	0.80
Against the rights of persons engaged in gainful employment (Arts. 218–221.)	5,035	0.66
Financial offences (Arts. 310–316.)	4,042	0.53

30 Source: data from Police Headquarters.

Category of offences	Number	%
Against honour and physical integrity (Arts. 212–217.)	3,811	0.50
Against public safety (Arts. 163–172.)	803	0.10
Against the environment (Arts. 181–188.)	327	0.04
Other	329	0.04
TOTAL	**767,099**	**100**

Interesting conclusions can be drawn from the data on suspects in 2022 (Table 3), with the following dataset including all suspects in that year, thus including foreigners. The concept of 'suspect' in Poland is taken directly from the Code of Criminal Procedure: a suspect is a person with regard to whom a decision on the presentation of charges has been issued, or who, without such a decision having been issued, has been charged in connection with proceeding to questioning as a suspect. Such a person is considered to be an accused person as soon as a charge has been brought or a motion for conditional discontinuance of proceedings has been submitted to court by the public prosecutor.

In 2022, the Polish Police recorded 317,194 suspects. And again, the vast majority, 274,569, or 87% of the total suspects, were linked to acts under the Criminal Code.

Table 3. Number of suspects in 2022 by groups of crimes from the Criminal Code [31]

Category of offences	Number
Property crime (Arts. 278–295.)	93,336
Against road safety (Arts. 173–180.)	67,145
Against the family and guardianship (Arts. 206–211.)	43,086
Against the administration of justice (Arts. 232–247.)	17,643
Against freedom (Arts. 189–193.)	13,161
Against life and health (Arts. 148–162.)	13,035
Against the activities of state institutions and local self-government (Arts. 222–231.)	9,608
Falsification of documents (Arts. 270–277.)	5,929
Against public order (Arts. 252–264a.)	3,391
Against sexual freedom and morality (Arts. 197–205.)	2,778
Economic offences (Arts. 296–309.)	2,398
Against honour and physical integrity (Arts. 212–217.)	1,069
Against the rights of persons engaged in gainful employment (Arts. 218–221.)	686
Against the protection of information (Arts. 265–269b.)	493
Against public safety (Arts. 163–172.)	331

31 Source: data from Police Headquarters.

Category of offences	Number
Against the environment (Arts. 181–188.)	230
Financial offences (Arts. 310–316.)	93
Other	157
TOTAL	**274,569**

6. Foreigners in Poland

At the outset, it is worth recalling that the legal status of foreigners in Poland is regulated by the aforementioned Act of 13 June 2003 on foreigners. Thus, a foreigner is a person who does not have Polish citizenship. A foreigner who is a citizen of two or more countries is treated as a citizen of the country whose travel document constituted the basis for entry into the territory of the Republic of Poland.

In order to analyse the crime structure of foreigners in Poland, it is first necessary to present the general structure of foreigners in Poland.

There is no doubt that the structure of foreigners in Poland is very diverse, yet quite predictable and stable. According to the Polish Office for Foreigners, almost 460,000 foreigners currently hold valid residence permits in Poland. Of the 457,000 foreigners who had valid residence permits on 1 January 2021, the largest groups were citizens of Ukraine – 244,200, Belarus – 28,800, Germany – 20,500, Russia – 12,700, Vietnam – 10,900, India – 9,900, Italy – 8,500, Georgia – 7,900, China – 7,100, and the United Kingdom – 6,600.

However, in 2020, the largest increase among foreigners settling in Poland concerned citizens of Ukraine – by 29,400 people, Belarus – by 3,200, Georgia – by 2,400, Moldova – by 1,200, and South Korea – by 500 people.

Most foreigners hold temporary residence permits, which can be issued for up to three years. This type of document is currently held by 272,400 persons. The group of foreigners entitled to permanent residence, on the other hand, amounts to 102,100 persons. Registered residence is also held by 81,500 citizens of European Union Member States. Thus, there is a strong concentration of foreigners in the provinces (Polish: *województwo*)[32] with the largest urban centres. The most popular regions are the following provinces: Mazowieckie – 119,000, Małopolskie – 52,000, Wielkopolskie – 41,000, and Dolnośląskie – 37,000. Young people are those most likely to settle in Poland: approximately 60% of foreigners with valid residence permits are between 18 and 40 years of age, and approximately 4% are over 60 years of age.[33]

32 Also translated as 'Voivodeship.'

33 Siwak, 2021. The above figures do not take into account those temporarily residing in Poland under visa-free travel or visas.

There is no doubt that Russia's hostilities in Ukraine, located across Poland's immediate eastern border, must have resulted in migratory movements of foreigners of Ukrainian origin to Poland.

It is therefore not surprising that the largest group of foreigners in Poland at the moment are persons of Ukrainian origin. It is therefore clear that since the beginning of hostilities, i.e. 24 February 2022, persons of Ukrainian origin have been by far the largest group of foreigners in Poland, currently accounting for just over 80% of the total number of foreigners who have settled in the country. Currently, almost 1 million Ukrainian citizens, mainly women and children, reside in Poland. Based on data from the Polish Office for Foreigners, a total of 1.4 million people of Ukrainian origin have valid residence permits in the country. It is also interesting to note that the Polish legal order has an Act on Assistance to Ukrainian Citizens in Connection with the Armed Conflict on the Territory of that State,[34] which sets out specific rules for the legalisation of the stay of Ukrainian citizens who arrived on the territory of the Republic of Poland from the territory of Ukraine in connection with the warfare conducted on the territory of that state, and of Ukrainian citizens holding the Pole's Card who, together with their immediate family, arrived on the territory of the Republic of Poland because of that warfare. On the basis of this law, several facilitations have been introduced concerning the stay of persons from Ukraine in Poland. Therefore, thanks to this law, most Ukrainians stay in Poland using temporary protection, which is confirmed by receiving a PESEL number. Currently, there are almost 1 million people registered on this basis. Women and children account for approximately 87% of this group, and children and adolescents account for approximately 43% of Ukrainian citizens with PESEL numbers; among adults, on the other hand, women account for 77%.

In addition, 360,000 Ukrainian citizens hold valid temporary residence permits. The vast majority of these were issued in connection with taking up employment. On the other hand, slightly more than 65,000 have permanent residence permits or long-term EU resident permits. The territorial distribution of Ukrainians settling in Poland is characterised by concentration in provinces with large urban agglomerations. The most popular regions are the following: Mazowieckie Province – 21% of persons, Dolnośląskie Province – 11%, Wielkopolskie Province – 11%, Małopolskie Province – 10%, and Śląskie Province – 9%.[35]

The second most numerous group of foreigners in Poland are citizens of Belarus. Based on data from the Office for Foreigners in Poland, the total number of Belarusians with valid residence permits exceeds 50,000. It is also worth mentioning here that considerable facilitation has also been prepared for people

34 Law of March 12, 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of the country (Journal of Laws of 2022, item 583).

35 Siwak, 2021.

from Belarus with regard to the issuing of visas and access to the labour market.[36] Therefore, since the beginning of 2021, the number of Belarusian citizens with valid residence permits has increased by approximately 90%. It is also important to note that most Belarusians have permanent residence permits issued in connection with their Polish ancestry and the Pole's Card.[37] According to data from the Office for Foreigners, men and women emigrate from Belarus to Poland in similar proportions. Of the slightly more than 50,000 Belarusian citizens with valid residence cards, approximately 55% are between the ages of 20 and 39. Children and adolescents under 20 years of age account for 17% and those over 40 about 28%. The territorial distribution of Belarusians settling in Poland is quite uneven. The majority reside in Mazowieckie Province – 19,000 people, and Podlaskie Province – 9,000 people. The other popular regions are Malopolskie (4,200), Pomorskie (4,000), and Lubelskie (3,200).

The group of foreigners in Poland showing the third-highest growth are persons of Georgian origin. Based on data from the Office for Foreigners, the number of Georgian citizens with valid residence permits exceeds 10,000. It may be noted that this number is twice as high as it was just two years ago. Georgian immigration to Poland is economic in nature and is mainly related to professional issues, as Georgians can benefit from easier access to the labour market on the basis of the so-called work assignment statements. It is also worth pointing out that the increase in the number of Georgians settling in Poland has been noticeable since the introduction of visa-free travel in 2017. Almost all Georgians—96% of them—have temporary residence permits. These can be issued for up to 3 years. The most common purpose of stay in Poland is to take up employment—96% of cases. This is followed by family issues (2%) and education (1%). Of the 10,000 Georgian citizens with valid residence cards, about 58% are between the ages of 18 and 40. Children and adolescents under the age of 18 account for only 2%, and those over the age of 40 for about 40%. Men predominate – 8,500 people (82%), compared

36 Available at: https://www.gov.pl/web/poland-businessharbour (Accessed: 20 June 2023). Such facilitation includes, for example, the Poland Business Harbour program. This is a Comprehensive package facilitating a hassle-free relocation to the Republic of Poland for IT professionals and start-ups and other firms. Thanks to the package of services, it is possible to find out, among other things, how to quickly and efficiently start a business in Poland, obtain support for the relocation of employees and their families, or receive legal and visa assistance in a 'business concierge' formula. In addition, individuals and firms can count on the facilitation of contacts with local governments or Special Economic Zones, which have taken an active role in preparing an offer for relocated employees and their families by creating temporary office and housing space. In addition, children continuing their education in Polish schools will be entitled to additional hours of Polish language instruction.

37 The Pole's Card is a document confirming membership in the Polish Nation. The Pole's Card does not imply Polish citizenship, nor is it a document entitling a person to cross the border or settle on the territory of the Republic of Poland. The Pole's Card cannot be granted to a person who has Polish citizenship or a permanent residence permit in the territory of the Republic of Poland or who has the status of a stateless person.

to 1,900 women. The territorial distribution of Georgians settling in Poland is fairly even. The most popular regions are Wielkopolskie Province – 17%, Mazowieckie Province – 16%, Łódzkie Province – 15%, and Małopolskie Province – 14%.[38]

7. Structure of foreigners' crime in Poland

The following data strictly concerning the criminality of foreigners (Table 4) indicate that the number of suspected foreigners in Poland has had a very dynamic and variable trend of pluses and minuses,[39] starting from 1990, which saw the lowest numbers, until 2022, where the number of foreign suspects increased significantly.[40] There is no doubt that this jump was justified by the continuous development of migration and the opening of Poland's borders after joining the European Union. A significant number of suspect foreigners can also be seen in 2021. These two years, i.e. 2021 and 2022, which saw the highest numbers of suspect foreigners. On the basis of this upward trend, it can be predicted that the next year, i.e. 2023, will be similar and that the forecast of a significant or slight decrease in foreigner crime is unlikely. The reason for the projected increase or stagnation is the general structure of foreigners in Poland, which is steadily increasing, especially those from across Poland's eastern border.

Table 4. Number of suspected foreigners (in absolute numbers)[41]

	Absolute numbers	% of all suspects
1990	719	0.3
1991	2,402	0.8
1992	3,575	1.2
1993	3,010	1
1994	3,983	1
1995	6,349	1.5
1996	6,956	1.8
1997	8,306	2
1998	6,390	1.6
1999	6,017	1.7
2000	5,106	1.3
2001	7,061	1.3

38 Siwak, 2021.
39 Urban and Piotrowicz, 2012, p. 200; Klaus, Laskowska and Rzeplińska, 2017, p. 19.
40 Statistics for 2023 have not yet been compiled.
41 Data from the Police of Poland.

	Absolute numbers	% of all suspects
2002	6,815	1.2
2003	5,591	1
2004	3,870	0.7
2005	3,146	0.5
2006	2,478	0.4
2007	2,293	0.4
2008	2,141	0.4
2009	2,034	0.4
2010	2,319	0.4
2011	2,242	0.4
2012	2,152	0.4
2013	3,636	0.8
2014	3,541	1
2015	3,518	1.2
2016	4,613	1.5
2017	6,286	2.1
2018	7,935	2.4
2019	9,755	2.9
2020	9,336	3.0
2021	11,698	3.6
2022	10,808	3.4

From the data on foreign suspects by nationality (Table 5) for 2022, it can be seen that the main group consists of people from Ukraine, Georgia, and Belarus.

More specifically, first, persons of Ukrainian origin number 5,291, making up 48.95% of the total suspects for 2022; second, persons of Georgian origin number 2,063, making up 19.09% of the total suspects for 2022; and third, persons of Belarusian origin number 719, making up 6.65% of the total suspects for 2022.

It is worth noting that the top three countries are Ukraine, Georgia, and Belarus, which correlates with the general migration trends discussed earlier regarding the structure of foreigners in Poland, where the largest groups of foreigners are persons from these three countries.

Table 5. Foreign suspects by nationality, full catalogue of offences for 2022[42]

State	Number	% of foreign nationals suspected
UKRAINE	**5,291**	48.95
GEORGIA	**2,063**	19.09
BELARUS	**719**	6.65
MOLDOVIA	**416**	3.85
ROMANIA	**209**	1.93
GERMANY	**172**	1.59
BULGARIA	**156**	1.44
RUSSIA	**156**	1.44
CZECH REPUBLIC	**126**	1.17
IRAQ	**115**	1.06
LITHUANIA	**114**	1.05
SLOVAKIA	**97**	0.90
ARMENIA	**81**	0.75
TURKEY	**72**	0.67
UZBEKISTAN	**61**	0.56
ITALY	**61**	0.56
UK	**57**	0.53
LATVIA	**54**	0.50
AZERBAIJAN	**47**	0.43
INDIA	**41**	0.38
SPAIN	**34**	0.31
TAJIKISTAN	**34**	0.31
VIETNAM	**31**	0.29
SYRIA	**30**	0.28
NIGERIA	**29**	0.27
NETHERLANDS	**28**	0.26
TURKMENISTAN (TURKMENIA)	**27**	0.25
CHINA	**22**	0.20
FRANCE	**22**	0.20
USA (UNITED STATES OF AMERICA)	**19**	0.18
SOUTH KOREA	**18**	0.17
HUNGARY	**18**	0.17
BELGIUM	**16**	0.15
ESTONIA	**16**	0.15

42 Data from the Police of Poland.

State	Number	% of foreign nationals suspected
KAZAKHSTAN	**16**	0.15
SWEDEN	**16**	0.15
TUNISIA	**16**	0.15
PAKISTAN	**15**	0.14
PORTUGAL	**14**	0.13
IRELAND	**13**	0.12
NORWAY	**13**	0.12
SERBIA	**13**	0.12
ZIMBABWE (RHODESIA)	**13**	0.12
ISRAEL	**10**	0.09
RWANDA	**10**	0.09
IRAN	**9**	0.08
KYRGYZSTAN (KYRGYZSTAN)	**9**	0.08
ALBANIA	**8**	0.07
CROATIA	**8**	0.07
DENMARK	**8**	0.07
AUSTRIA	**7**	0.06
FINLAND	**7**	0.06
JORDAN	**7**	0.06
MOROCCO	**7**	0.06
SWITZERLAND	**7**	0.06
ALGERIA	**6**	0.06
BANGLADESH	**6**	0.06
BOSNIA AND HERZEGOVINA	**6**	0.06
EGYPT	**6**	0.06
COLUMBIA	**6**	0.06
LIBAN	**5**	0.05
SUDAN	**5**	0.05
AFGHANISTAN	**4**	0.04
ARGENTINA	**4**	0.04
BRAZIL	**4**	0.04
ETHIOPIA	**4**	0.04
MONGOLIA	**4**	0.04
PALESTINE	**4**	0.04
SLOVENIA	**4**	0.04
SAUDI ARABIA	**3**	0.03
CHILE	**3**	0.03

State	Number	% of foreign nationals suspected
PHILIPPINES	**3**	0.03
GREECE	**3**	0.03
CANADA	**3**	0.03
KONGO	**3**	0.03
MEXICO	**3**	0.03
SRI LANKA (CEYLON)	**3**	0.03
TANZANIA	**3**	0.03
ANGOLA	**2**	0.02
AUSTRALIA	**2**	0.02
INDONESIA	**2**	0.02
JAMAICA	**2**	0.02
YEMEN	**2**	0.02
CAMEROON	**2**	0.02
NEPAL	**2**	0.02
NIGER	**2**	0.02
PERU	**2**	0.02
UGANDA	**2**	0.02
BOLIVIA	**1**	0.01
CYPRUS	**1**	0.01
GHANA	**1**	0.01
GUATEMALA	**1**	0.01
ICELAND	**1**	0.01
YUGOSLAVIA (SERBIA AND MONTENEGRO)	**1**	0.01
KENIA	**1**	0.01
KOSOVO	**1**	0.01
LIBIA	**1**	0.01
NAMIBIA	**1**	0.01
NEW ZEALAND	**1**	0.01
SINGAPORE	**1**	0.01
VENEZUELA	**1**	0.01
FAROE ISLANDS	**1**	0.01
UNITED ARAB EMIRATES	**1**	0.01
TOTAL	**10,808**	**100%**

From the following data (Table 6) on the categories of offences for which foreigners were suspected in 2022, it is worth noting that among the offences for which foreigners were suspected in 2022, 81% were acts located directly in the

Criminal Code. The first group of offences was offences against safety in communication, including 3,510 offences; second was crimes against property (3,236 offences); third was offences against public order (408 offences); and fourth was crimes against life and health (342 offences).[43]

An interesting note is that in 2022, the number of suspects in the group of offences against public order increased significantly. In 2021 it was 136 persons, but already in 2022 it had risen to 408 persons. This mainly reflects the crime of illegal border crossing, which is located in Article 264(2) and (3) of the Criminal Code.[44] This provision defines the offence of illegal crossing of the state border and reads as follows:

> whoever crosses the border of the Republic of Poland in violation of the law, using violence, threats, deception, or in cooperation with other persons, shall be subject to the penalty of deprivation of liberty for up to 3 years. In turn, whoever organises the crossing of the border of the Republic of Poland by other persons in violation of the law, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

In 2021, there were 24 foreigners suspected of such acts, while in 2022 as many as 305.

Table 6. Categories of offences that foreigners were suspected of in 2022 (Act of 6 June 1997 – Criminal Code)

Category of offences	Number
Against road safety (Arts. 173–180.)	3,510
Property crime (Arts. 278–295.)	3,236
Against public order (Arts. 252–264a.)	408
Against life and health (Arts. 148–162.)	342
Against the administration of justice (Arts. 232–247.)	313
Falsification of documents (Arts. 270–277.)	243
Against freedom (Arts. 189–193.)	210
Against the activities of state institutions and local self-government (Arts. 222–231.)	210
Against the family and guardianship (Arts. 206–211.)	163
Against sexual freedom and morality (Arts. 197–205.)	62
Economic offences (Arts. 296–309.)	53

43 Woźniakowska-Fajst, 2016, p. 44.
44 Laskowska and Perkowska, 2020, p. 9.

Category of offences	Number
Against public safety (Arts. 163–172.)	19
Against honour and physical integrity (Arts. 212–217.)	11
Against the protection of information (Arts. 265–269b.)	8
Financial offences (Arts. 310–316.)	7
Against the rights of persons engaged in gainful employment (Arts. 218–221.)	6
Against the environment	4
Total	8,805

Table 7. Convicted foreign nationals, 2016–2020[45]

	Total foreign nationals convicted	% of convicts
2016	9,337	3.2
2017	8,379	3.5
2018	10,368	3.8
2019	11,987	4.2
2020	11,659	4.6

8. Summary

Comparing the structure of offences of total suspects and foreign suspects, some similarities can be seen—the two most frequent groups of offences of both groups of suspects are offences against property and against safety in communication. At the same time, these are the groups of acts most frequently committed in Poland. Foreigners, on the other hand, were more frequently suspected of offences against public order than the total number of suspects in Poland in 2022. It is also notable that the three countries on the eastern side of Poland's border are at the top of these statistics.[46] This coincides with the general migration trend in Poland, where people from Ukraine, Belarus, and Georgia rank at the top of these statistics. It also appears that the increase in migration from Poland's eastern border will continue.

45 Data from the National Criminal Register.
46 Włodarczyk-Madejska, Kopeć and Goździk, 2021, p. 267.

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Border Control and Migration in Slovenia: Border Protection in the Case of Persons Crossing National Borders Illegally

ABSTRACT: *Protecting and controlling national borders are particularly important for preventing and combating irregular migration. Adequate police organisation, training, and exercise of appropriate statutory powers and measures are crucial in this context. This article discusses the role of the Slovenian Police in curbing irregular migration from three perspectives: (1) national normative regulations for border control; (2) the procedural regulation of the exercise of powers and measures by the police in controlling state borders; and (3) the compliance of the legal regulation of powers and measures with the provisions on the protection of human rights and fundamental freedoms laid down in the Constitution of the Republic of Slovenia and international conventions. We found that the national normative and procedural regulations governing the exercise of police power and measures for controlling state borders are consistent with the uniform regime in the Schengen Borders Code. In contrast, in assessing their compliance with constitutional and international standards that guarantee and protect human rights, we questioned the appropriateness of the normative regulations that allow the police to invasively search the body and belongings of persons, in addition to frisking them and their belongings, without a court order, in the context of border controls, where the standard of proof is low. Furthermore, we draw attention to the lack of clarity in the internal instructions and procedural provisions of the police, which allow the return of persons to foreign security authorities, disregarding*

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safeguards protecting persons seeking international protection. Moreover, the article focuses on the entry of the Republic of Croatia into the Schengen Area, which resulted in the Republic of Slovenia losing its external Schengen border. The new situation dictates the need for changes in the organisation, staffing, and tactics of the Slovenian Police.

■ **KEYWORDS:** irregular migration, state border control, police powers, compensatory measures, legal protection for asylum seekers

1. Introduction

In the Republic of Slovenia (hereinafter Slovenia), control of state borders is a task of the police that derives from its fundamental duty to ensure the security of people and property.[1] The protection and control of the state border is the subject of a separate strategic document (see below), and the control of the state border as a police task is defined in more detail under the Police Tasks and Powers Act.[2] Moreover, it regulates the general power of the police to perform this task. The key issues of the organisation and manner of conducting state border control, implementing of compensatory measures, and international police cooperation in state border control are regulated by the State Border Control Act.[3]

In practice, various factors can influence the guarantee of the right to security and feeling of security,[4] among which the issue of irregular migration has been at the forefront of the police's task of controlling national borders for more

1 Security is a fundamental human right expressly provided for by several international and regional human rights treaties, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. In the internal law of Slovenia, the right to security is provided in Art. 34 of the Constitution of the Republic of Slovenia where it is stated that 'everyone has the right to personal dignity and safety.' While the Constitution primarily protects the individual's personal security in relation to (state) power, it also protects everyone's personal security in relation to other individuals and legal entities. See Flander and Tičar, 2019, pp. 422–424. The authors explore the right to security through the prism of its regulation within Slovenian law at the state and local levels.

2 Art. 4 of the Police Tasks and Powers Act (*Zakon o nalogah in pooblastilih policije* [PTPA]), Official Gazette of the Republic of Slovenia, Nos. 15/13, 23/15, 10/17, 47/19.

3 Art. 1 of the State Border Control Act (*Zakon o nadzoru državne meje* [SBCA-2]), Official Gazette of the Republic of Slovenia, Nos. 35/10 – officially consolidated text, 5/17, 68/17, 47/19, 139/20, 161/21, 29/22 and 76/23.

4 Aleš Bučar Ručman and Ada Šulc note that people's sense of security is largely influenced by negative media reports, which link the issue of migration to increased crime rates and danger to the 'native' population. Bučar Ručman and Šulc, 2019, pp. 5–20.

than a decade.[5] In the Schengen Area, the requirement for the free movement of people and goods has radically changed the paradigm of state border management and the control and protection of state borders. Traditional border controls are increasingly being replaced by compensatory measures, which are conducted in the interior of the country to compensate for the lack of traditional police control at the border. This is also true of Slovenia, which, similar to other EU Member States, has recently experienced a significant increase in illegal border crossings.[6]

This article discusses the role of the Slovenian Police in curbing irregular migration from three perspectives: (1) national normative regulations for border control; (2) the procedural regulation of the exercise of powers and measures by the police in controlling state borders; and (3) compliance of the legal regulation of powers and measures with the provisions on the protection of human rights and fundamental freedoms established in the Constitution of Slovenia and international conventions. This article aims to establish whether the national normative and procedural regulations governing the exercise of police power and measures for controlling state borders are consistent with the uniform regime in the Schengen Code and the constitutional and international standards for guaranteeing and protecting human rights. Furthermore, it focuses on the entry of the Republic of Croatia into the Schengen Area, which resulted in the loss of an external Schengen border for Slovenia. The new situation dictates the need for changes in the organisation, staffing, and tactics of the Slovenian Police.

2. State border control and control of the movement and residence of foreigners as one of the core strategic and statutory tasks of the Slovenian Police

■ *2.1. Strategy for the Coherent Management of the State Border of the Republic of Slovenia*

Slovenia became part of the Schengen Area in 2006.[7] Since then, the government has addressed border controls and irregular migration through strategic

5 Karmen Medica distinguishes between irregular, illegal and undocumented migration. Irregular migration involves foreigners legally crossing a state border and staying in a country for longer than allowed. In illegal migration, foreigners illegally enter the country with forged documents. Undocumented migration involves the operation of international smuggling networks to smuggle foreigners who are economic migrants. Medica, 2007, p. 125.

6 From 1 January 2023 to 31 May 2023, 15,456 unauthorised entries were processed. During the same period in 2022, 5,108 unauthorised entries were recorded. See Policija, 2023.

7 For more on this and the history of the formation of the Slovenian state and the activities of the Slovenian Police, see Celar, 2021. The author draws attention to the difficult periods of Slovenia's convergence, accession and full membership of the EU, and difficulty of the requirements for joining the Schengen Area.

documents. The National Security Strategy[8] (ReNSS-2) is the primary strategic document in the field of security of Slovenia. It defines irregular migration as a threat and risk to national security. The Strategy states that Slovenia is primarily affected by irregular migration owing to migration flows across its territory. Since the mass migrations of 2015 and 2016, the external land border of Slovenia's section of the Schengen Area has been subjected to unceasing pressure from irregular migration. The vast majority of migrants applying for international protection in Slovenia leave the country before the process is completed, indicating an abuse of this institution.[9]

Based on the assumptions of ReNSS-2, the Strategy for the Coherent Management of the State Border of Slovenia[10] (hereinafter IBM Strategy) was adopted for the implementation of the Frontex Regulation.[11] The IBM Strategy determines the entities, primary risks, and basic purposes and objectives of state border management. It details the surveillance and protection of state borders, the production of risk analyses, and cooperation between agencies or authorities within and outside the state. Furthermore, it deals with compensatory measures and measures within the free-movement area and return procedures. It concludes by stressing the importance and forms of education and training, use of the latest technologies, respect for human rights, and fundamental freedoms in dealing with individuals. In compliance with the Strategy, the police perform tasks related to the control and protection of state borders, whereas the Financial Administration of the Republic of Slovenia (FURS) performs procedures related to the import control of the customs system. Slovenia adopted an Action Plan to implement its IBM Strategy.

Furthermore, the IBM Strategy stipulates that the police should cooperate with the Slovenian Armed Forces to protect state borders in accordance with relevant national legislation and applicable plans.[12] The Slovenian Armed Forces provide assistance in protecting the state border in accordance with the provisions

8 The Resolution on the National Security Strategy of Slovenia (*Resolucija o Strategiji nacionalne varnosti Republike Slovenije* [ReNSS-2]), Official Gazette of Slovenia, No. 59/19.

9 ReSNV-2, item 4.9.

10 The Ordinance of Integrated Border Management Strategy of Slovenia (*Odlok o strategiji skladnega upravljanja državne meje Republike Slovenije* [IBM Strategy]), Official Gazette of Slovenia, Nos. 162/21 in 120/22.

11 Regulation (EU) No. 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) No. 2016/1624 *OJ L 295, 14 November 2019, pp. 1–131.*

12 Employing the army to protect the border could be problematic, controversial, and inconsistent with the notion of a democratic state whose borders are protected only by security authorities, such as the police or border guards. See also Celar, 2021, p. 410.

of Article 37 of the Defence Act[13] (DA), based on decision of the Government of Slovenia on the participation of the Slovenian Armed Forces in protecting the state border in the interior of the state territory and in protecting certain facilities or areas.[14] The Slovenian Armed Forces cooperate with the police for broader protection of the national border based on a joint operational and tactical plan.

If the security situation requires it, the National Assembly, acting on a proposal of the Slovenian Government, may, by a two-thirds majority of the votes of members present, decide that members of the Slovenian Armed Forces can exercise the exceptional powers referred to in Article 37a of the DA, exceptionally in the context of the broader protection of the national border and in accordance with the plans and prior approval of the government.[15] The measure may last for a maximum of three months, with the possibility of extension. To date, this exception has not been ordered.

Based on a government decision on measures for the effective management of threats, risks, and challenges, technical barriers (wire and panel fences) were installed in 2015 on certain sections of the external Schengen border, the state border with the Republic of Croatia. These technical barriers are gradually being removed. However, the police are responsible for regularly monitoring the security situation and adapting operational plans to protect state borders.

■ *2.2. The normative framework for the protection and control of the state border*

The protection and control of the state border are important because it is one of the most important institutions that ensures the state's security in the face of international terrorism; illegal trafficking in arms, drugs, and stolen vehicles; irregular migration, smuggling, and trafficking in human beings; and the illegal entry and immigration of foreigners into Slovenia. The second dimension of border

13 The Defence Act (*Zakon o obrambi* [DA-UPB1]), Official Gazette of the Republic of Slovenia No. 103/04 Art. 37(4) provides that the Slovenian Armed Forces may cooperate with the police in the broader protection of the state border in the interior of the state territory. Furthermore, it contains the specific provision that in such cases members of the Slovenian Armed Forces do not have police powers when conducting these tasks.

14 The IBM Strategy, Para. 2.1.

15 The Act Amending the Defence Act (*Zakon o spremembi zakona o obrambi* [DA-E]), Official Gazette of the Republic of Slovenia, No. 95/15. Art. 37a provides that in these cases members of the Slovenian Armed Forces may exercise the following powers: warn, deploy, and temporarily restrict the movement of persons, and help control groups and crowds. They exercise all these powers under the conditions applicable to police officers and must immediately inform the police of the exercise of these powers. It may be concluded that this exceptional use of the army in protecting the state border, whereby members of the army act independently and, in accordance with the law, are allowed to exercise individual executive police powers, which in peacetime interfere with human freedoms and rights and raises a number of issues, such as the following: the use of the army to conduct police tasks, the independent exercise of police tasks without the supervision of the police, and the competence of army members to conduct police powers.

protection and control is the prevention of violations of state border inviolability. In Slovenia, the police protect and control the border to ensure the security of the country and all other Schengen Area Member States.[16] During peacetime, the police, an agency of the Ministry of the Interior,[17] are the only state authorities that control and protect the state border.[18]

The two key pieces of legislation governing the protection and control of state borders are the Police Tasks and Powers Act (PTPA) and State Border Control Act (SBCA-2). The PTPA defines the fundamental duties of the Slovenian Police, which are to ensure the security of individuals and communities, respect for human rights and fundamental freedoms, and to strengthen the rule of law.[19] The police provide security because of the 'public interest' in this. Public interest exists whenever it is a matter of averting a threat to an individual, unspecified group of people, or a community.[20] The law derives police duties and powers from fundamental duties related to this. Article 4 of the PTPA sets out eight core police tasks,[21] two of which are relevant to our study: 1. control of the state border and 2. tasks related to the movement and residence of foreigners.

With regard to conducting border control tasks, the police have general powers granted under the PTPA and specific powers under SBCA-2. Police physically control the state border to prevent and detect criminal offences listed in the Penal Code and offences stipulated in the legislation governing the protection of the state border. As a member of the Schengen system, Slovenia must comply with the provisions of the Schengen Borders Code when controlling its state borders.[22] The entry, movement, and residence of foreigners into Slovenia are generally regulated

16 The IBM Strategy also does this.

17 Regarding the position of the police in the structure of the state organisation, see the Organisation and Work of the Police Act (*Zakon o organiziranosti in delu v policiji* [OWPA], Official Gazette of the Republic of Slovenia, Nos.15/133, 11/14, 86/15, 77/16, 77/17, 36/19, 200/20, 172/21 and 141/22.

18 The Slovenian Police is centrally organised, which means that all police tasks are conducted by one authority. Specialised police units are generally involved in the work of border control and the problems related to foreigners.

19 Art. 1 of the PTPA. See also Žaberl, 2006, p. 16; Žaberl et al., 2015, p. 8.

20 Žaberl et al., 2015, p. 8.

21 Ibid. The PTPA prescribes the tasks of the police in vague legal terms, such as personal security, protection of people's property, public order, traffic regulation, control of the state border, protection of certain persons. Thus, the legislature provides the police with a general legal basis for action, however, these tasks are more precisely defined in sectoral legislation (e.g. procedural and substantive legislation in the field of detection and investigation of criminal offences and misdemeanours, ensuring public order, control and regulation of road traffic, control of the state border, tasks related to foreigners in Slovenia).

22 Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), *OJ L 77, 23 March 2016, pp. 1–52.*

by the Aliens Act (FA-2-UPB9).[23] FA-2-UPB9 determines the right of foreigners to enter the country, the conditions for refusal of entry, the conditions for foreigners' residence in Slovenia, and the conditions for the removal of a foreigner from the country. The International Protection Act also sets out important tasks and powers for the police connected with the movement and residence of foreigners.[24]

The control and protection of state borders is primarily conducted by the police through two forms or institutions of policing: control at border-crossing points and compensatory measures in the interior of the country. As both entail several measures by which the police encroach on human freedom and rights, we define and analyse them in more detail below.

2.2.1 Border control

Border control is the cornerstone of effective national and EU border control. In addition, border control (along with compensatory measures within the country) is an effective means of controlling irregular migration and other illegal practices.

SBCA-2 states that the purpose of protecting the state border is to protect human life and health; prevent and detect crimes and offences and their perpetrators; prevent unauthorised migration; ensure the safety of people, property, and the environment; and prevent and detect other threats to public security and order.[25] Based on the Schengen Borders Code,[26] the SBCA-2 stipulates that a police officer may, in the context of border checks, a) demand the presentation of valid documents required for crossing the state border and enter information on the circumstances of entry into and exit from the country in the documents for crossing the national border; b) conduct checks on people, vehicles and people's belongings; c) detain a person for the time strictly necessary, up to a maximum of 48 hours.

The law introduces a gradual (cascading) escalation of border control measures from a basic procedure that interferes with the privacy of information through a procedure that interferes with physical integrity to a possible procedure that interferes with freedom of movement or personal liberty, depending on the level of suspicion of the person intending to cross the state border. Thus, the legislature follows the principle of proportionality through normative regulation.[27]

Although the inspection of documents and the entry of certain data in documents for crossing the state border do not constitute an invasive and problematic

23 The Foreigners Act (*Zakon o tujcih* [FA-2-UPB9]), Official Gazette of the Republic of Slovenia, Nos. 91/21 – officially consolidated text and 48/23.

24 The International Protection Act (*Zakon o mednarodni zaščiti* [IPA-1-UPB1]), Official Gazette of the Republic of Slovenia, Nos. 16/17 – officially consolidated text, 54/21 and 42/23.

25 Art. 2 of the SBCA-2.

26 Art. 1(3) of the SBCA-2 stipulates that the activities and measures referred to in the Schengen Borders Code are relevant for the control of the state border under this law.

27 For more on the principle of proportionality, see Žaberl et al., 2015.

intervention, according to the authors, this is not the case when it comes to the control of people, vehicles, and belongings carried by people crossing the national border. Although the law, in accordance with the principle of *lex certa*, defines each procedure in a specific and clear manner, the existing regime is questionable in terms of the admissibility of such procedures considering the concept of 'legitimate expectation of privacy'. The law determines that in addition to document examinations, the checking of people may also include the need for a frisk search and even a body search, which is permitted in the event of suspicion of possession of prohibited goods or objects or for establishing identity.[28] A body search that admittedly does not involve a body cavity search[29] with such a low level of suspicion of possessing prohibited items or only for establishing identity could, in the authors' view, be constitutionally questionable.

A similar conclusion can be drawn concerning the provisions governing vehicle checks. The law determines that it includes an external and internal inspection of vehicles and vehicle search.[30] A search may be conducted if it is suspected that a person in the vehicle is carrying prohibited objects, which would help establish their identity or the identity of other passengers and prevent unauthorised entry into Slovenia. A search involves a detailed inspection of all parts of the vehicle, including the disassembly of individual parts.[31]

The law introduces a similar provision governing the inspection and search of objects carried by a person or vehicle. The legislature restricts the possible search of objects to cases where there is a suspicion that there are prohibited objects or objects that could help establish identity. A search involves a detailed inspection of all the parts, including the disassembly of individual parts.[32]

From the perspective of protecting human rights as guaranteed by the Constitution, these provisions could be controversial, particularly as they allow, at a low level of suspicion,[33] invasive and detailed search of persons, their belongings and vehicles. Under the Criminal Procedure Act[34] and misdemeanour legislation, a prior court order is generally required for search that involves detailed and invasive interference with legally protected values, however, this is not the case for border control cases under SBCA-2.

28 Art. 29(1) and (2) of the SBCA-2.
29 This is expressly prohibited by law in the above provisions.
30 Art. 29(3) of the SBCA-2.
31 Art. 29(4) of the SBCA-2.
32 Art. 29(6) of the SBCA-2.
33 Suspicion or grounds for suspicion is the lowest level of suspicion in criminal and misdemeanour law, where mere suspicion, including unverified and anonymous information, or even a mere feeling of a threat to security on the part of a representative of a particular authority, is sufficient. See the Decision of the Constitutional Court of the Republic of Slovenia No. UP-13/94, Point 10.
34 Arts. 214–217 of the Criminal Procedure Act (*Zakon o kazenskem postopku* [CPA -UPB16], Official Gazette of the Republic of Slovenia, No. 176/21 – officially consolidated text.

This dilemma has (at least apparently) been resolved by the Constitutional Court of Slovenia, which did not rule on the constitutionality and legality of the provisions of SBCA-2 but rather on the constitutionality of similar provisions contained in the Customs Service Act,[35] which permits customs officers to search a vehicle at border crossings. The Constitutional Court has taken the view that the expectation of the privacy of a person crossing the state border at a border-crossing point is low for two reasons. First, a private vehicle is not considered a dwelling in which an individual establishes a circle of intimate activity.[36] The second reason is that individuals wishing to cross a border are fully aware of the high probability of being subjected to checks, which simultaneously constitutes interference with their privacy.[37]

Although the Constitutional Court ruled that a vehicle search by a customs officer at a border crossing without a court order is not incompatible with an encroachment on the constitutionally protected right to privacy under Article 35 of the Constitution of Slovenia,[38] we are not convinced that it would have ruled in the same way in the case of the permissible search of a person under SBCA-2.

2.2.2 Compensatory measures and measures inside the free movement area

Owing to the abolition of internal border controls, the Schengen Borders Code sets out obligations and restrictions on the control of persons within the territories of related Member States. The fundamental premise of the free movement of people entails that, although countries may adopt certain security measures, they should not aim to conduct border controls in the interior of the country and should only involve random checks.[39]

Compensatory measures (*Slov. izravnalni ukrepi*) are necessary to replace border controls that are no longer in place on the internal borders of most EU Member States. They replace these controls and ensure the security of the EU Member States and other members of the Schengen area. The aim of the measures at the internal borders and in the interior of the country is to identify illegal entry, check the legality of residence in Slovenia, and detect and prevent irregular migration and cross-border crimes.[40] The IBM Strategy identified two core areas and

35 The Customs Service Act (*Zakon o carinski službi* [ZCS-1 -1-UPB1], Official Gazette of the Republic of Slovenia, Nos. 103/04 – officially consolidated text, 40/09 and 9/11.

36 The Constitutional Court of the Republic of Slovenia has already ruled so in Decision No. Up-32/94.

37 Decision of the Constitutional Court of the Republic of Slovenia No. Up-1293/08-24, of 6 July 2011, Point 25. The Constitutional Court emphasises that the State has the sovereign right to control persons and objects crossing the state border, to ensure its security and the security of its population. See also Mozetič, 2009, pp. 3–15.

38 The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*), Official Gazette of the Republic of Slovenia, Nos. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 47/13, 75/16 and 92/21. See also Constitutional Court Decision No. U-I-272/98.

39 See Art. 21 of the Schengen Borders Code, which stipulates that the application of compensatory measures must not have the same effect as border controls.

40 IBM Strategy, Point 5.

forms of policing: 1. control of foreigners inside the country and 2. the random and non-discriminatory application of compensatory measures.

The supervision of foreigners in the country's interior is conducted by police units through direct access to the database on the compulsory registration of the address of residence for all foreigners entering and staying in Slovenia. By contrast, compensatory measures are ensured through the effective implementation of random police checks at internal borders, which must not take the form of systematic border controls.

In this respect, a particularly problematic provision was the previously applicable State Border Control Act, which stipulated that to prevent unauthorised entries and stay in Slovenia and to prevent and detect cross-border crime, police officers were allowed to conduct checks on persons, vehicles, and belongings in the interior of the country, in addition to international transport connections and facilities important for cross-border traffic.[41] The legal regulation here was certainly vague and inconsistent with the *lex certa* principle and even with the Schengen Borders Code, which does not allow for targeted controls in the interior of a country. Considering the size of Slovenia, the law did not limit such activities to a specific distance from the border, as other EU countries have done.

With the 2009 amendment of the State Border Control Act (SBCA-2), the country's compensatory measures were redefined. These measures are no longer equated with similar measures taken at border-crossing points when a crossing of the national border is intended or has already been conducted but are set out separately and explained in accordance with the principle of clarity. A police officer may use the prescribed measures to uncover unauthorised entry, check the lawfulness of residence and prevent and detect irregular migration and cross-border crime only against a person who is reasonably likely to have crossed the state border. These measures include checking documents and checking the person, vehicle, and belongings. These measures are implemented on a random and non-discriminatory basis.[42]

41 Art. 35 of the State Border Control Act (*Zakon o nadzoru državne meje* [SBCA-1]), Official Gazette of the Republic of Slovenia, No. 110/06 – officially consolidated text. This law expired on 21 July 2007, that is, when SBCA-2 entered into force. The radical change in the level of legal protection of privacy in EU countries, manifested in the deterritorialised, unpredictable and diffuse implementation of compensatory measures and police controls in the interior of the country, is highlighted by Mozetič, 2009, pp. 3–15.

42 Art. 35 of the SBCA-2; In this point we can mention the case (No. 215/19) *Basu v. Germany*, where the European court of human rights (ECHR) held that there has been violation of Art. 14 (prohibition of discrimination) taken in conjunction with Art. 8. The applicant is a German national of Indian origin who lives in Berlin. The police allegedly conducted an identity check on him only because of his skin colour. He was travelling on a train which had just passed the border from the Czech Republic. When asked, the police told him that it was a random check. ECHR observes that it has found a breach of ECHR because the administrative courts declined to examine the merits of the applicant's complaint about having been treated in a discriminatory manner by the identity check.

To implement compensatory measures, police units prepare periodic risk analyses in accordance with the methodology outlined in the Common Integrated Risk Analysis Model 2.1 (CIRAM).[43] Based on Article 29 of the Frontex Regulation,[44] the CIRAM provides a common methodological framework for analysing irregular migration in EU Member States and Schengen Associated Countries. The results of the risk analyses, which are presented in the form of recommendations for responding to the identified threats, are used by police units to plan their activities to prevent irregular migration using compensatory measures. This considers the geography of the area in which the police unit operates, infrastructure in the area, human resource capabilities of the police unit, equipment available, and operational findings of the police unit.

In addition to the above recommendations, police units prepare risk profiles describing the most frequent or new methods and areas of unauthorised border crossings and most frequent means of transport for irregular migrants. Profiles are also being prepared to identify the most frequently stolen or newly stolen vehicles and other items that may be the subject of cross-border crime, such as illegal drugs and weapons. Risk profiles are only tools for targeted police action and, in no way, constitute an obligation to act in all cases where police officers encounter persons or objects listed in the risk profiles.

When checking a person as part of a compensatory measure, a police officer should run their hands over the person's clothing and examine the contents of any objects in the person's possessions, under their control, or in the vehicle.[45] Examination of a vehicle comprises an external and internal inspection of the vehicle, including its hidden parts.[46]

Compensatory measures are more adequately regulated than measures implemented in the context of border controls. The requirement of a reasonable likelihood that someone has crossed the state border and the further requirement of suspicion of a prohibited act to conduct a check on a person, their belongings, and vehicle, exclude the possibility of systematic and discriminatory police action. In the context of these measures, the law does not allow for greater encroachment on personal rights, such as body search or search through belongings and vehicles by disassembling individual parts. However, in the event of the discovery of objects that may be confiscated under the law governing criminal proceedings or the law governing misdemeanour proceedings, the law refers to the continuation

43 European Border and Coast Guard Agency (FRONTEX): Common Integrated Risk Analysis Model 2.1. [Online]. Available at: https://prd.frontex.europa.eu/document/common-integrated-risk-analysis-model-2-1/ (Accessed: 17 July 2023).

44 Regulation (EU) No. 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) No. 2016/1624, *OJ L 295, 14 November 2019, pp. 1–131.*

45 Art. 35b(4) of the SBCA-2.

46 Art. 35b(5) of the SBCA-2.

of proceedings under these laws, thus satisfying formal procedural requirements and safeguards in misdemeanour and criminal proceedings.

When conducting police tasks within the free movement zone, the police not only have powers under the SBCA-2 but also all the general powers under the PTPA, as the control of the state border and foreigners is one of the general tasks of the police under this Act. Some general police powers under the Act have also been specifically adapted to the problem of dealing with foreigners in the interior of the country.

Thus, pursuant to Article 57 of the PTPA, the police may bring foreigners who do not fulfil the conditions for entry into, transit through, or exit from a country or territory party to the Convention implementing the Schengen Agreement to official police premises, to the official premises of another authority, or to a specified place.[47] Such an arrest is a temporary restriction of movement. The same law further suggests that police officers may detain for up to 48 hours a person who is to be handed over to foreign security authorities or who has been received from foreign security authorities and is to be handed over to the competent authority.[48] As detention constitutes primary interference with the right to freedom of movement, the detained person is entitled to all the rights of a person deprived of their liberty.[49]

One of the compensatory measures arising from the commitments of the Convention implementing the Schengen Agreement is the power of covert recording and targeted controls. According to the PTPA, this measure, which is ordered by the public prosecutor if there are reasonable grounds for suspicion of catalogued offences, applies to persons and vehicles.[50] Covert recording refers to finding a person or vehicle against whom measures have been ordered and gathering certain information. This information includes details of the person or vehicle; the place, time, and reasons for the control; the route and planned destination; the people accompanying the person being searched for; the vehicle used or the items carried by the person; and other relevant circumstances communicated to the authority that ordered the alert.[51] Targeted control involves a body search and thorough vehicle search based on the national law governing the search procedure. If the national law does not allow such a search, only a covert recording is made.[52] Thus, the legal provision is correct as it only allows such a measure to be conducted if there is a sufficiently high standard of proof, if there are reasonable grounds for suspecting the catalogued serious crimes have been committed, and if the public prosecutor has issued a written order to that effect. The provision

47 Art. 57(2) indent 4 of the PTPA.

48 Ibid., Art. 64 indent 4. For more on this, see: commentary by Senčar, A. in Žaberl et al., 2015.

49 For more on this see Klemenčič, Kečanović and Žaberl, 2002, pp. 121–126.

50 Art. 45 of the PTPA.

51 Art. 44(1) and (4) of the PTPA.

52 Art. 44(3) of the PTPA.

that the search of a person or vehicle may only be conducted in accordance with national law provides for both *ex ante* and *ex post* judicial protection.

3. Police procedure and measures in the event of unauthorised crossing of the state border

The procedures and police measures in border controls and compensatory measures in the interior of the country differ depending on how the border is crossed and the status of foreigners crossing the state border: a) the procedure followed by police officers when dealing with foreigners who enter Slovenia legally; b) the procedure followed by police officers when dealing with foreigners who enter Slovenia illegally; c) the procedure followed by police officers when dealing with foreigners applying for international protection.

The Aliens Act (FA-2-UPB9) sets out rules for entry and exit for all non-citizens of Slovenia. In addition to the conditions and forms of entry at internal and external Schengen borders, it determines what constitutes unauthorised entry into the country. Article 12 of the Aliens Act provides that foreign entry into Slovenia is deemed illegal if: a) they avoid border checks at the border-crossing point when it is in operation; b) they avoid border checks outside or at border crossing point when it is not in operation; c) when entering Slovenia, they use foreign, forged or otherwise altered travel and other documents required for entry, or provide false information to border control authorities, or deliberately omit information regarding an altered name or a new document issued at the time when a valid measure is published in the Schengen Information System or national registers; d) they enter Slovenia at the internal Schengen border without an appropriate travel document or other travel document or do not have an entry permit; e) they enter Slovenia at the internal border, although the period for which they were prohibited from entering the country has not yet expired.

Police publish annual and biannual activity reports on their website.[53] The 2022 Work Report lists, among other things, the number of people processed for illegal border crossings over the last ten years.[54] The number of unauthorised border crossings has increased significantly over the past two years.

53 The website of the Slovenian Police is [Online]. Available at: www.policija.si.

54 Ministry of Interior, Police, 2023, p. 142. Statistics in the annual and biannual reports on illegal migration also include: the number of total violations of the FA-2-UPB9; the number of violations of SBCA-2; nationality and number of persons turned away at border crossing points; number, type and country of origin of forged documents detected at border controls; nationality of persons attempting to misuse documents at border crossing points; the number of unauthorised stays detected; the number and nationality of persons processed for evading border controls; the number and nationality of persons issued with return decisions; the number and nationality of persons accommodated in the centre for foreign nationals; and the number and nationality of persons removed from the country.

Table 1: The number of persons processed for illegal border crossings[55]

Year	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Number	895	731	452	1,110	1,944	9,263	16,260	14,639	10,197	32,025

■ *3.1. Police procedure*

In accordance with Article 40 of the PTPA, the police first conduct a procedure to establish the identity of a person they suspect has entered the country illegally. After the unauthorised entry has been established, an initial information interview is conducted in a language or manner that the person can understand, followed by a security check, as provided for in Article 51 of the PTPA, and the person is brought to police premises, as provided for in Article 57 of the PTPA.[56] A person who has illegally entered the country is interviewed at police premises to establish the facts and circumstances of unauthorised entry. The findings are used in procedures involving migrants and form an integral part of all subsequent decisions made by the police.

At the beginning of the interview, the police determines which language the person speaks and whether a translator is required. The police have contracts with translators for most languages understood and spoken by people who have most often been processed for illegal entry in the past or who the police expect to need in their dealings with foreigners. If the police do not have a contract with a translator for a particular rare language, they can avail the services of another translator who can translate that language and pay for the service according to the criteria applicable to contract translators. If a translator is required, the police will stop the interview and wait for the translator to arrive.

After the interview, the police make an official record of the person's statement. The official record is signed by the police officer who conducted the interview, the foreigner interviewed and the translator, if present, during the interview. The official record is used as an annex in all subsequent procedures involving the person.

■ *3.2. Legal protection for irregular migrants*

3.2.1. Legal advice and the return procedure

At the beginning of the procedure, police inform the person who has illegally crossed the border about the possibility of receiving legal advice in the return

55 Source: Ministry of Interior of the Republic of Slovenia, Police [Online]. Available at: https://www.policija.si/o-slovenski-policiji/statistika/mejna-problematika/nedovoljene-migracije-na-obmocju-republike-slovenije.

56 The second paragraph of Art. 57 of the PTPA provides, among other conditions, that a police officer may conduct a warrantless arrest of a foreigner who does not fulfil the conditions for entry into, transit through or exit from a country or territory party to the Schengen Implementing Convention.

procedure. Legal advice is provided by a contracted NGO or another service that provides advisors with appropriate legal expertise. The person is provided an information leaflet with basic information on how to follow the procedure and the contact details of the contracted NGO. Furthermore, the person is informed that they may express their intentions to apply for international protection.

The obligation to provide legal advice in EU law is laid down in Article 13/3 of Directive 2008/115/EU (hereinafter the Return Directive).[57] In Slovenia, it is implemented directly based on the above directive. The police will select, by public tender, a suitable NGO or other service that can be present during the return procedure and provide legal advice to the person undergoing the procedure at request. A contract is concluded with the selected NGO or other service for a three-year period. Six months before the contract expires, the police reissue a public call for tender for a new contract service. There are no restrictions, either statutory or otherwise, on selecting the same contracting party. In addition to the NGO's duty and contractual obligations, the contract determines the payment of the costs of independent observation of the proceedings, which is the obligation of the police.

A representative of the contracted NGO or other service may provide legal assistance during the procedure and ensure that the person's fundamental human rights under the Constitution, international conventions, and procedural rights under FA-2-UPB9 are guaranteed. When a person decides to have a representative of the NGO present, the police procedure is suspended until the arrival of the representative of the contracted NGO. A representative of the NGO is present in the police unit dealing with the person at all times during the proceedings or as long as the person concerned wishes. A contracted NGO or other service prepares an annual report on its activities and findings, which it is obliged to submit to the police.

Within the scope of their powers under the Ombudsman Act,[58] the Ombudsman periodically visits police stations where migrants are apprehended and detained. During these visits, regular checks concerning the provision of legal advice to migrants who illegally entered the country and are the subject of police proceedings are performed. The Ombudsman publishes the findings of direct visits to various police forces in the country in the form of recommendations in the annual activity report.

57 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ L 348, 24 December 2008, pp. 98–107.*

58 The Human Rights Ombudsman Act (*Zakon o varuhu človekovih pravic* [HROA-UPB2]) Official Gazette of the Republic of Slovenia, No. 69/17.

3.2.2. Specifics of the procedure for unaccompanied minors

During the procedure, if the person is an unaccompanied minor, the special provision of Article 82 of the FA-2-UPB9, which prescribes the mandatory involvement of a guardian for the specific case, is immediately applied. For this purpose, a protocol for cooperation between Social Work Centres and police in providing assistance to unaccompanied minors has been established. The Protocol regulates the specificities of procedures against unaccompanied minors who are being processed by the police for unauthorised entry into the country.

The police inform the nearest competent Social Work Centre, whose duties are laid down in the Social Assistance Act.[59] Although FA-2-UPB9 does not include this in its provisions, in practice, the return procedure for unaccompanied minors is suspended until a guardian is appointed for the specific case. The guardian is appointed by the competent Social Work Centre through an official decision. The decision is prepared in accordance with the provisions of the General Administrative Procedure Act,[60] which is the *lex generalis* for the implementation of administrative procedures in Slovenia.

3.2.3. International protection

In Slovenia, international protection is regulated by the International Protection Act (IPA-1-UPB1). The IPA-1-UPB1 regime essentially constitutes a normative concretisation of the constitutional right to international protection (i.e. the right to asylum) by specifying the content and procedure for obtaining refugee or subsidiary protection status.

Under the provisions of IPA-1-UPB1, refugee status is granted to a third-country national who, owing to a well-founded fear of being persecuted for reasons of belonging to a particular racial or ethnic group, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to fear, is unwilling to enjoy the protection of that country, or to a stateless person who is outside the country of their habitual residence and, owing to well-founded fear, is unable or unwilling to return to that country.[61] Subsidiary protection status shall be granted to a third country national or stateless person who does not qualify for refugee status if there are substantial grounds for believing that they would, on return to the country of origin or, in the case of a stateless person, the country of last habitual residence, be at real risk of suffering serious harm.[62]

59 The Social Assistance Act (*Zakon o socialnem varstvu* [ZSV-UPB2]), Official Gazette of the Republic of Slovenia, Nos. 3/07 – officially consolidated text, 57/12, 39/16, 29/17, 54/17 and 28/19.

60 The General Administrative Procedure Act (*Zakon o splošnem upravnem postopku* [GAPA-UPB2]), Official Gazette of the Republic of Slovenia, Nos. 24/06 – officially consolidated text, 126/07, 65/08, 8/10 and 82/13.

61 Art. 20(2) of the IPA-1-UPB1. See also Klemenčič, Kečanović and Žaberl, 2002.

62 Art. 20(3) of the IPA-1-UPB1.

IPA-1-UPB1 stipulates that a person who expresses the intention to apply for international protection in Slovenia and has illegally entered the country or illegally prolonged their stay must do so as soon as possible.[63] However, at any stage of the procedure for dealing with a person who has entered the country illegally, the police are obliged to establish facts and circumstances indicating that the person may be a refugee under the Geneva Convention.[64] At any time during the procedure, a person may express their wish to apply for international protection. In this case, the police will stop the return procedure and conduct a preliminary procedure under Paragraph 1 of Article 42 of IPA-1-UPB1.

The preliminary procedure is regulated in more detail in the rules on the procedure for aliens who wish to apply for international protection in Slovenia and on the procedure for accepting applications for international protection.[65] Through this procedure, the person's identity and the route by which they entered Slovenia are established. The police then fill out the registration form provided for in Paragraph 2 of Article 42 of IPA-1-UPB1 and accept the person's declaration of intention to apply for international protection. The declaration can be handwritten by the person in their own language and translated by a translator, or written by the police with the help of a translator; however, in this case, it must also be signed by the person concerned. When the declaration is written by the police on behalf of the foreigner, it is read aloud to the foreigner before they sign it. By signing, the person agrees to the contents of the declaration. These documents, together with any identification documents possessed by the person, are handed over to the competent authority for the reception and processing of applications for international protection. The police organise transport and escort the person who has expressed the intention to apply for international protection to the seat of the competent administrative authority. When several people express their intention to apply for international protection with a particular police unit and need to be transported to a competent administrative authority or to an accommodation facility for applicants for international protection, the police organise transport with a contracting party. Police pay for transport using funds earmarked for this purpose.

A person who has expressed an intention to apply for international protection may not be returned to or removed from Slovenia until the application has been lodged, except in the case of extradition owing to criminal proceedings against the person in other countries or before the International Criminal Court,

63 Art. 35 of the IPA-1-UPB1.

64 *Convention* relating to the Status of *Refugees* (189 U.N.T.S. 150, entered into force 22 April 1954). United Nations, 1951.

65 Rules on the procedure for aliens who wish to apply for international protection in Slovenia and on the procedure for accepting applications for international protection (*Pravilnik o postopku s tujcem, ki izrazi namen podati prošnjo za mednarodno zaščito v Republiki Sloveniji, ter postopku sprejema prošnje za mednarodno zaščito*), Official Gazette of the Republic of Slovenia, Nos. 173/21 and 131/22.

or if Slovenia would be in breach of its international obligations if it did not extradite the person.[66]

The procedure for recognising international protection begins when the preliminary procedure has been completed and the person lodges an application for international protection or subsidiary protection status with the competent administrative authority.[67] The application may be made by any person of legal age, individually, on their own behalf, or orally on the record. Exceptionally, applications can be lodged electronically or in writing.[68] The Ministry of the Interior is the administrative authority responsible for processing the applications.[69]

When applying, a person is informed of the possibility of legal aid provided in the form of a refugee counsellor. The refugee counsellor provides support and legal assistance in procedures for recognising international protection and legal remedy proceedings before the Administrative Court and Supreme Court of the Republic of Slovenia.[70] The Ministry of Justice prepares and publishes a public call for refugee counsellors in the Official Gazette of the Republic of Slovenia and appoints them for five years. Furthermore, the Ministry may dismiss a refugee counsellor if it is established that the person no longer fulfils the conditions for the post, if the refugee counsellor wishes, or if it is established that the refugee counsellor has concealed essential information about an applicant for international protection based on which the applicant is not entitled to international protection.[71] The Ministry maintains a directory of refugee counsellors containing personal data on refugee counsellors, the Ministry of Justice's record-keeping obligations, and the obligations of refugee counsellors to notify them of changes to personal data, including information on the counsellor's availability.[72] The refugee counsellor is entitled to a fee for the work they perform and to be reimbursed for the costs of legal assistance provided. The Ministry of Justice provides funds for fees and reimbursements.[73]

Since 2019, the Ministry of the Interior has been publishing monthly data on the number and nationality of people who have applied for international

66 Art. 36 of the IPA-1-UPB1. In his 2021 report, the Ombudsman noted that migrants were often returned to neighbouring countries, particularly Croatia, from which they entered Slovenia without being processed for asylum. He further stated that the failure to follow due process of law meant that appeals to the competent authorities were not enabled and that the competent authorities had not properly documented asylum applications. Migrants also had no access to legal aid.
67 Art. 44(1) of the IPA-1-UPB1.
68 Art. 45(1) of the IPA-1-UPB1.
69 Art. 7(2) of the IPA-1-UPB1. Within the Ministry, applications are handled by the Migration Directorate at the International Protection Procedures Division.
70 Art. 9 of the IPA-1-UPB1.
71 Art. 10 of the IPA-1-UPB1.
72 Art. 10 of the IPA-1-UPB1.
73 Art. 11 of the IPA-1-UPB1.

protection on its publicly accessible website. The data indicate that the number of applications almost doubled between 2020 and 2022.

Table 2. The number of applications for international protection[74]

Year	2019	2020	2021	2022
Number	3,821	3,542	5,301	6,787

Before deciding on the application, the competent authority conducts a personal interview with the applicant for international protection. During the personal interview, the authority responsible for examining the application for international protection re-establishes the applicant's identity and the reasons for lodging the application for international protection, although these circumstances have already been established in the previous procedure. Any other facts and circumstances that may be relevant to the decision in the procedure are also established. The applicant must mention all facts and circumstances that justify their fear of persecution or serious harm. Thus, the burden of proof for obtaining international protection is on the applicant for international protection.[75]

A person applying for international protection may have their movements temporarily restricted by the decision-making authority, in accordance with the conditions laid down in IPA-1-UPB1. A person's movement may be restricted if circumstances indicate that the person is likely to escape or leave Slovenia. Movement may be restricted to the accommodation area of the Asylum Centre. An appeal against the decision to restrict movement may be brought within three days before the Administrative Court of Slovenia. The Administrative Court must make a decision within three days of hearing a person whose movement has been restricted.[76]

They must provide all documentation and available evidence to support their applications. When verifying the conditions for international protection, the official considers, *inter alia*, the applicant's statements, the documents and evidence obtained, general information on the country of origin (in particular, on the state of human rights and fundamental freedoms, the sociopolitical situation, and the legislation adopted), and specific information on the country of origin (i.e. detailed and in-depth information related to the specific case). The fact that the applicant has already been subjected to persecution or serious harm, or has been directly threatened with persecution or serious harm, is a serious indication under IPA-1-UPB1 of the applicant's well-founded fear of persecution or risk of

74 Source: Ministry of Interior of the Republic of Slovenia [Online]. Available at: https://www.gov.si/podrocja/drzava-in-druzba/priseljevanje-v-slovenijo/ (Accessed: 17 July 2023).

75 Arts. 21 and 46 of the IPA-1-UPB1.

76 Art. 84 of the IPA-1-UPB1. Pursuant to the provisions of FA-2-UPB9, movement may also be restricted for a person who is accommodated in an Aliens Centre and is in the process of being removed from the country.

serious harm owing to the applicant's membership of a particular race, ethnic or social group, nation, religion or political opinion. The entities that may conduct persecution or cause serious harm, as defined in Articles 26 and 27 of this Law, are the State, political parties or organisations controlling the State or a substantial part of its territory and, under certain conditions, non-State entities.[77]

The competent authority decides whether to accept or reject the application.[78] If the application is accepted, the person is granted international protection status (i.e. refugee or subsidiary protection status). If the application is rejected, the competent authority shall, in accordance with Paragraph 10 of Article 49 of IPA-1-UPB1, set a time limit of 10–30 days for voluntary departure by means of a single decision rejecting the application for international protection. Within this time limit, the person must leave Slovenia, the territories of the Member States of the European Union, and the territories of the signatory states of the Schengen Implementing Convention.[79]

If the applicant is already receiving assistance or protection from United Nations bodies and agencies (with the exception of the High Commissioner for Refugees), if there are reasonable grounds to suspect that they have committed a crime (against peace, a war crime, crime against humanity or serious crime of a non-political nature in another country before entering Slovenia), if reasonable grounds exist that they should be considered a danger to the security or territorial integrity of Slovenia (because of a threat to its sovereignty or constitutional order, if they pose a danger to Slovenia following a final conviction for a serious crime and for other reasons specified in the law), the competent authority may exclude the applicant from the procedure for international protection.[80]

If the person has already been granted international protection status by another EU Member State, or if another Member State is responsible for examining the application under the criteria set out in Regulation 604/2013/EU,[81] the application for international protection is inadmissible under IPA-1-UPB1.[82] In this case, the competent authority follows the procedures set out in Regulation

77 Arts. 21–27 of the IPA-1-UPB1.

78 Art. 49 of the IPA-1-UPB1.

79 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *OJ L 239, 22 September 2000, pp. 19–62.*

80 Art. 31 of the IPA-1-UPB1.

81 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), *OJ L 180, 29 June 2013, pp. 31–59.*

82 Art. 51 of the IPA-1-UPB1.

603/2013/EU,[83] which lays down the criteria for determining the Member State responsible for examining an application for international protection. An application for international protection may also be unfounded if the person has arrived through countries that are considered first safe countries of entry.[84] The competent authority has drawn up a list of such countries, including all EU Member States and certain third countries.

A person whose application for international protection has been rejected is addressed in the subsequent procedure, in accordance with the provisions of FA-2-UPB9. IPA-1-UPB1 also provides for the possibility of reapplying for international protection, which is open to all persons whose application for international protection has been rejected or whose procedure for obtaining international protection has been suspended for various reasons. The competent authority examining applications for international protection is obliged to make decisions on any renewed application.[85]

In addition to the number of applications for international protection, the Ministry of the Interior publishes statistics on applications that have been resolved, renewed, granted international protection status, rejected, discontinued or refused on its public website.

Table 3: The number of applications, renewed applications, resolved applications, approved applications, rejected applications, discontinuation of procedure and refused applications for international protection[86]

Year	Applications	Renewed applications	Resolved applications	Approved applications	Rejected applications	Discontinuation of procedure	Refused applications
2019	3,821	56	3,838	85	128	3,273	352
2020	3,548	29	3,636	89	215	2,875	457
2021	5,301	23	5,008	17	151	3,445	1,390
2022	6,787	24	6,900	203	141	3,983	2,573

83 Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), *OJ L 180, 29 June 2013, pp. 1–30.*

84 Art. 53 of the IPA-1-UPB1.

85 Art. 64 of the IPA-1-UPB1.

86 Source: Ministry of Interior of the Republic of Slovenia [Online]. Available at: https://www.gov.si/podrocja/drzava-in-druzba/priseljevanje-v-slovenijo/ (Accessed: 17 July 2023).

■ *3.3 The return procedure*

The continuation of the procedure with a person who has illegally entered the country depends on the legal possibilities and circumstances for returning the person. The person may be returned under a bilateral agreement between two neighbouring countries or by direct return to the country of origin.

For readmission to a neighbouring country under a bilateral return agreement, the police inform the security authorities of the country of return and announce the return of the person. A person can be returned according to informal procedures between the security authorities of neighbouring countries at the level of the local police forces of both countries. During the informal procedure, the authorities of the country of return either accept or reject the person. This procedure can also be conducted in less than 12 hours after the unauthorised crossing of a state border. If the authorities of the country of return accept the person, the procedure is completed by the Slovenian Police.

If the security authorities of the country of return refuse to accept persons during the informal procedure, the evidence collected is forwarded at the national police level, and a formal notification is sent to the country of return for the persons concerned. If a formal return announcement receives a positive answer, the security authorities agree on a time to receive the persons at the border. The location where people are handed over is written in the bilateral agreement on the return of persons. If the response to the formal return notice is negative and/or if the police do not collect sufficient evidence of unauthorised entry into Slovenia from a neighbouring country, the police will conduct an offence procedure under the Minor Offences Act by issuing a payment order.[87]

The Human Rights Ombudsman of Slovenia has expressed various concerns related to the Slovenian authorities' readmission process. In the context of the European Network of National Human Rights Institutions (ENNHRI) project, the ombudsman draws a national report on the human rights situation of migrants at the border,[88] where it is stated that the majority of migrants returned to Croatia and to other neighbouring countries in readmission procedures have no legal remedy or judicial protection at their disposal. Therefore, the Slovenian Constitutional Court was suggested to ask the Court of Justice of the European Union (CJEU) to provide a preliminary ruling on the applicability of the Bilateral Agreement.

In relation to the current situation in Slovenia, where all land borders are considered Schengen internal borders, the CJEU in the Arib[89] case considered whether an internal border where border controls were reintroduced pursuant to the Schengen Code could be equated to an external border for the Return Directive. The CJEU noted that the Return Directive would continue to apply if a Member

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87 The Minor Offences Act (*Zakon o prekrških* [MOA-1-UPB8]), Official Gazette of the Republic of Slovenia, Nos. 29/11 – officially consolidated text, 21/13 and 111/13.

88 National Report on the situation of human rights of migrants at the border, 2021.

89 CJEU, C-444/17, Préfet des Pyrénées-Orientales v. Abdelaziz Arib [GC], 19 March 2019.

State reintroduces border controls on its internal borders. The Court ruled that the concepts of internal and external borders are mutually exclusive and that internal borders at which border controls are reinstated cannot be considered external borders. The CJEU concluded that opting out of the application of the directive in border cases does not cover the situation of migrants in an irregular situation, who were apprehended at an internal border where border controls have been reintroduced.[90]

A person who cannot be returned to their country of origin or a third country is issued with a return decision by the competent authority. The decision sets a deadline between 10 and 30 days for a person to leave voluntarily. The number of days of voluntary departure depends on personal circumstances and the findings of the procedure. A person who has been given a deadline for voluntary departure may apply to extend the deadline for voluntary departure. The request must state the reasons for extending the voluntary departure deadline. There is no limit to the number of extensions of the voluntary departure deadline, however, the number of days for voluntary departure is limited (up to a maximum of 30 days). The voluntary departure decision also determines the conditions for a ban on entry into Slovenia. The ban on entry also applies to the territories of the Member States of the European Union and signatory states of the Schengen Implementing Convention. However, the ban on entry does not take effect if a person leaves Slovenia in accordance with the deadline set for voluntary departure. The person proves this by declaring they have left Slovenia and crossed the EU's external border by implementing a voluntary departure decision and obtaining the relevant exit stamp from border control.[91]

■ *3.4 Accommodation in the Aliens Centre*

If a person who has not been granted voluntary departure by a return decision is in danger of escaping, they are banned from entering Slovenia for one to five years.[92] They are accommodated in the Aliens Centre by the Police, where they are placed under restriction of movement by a decision pursuant to Article 76 of the FA-2-UPB9 to prepare for or effect the removal, handover or extradition of the person to be removed from the country. The restriction of movement in the Aliens Centre may last for the minimum period necessary to remove a person from the country, but no longer than six months. The restriction of movement can be extended for an additional six months if the person does not cooperate in the procedure or if there is a delay in obtaining travel documents. However, the police must reasonably expect that it will be possible to remove the person from the country within the extended period of restriction of movement. A person

90 Handbook on European law relating to asylum, borders and immigration, Edition 2020.
91 Arts. 65–67 of the FA-2-UPB9.
92 Art. 68 of the FA-2-UPB9.

whose movement has been restricted by the police has the right to bring an action with the Administrative Court against the detention decision within three days of the service of the decision. Foreigners do not have the right to free legal help to prepare for such actions or be represented in court. The appeal does not stay the enforcement, therefore, the Administrative Court must rule on the action within six days.[93]

In 2015, the Administrative Court initiated a procedure before the Constitutional Court, claiming that detained migrants did not have fast and effective access to judicial remedy regarding detention. However, the Constitutional Court dismissed the case without reviewing the constitutionality of the relevant regulation.

In addition to an appeal against a decision to restrict movement, the law provides for an examination of the grounds for restricting movement at the Aliens Centre. Fifteen days before the end of the three-month period of restriction of movement, the police must provide the person with all available documentation related to the person's return. Before three months have expired after a restriction of movement is imposed, the Ministry of the Interior must, *ex officio,* determine the validity of the restriction of movement for a person whose movement has been restricted for three months. The Administrative Court shall, *ex officio,* determine the grounds for restriction of movement against persons who have been restricted for more than three months. If the authorities examining the grounds for restriction of movement determine that the conditions for restriction of movement are no longer met, they shall order the police to immediately release the person from the Aliens Centre.[94]

Restriction of movement is not the only option available to police in situations where people need to be removed from the country; however, this is not possible because of objective circumstances. *Ex officio,* as soon as possible, after the restriction of movement is imposed, the person concerned may be subjected to less restrictive measures of residing outside the Aliens Centre by being assigned a place of residence, being obliged to report regularly to the nearest police station, and having to present their identity documents to the police for safekeeping. A person can also apply for such a measure, and the police are obliged to consider all the circumstances of each case before deciding on a more lenient measure.[95]

During the return procedure, if circumstances arise while the person is staying at the Aliens Centre, making it impossible to return or remove the person from the country, the police will issue a decision that allows the person to stay. This decision allows the person to stay temporarily in Slovenia. Such permission to stay is issued for a period of six months and may be extended *ex officio* for as

93 Arts. 78–79 of the FA-2-UPB9.

94 Art. 79a of the FA-2-UPB9.

95 Art. 81 of the FA-2-UPB9.

long as there are reasons why the person cannot be removed from the country. There is no limit to the number of times the permission to stay may be extended, only to the period of validity of the provision (up to a maximum of six months).[96] A person who is allowed to stay temporarily in Slovenia has the right to receive emergency healthcare and basic social care. Minors also have the right to attend primary schools. Police are liable for costs incurred.[97]

Unaccompanied minors or families with minors who are in return procedures, are to be accommodated in agreement with an appointed guardian in a suitable institution for the accommodation of minors.[98] Only if this is not possible are they detained at the Aliens Centre. However, despite the long-standing advocacy by the Ombudsman and other stakeholders, the authorities have failed to accommodate minors in a suitable institution, and practically all minors in return procedures are detained at the Aliens Centre.[99]

4. Conclusion

An analysis of strategic documents and legislation in the field of police operations and the prevention of irregular migration revealed that Slovenia has a satisfactory framework in this area. Strategic documents and national legislation are aligned with EU law. The basic police legislation and the sectoral legislation on state border control and control over the movement and residence of foreigners in Slovenia provide the police with an adequate legal basis for action and effective implementation of police tasks in this area of police work.

We can be somewhat critical of the regime under SBCA-2, which allows the police to body search a person, their belongings and means of transport when conducting border control subject to the lowest standard of proof: suspicion. In such cases, the intensity of interference with personal human rights may require prior judicial review, at least in the case of a body search. Considering the substantial pressure owing to irregular migration in 2020, the Ombudsman also alerted the police to inconsistencies connected with the intentions of foreigners concerned with seeking international protection, which was not always and consistently respected. Consequently, those who should have been treated under the provisions of the International Protection Act (IPA-1-UPB1) were returned to Croatia.

As of 1 January 2023, the Republic of Croatia joined the Schengen Area, which means that Slovenia has become a member of the EU without internal border controls. This calls for a reanalysis of the security situation and an adaptation of the organisation of border surveillance and protection already being conducted

96 Art. 73 of the FA-2-UPB9.
97 Art. 75 of the FA-2-UPB9.
98 Art. 82 of the FA-2-UPB9.
99 National Report on the situation of human rights of migrants at the border, 2021.

by the Slovenian Police. It has begun to enact organisational and staffing changes, with the bulk of the staff guarding the external Schengen border redeployed to units tasked with compensatory measures.

This is particularly important, as analyses have indicated that the number of illegal border crossings has risen sharply in recent years. Although Slovenia is recognised as a migratory country that foreigners merely pass through on their way to other countries, it is obliged under the Schengen Borders Code to effectively prevent illegal and unauthorised migration.

Finally, the National Security Strategy appears correct in stating that the pressure of illegal migration flows on Slovenia will continue to significantly determine the future socioeconomic and political security situation, both globally and in the region. A further increase in illegal or mass migration poses a potential threat to the security and well-being of the population and a significant burden on the national security system of Slovenia. The increased migration pressure on Slovenia and the wider environment could indirectly lead to an increase in extremism, a deterioration of the security situation, and changes in internal and external policies.

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