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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.

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

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

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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