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PUSHBACKS IN POLAND: GROUNDING THE PRACTICE IN DOMESTIC LAW IN 2021[1,2]

Abstract: *In the summer of 2021 deliberate actions by the Belarusian state authorities led to a huge increase of people irregularly crossing the border from Belarus to Poland. Instead of addressing this humanitarian crisis, the Polish government responded with actions that were in violation of its international obligations and domestic law. Among these measures was carrying out "pushbacks" and grounding them in Polish domestic law. "Pushbacks" are the practice of returning people to the border without assessing their individual situation. The formalization of those practices in 2021 was done within two legal frameworks; one interim and one permanent. They continue to function in parallel while containing different provisions. This article assesses the two frameworks' compatibility with domestic and international law and concludes that they both violate domestic and international rules. In the context of EU law, the article demonstrates the incompatibility of the two frameworks with the so-called Asylum Procedures Directive and Return Directive. The article further argues that the pushbacks violate the European Convention of Human Rights and would not fall within the exceptions to the prohibition of collective expulsions.*

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2 Parts of this article are based on texts I have published before on Verfassungsblog (G. Baranowska, *The Deadly Woods. Legalizing pushbacks at the Polish-Belarusian border*, Verfassungsblog, 29 October 2021, available at: https://bit.ly/3FvdlJS; G. Baranowska, *A Tale of Two Borders. Poland's continued illegal actions at its border with Belarus*, Verfassungsblog, 10 March 2022, available at: https://bit.ly/3LZ7bEw (both accessed 30 June 2022)), as well as in two chapters, *see* G. Baranowska. *Can a state limit the processing of asylum applications (evaluation of the provisions of so called the Pushback Act)* and *The legality and permissibility of push-back policies (forcing people back over a border) and assessment of the attempts to legalise it in Poland*, both in: W Klaus. (ed.) *Beyond the Law. Legal assessment of Polish state's activities in response to humanitarian crisis on the Polish-Belarusian Border*, Wydawnictwo INP PAN, Warsaw: 2022.

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INTRODUCTION

In the second half of 2021 thousands of persons were forced to repeatedly wander in minus temperatures though thick woods in the borderlands of Poland and Belarus. The situation was created by the actions of Belarusian authorities, which had issued touristic visas to people from crisis regions and facilitated their arrival to the Polish, Latvian and Lithuanian borders. After they crossed the border irregularly, Polish authorities forced them back to Belarus, and Belarusian authorities back to Poland, leading to serious injuries and deaths. These practices were also applied to pregnant women, children and person with disabilities.

The Polish authorities decided to ground their practices in domestic law. This was done within two frameworks: an interim one based on an executive regulation (August 2021); and a permanent measure based on an act of Parliament (October 2021). In March 2022, a Polish regional court in Hajnówek issued a ruling with regard to a pushback carried out on the basis of the executive regulation and declared it to be illegal, unjustified, unlawful and irregular.[3] As of the time of this writing, i.e. July 2022, both frameworks, each of which contains different regulations, remain in force in parallel.

This article provides an overview of the Polish laws grounding pushbacks in domestic law and examines them in the context of international and EU law. It starts by introducing the term "pushback" and giving examples how it has been grounded in domestic law by several EU countries (Section 1). Next it presents the legal steps taken by Polish authorities to respond to the increase of people crossing the Polish-Belarusian border irregularly beginning in the summer of 2021 (Section 2). This is done in order to place the events in the broader context in which the pushbacks were taking place. Section 3 discusses the two frameworks that were adopted in Poland and which grounded pushbacks in domestic law: the executive regulation (3.1) and the parliamentary act (3.2). The next section (4) presents a domestic judgment from March 2022, in which the legality of the pushbacks carried out on the basis of the executive regulation was assessed. This serves as a bridge to Section 5, in which the two frameworks are assessed with regard to their compatibility with domestic and international law. This section finds that they violate domestic (5.1), refugee

[3] Wyrok Sądu Rejonowego w Bielsku Podlaskim VII Zamiejscowy Wydział Karny w Hajnówce [Judgment of the Regional Court in Bielsko Podlaskie VII Penal Branch Division in Hajnówka], 28 March 2022, VII Kp 203/21.

(5.2), and European Union (EU) law (5.3), as well as the European Convention of Human Rights (ECHR) (5.4).[4]

1. PUSHBACKS

1.1. The term and practice of pushbacks

At various EU borders people who are trying to cross a border, or have crossed it, are forced back over the border, without their individual situation being assessed.[5] Such practices have been called "pushbacks". The practice is a violation of international law, as states are obliged under international law to review claims of international protection, and collective expulsions without an assessment of individual circumstances are prohibited.[6] Furthermore, as has been widely reported pushbacks often involve physical violence, ill-treatment, seizure of cell phones as soon as the persons are apprehended, and the destruction of their belongings.[7] Consequently, when performed using force and violence – which is often the case – they also breach other human rights, such as the prohibition of torture and inhuman treatment.

The UN Special Rapporteur on the human rights of migrants has defined the term "pushback" in his 2021 report as:

> various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.[8]

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[4] While the article does not deal with the UN treaty bodies' assessment of pushbacks, it is worth pointing out that in the light of those decisions, the pushbacks taking place at the Polish-Belarusian border are very likely to be deemed to constitute a human rights violation. See for example UN Committee on the Rights of the Child, *D.D. v. Spain* (CRC/C/80/D/4/2016), 1 February 2019 – while the decision concerned unaccompanied minors, the general principles in it are relevant also for other contexts; *see* V. Wriedt, *Push-backs rejected: D.D. v. Spain and the rights of minors at EU borders*, EU Migration Law Blog, 29 April 2019, available at: https://bit.ly/3l6SD9X (accessed 30 June 2022).

[5] This means that neither their asylum claims nor any other claims, such as for example being an unaccompanied minor, are assessed.

[6] I. Goldner Lang, B. Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement*, 3(17) European Constitutional Law Review 442 (2021), pp. 451-459; H. Hakiki, *The ECtHR's Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective*, in: S. Schiedermair, A. Schwarz, D. Steiger (eds.), *Theory and Practice of the European Convention on Human Rights*, Nomos: Baden-Baden: 2022.

[7] *The Black Book of Pushbacks*, Border Violence Monitoring Network, 2020, available at: https://bit.ly/3FrVunb (accessed 30 June 2022).

[8] Special Rapporteur on the Human Rights of Migrants, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, A/HRC/47/30, 12 May 2021.

While this is not a legal definition, it does give a good overview of the practice and its different forms. It consists of forcing refugees, asylum seekers and migrants back to the country from which they crossed the border, without observing the necessary human rights safeguards. Within this practice the individual situation of each person is not assessed; thus it denies access to asylum procedures and is at odds with the principle of non-refoulement. The border guards engaged in pushback operations usually claim that the persons in question did not mention the wish to apply for international protection.[9] This practice is widespread in Europe and has been noted at all the main migration routes to Europe.[10]

1.2. Grounding pushbacks in domestic law

Some states conduct pushbacks informally without any records, and subsequently deny that they have taken place. Others issue semi-formalized paperwork in fast-track procedures. Still other states, among them recently Poland, formalize those practices in domestic law. In this article I do not use the term "legalised" pushbacks, as the point of the practice is to misapply the law. Instead, I use the phrase "grounding the practice in domestic law", which in my opinion better reflects the rationale of the act.[11]

Poland is not the first country to ground pushbacks in domestic law. In Spain, for example, a law was adopted in 2015 which introduced a special legal regime for returning persons detected at the territorial border line of Ceuta and Melilla who have tried to cross irregularly.[12] Similarly, a Hungarian law has allowed for such returns to Serbia. The application of this law led to judgments by the European Court of Human Rights (ECtHR)[13] and Court of Justice of the European Union,[14] both of which ruled that the so-called 'expedited returns' have to meet the conditions established in the ECtHR case law and EU law.[15]

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[9] W. Klaus, *The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19*, 10 Social Sciences 435 (2021).

[10] Council of Europe, Commissioner for Human Rights, *Pushed beyond the limits. Four areas for urgent action to end human rights violations at Europe's borders*, 2022, available at: https://bit.ly/3wnlPPj (accessed 30 June 2022).

[11] I would like to thank Hanaa Hakiki for introducing me to this phrase, as well as for inspiring discussions on border violence and migration.

[12] Ley Orgánica 4/2015, 30 March 2015, de prección de la seguridad ciudadana. *See also* Wriedt, *supra* note 4.

[13] ECtHR (GC), *Ilias and Ahmed v. Hungary* (App. No. 47287/15), 21 November 2019; ECtHR, *R.R. and Others v Hungary* (App. No. 36037/17), 2 March 2021.

[14] Case C-564/18 *LH v. Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2020:218; Joint Cases C924/19 PPU and C925/19 PPU *FMS and others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367.

[15] J. De Coninck, *(Il-)Legal Gymnastics by Poland and Hungary in EU Border Procedures*, Verfassungsblog, 11 November 2021, available at: https://bit.ly/3l9i4b6 (accessed 30 June 2022).

In response to the events on the EU eastern border in summer 2021, Latvia also has grounded pushbacks in domestic law. An executive regulation was introduced which allowed the Latvian State Border Guard, National Armed Forces and State Police to return people who have irregularly crossed the Latvian border from Belarus without formal procedures and irrespective of their wish to claim asylum. Furthermore, they are allowed to use physical force and special means to ensure compliance.[16]

2. POLISH RESPONSES TO EVENTS ON THE POLISH-BELARUSIAN BORDER SINCE THE SUMMER OF 2021

The situation on the eastern EU-borders in 2021 was caused by a policy of the Belarusian regime, which issued tourist visas to persons from crisis regions so that they could fly to Minsk, and then provided them with transport to Belarusian borders with neighbouring countries. Due to this practice, thousands of persons were trying – many successfully – to irregularly cross borders into Poland, Lithuania and Latvia.[17] Being in Belarus, they had no possibility to enter the EU regularly.[18] At the border they were forced by Belarusian state agents to cross into Poland. The conducted pushbacks exposed the individuals to a risk of torture and inhuman treatment at the hands of Belarusian state agents.[19]

In response to this situation, the Polish authorities employed a number of measures. One of them – pushbacks – is examined more closely in this article. The legal frameworks put in place in September and October 2021 are analyzed, but it is worth pointing out that the Commission for Human Rights of the Council of Europe found that the practice of pushbacks had been occurring systematically even before the Polish legislation was adopted.[20]

Along with the widespread pushbacks, a state of emergency was announced, which prohibited persons from entering the area close to the border. This worsened the humanitarian crisis, as it made providing support significantly more difficult. Additionally, it made it impossible for journalists to report from the ground on the situation at the border. The state of emergency was initially implemented in

[16] A. Jolkina, *Trapped in a Lawless Zone. Forgotten Refugees at the Latvia-Belarus Border*, Verfassungsblog, 2 May 2022, available at: https://bit.ly/3w74fjz (accessed 30 June 2022).

[17] Grupa Granica, *Humanitarian crisis at the Polish-Belarusian border. Report*, 2021, available at: https://bit.ly/39YWnbo (accessed 30 June 2022).

[18] The situation further deteriorated after the Russian invasion of Ukraine in February 2022, as it made it extremely difficult to leave Belarus due to international responses to Belarusian involvement in the war.

[19] Council of Europe, Commissioner for Human Rights, *supra* note 10.

[20] Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights *R.A. and others v. Poland* (App. No. 42120/21), available at: https://bit.ly/3MdMXXv (accessed 30 June 2022), para. 17.

the region in September 2021.[21] As according to the Polish constitution a state of emergency could be ongoing for a maximum of 150 days,[22] the situation should have changed on 1 December 2021, making the area available for humanitarian organizations and journalists. However, in November 2021 an amendment to the law on the protection of the state border and certain other acts was adopted, allowing for a de facto extension of the state of emergency.[23] The law gives the minister in charge of interior affairs the competence to introduce a temporary prohibition against entering selected border regions,[24] and indeed such a temporary prohibition at the border with Belarus was introduced starting in December 2021,[25] and subsequently prolonged in March 2022 (several days after Russia's full-scale invasion of Ukraine) until June 2022.[26]

These legislative efforts have been accompanied by attempts to intimidate human rights defenders. They have been threatened with criminal sanctions[27] and harassed, which even led to a statement by several UN experts in February 2022, who called upon Poland to "investigate all allegations of harassment of human rights defenders, including media workers and interpreters at the border with Belarus, and grant

[21] Rozporządzenie Prezydenta Rzeczypospolitej Polskiej w sprawie wprowadzenia stanu wyjątkowego na obszarze części województwa podlaskiego oraz części województwa lubelskiego [Regulation of the President of the Republic of Poland on the introduction of a state of emergency in part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship], Journal of Laws 2021, item 1612.

[22] Initially 90 days and then with one extension for a period no longer than 60 days (Art. 228.1). The state of emergency was indeed prolonged after 90 days for another 60 days, *see* Rozporządzenie Prezydenta Rzeczypospolitej Polskiej w sprawie przedłużenia stanu wyjątkowego na obszarze części województwa podlaskiego oraz części województwa lubelskiego [Regulation of the President of the Republic of Poland on the extension of the state of emergency in part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship], Journal of Laws 2021, item 1788.

[23] Ustawa o zmianie ustawy o ochronie granicy państwowej oraz niektórych innych ustaw [An act amending the act on the protection of the state border and some other acts], Journal of Laws 2021, item 2191.

[24] The law, and consequently the executive regulations introduced on the basis of the law, are violating the Constitution procedurally and materially (M. Górski, *Lawfulness of the introduction of a state of emergency and the limitations on civil rights under it, including restriction on movement,* in: W. Klaus (ed.), *supra* note 2.

[25] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji w sprawie wprowdzenia czasowego zakazu przebywania na określonym obszarze w strefie przygranicznej przyległej do granicy państwowej z Republiką Białorusi [Regulation of the Minister of the Interior and Administration on the introduction of a temporary ban on staying in a specific area in the border zone adjacent to the state border with the Republic of Belarus], Journal of Laws 2021, item 2193.

[26] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji w sprawie wprowadzenia czasowego zakazu przebywania na określonym obszarze w strefie przygranicznej przyległej do granicy państwowej z Republiką Białorusi [Regulation of the Minister of the Interior and Administration on the introduction of a temporary ban on staying in a specific area in the border zone adjacent to the state border with the Republic of Belarus], Journal of Laws 2022, item 488.

[27] *See also* W. Klaus, who shows that humanitarian help at the border does not meet the criteria of crimes provided for by Polish law. W. Klaus, *Criminalisation of solidarity. Whether activists who help forced migrants in the borderland can be penalised for their actions?* in: W. Klaus (ed.), *supra* note 2.

access to journalists and humanitarian workers to the border area ensuring that they can work freely and safely."[28]

3. GROUNDING PUSHBACKS IN POLISH LAW IN 2021

3.1. Executive regulation

The executive regulation, adopted on 21 August 2021, was the first attempt to ground pushbacks in domestic law in Poland. It is an amendment to an executive regulation from 13 March 2020, adopted within the response to the COVID-19 pandemic, and as such is supposed to be an interim measure. In this section, the original executive regulation will first be shortly described (3.1.1), as it drastically restricted the possibility to claim international protection, which is relevant also for the assessment of the pushback practices. Next the 2021 amendment specifically introducing pushbacks will be analyzed (3.1.2).

3.1.1. COVID-19 Executive Regulation (2020)

The original executive regulation from 2020 suspended and restricted border traffic at selected border crossing points to Russia, Belarus and Ukraine.[29] It included two annexes: one listing those border crossings where the crossing was suspended, and the other where the crossing was restricted. On those border crossings where the executive regulation restricted border traffic, the act only allowed selected categories of persons to cross. Initially this included Polish citizens, their spouses and children, foreigners holding a "Polish Card" (pol. *Karta Polaka*), members of diplomatic and consular missions and their families, foreigners with the right of permanent or temporary residence in Poland, as well as foreigners with the right to work in Poland.[30]

This list was subsequently extended to include additional categories of persons,[31] but asylum seekers were never included, meaning that they are not allowed to enter Poland through those border crossings. As the other border crossings from Russia, Belarus and Ukraine are suspended, this practically meant that the executive regulation made it nearly impossible for asylum seekers to enter Poland from those countries. Under the executive regulation the commanding officer of the Border Guards can allow asylum seekers to enter. However, according to Poland's domestic

[28] OHCHR, *Poland: Human rights defenders face threats and intimidation at Belarus border – UN experts*, 15 February 2022, available at: https://bit.ly/3PpeVBY (accessed 30 June 2022).

[29] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych [Regulation of the Minister of the Interior and Administration on the temporary suspension or restriction of border traffic at specific border crossing points], Journal of Laws 2020, item 435.

[30] *Ibidem*, para. 3.2

[31] Including, among others, drivers, students, researchers, citizens of Belarus and Ukraine.

law and international obligations, asylum seekers do not have to seek additional permits to ask for international protection. Consequently, these regulations are in violation of Poland's domestic law as well as its international obligations.

3.1.2. 2021 Amendment

In August 2021, in response to the increase of persons who irregularly crossed the border from Belarus, the Minister of Interior and Administration adopted an amendment to the 2020 executive regulation suspending and restricting border traffic. According to the amendment, persons not included in one of the categories (i.e. allowed to cross a border crossing on which traffic was restricted), and who have crossed the border are to be returned to the Polish border.[32] Importantly, the amendment not only concerns people at the suspended and restricted border crossing points, but also "beyond the territorial range of the border crossing."[33] Consequently, every person identified on the territory of Poland who does not fall into one of the categories and has crossed the border from Russia, Belarus or Ukraine after 20 August 2021 can be returned to the border on the basis of the amendment.

The amendment does not provide for any procedure by which the return to the border should take place: it only specifies that the person should be returned to the border. It requires no formal documentation concerning this return. The amendment does not even include information about where the return should take place, thus implicitly confirming the practice of returning persons outside of border crossings.

3.2. Parliamentary act

On 23 August 2021, just two days after the above-described amendment was adopted, the government submitted a draft of a parliamentary act which aimed at the same goal: to ground in domestic law the practice of returning persons who have crossed the border irregularly. The law entered into force on 25 October 2021.[34] In contrast to the one-sentence on the return contained in the executive regulation, the parliamentary act includes more details about the procedure.

According to the parliamentary act, when persons are apprehended immediately after crossing an external border in violation of the law, the commanding officer

[32] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych [Regulation of the Minister of Interior and Administration amending the ordinance on the temporary suspension or limitation of border traffic at certain border crossing points], Journal of Laws 2021, item 1536.

[33] *Ibidem*, para. 1: "In the case of discovery of the persons referred to in paragraph 1. 2a, at the border crossing point where the border traffic has been suspended or limited and beyond the territorial range of the border crossing point, such persons shall be returned to the state border line."

[34] Ustawa o zmianie ustawy o cudzoziemach oraz niektórych innych ustaw [Law amending the Law on foreigners and other laws], Journal of Laws 2021, item 1918.

of the Border Guard issues an order according to which the persons have to leave Poland. The order contains a prohibition to re-enter Poland and other Schengen area countries during a specified period (between 6 months and 3 years). It may be appealed to the Commander-in-Chief of the Border Guard, but this does not suspend its execution.

The parliamentary act is narrower than the executive regulation, which does not require apprehension "immediately after crossing" the border. At the same time however, it is much more general than the executive regulation, which was an amendment to the COVID-19 rules and as such is supposed to be an interim measure.

The parliamentary act also deals explicitly with asylum seekers, by allowing the border guards to disregard applications for international protection from people apprehended immediately after crossing an external border in breach of the law. That clearly violates Poland's international obligations.[35] The one exception with regard to asylum seekers in the parliamentary act concerns persons coming directly from the territory of a country where their life or freedom is threatened with persecution or the risk of serious harm. Additionally, they need to present credible reasons for their "illegal" entry to Poland and submit their asylum claims immediately after crossing the border. It is highly unlikely that asylum seekers would be able to meet these conditions.

3.3. The two frameworks in parallel

Consequently, two frameworks grounding pushbacks in domestic law exist in parallel. The interim one based on the COVID-19 regulation allows the return of anyone not fitting into any of the categories of persons authorized to enter into Poland who has crossed the border from Russia, Belarus or Ukraine after 20 August 2021. The second, based on the parliamentary act, allows the return of persons apprehended immediately after crossing the border irregularly. The pushbacks within the second framework are performed on the basis of an order and result in a prohibition to re-enter the Schengen area – while pushbacks within the first one do not.

Such a state of affairs gives the border guards flexibility as to which framework to use with regard to particular pushbacks. As the interim framework does not require the officers to issue an order, it could be their preferred framework. While it cannot be stated with certainty which of these two regulations is applied more often, it was the interim framework that led to the first domestic judgment discussed in the following section.

[35] *See more* in section 5. See also critique of the act by the Polish Ombudsman [Rzecznik Praw Obywatelskich], 3.10.2021, available at: https://bit.ly/3LRijDj; several Polish NGOs: Fundacja Ocalenie, 28 September 2021, available at: https://bit.ly/39MByzP; Helsińska Fundacja Praw Człowieka, 6 September 2021, available at: https://bit.ly/3kS8KYV, as well as the UNHCR, 16 September 2021, available at: https://bit.ly/3wdaQIe (all accessed 30 June 2022).

4. DOMESTIC JUDGMENT

In March 2022, a Polish regional court in Hajnówek issued a ruling in a case concerning a pushback carried out on the basis of the executive regulation.[36] The case concerned three Afghan nationals, who irregularly crossed the border from Belarus to Poland on 29 August 2021, i.e. eight days after the executive regulation was adopted. According to the facts reiterated in the judgment, after crossing the border they met with a person with whom they signed a power of attorney to represent them in proceedings for international protection. Subsequently, the Border Guards were called and informed about their wish to apply for international protection – this was recorded on a phone. The three Afghan nationals were then brought to a border guard post, which their representative was not allowed to enter. After a couple of hours spent in the facility, they were driven into the forest to the border with Belarus. No official documentation from the incident was drawn up.

A complaint was brought against the Border Guard concerning the deprivation of liberty. The commanding officer of the local Border Guard responded that the incident was not a deprivation of liberty, but a "temporary restriction of freedom of movement" in the course of a return procedure as foreseen in the executive regulation. It was argued that the Afghan nationals were transferred and held at the facility to rest and be fed. According to the response, there was no information on their claim for international protection.

The court found that the facts in the case constituted a deprivation of liberty, which was not conducted correctly inasmuch as it was not documented. It further stated that driving people in the middle in the night deep into a restricted nature reserve without appropriate equipment was deeply inhumane and in violation of the law. With respect to the law assessed in this article, importantly the court also issued explicit comments on the executive regulation. While the court acknowledged that the regulation does not specify how the procedure for return to the state border should take place, it stated that this is irrelevant, as the executive regulation was adopted in excess of the executive's statutory authorization. The court reiterated that the Minister of Interior and Administration was by law authorized only to suspend or restrict the crossing at border crossings – not at other places. Furthermore, the executive regulation cannot restrict the right to stay in Poland while claims for international protection are being processed. In consequence, the court found the pushbacks to be unreasonable, illegal, and incorrect in light of the applicable law.

[36] Wyrok Sądu Rejonowego w Bielsku Podlaskim VII Zamiejscowy Wydział Karny w Hajnówce [Judgment of the Regional Court in Bielsko Podlaskie VII Penal Branch Division in Hajnówka], 28 March 2022, VII Kp 203/21.

5. COMPATIBILITY OF THE FRAMEWORKS GROUNDING PUSHBACKS IN POLISH LAW WITH DOMESTIC LAW AND INTERNATIONAL LAW

5.1. Domestic law

The above judgment does not leave any doubts that the executive regulation – and consequently pushbacks conducted on its basis – are in violation of Polish law. While it dealt specifically with a situation in which there was a deprivation of liberty, the court's findings also hold true for pushbacks when no deprivation of liberty takes place.[37] Firstly, the court found that the executive regulation was adopted in excess of the executive's statutory authorization. Secondly, it found that the executive regulation cannot limit the stay in Poland for persons submitting claims for international protection. The second finding is also relevant with respect to pushbacks conducted on the basis of the parliamentary act.

As mentioned above, the parliamentary act explicitly allows for disregarding an application for international protection from people apprehended immediately after crossing an external border in breach of the law. Just as was the case with the executive regulation, so too the parliamentary act cannot restrict the stay in Poland while claims for international protection are being processed.

The right to asylum is enshrined in the Polish Constitution, which specifies that foreigners may be granted refugee status in accordance with international agreements to which Poland is a party.[38] The Law on Foreigners states that the application for international protection is submitted through commanding officers of the Border Guards.[39] Consequently, every person that submits an application for international protection to a Border Guards should be allowed to enter Poland and remain on its territory until the application is processed.[40]

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[37] For example if a person would be "pushed back" to Belarus while physically at the border.

[38] Konstytucja Rzeczpospolitej Polskiej [Constitution of the Republic of Poland], Journal of Laws 1997, No. 78, item 483, Art. 56.

[39] Ustawa o cudzoziemach [Law on foreigners], Journal of Laws 2003, No. 128, item 1176, Art. 24. *See also* J. Chlebny (ed.), *Prawo o cudzoziemcach. Komentarz* [Law on foreigners. Commentary], CH Beck, Warszawa: 2020.

[40] M Półtorak, *Can an application for international protection be refused and when is it considered to be submitted?*, in: W. Klaus (ed.), *supra* note 2. *See also* P. Dąbrowski, *Niedopuszczalność odmowy wjazdu cudzoziemca na terytorium RP bez wyjaśnienia, czy cudzoziemiec deklaruje wolę ubiegania się o ochronę międzynarodową. Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 20 września 2018 r., II OSK 1025/18* [Inadmissibility of refusing entry of a foreigner to the territory of the Republic of Poland without clarifying whether the foreigner declares the will to apply for international protection. Gloss to the judgment of the Supreme Administrative Court of September 20, 2018, II OSK 1025/18], 3 Orzecznictwo Sądów Polskich 150 (2019).

While the Hajnówek judgment[41] did not deal with the consequences of irregular crossings of borders as foreseen in the Polish Penal Code and the Petty Offences Code, it is worth mentioning them in this context. Crossing the Polish border irregularly constitutes a violation of Art. 49a of the Petty Offences Code[42] and may also constitute a violation of Art. 264 of the Penal Code[43] (crossing borders in violation of law, using violence, threats, deception or in cooperation with other persons). Persons seeking international protection are exempted from those rules, as Poland is party to the Convention Relating to the Status of Refugees[44] (Art. 31.1). Thus, according to Polish law when an irregular crossing is discovered, state authorities are under an obligation to initiate proceedings under the Petty Offences Code (and possibly the Polish Penal Code), unless the persons are claiming asylum. Consequently, by returning persons who have crossed irregularly without initiating either criminal or asylum procedures, both the executive regulation and the parliamentary act are inconsistent with Polish law.

5.2. International refugee law

Poland has been a party to the 1951 Convention Relating to the Status of Refugees (Refugee Convention) since 1991. According to the Refugee Convention, all state-parties are obliged to review applications for international protection. The Convention does not provide for the possibility of its suspension. Provisional measures can be applied only in time of war or other grave and extraordinary circumstances with respect to a particular person before declaring that person a refugee (Art. 9). Consequently, these measures have to be decided on a case-by-case basis. A general ban on submitting applications for international protection with regard to a group of persons – as is foreseen in the parliamentary act – is thus in violation of the Refugee Convention.

The Refugee Convention also addresses the specific situation of people who have entered states irregularly. Art. 31 recognizes that asylum seekers are not required to enter states in a regular manner, as long as they can show "good cause" for entering without the necessary documentation.[45] It foresees that states should

[41] *See* section 4.

[42] Kodeks wykroczeń [Petty Offences Code], Journal of Laws 1971, No. 12, item 114.

[43] Kodeks karny [Penal Code], Journal of Laws 1997, No. 88, item 553.

[44] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. On how current migration control practices have limited the possibility to seek asylum in the globalized world, *see* T. Gammeltoft-Hansen, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, Cambridge: 2013.

[45] G.S. Goodwin-Gill, J. McAdam, *The Refugee in International Law, Third Edition,* Oxford University Press, Oxford: 2007, pp 384-385. Importantly however, Goodwin-Gill and McAdam also recognize that this has been differently approached by states in their domestic legislation, citing in particular Australian law. For more on Art. 31 *see also* G.S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in: E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge: 2003, p. 187.

not impose penalties upon persons who come directly from a territory where their life or freedom was threatened, as long as they present themselves without delay to the authorities and show good cause for the irregular entry. As highlighted by Goodwin-Gill and McAdam, imposing penalties without an individual assessment of the claims of an asylum seeker is not only a breach of Art. 31, but is also likely to violate the obligations to ensure and protect the human rights of everyone within its jurisdiction.[46] The benefits of the non-penalization is restricted to refuges "coming directly" from the said territory.[47] However, as explained in Zimmermans's commentary to Art. 31, the only category of refugees whose behaviour could be rationally targeted and penalized are those that have already been accorded refugee status and residence in a transit state to which they can safely return.[48]

The wording of Art. 31 is similar to the one employed in the parliamentary act with regard to persons seeking international protection. However, the rationale for using this in both legal acts is substantially different. Art. 31 of the Refugee Convention does not concern the filing of asylum applications – it concerns the non-penalization of irregular entry. The analysed parliamentary act in turn deals with returning persons to the border without assessing their claims of international protection. Not accepting an asylum application and/or not allowing one to be processed is much more than the penalization of the irregular entry.

If however we were to consider the application of Art. 31 in the given context, it would require scrutinizing the circumstances of the persons who have crossed from Belarus, while an asylum application concerns a threat to their life and freedom in other countries (for example Syria or Afghanistan). In such a case the current situation in Belarus and how it impacts their life and freedom would also need to be considered. The ECtHR did not consider Belarus to be a safe third country before August 2021.[49] This assessment has further deteriorated due to the conduct of Belarussian authorities since then, as they have been widely reported to have used physical violence to force people to cross back into Poland. The Council of Europe Commissioner for Human Rights stated in January 2022 that expelling migrants and asylum seekers to Belarus is likely to put them at risk of torture or inhuman or degrading treatment at the hands of Belarussian state agents. She added that

[46] Goodwin-Gill, McAdam, *supra* note 43, p. 267.

[47] *Ibidem*, pp. 149-150.

[48] G. Noll, *Part Six Administrative Measures, Article 31*, in: A. Zimmermann, F. Machts, J. Dörschner (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Cambridge University Press, Cambridge: 2011, pp. 1256-1257. *See also* Hathaway, who argues that "all refugees whose illegal entry or presence is due to the risk of being persecuted in a country of asylum are today entitled to exemption from immigration penalties" (J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge: 2004, p. 401).

[49] ECtHR, *M.K. and Others v. Poland* (App. Nos. 40503/17, 42902/17 and 43643/17), 23 July 2020, paras. 177-185; *D.A. and Others v. Poland* (App. No. 51246/17), 8 July 2021, para. 64.

inasmuch as this situation is well-documented, it is, or should be, known to the Polish authorities.[50]

Furthermore, the Refugee Convention contains a prohibition of expulsion or return to the frontiers of territories where the migrants' life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion (Art. 33). As pushback procedures do not assess the personal circumstances of asylum seekers, the procedure itself contravenes the principle of non-refoulement. Consequently the pushbacks carried out on the basis of the parliamentary act and the executive regulation are both in violation of the principle of non-refoulement and of the Refugee Convention.

As the refugee regime in Europe is largely driven by the legal regimes established within the EU and the Council of Europe,[51] it is important to scrutinize the parliamentary act and the executive regulation in the light of these two legal regimes as well.

5.3. EU law

The asylum procedures within the EU were harmonized in 2013 through the so-called Asylum Procedures Directive.[52] According to the Directive, persons applying for international protection have a right to remain in the member states for the entire procedure.[53] Member states can accelerate the examination procedure of claims,[54] but they cannot simply disregard asylum claims. In light of the Asylum Procedures Directive, when a foreigner submits an application for international protection, the application must be processed and the person is allowed to stay in the EU throughout the entire procedure. Pushbacks conducted on the basis of the

[50] Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights *R.A. and Others v. Poland* (App. No. 42120/21), available at: https://bit.ly/3MdMXXv (accessed 30 June 2022), para. 17. *See also* M. Górski, *Is deportation to Belarus legal, or can Belarus be considered a safe third country?* in: W. Klaus (ed.), *supra* note 2.

[51] E. Tsourdi, *Regional Refugee Regimes*, in: C. Costello, M. Foster, J. McAdam (eds.), *The Oxford Handbook of International Refugee Law*, Oxford University Press, Oxford: 2021. See in particular the aspects in which EU law diverges from the Refugee Convention (pp. 357-358). On the interplay between the EU and ECtHR law with regard to asylum seekers, *see also* J. De Coninck, *The Impact of ECtHR and CJEU Judgments on the Rights of Asylum Seekers in the European Union: Adversaries or Allies in Asylum*, European Yearbook on Human Rights 343 (2018).

[52] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60. For more on the Asylum Procedures Directive in this context *see* G. Cornelisse, *Territory, Procedures and Rights: Border Procedures in European Asylum Law*, 35(1) Refugee Survey Quarterly 74 (2016), in particular section 2 on: "EU Legal Framework: Can Member States Deny Asylum Seekers Entry". *See also* Resolution 2299(2019) of the Parliamentary Assembly of the Council of Europe on pushbacks, which calls on EU member states to refrain from pushbacks and states that in line with obligations under the Asylum Procedures Directive all persons arriving at the border have to be informed about international protection and ensured access to legal assistance and representation.

[53] Art. 9 of Directive 2013/32/EU.

[54] *Ibidem*, Art. 31(8).

Polish parliamentary act and the executive regulation with regard to persons who expressed the intention of submitting[55] a claim for international protection were thus in violation of the Asylum Procedures Directive.[56]

However, it is not only the Asylum Procedures Directive which is violated through pushbacks carried out on the basis of the parliamentary act and the executive regulation. The so-called Return Directive[57] regulates the procedures that are initiated with regard to persons who have already entered the territory of an EU Member State, including when they have crossed irregularly. While Member States have the possibility not to apply the Return Directive to "refusal of entry decisions",[58] refusals of entry concern those who have not yet crossed into EU Member States territory.[59] As the pushbacks initiated on the basis of the parliamentary act or the executive regulation applied to persons who are clearly already in Poland, these do not constitute a "refusal of entry" under EU law. Even if they would, the Return Directive specifies that a refusal of entry is without prejudice to special provisions concerning the right to asylum.[60]

According to the Return Directive, in order to return a person who stays illegally on an EU Member States territory, the Member State shall issue a return decision.[61] Inasmuch as the Polish executive regulation does not provide for such a documentation, this has to be considered as a violation of the Return Directive.[62] In particular, the Return Directive foresees procedural safeguards for a return decision, including the form in which it should be issued and remedies.[63] Furthermore, the Return Directive explicitly states that it shall be without prejudice to the asylum regulations.[64] This is in contrast to the Polish parliamentary act, which explicitly allows for disregarding claims for international protection.

Last but not least, neither one of the two acts specify where the return of the foreigner should take place. In practice, the pushbacks in Poland consisted of forc-

[55] Expressing the intention to apply for international protection is the first step of submitting one, which should unconditionally trigger subsequent steps of the procedure. *See ibidem*, Art. 6.

[56] While this has not been adopted yet, a law on "expedited proceedings" has been debated in Poland. On the various drafts, *see* W. Klaus, *Between closing borders to refugees and welcoming Ukrainian workers. Polish migration law at the crossroads*, in: E.M. Goździak, I. Main, B. Suter (eds.), *Europe and the Refugee Response. A Crisis of Value?,* Routledge, London: 2020, pp. 82-84.

[57] Directive 2008/115/CE of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98.

[58] *Ibidem*, Art. 2.2.

[59] Regulation 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, Art. 14.

[60] *Ibidem*, Art. 14.1.

[61] Directive 2008/115/CE, Art. 6.

[62] Similarly, refusals of entry decisions are also given on a standard form which is handed to the third-country national (Schengen Borders Code, Art. 14).

[63] Directive 2008/115/CE, Arts. 12-14.

[64] *Ibidem*, Art. 4.2

ing foreigners to cross the border in an unauthorised place. This in itself can be considered a violation of the Return Directive and the Schengen Borders Code.

5.4. The Council of Europe system

As mentioned above, the Council of Europe system is the second system that drives the refugee regime in Europe. Within this system the ECtHR plays a particularly important role in establishing standards.[65] While the ECHR and its additional protocols do not contain any explicit obligation to receive and examine applications for international protection, they do contain the prohibition of collective expulsions of aliens (Art. 4 of the Protocol 4), which has been applied in pushback cases.[66] The practice has also been examined by the ECtHR in the context of the violation of Art. 3.[67] In connection with the failure to process applications for international protection submitted at the Polish border with Belarus, the ECtHR has repeatedly found a violation of both Art. 3 ECHR and Art. 4 of the Protocol 4.[68]

In cases in which applicants have presented themselves at the border seeking international protection, but were removed in a summary manner to a third country (without an assessment of the risk of torture or inhuman or degrading treatment upon return), the ECtHR applies Art. 3 ECHR.[69] The ECtHR has ruled that states cannot deny access to their territory to persons who come to a border checkpoint and allege that they may be subjected to ill-treatment if they remain on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk. Importantly, "taking into account the absolute nature of the right guaranteed under Article 3, the scope of that obligation was not dependent on whether the applicants had been carrying documents authorising them to cross the (...) border or whether they had been legally admitted to (...) territory on other grounds."[70] This should equally apply to the post-August-2021 pushbacks.[71]

In the 2020 judgment *N.D. and N.T. v. Spain* the ECtHR's Grand Chamber introduced an exception to the application of the prohibition of mass expulsions (Art. 4 of the Protocol 4). It applies to situations wherein people "cross a land border in an unauthorized manner, deliberately take advantage of their large numbers

[65] For a broader critique on the ECtHR approach to migration and refugee protection, see M.D. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press, Oxford: 2015; C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, Oxford: 2016.

[66] Art. 4 of Protocol No. 4 to the European Convention on Human Rights. Hakiki, *supra* note 6.

[67] *Ilias and Ahmed v. Hungary*.

[68] *M.K. and Others v. Poland*; *D.A. and Others v. Poland*.

[69] *Ilias and Ahmed v. Hungary*.

[70] *M.K. and Others v. Poland*, paras. 178-179.

[71] This concerns the procedural limb of Art. 3, which is very often raised in pushback cases. However, in some cases the substantive limb of Art. 3 has also been raised, for example because of the treatment of people being pushed back by border guards. This could also be the case in applications concerning Poland's post-August-2021 pushbacks.

and use force."[72] When assessing such situation, the Court analyzes whether the state provided genuine and effective access to means of legal entry, in particular border procedures. If the state provided such means, the Court considers whether the applicant had cogent reasons not to make use of them and whether they were based on objective facts for which the state was responsible.[73] In *N.D. and N.T. v. Spain* the ECtHR found that the applicants had access to means of legal entry and did not have cogent reasons for not making use of them.[74]

In assessing this exception in subsequent applications, the ECtHR clearly distinguished those cases from *N.D. and N.T. v. Spain* by highlighting that the applicants' situation "cannot be attributed to their own conduct."[75] In other cases, the ECtHR pointed to the fact that the applicants were not storming the border *en masse* using force.[76] Similarly, the pushbacks in Poland did not concern such situations. Firstly, the crossings did not take place with the use of force, as people crossed the border in unmarked places.[77] Secondly, this was not done in "large numbers". While it is not entirely clear what reaches the threshold of "large numbers", the Polish-Belarusian border has been predominantly crossed by groups consisting of a dozen or so and up to several dozen persons,[78] which is very unlikely to be found be a "large number" (in *N.D. and N.T. v. Spain* the group consisted of 600 persons[79]). Consequently, this aspect should not be relevant for the pushback cases in Poland.

If the ECtHR were however to still examine whether the people who have crossed the border irregularly circumvented effective procedures for legal entry,[80] it would have to consider whether such procedures were available. As mentioned

[72] ECtHR, *N.D. and N.T. v. Spain* (App. Nos. 8675/15 and 8697/15), 13 February 2020, para. 201.

[73] *Ibidem*, paras. 206-232.

[74] *Ibidem*, para. 201. For a critique of the judgment, see for example Hakiki, *supra* note 6; M. Paz, *The Legal Reconstruction of Walls: N.D. & N.T. v. Spain 2017, 2020*, 22 Legislation and Public Policy 693 (2020); A. Sardo, *Border Walls, Pushbacks, and the Prohibition of Collective Expulsions: The Case of N.D. and N.T. v. Spain*, 23(3) European Journal of Migration and Law 308 (2021).

[75] ECtHR, *A.I. and Others v. Poland* (App. No. 39028/17), 30 June 2022, para. 55; *A.B. and Others v. Poland* (App. No. 42907/17), 30 June 2022, para. 52. Those two judgments are particularly interesting, as they apply the principles established in *N.D. and N.T.* for the first time to a case brought against Poland. However, it concerns applications from peoples whose asylum applications were refused by border guards at official crossings, so the factual circumstances are different to what the ECtHR will have to decide in post-August-2021 pushback cases.

[76] ECtHR, *Shahzad v. Hungary* (App. No. 12625/17), 8 July 2021, para. 61.

[77] In a recent case the ECtHR had no doubt about applying the *N.D. and N.T. v. Spain* exception to a situation in which there was clearly no force applied to cross the border. Differently than the pushbacks in Poland, the situation however concerned a crossing of a land border en masse, *see* ECtHR, *A.A. and Others v. North Macedonia* (App. No. 55798/16), 5 April 2022, para. 114. Indeed, the ECtHR highlighted that the applicants were "taking advantage of their large numbers" (para. 115).

[78] Grupa Granica, *supra* note 17.

[79] *N.D. and N.T. v. Spain*, para. 24.

[80] As it did in other cases; see for example *Shahzad v. Hungary*, paras. 61-65 and ECtHR, *M.H. and Others v. Croatia* (App. Nos. 15670/18 and 43115/18), 18 November 2021, paras. 295-301.

in the sections above, the COVID-19 regulations suspended and restricted border traffic at selected border crossing points to Russia, Belarus and Ukraine. This made it virtually impossible for people wishing to submit claims for international protection to cross these border crossings. While both under the parliamentary act and executive regulation the Border Guards are allowed to make an exception and not return a person that wishes to lodge a claim for international protection, such extraordinary measures can hardly be considered to constitute an effective procedure.

The *N.D. and N.T. v. Spain* exception was subsequently widened in *A.A. and Others v. North Macedonia*. Leaving aside the critique of that judgment, which has excessively broadened the exception to the prohibition of collective expulsions[81], it is worthwhile to distinguish the situation in *A.A. and Others v. North Macedonia* and the post-August-2021 pushbacks in Poland. In *A.A. and Others v. North Macedonia* the ECtHR pointed out that states may refuse to grant access to their territory to those who have failed to seek asylum at other crossings at a different location, especially "by taking advantage of their large numbers."[82] As explained above with regard to the situation in Poland there were no effective ways to apply for international protection at other places. Also, the persons were clearly not taking advantage of their large numbers. Consequently, *A.A. and Others v. North Macedonia* should not influence the assessment of the pushbacks in Poland.

CONCLUSIONS

The Polish authorities responded with force to the humanitarian crisis caused by the Belarusian authorities, who facilitated the arrival of many persons crossing the border irregularly. It introduced a number of legal and factual solutions, many of which violated domestic and international law.[83] One of the measures undertaken consisted of pushbacks. i.e. the practice of returning people to the border without assessing their individual situations. Those actions have been grounded in Polish domestic law, first through an executive regulation and then through a parliamentary act. While containing different provisions, they are in force in parallel, thus offering border guards flexibility as to which framework to use with regard to a given pushback.

This article has assessed these two legal frameworks and demonstrated that they are in violation of law. Starting with a domestic judgment from March 2022, the

[81] D. Schmalz, *Enlarging the Hole in the Fence of Migrants' Rights. A.A. and others v. North Macedonia*, Verfassungsblog, 6 April 2022, available at: https://bit.ly/3wdsQ6o; V. Wriedt, *Expanding exceptions? AA and Others v North Macedonia, Systemic Pushbacks and the Fiction of Legal Pathways*, EU Migration Law Blog, 7 June 2022, available at: https://bit.ly/3nEPqQl (both accessed 30 June 2022).

[82] *A.A. and Others v. North Macedonia*, para. 115.

[83] *See* W. Klaus (ed.), *supra* note 2.

article shows that the executive regulation – and consequently pushbacks conducted on its basis – are in violation of Polish law. Firstly, the executive regulation was adopted in excess of the executive's statutory authorization. Secondly, the stay in Poland for persons submitting claims for international protection cannot be limited. This explicitly concerns the parliamentary act, which allows for disregarding applications for international protection from people apprehended immediately after crossing an external border in breach of the law. Consequently, under Polish law every person that submits an application for international protection to a Border Guard should be allowed to enter Poland and remain on its territory until the application is processed; which is not the case under the executive regulation.

The article has further argued that the two frameworks grounding pushbacks in domestic law are in violation of international refugee law, specifically the Refugee Convention, to which Poland has been a party since 1991. Importantly, the Convention also protects the rights of persons who have crossed irregularly and issue their wish to submit a claim for international protection.

Furthermore, the two frameworks violate both the EU asylum Procedures Directive and the Return Directive. According to the Procedures Directive , persons applying for international protection have a right to remain in the Member States for the entire procedure. The Return Directive provides clear safeguards with regard to all persons who are returned from the EU – not only those submitting claims for international protection. The procedures for return under both of the Polish framework regulations do not meet the safeguards provided for in the Return Directive, including the documentation of the process.

Lastly, the article has examined the ECtHR case law to show that the pushbacks under the two Polish framework regulations were in violation of the ECHR. It assessed the Polish practices in the light of two recent judgments – *N.D. and N.T. v. Spain* (2020) and *A.A. and Others v. North Macedonia* (2022) – both of which have introduced broad exceptions to the prohibition of mass expulsion. It distinguished the cases and thus argues that the exceptions would not apply to the pushbacks conducted under the two frameworks in Poland, both because of the laws – which made it impossible to apply for international protection at the border – and the situation on the ground, as the people were not crossing the borders en masse and with force.