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Legalisation of pushback procedure in the wake of the Belarus-European Union border crisis

Abstract: The principle of non-refoulement has been a part of international law for decades. Recent states' practices have come to undermine this rule by engaging in pushback in the face of the migrant crisis. The author examines the legality of the pushback procedure as a part of the self-defence principle or as a new customary international law rule, especially if a state is under a hybrid attack as was in the case of the EU-Belarus border crisis. This article aims to assess the law and policy regarding the pushback procedure in light of a new era of hybrid warfare.

Key words: pushback, international law, refugee, human migration, non-refoulement

Introduction

The second decade and the beginning of the third decade of the twenty-first century have seen an increased movement of refugees and migrants primarily from the Middle East and Africa to Europe. The first crisis has been in the Mediterranean region and since 2015 more than one million refugees have tried to get to the member states of the European Union (EU) and request asylum there. Some migrants did not try to escape the conflict and were labelled 'economic migrants' (Fasanotti, 2022; OECD, 2015, pp. 1–5). The second migrant crisis started in 2021 at the EU external border with Belarus. The Lukashenko regime, as an act of vengeance for the EU's 'help' to Belarusian opposition a year earlier, decided to facilitate migrants from the Middle East and Africa in entering EU territory from Belarus, mainly by illegal measures. The EU called the Lukashenko regime's policy an "instrumentalization of migrants for political purposes" (Adams, 2021; Dymer, 2022). The scale of migration has overwhelmed Europe. States found themselves inadequate to cope with the migrant crisis. Many of them resolved to pushback procedure as a policy tool to deal with the migrants and refugees. From a legal perspective,

aliens have the right to request asylum and not to be refouled (expelled) to the country they come from. From the government's perspective, states must protect their country and citizens. They have to ensure security and protect their borders. Recent events have clearly shown that the international legal system regarding refugees and migrants may be viewed as outdated for the twenty-first-century problem of instrumentalised migration. The flow of illegal migrants to Europe is increasing and the future paints a grim picture (Frontex, 2022).

The author's aim is to examine the definition of the pushback procedure and its legality under the current legal framework as well as European and national court rulings. Furthermore, the pushback procedure is evaluated as a part of the self-defence principle or as a new customary international law rule, especially in cases where a state is under a hybrid attack. The author also analyses recent pushback practices primarily by European Union member states to draw a bigger picture regarding the legality of pushback procedure. This article argues that in light of a new era of unconventional warfare, there is a need to reconsider the pushback procedure and recognise its legality under specific circumstances, such as instrumentalised migration. The central hypothesis of this paper is that, within the evolving geopolitical framework, the pushback procedure can be understood as a legal tool for addressing hybrid attacks.

The definition of pushback and its legality

Pushback is a state's formal act or practice that refuses refugees or migrants to enter its territory, or it is a collective forced expulsion of migrants or refugees by which it pushes them back over a border after they cross it. There is no consideration of individual circumstances and no possibility of applying for asylum or international protection (Stefan, Cortinovis, 2021, pp. 180–182; Šalamon, 2020, pp. 144–145). The non-refoulement principle is the most fundamental rule that the pushback procedure violates. This rule prohibits expulsion, extradition or a return of a refugee to the state where there is a belief that this person's freedom or life could be threatened unless this person is a threat to national security or committed a serious crime that constitutes a danger to the country (Goodwin-Gill, 2008; Mathew, 2021, pp. 899–900). Pushback procedure breaches article 33 of the 1951 Refugee Convention, article 3 of the European Convention of Human Rights, article 4 of Protocol no. 4 to the Convention, article 19

of the Charter of Fundamental Rights of the EU and articles 3 and 4 of Schengen Borders Code (European Center for Constitutional and Human Rights, 2021; Baranowska, 2022b, p. 10). The European Court of Human Rights (ECtHR), to prevent violation of the Convention, requires a state to assess each time individual situation of a refugee and his or her need for protection and whether it is safe for him or her to return to the country of origin or the country he or she entered the border from (Special Representative of Secretary General on Migration and Refugees, 2021, pp. 1–2).

States have a sovereign right to control and protect their borders, but their entry policies must be applied following international law (Luyten, 2022, pp. 2–3). Every human has the right to asylum (art. 14 of the Universal Declaration of Human Rights). Under some circumstances, there is a possibility to take provisional measures to check the refugee status in the case of a particular person. EU directive 2013/32/UE states that refugees applying for international protection shall remain within the territory of an EU member state pending the examination of the application and be allowed to enter the territory of a member state if he or she wants (Baranowska, 2022a, pp. 8–9).

Court rulings regarding pushback in Europe

In various judgments, the ECtHR has condemned pushback practices as collective expulsions and ruled them unlawful. In the case of Ilias and Ahmed v. Hungary or Shahzad v. Hungary the Strasbourg Court ruled that Hungary violated the law because of its systematic policy of pushback practice of migrants to the Serbian border (Verseck, 2021). In other cases, ECtHR found a state in violation of the non-refoulement, e.g.: M. H. and others v. Croatia, Hirsi Jamaa and Others v. Italy (pushback at the high seas), D.A. and Others v. Poland, M.K. and others v. Poland and Safi and others v. Greece (Luyten, 2022, pp. 2–3). In the case of N.D. and N.T. v. Spain, the Strasbourg court did not find Spain in violation of Article 13 of the Convention and of Article 4 of Protocol No. 4 to the Convention, because Spain made it possible for applicants to seek admission to Spanish territory and the applicants failed to use the legal framework. They instead chose to illegally cross the border. However, the court upheld that the state shall protect its border "in a manner which complies with the Convention guarantees, and in particular with the obligation

of non-refoulement" (EDAL, 2020). There are also domestic (national) court rulings against pushback procedure. For example, the Voivodeship Administrative Court in Bialystok ruled that the pushback procedure at the Polish-Belarusian border against applicants was unlawful because it violated not only international and European law but also art. 56 of the Polish Constitution (the right to asylum) and Polish statutes (Biuletyn Informacji Publicznej RPO, 2022).

EU and national policies towards pushback

The Polish Border Guard requires refugees to come directly from a territory where their life was threatened if they want to apply for international protection (Perkowska, 2022, pp. 34–35). Poland amended its statutes in 2021. The new law allows Polish authorities to expel refugees who illegally enter the territory of Poland. The Head of the Office for Foreigners may leave the application for international protection without examination if a refugee is caught immediately after illegally crossing the border (Baranowska, 2022b, pp. 9–10). Both Lithuania and Latvia have engaged in pushback procedures. They do not want to back down until the European law is amended (Andrukaitytė, Stankevičius, 2022; Amnesty International UK, 2022). The Lithuanian government approved a proposal to formalise the policy of turning away irregular migrants at the border (Andrukaitytė, Masiokaitė-Liubinienė, 2023). Greece has conducted multiple pushbacks against people in the Aegean Sea. The Greek government's decision to temporarily suspend the right to seek asylum between March and May 2020 was considered illegal (Legal Centre Lesvos, 2021, p. 43). Great Britain's Nationality and Borders Act is set to punish people who arrive in Great Britain irregularly by pushing back those seeking asylum in the UK if they have passed through a 'safe' country (UNHCR, 2023).

In December 2021 Commission proposed temporary legal and practical measures to address the emergency at the EU's external border with Belarus. The goal is to assist Latvia, Lithuania and Poland in addressing the crisis at the EU's external border with Belarus (European Commission, 2021). Member States are to be provided with new legal instruments to swiftly manage the migration situation at the EU eastern border, including extending the registration period for asylum and the "possibility to apply the accelerated procedure at the border for all applications" (Ra-

sche, 2022, pp. 4–6). The EU's deals with third countries to stop illegal migrants and its silence on pushback practices might seem as a change in policy to allow this procedure.

Legalisation of pushback?

The amendment to the Polish law allowed authorities under certain circumstances to expel refugees (Pawlak, Wlodarczak-Semczuk, 2021). The Polish government justified the draft by stating that its goal is to adjust the national law to the current migration crisis on the EU-Belarus border. The main threats were the growing appearance of human trafficking and abuse of the asylum procedure by economic migrants. In the government's view, these new measures enhanced homeland security and public safety. The Constitution is the supreme law in Poland (art. 8). Poland safeguards the independence and integrity of its territory (art. 5). Constitutional freedoms and rights may be limited by statutes when it is necessary to ensure the protection of its security or public order (Konstytucja Rzeczypospolitej Polskiej, 1997). The behaviour of Belarus was not under international law. For example, the Preamble to the United Nations Charter expresses that states are "to practice tolerance and live together in concluding one another as good neighbours", and in the article 1 and 2 of the Charter, there are expressed rules and laws that ensure that states shall maintain peace and security, maintain friendly relations and shall not "threat or use of force against the territorial integrity or political independence of any state".[1]

There is a valid argument that an uncontrolled 'wave' of migrants could threaten the state's security. In the 'flood' of migrants there might be terrorists who only pose as refugees. The European Commission recognised the Belarusian government's acts as a hybrid threat. The EU defined it as a state-sponsored instrumentalization of people for political ends committed by a state or non-state actor. "All these forms of threats have the intention of destabilising or undermining society and key institutions and have the effect of putting citizens at risk. Countering hybrid threats is one of the most complex challenges the European Union and its Member States face" (European Commission, Joints Communication to

[1] United Nations, Charter of the United Nations, 1 UNTS XVI, 24 October 1945, https://www.refworld.org/legal/constinstr/un/1945/en/27654, 8 July 2024.

the European Parliament, The Council, et al., 2021). In M.H. and others v. Croatia, the Croatian government raised the fact that migrants "had had genuine and effective access to an official border-crossing point, which they had failed to use". ECtHR noted in the case of Hirsi Jamaa and others v. Italy that the Italian interior minister had said: "pushback policy was very effective in combating illegal immigration" and it "discouraged criminal gangs involved in people smuggling and trafficking, helped save lives at sea and substantially reduced landing of irregular migrants along the Italian coast".

Pushback procedure as a state's self-defence policy might be in authorities' view justified and seen as the only legitimate instrument to combat the hybrid attack. No change in international law could lead to further erosion of refugee law. States might start leaving international conventions or use any instruments to protect their borders. States could always try to amend the 1951 Refugee Convention by adding a pushback provision or concluding a new refugee treaty. As already mentioned, some EU member countries proposed new amendments to EU migration law that would legalise pushback procedure if a state declared an extreme situation (Gotev, Kaczyński, Michalopoulos, 2021). In axiology conflict, the state's right to self-defence (including against hybrid attack) seems to be of greater significance than the principle of non-refoulement. The current world does not resemble that from the 1950s. There are more hybrid (unconventional) attacks than open-armed, and more are expected to occur (Hofman, 2007, pp. 55–59).

States' practice

EU Member States have for years prevented displaced individuals from entering their territory and forcibly returned them to neighbouring or third countries, in violation of the right to seek asylum and the principle of non-refoulement. Numerous states see the uncontrolled flow of migrants as a threat to their security. Italy, Malta, Greece and Spain outsourced to non-EU states and enlisted private vessels to push back migrants at sea and push back passengers into detention centres. There were also numerous reports of ill-treatment of migrants and committed pushback by Member States at EU borders, e.g., in the Aegean Sea, at the Morocco-Spain border, Hungary-Serbia border, Romania-Serbia border, Croatia-Bosnia border, Belarus-Poland border, and Belarus-Lithuania

border. A 2020 report conducted by Refugee Rights Europe and the End Pushbacks Partnership highlighted the pushback practice at the external borders of Bulgaria, Croatia, Greece, Hungary, Romania, Poland, Slovakia and Spain (Refugee Rights Europe, 2020, pp. 12–71). Other countries with alleged pushback practices are Cyprus, France, Estonia, Malta, Macedonia and Slovenia, while the Frontex agency was accused of it (Luyten, 2022, pp. 2–11; Committee on Migration, Refugees and Displaced Persons, 2015; Rooney, Welander, 2021).

The Council of Ministers of the Republic of Poland adopted 15th October 2024 a strategy for migration called: "Odzyskać kontrolę. Zapewnić bezpieczeństwo. Kompleksowa i odpowiedzialna Strategia Migracyjna Polski na lata 2025–2030". In this legal paper, security of the state is underlined as the most important factor regarding the migration, especially the protection of Polish borders against hybrid attacks. Poland considers suspending the right to accept asylum applications in the event of threat to its security. The Republic of Poland vows to continue strengthening its border infrastructure (Council of Ministers, 2024, pp. 3–5). Although the pushback procedure is not mentioned in this legal text, the government's commitment to protect polish borders means that the pushbacks will be part of its policy.

The pushback procedure is not limited to European countries. For example, Australia and the United States conducted pushback at sea to prevent migrants from reaching its territory (McDonnell, 2021). Some states in the Southeast Asia region resorted to pushbacks at sea, e.g., the Indochinese refugee crisis or the navies of Indonesia, Malaysia and Thailand in the Andaman Sea refugee crisis (Mathew, 2021, pp. 907–908).

As shown in this article, there is a widespread states' pushback practice and at least some countries deem this practice legal (under some circumstances) because it is their inherent right to protect their border and territory. If the pushback rule was seen as a rule derived from the self-defence rule (art. 51 UN Charter), then the principle of non-refoulement would become inapplicable (since it is not a UN Charter rule), under the art. 103 of the UN Charter. As shown above, the states' practice regarding pushback procedure is clear. There arises a question if there is a chance for a new customary international law rule to be created. A new pushback rule could express the legality of collective expulsion of illegal migrants when the state is under a hybrid or armed attack such as at Belarus-EU border, needs to defend its territory, declares a state of emergency and there exists a legal way to request asylum. In addition, a country where the migrant is pushed back shall be seen as safe.

Conclusion

Migration crises are an inherent part of the twenty-first century. Millions of people from different countries try to migrate legally or illegally to Europe for various reasons. States see the danger in an overflow of migration in their borders. They turn to dubious instruments to cope with the new situation. One of the most controversial is the pushback procedure. There is a wide European states' practice regarding pushback. In international and domestic court rulings, the pushback procedure has been ruled unlawful, violating international and European law. Those rulings did not convince governments to abandon their pushback policy. Authorities see pushback as the only useful instrument to combat illegal human smuggling and trafficking and defend its borders against hybrid attacks. Moreover, some authorities see it as an effective tool in decreasing illegal migration and enhancing border protection while compelling migrants to seek a legal way to obtain asylum or international protection, as well as saving their lives. Recent states' practice and their interpretation of legal rules show that the pushback procedure can be understood as a legal tool for addressing hybrid attacks and combat illegal migration.

The world has changed since the adoption of the 1951 Refugee Convention. Hybrid attacks will likely occur more frequently in the future, especially as instrumentalised migration policy tools. Without amending the laws to give states a legitimate instrument to combat hybrid attacks, there will be no change regarding the pushback procedure. States, seeing it as an effective tool, will likely continue to do so. There should be a consideration of the legal regime in the EU regarding migrants, hybrid warfare and border protection. The current status is no longer an appropriate measure that resembles the reality of a problem and gives adequate instruments. A new EU policy regarding pushback shall allow the collective expulsion of illegal migrants under strict conditions.

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Legalizacja procedury pushback w następstwie kryzysu na granicy Unii Europejskiej z Białorusią

Streszczenie

Zasada non-refoulement jest częścią systemu prawa międzynarodowego od dekad. W ostatnich latach praktyka państw, stosujących pushback jako odpowiedź na kryzys migracyjny, powoduje erozję tej zasady. Artykuł analizuje legalność procedury pushback jako zasady wywodzącej się z prawa do samoobrony państwa lub jako nowopowstałej normy międzynarodowego prawa zwyczajowego pod kątem zagrożenia wojną hybrydową na przykładzie kryzysu na granicy Unii Europejskiej z Białorusią. Artykuł dokonuje oceny polityczno-prawnej procedury pushback w świetle nowej ery zagrożeń hybrydowych.

Słowa kluczowe: pushback, prawo międzynarodowe, uchodźca, migracja ludności, zakaz wydalania lub zawracania

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