

No Way Home: Poland and Lithuania’s Asylum Violations in the Belarus Border Crisis

Julia Kaluta†

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† J.D. Candidate, 2025, UNC School of Law. Editor in Chief, *North Carolina Journal of International Law*, Vol. 50. Thank you to my parents, Grażyna and Andrzej Kaluta, for their endless support and love in all my endeavors; thank you to my brother, Jan Kaluta, for being my best friend. Lastly, a huge thank you to the Vol. 50 staff for all their hard work on this issue. Most law journals would not be made possible without the oftentimes invisible, unpaid labor of so many brilliant law students. Thank you again.

I. Introduction

The Belarus border crisis has flown under the radar in recent years due to the simultaneous and highly publicized Russian invasion of Ukraine. As Lithuania and Poland took in thousands of refugees to much international praise, the Belarus crisis, and its inhumane conditions, took a back seat on the global stage. Despite the internationally recognized right to asylum, countries have tried to circumvent their legal responsibilities through “pushback laws” that force migrants back into the countries that they came from. “Pushback laws” have been adopted by both Poland and Lithuania in light of the new migrant crisis, setting a dangerous precedent of denying asylum as a solution to national security threats.

This Note discusses the Polish and Lithuanian legal responsibilities and shortcomings in light of the Belarus border crisis. Part I of this Note will provide background information on the Belarusian migrant crisis in both Poland and Lithuania; I discuss how the Belarusian government incentivized migrants to come to Belarus under the guise of easy access into Central Europe, as well as how Polish and Lithuanian governments responded. In Part II, I lay out international legal doctrines that both Poland and Lithuania have signed onto, and their respective domestic refugee and asylum law. In Part III, I discuss how Poland and Lithuania are violating international law through illegal domestic pushback measures in addition to potential torture claims. Finally, this Note compares the double standard in Poland and Lithuania’s response to the Belarus border crisis, compared to their handling of Ukrainian refugees, and ends by urging mitigation measures to prevent further irreparable harm.

II. Background

Following the 2020 European Union Belarus sanctions, which addressed the fraudulent sixth-term presidential re-election of Aleksandr Lukashenko,¹ Polish officials reported that President Lukashenko was attempting to destabilize neighboring states through an increase in migrant crossings into the European Union.²

¹ See MINISTÈRE DE L’EUROPE ET DES AFFAIRES ÉTRANGÈRES, *Imposing Sanctions Against Russia and Belarus* (Mar. 2024), <https://shorturl.at/qswV6> [<https://perma.cc/C58S-LKYC>] (last visited Dec. 18, 2023).

² See INFO MIGRANTS, *Poland Accuses Belarus and Russia of Deliberately ‘Prepping Migration Crisis,’* (Sept. 8, 2023), <https://www.infomigrants.net/en/post/50970>

While Lukashenko denied these allegations,³ his previous statements regarding migrant control and a simplified visa system for Middle Eastern “tourists” suggested otherwise.⁴ Starting in the summer of 2021, thousands of “tourist” visas were being granted to Middle Eastern and North African individuals, most frequently from Iraq, Syria, Afghanistan, and Turkey.

“Tourist” visas helped individuals come to Belarus under the guise of recreational stay, when in reality the purpose was to enter Central Europe through alternative means.⁵ At first, individuals could apply for visas in Minsk upon arrival, but after a few months, visa requirements tightened ever so slightly; now visas are required before departure.⁶ However, the process still remains relatively simple, thanks to state-controlled tourist agencies.⁷ Due to European Union pressure, airlines halted flights from the Middle East to Minsk.⁸ Instead, migrants turned to the alternative Eastern Borders Route, first flying into Moscow before leaving for Minsk, usually on a ten to twelve-hour bus ride.⁹ Despite this move to the

/poland-accuses-belarus-and-russia-of-deliberately-prepping-migration-crisis [https://perma.cc/8DKV-XATM] (last visited Dec. 18, 2023).

³ See Sergei Kuznetsov, *Lukashenko Sends Mixed Signals Over Belarus Migrant Crisis*, POLITICO (Nov. 26, 2021, 8:53 PM), <https://www.politico.eu/article/alexander-lukashenko-sends-mixed-signals-over-belarus-poland-migrant-crisis/> [https://perma.cc/BN9S-KLWH] (last visited Dec. 18, 2023).

⁴ *Id.* (Lukashenko stated, “You’ve [referring to EU countries] enforced sanctions against me. You’ve put a noose on my neck in order to choke me, and you, scoundrels, want me to protect you? It won’t happen”). See Paul Adams, *How Belarus is Helping ‘Tourists’ Break into the EU*, BBC (Oct. 21, 2021), <https://www.bbc.com/news/world-58952867> [https://perma.cc/6WYJ-5F7K] (last visited Dec. 18, 2023).

⁵ Katie Toth, *The Hottest Forest in the World*, FOREIGN POLICY (Aug. 13, 2023, 7:00 AM), <https://foreignpolicy.com/2023/08/13/poland-belarus-border-migration-crisis-wagner-group-russia-ukraine-election/> [https://perma.cc/6CL8-VTPS] (last visited Dec. 18, 2023).

⁶ Stanislaw Ivashkevich, *Undercover of Security Forces*, BELARUSIAN INVESTIGATIVE CENTER (June 7, 2023), <https://investigatebel.org/en/investigations/who-could-make-millions-of-dollars-on-the-migration-crisis> [https://perma.cc/E9RG-VRJU] (last visited Dec. 18, 2023).

⁷ *Id.*

⁸ BIRN Investigations Team, *How Smugglers Bring Migrants into EU Despite Poland’s New Wall on Belarus Border*, REPORTING DEMOCRACY: BALKAN INSIGHT (July 19, 2023, 7:35 AM), <https://balkaninsight.com/2023/07/19/how-smugglers-bring-migrants-into-eu-despite-polands-new-wall-on-belarus-border/> [https://perma.cc/CUC6-6XK3] (last visited Dec. 18, 2023).

⁹ *Id.*

alternative, marketing for Belarus excursions exploded, as tourist agencies in the Middle East started promoting all-inclusive trips to Belarus; in one instance, a state-owned Belarus travel agency doubled its flights to Minsk.¹⁰

Middle Eastern refugees are drawn to Minsk under the false pretense of easy access to the European Union.¹¹ With militant threats in their home countries, thousands seek a place of refuge; entering through Europe through Belarus's neighbors – Poland, Lithuania, or Latvia – could be the safe, new home they desperately need. But coming to Minsk is the easy part. Getting to the border is a different story. Some hire smugglers who coordinate trips to European Union border points, which can cost anywhere between \$9,000 to \$12,000 a person, not including airfare, hotel reservations, or tourist visas.¹² Others approach the border on their own in rented cars.¹³ Either way, success is not guaranteed.¹⁴

A. Polish & Lithuanian Response

Since 2021, more than 45,000 migrants have attempted to cross the Polish-Belarus border, resulting in a humanitarian crisis.¹⁵ Thousands of migrants enter the border and get stranded in the tumultuous conditions of the Białowieża Forest, one of the largest and oldest forests across the European Plain.¹⁶ Migrants report crossing swamps and rivers in freezing temperatures, often for days at a time without food or water, only to be sent back once Polish border guards found them.¹⁷ These border guards physically push migrants across the border without any due process, despite desperate pleas for asylum.¹⁸ Some border-migrant interactions

¹⁰ See Ivashkevich, *supra* note 6.

¹¹ Scott Neuman, *How a Political Standoff Trapped Hundreds of Migrants at the Belarus-Poland Border*, NPR (Nov. 17, 2021, 3:01 PM), <https://www.npr.org/2021/11/17/1056129127/poland-belarus-eu-migrant-border-crisis> [https://perma.cc/M54F-GM4F] (last visited Dec. 18, 2023).

¹² Adams, *supra* note 4.

¹³ See Adams, *supra* note 4.

¹⁴ See Adams, *supra* note 4.

¹⁵ See INFO MIGRANTS, *supra* note 2.

¹⁶ See Toth, *supra* note 5.

¹⁷ See Toth, *supra* note 5.

¹⁸ HUMAN RIGHTS WATCH, *Violence and Pushbacks at Poland-Belarus Border*, <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border> [https://perma.cc/J9D3-H2H7] (last visited Dec. 18, 2023).

have become violent, as Polish guards destroyed migrants' phones, took their belongings, and punched, tasered, and pepper sprayed begging individuals.¹⁹

Lithuania responded similarly to Poland in physically pushing back migrants across the Belarus border.²⁰ As of August 2021, Lithuanian border guards pushed back individuals at least 10,000 times, granting only 381 individuals legal entry.²¹ On par with Poland, border guards have beat, robbed, tasered, and stun-gunned migrants.²² Migrants are detained in Foreigner Registration Centers – overcrowded areas surrounded by barbed wire and walls, including two former prisons.²³ Migrants are kept for months at a time without proper access to food, water, medical care, or legal representation.²⁴ Center guards verbally abuse detainees and have routinely failed to provide migrants with proper asylum information.²⁵ In multiple instances, guards leveraged sex with female detainees in exchange for helping them leave the center.²⁶

B. Belarus Counter-Response

On the Belarus side of the border, guards beat, raped, extorted, and restricted migrants into “collection sites” – open air areas without shelter.²⁷ Migrants were pushed into restricted areas without

¹⁹ *Id.*

²⁰ EURACTIV, EU Court Slams Lithuania's Belarus Migrant Pushbacks, https://www.euractiv.com/section/politics/short_news/eu-court-slams-lithuanias-belarus-migrant-pushbacks/ [https://perma.cc/XN2U-DBSV] (last visited Dec.18, 2023).

²¹ AMNESTY INT'L, *Lithuania: Forced Out or Locked Up – Refugees and Migrants Abused and Abandoned*, AI Index EUR 53/5735/2022 at 16 (June 27, 2022), <https://www.amnesty.org/en/documents/eur53/5735/2022/en/> [https://perma.cc/4GXH-29GQ].

²² *Id.* at 4, 18.

²³ *Id.* at 5.

²⁴ *Id.* at 5.

²⁵ *Id.* at 21, 42.

²⁶ *Id.* at 41. In Latvia, migrants were beaten, sometimes naked, and held in undisclosed locations. Latvian border guards worked with the army and police to pushback migrants across the border. Individuals reported they were frequently threatened and forced to sign return-procedure paperwork. AMNESTY INT'L UK, *Latvia: 'Cruel ultimatum' and brutal force used to push back refugees at the border – news report* (Oct. 12, 2022, 11:01 p.m.), <https://www.amnesty.org.uk/press-releases/latvia-cruel-ultimatum-and-brutal-force-used-push-back-refugees-border-new-report> [https://perma.cc/8KJ4-4BTH].

²⁷ HUMAN RIGHTS WATCH, “DIE HERE OR GO TO POLAND” 18 (Nov. 24, 2021), <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands->

food or water for unknown periods of time, with the exception of an occasional campfire.²⁸ Exhausted, wet, and sometimes injured, migrants were kept in the collection sites without proper medical attention.²⁹ Amongst the migrants were children and elderly with worsening conditions.³⁰ In the now-closed Bruzgi camp, migrants reported being able to purchase one meal a day for about triple the market price.³¹ Individuals would sleep on wooden pallets and shower once a week.³² One woman and her daughter reported being pushed into a basement facility where they were sexually assaulted by border guards.³³ At least two guards proceeded to vaginally and anally rape the mother in front of her daughter.³⁴

After being confined to these sites, migrants were forced by Belarus guards to go across the Polish border once again.³⁵ As one guard stated, “[y]ou have a choice. You either die here [in Belarus] or you go to Poland.”³⁶ In at least seven cases, a Belarus guard cut a hole in the barbed-wire border fence to push migrants through.³⁷ In another, border guards pushed a raft across the river into a fierce current that killed a man.³⁸

The total number of crossings from Belarus may include multiple crossings by single individuals.³⁹ Even when migrants no longer want to enter Poland, they are trapped in a tumultuous cycle of being pushed into Poland by Belarus guards only to be pushed back into Belarus by Polish guards.⁴⁰

shared-responsibility-border-abuses [<https://perma.cc/M77F-HJNK>].

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ HUMAN RIGHTS WATCH, *supra* note 18.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ HUMAN RIGHTS WATCH, *supra* note 27.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

C. *The Crisis Today*

The Polish government continues the xenophobic narrative of migrants, continually labeling the migrant crisis as a direct attack from Belarus on the European Union, instead of accounting for the human lives at stake.⁴¹ While the numbers have been slowly increasing, after a temporary decline in 2021,⁴² some months receive an exorbitant amount of entry attempts (such as 17,000 entries in October 2021).⁴³ Between January and August 2023, over 19,000 people have attempted to enter the Polish border through Belarus.⁴⁴ As entries continue to increase, so do the pushbacks. As of 2022, Poland only accepted 5.6% of its refugee applications.⁴⁵ Since the crisis began in 2020, NGO Grupa Granica has reported 37 deaths and almost 300 missing individuals.⁴⁶

The Polish government continually denies journalists, NGOs, and activists access to the border detention facilities, and organizations that are able to help migrants do so in secret.⁴⁷ Instead of increasing aid, Poland and Lithuania have drastically increased the amount of troops in the name of national security, amidst the

⁴¹ VOA NEWS, *Poland Says Belarus, Russia ‘Organizing’ New Migrant Influx* (Aug. 7, 2023, 12:51 PM), <https://www.voanews.com/a/poland-says-belarus-russia-organizing-new-migrant-influx/7214946.html> [<https://perma.cc/68WQ-UW2P>].

⁴² See Toth, *supra* note 5.

⁴³ Andrew Roth, *Poland-Belarus Border Crisis: What is Going on and Who is to Blame?*, THE GUARDIAN, (Nov. 21, 2021), <https://www.theguardian.com/world/2021/nov/09/poland-belarus-border-crisis-migrants-eu-explainer> [<https://perma.cc/8VMT-2XHH>].

⁴⁴ *Id.*

⁴⁵ European Council on Refugees and Exiles, *Asylum Information Database Statistics: Poland* (May 22, 2023), <https://asylumineurope.org/reports/country/poland/statistics/> [<https://perma.cc/67JA-9BJ2>].

⁴⁶ EUROPEAN COUNCIL ON REFUGEES AND EXILES, *EU Eastern Borders: More Deaths at Poland Belarus Border as Reports of Pushbacks, Detention and Crack-down on Solidarity Continue, Council of Europe Concerned over Pushbacks and Criminalization in Latvia* (Feb. 17, 2023), <https://ecre.org/eu-eastern-borders-more-deaths-at-poland-belarus-border-as-reports-of-pushbacks-detention-and-crack-down-on-solidarity-continue-council-of-europe-concerned-over-pushbacks-and-criminalisation-in-lat/> [<https://perma.cc/9T2F-MPAB>].

⁴⁷ Jes Paluchowska, *Migrant Crisis on the Poland-Belarus Border Claims Hundreds as Activists and Media Denied Access*, ORG. WORLD PEACE (Aug. 2, 2023), <https://theowp.org/reports/migrant-crisis-on-the-poland-belarus-border-claims-hundreds-as-activists-and-media-denied-access/> [<https://perma.cc/YBD8-DLPU>] (last visited Dec. 18, 2023).

larger Wagner troop presence in Belarus.⁴⁸ However, the migrant crisis is far from over, as thousands of individuals continue to be denied asylum requests without due process, in turn being detained with no further information. Poland and Lithuania are violating their international legal responsibilities by straying away from all conventional asylum protocols and enacting laws that directly contradict their responsibilities to refugees.

III. Legal Background

A. Background International Law on Refugees

The right to asylum is internationally recognized in Article 14 of the Universal Declaration of Human Rights, codified in 1948.⁴⁹ Who constituted as a refugee was later developed in the 1951 Convention Relating to the Status of Refugees (“The Convention”).⁵⁰ The Convention has been ratified by 146 State parties, including Poland, Lithuania, and Belarus.⁵¹ The Convention lays out a list of Articles that each refugee is entitled to, such as welfare services, administrative measures, and judicial status.⁵² The 1967 Protocol broadened the scope of the 1951 Convention, removing the original “geographical and time limits.”⁵³

Article 18 in the Charter of Fundamental Rights of the European Union states the right to asylum “shall be guaranteed” as per the rules of the Geneva Convention, 1967 Protocol, in addition to the Treaties of the European Union and Functioning of the European Union.⁵⁴ The Convention defines “refugee” as someone who has a

⁴⁸ Yuliya Talmazan, *Poland Moves Troops to Belarus as Wagner Fighters Fuel NATO Tensions*, NBC NEWS (Aug. 12, 2023, 11:30 AM), <https://www.nbcnews.com/news/world/poland-troops-belarus-border-wagner-fighters-nato-tensions-rcna98974> [https://perma.cc/SU95-RCNM].

⁴⁹ G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

⁵⁰ U.N. Convention Relating to the Status of Refugees, *United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A_CONF.2_108 (July 25, 1951).

⁵¹ Chapter V Refugees and Stateless Persons, Convention Relating to the Status of Refugees, UNITED STATES TREATY COLLECTION (Aug. 10, 2024), https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en#EndDec [https://perma.cc/LP4U-4KZA].

⁵² *Id.*

⁵³ U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

⁵⁴ Charter of Fundamental Rights of the European Union, 2012 O.J. (C326) 392, 399.

“well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”⁵⁵

“Well-founded fear” has been defined by domestic courts as a reasonable chance of persecution if the migrant is to be returned to their home country.⁵⁶ The International Criminal Court defines persecution as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁵⁷ While countries have their own asylum frameworks, the United Nations (“UN”) established the Refugee Status Determination Procedural Handbook (“the Handbook”) to establish minimum procedures of due process for asylum seekers.⁵⁸ Asylum seekers are entitled to due process on a non-discriminatory basis.⁵⁹ Due process requires inspection on an “individual basis” by individuals trained in the “relevant criteria and principles” of the 1951 Convention.⁶⁰

While race, religion, nationality, and political opinion tend to be self-explanatory in the refugee definition, who constitutes a member “of a particular social group” has been contested for decades. Some countries have adopted the “immutable trait” standard.⁶¹ The UN provided guidance on this, stating that a “particular social group” can be assessed according to three factors: “(1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary

⁵⁵ See U.N. Convention Relating to the Status of Refugees, *supra* note 50.

⁵⁶ See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (“Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that, to show a “well-founded fear of persecution,” an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country.”). See also *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals* (UN High Commissioner for Refugees Intervening) [1988] AC 958 (U.K. House of Lords).

⁵⁷ U.N. Rome Statute of the International Criminal Court, art. 7.2g 1998, U.N. Doc. 2187 U.N.T.S. 90.

⁵⁸ UNCHR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection (Feb. 2019) <https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/5ddfc47.pdf>.

⁵⁹ *Id.* at 52.

⁶⁰ See *id.* at 42–45.

⁶¹ See, e.g., *Matter of Acosta*, 19 I&N Dec. 211 (1987); *Case of BAH v. UK* Eur. Ct. H.R. 56328/07 (2011).

status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.”⁶² Domestic law examples of “particular social groups” include gender,⁶³ sexual orientation,⁶⁴ clan membership,⁶⁵ and past experiences.⁶⁶

There is also a nexus requirement that connects the persecution with the social group.⁶⁷ Academics and lawyers have long disputed the rigidity of the nexus requirement.⁶⁸ Some scholars utilize a but-for test, asking but for the member being a part of the social group, would the persecution occur.⁶⁹ Others, including an increasing number of courts, prefer the mixed-motive approach which considers whether the persecution that a migrant faced or might face is in some way affected by their membership in a particular social group.⁷⁰

B. Background International Law on Pushback and Detention of Refugees

1. Article 3 of the Convention Against Torture

While there is no uniform definition of a “pushback” used against European nations, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

⁶² UNCHR, Guidelines on International Protection, ¶ 6 (2002).

⁶³ Refugee Appeal No. 2039/93 Re MN, NZRSAA 2039/93, 12 Feb. 1996 (N.Z.); Refugee Appeal No. 71427/99, NZRSAA 71427/99, 16 Aug. 2000, ¶ 106–08 (N.Z.).

⁶⁴ See, e.g., Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822 (B.I.A. 1990).

⁶⁵ See, e.g., Matter of Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996); See also, e.g., Matter of H-, 21 I. & N. Dec. 337 (B.I.A. 1996).

⁶⁶ See, e.g., Matter of Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988) (former member of national police).

⁶⁷ European Union Agency of Asylum, Nexus (For Reasons of) <https://euaa.europa.eu/easo-practical-guide-qualification-international-protection/nexusfor-reasons> [https://perma.cc/Y6YU-NS25] (last visited Dec. 18, 2023); Immigration and Refugee Board of Canada, Grounds of Persecution – Nexus, <https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef04.aspx> [https://perma.cc/FQ6X-GF7H] (last visited Dec. 18, 2023).

⁶⁸ Alicia Triche, *Nexus and the US Refugee Definition*, THE FEDERAL LAWYER, Sept. 2008.

⁶⁹ Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, MICH. J. INT'L L. 265, 275 (2002).

⁷⁰ *Id.* at 281.

(CAT) establishes the prohibition of refoulement in Article 3: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷¹

The Committee Against Torture looks at both State patterns of human rights violations as well as individual circumstances of complainants.⁷² The Committee has stated:

the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.⁷³

Individualized fear of torture is a verified fear that pertains specifically to the complainant at hand. In *S.A.M. v. Denmark*, the Committee found the complainant’s asylum rejection not to be a violation of Article 3 as his fear of persecution by the Taliban was not a personalized fear, amongst other factors.⁷⁴ Similarly, in *A.S. v. Sweden*, the complainant’s identity as a Christian in a Iran, as well as his difficulties obtaining proper medical care, did not constitute torture under Article 3.⁷⁵

2. Article 16 of the Convention Against Torture

Complainants have tried to raise Article 16 – which states each State Party shall prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I”⁷⁶ – in cases where Article 3 was not applicable. However, Article 16 does not qualify as torture for non-refoulement purposes.⁷⁷ While the Committee has not defined the terms under

⁷¹ G.A. Res. 39/46 (Dec. 10, 1984).

⁷² *Id.* at art. 3(2). See *infra* note 73.

⁷³ Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 693/2015 (Aug. 3, 2018).

⁷⁴ In *S.A.M. v. Denmark*, the Committee considered other factors, such as the complainant’s temporary return to Afghanistan and his injuries. *S.A.M. v. Denmark*, Decision, Comm. No. 693/2015, U.N. Doc. CAT/C/64/D/693 (2015).

⁷⁵ *A.S. v. Sweden*, Decision, Comm. No. 949/2019, U.N. Doc. CAT/C/74/D/949 ¶ 10 (July 27, 2022).

⁷⁶ G.A. Res. 39/46, *supra* note 71, at art. 16.

⁷⁷ See, e.g., *T.M. V. Sweden*, Decision, Comm. No. 228/2003, U.N. Doc. CAT/C/31/D/228, ¶ 6.2 (Nov. 18, 2003).

Article 16,⁷⁸ the other cruel treatment has to surpass physical and mental fear that might be triggered by deportation.⁷⁹

The European Convention on Human Rights, which created the European Court of Human Rights (ECHR), does not provide an explicit right to asylum.⁸⁰ However, Article 3 states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁸¹ The ECHR varies on their assessment of improper facilities when considering Article 3 violations. Article 3 can either be taken separately or in conjunction with Article 13.⁸² The government bears the burden of proof to show evidence against a victim’s claims. The court in *Staney v. Bulgaria* lays out the general framework for what constitutes degrading treatment, stating that “treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or driving them to act against their will or conscience.”⁸³ Natural humiliation that stems from being held in custodial measures does not count as a violation of Article 3.⁸⁴

In *Staney*, the court held that the complainant’s placement in a decrepit social care home was a violation of Article 3 by itself, as the government knew about the extremely poor living conditions for years and did nothing to change them.⁸⁵ Though the degrading conditions did not seem purposeful, the government’s knowledge and lack of action violated Article 3.⁸⁶ The court also concluded that there was a violation of Article 13, because even if the complainant

78 MICHAEL J. GARCIA, CONG. RSCH. SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES, 5, 18 (2009).

79 See *A.A.C. v. Sweden*, Decision, Comm. No. 227/2003, U.N. Doc. CAT/C/37/D/227/2003 ¶ 7.3 (Nov. 16, 2006); *G.R.B. v. Sweden*, Decision, Comm. No. 83/1997, U.N. Doc. CAT/C/20/D/83/1997 ¶ 6.7 (May 15, 1998).

80 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

81 *Id.* at art. 3.

82 “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” *Id.* art. 13.

83 *Staney v. Bulgaria*, 36760/06 Eur. Ct. H.R. ¶ 203 (2012).

84 *Id.* at ¶ 204.

85 *Id.* at ¶ 212.

86 *Id.* at ¶ 211.

was removed from his environment, he would not be entitled to compensation for his treatment, in turn providing a disproportionate remedy to the issue at hand.⁸⁷

Khalifia and Others v. Italy applied the same framework to an asylum context.⁸⁸ The court analyzed degrading treatment through three factors: 1) the purpose behind the ill-treatment; 2) the ill-treatment's context, and 3) whether "the victim is in a vulnerable situation" including a level of suffering exceeding that inherently involved in detention.⁸⁹ The purpose behind ill-treatment requires circumstantial evidence that weighs whether the ill-treatment was used on purpose as a punishment mechanism, such as torture-induced confessions,⁹⁰ for the breaking of a complainant's physical and moral resistance.⁹¹ The court has broken down the second factor – context – by evaluating whether there was justifiable "heightened tension and emotions" which resulted in the ill-treatment,"⁹² such as police officers using excess force to illicit a confession in a life-threatening situation. Finally, for the third factor, suffering and humiliation must be perpetrated from the State or a principal actor acting on behalf of the State.⁹³ Humiliation is to be assessed based on the circumstances of the case and the nature, context, and manner, and method of execution.⁹⁴ Humiliation also has to be more than the average embarrassment that comes with legally-sound punitive measures. The Committee also stated that an improper condition's assessment must take into account any vulnerable populations that were involved.⁹⁵

Applying the three factors, the court in *Khalifia* stated there was no violation of Article 3 in assessing conditions in the Lampedusa

⁸⁷ *Id.* at ¶ 219.

⁸⁸ Case of *Khalifia and Others v. Italy*, 16483/12 Eur. Ct. H.R. (2016).

⁸⁹ *Id.* ¶ 160.

⁹⁰ See *Aksoy v. Turkey*, App. No. 21987/93, Eur. Ct. H.R., ¶ 63 (1996).

⁹¹ See *Kranstanov v. Bulgaria* 18269/18 Eur. Ct. H.R. (2023).

⁹² See *Egmez v. Cyprus*, App. No. 30873/96, Eur. Ct. H.R., ¶ 76 (2000) (stating that ill-treatment was due out of "heightened tensions and emotions" which does not count as torture).

⁹³ See *M.S.S. v. Belgium*, App. No. 30696/09, Eur. Ct. H.R., at 102 (2011) (Judge Sajó dissenting).

⁹⁴ *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R., ¶ 30 (1978).

⁹⁵ See GARCIA, *supra* note 78, at 8.

CSPA detention center and on the overcrowded ships.⁹⁶ Under the first factor, in both cases, the ill-treatment stemmed from the migrant crisis rather than purposeful punishment.⁹⁷ Under the second factor, the court found the ill-treatment to be a result of the exceptional situation and byproduct of the Arab Spring migrant influx.⁹⁸ This resulted in overcrowding and temporary subpar conditions but there was no intent to harm the migrants.⁹⁹ Lastly, the court held the restrictive conditions did not reach the level of severity needed for an Article 3 violation;¹⁰⁰ third party organizations were allowed to have a “permanent presence” within the detention facility to supply any necessary materials or help.¹⁰¹

3. *Article 4 of Protocol No. 4 of the Convention*

In addition to Article 3 of the ECHR, non-refoulement principles can also be tied to Article 4 of Protocol No. 4 to the Convention (Protocol 4), which states “collective expulsion of aliens” is also prohibited.¹⁰² The court has defined “collective expulsion of aliens” as State-sanctioned action that requires a foreigner to leave the State’s territory without proper examination of their circumstances.¹⁰³ This includes those who arrive at the border and are returned to their “originating State.”¹⁰⁴ It is the removing State’s responsibility to examine “whether or not the individual will have access to an adequate asylum procedure in the receiving third country.”¹⁰⁵ The removing State has a duty not to send the asylum-seeker to a country where they will be denied access to an adequate asylum procedure.¹⁰⁶

The court rules there was a violation in *Case of T.Z. and Others*

⁹⁶ Khalifia and Others v. Italy, *supra* note 88, at ¶ 186, 199.

⁹⁷ Khalifia and Others v. Italy, *supra* note 88, at ¶¶ 179, 183–84 (2016).

⁹⁸ Khalifia and Others v. Italy, *supra* note 88, at ¶ 137 (2016).

⁹⁹ Khalifia and Others v. Italy, *supra* note 88, at ¶¶ 183–85.

¹⁰⁰ Khalifia and Others v. Italy, *supra* note 88, at ¶ 199 (2016).

¹⁰¹ Khalifia and Others v. Italy, *supra* note 88, at ¶ 190.

¹⁰² Treaty on European Union, *signed* Feb. 7, 1992, C 326/15 (entered into force Nov. 1, 1993) (updated Aug. 2024).

¹⁰³ Case of D.A. and Others v. Poland, 51246/17 ¶ 79 (2021).

¹⁰⁴ *Id.*

¹⁰⁵ M.K. and Others v. Poland, 40503/17, 42902/17 & 43643/17 Eur. Ct. H.R. ¶ 172 (2020).

¹⁰⁶ *Id.* ¶ 173.

vs. Poland, where one applicant claimed she was being stalked by a man in Chechnya and the other applicant, her husband, claimed he was detained by police on false charges.¹⁰⁷ Both tried to enter through a Polish border checkpoint by way of Belarus and were turned away despite claiming risk of persecution.¹⁰⁸ The court found that Poland did not properly assess the applicants' risk¹⁰⁹ of being returned to Belarus.¹¹⁰ By being sent back to Belarus, the applicants were at "risk of 'chain refoulement'"¹¹¹ to their original state of Chechnya.¹¹²

On the other hand, the court deemed some alien removals through improper entry as not a violation of Protocol 4 for the first time in the *N.D. and N.T. v. Spain*.¹¹³ In *N.D.*, aliens who tried through to enter Morocco through the Melilla border fence were consistently stopped by Guardia Civil and given back to Moroccan authorities.¹¹⁴ The court continuously emphasized the importance of border protection, as seen in the Schengen Border Code,¹¹⁵ and context in Protocol 4 assessment.¹¹⁶ Moreover, if a migrant capitalized on the mass movement through illegal means, such as going through a border fence, when appropriate avenues for entry were available, the migrant is not protected under Protocol 4.¹¹⁷ In this case, the applicants crossed the border, circumventing the provided "genuine and effective access to procedures for legal entry

¹⁰⁷ Case of *T.Z. and Others v. Poland*, 41764/17 Eur. Ct. H.R. (2022).

¹⁰⁸ *Id.* at ¶ 3.

¹⁰⁹ *Id.* at ¶ 19. Under Protocol 4, not every applicant is entitled to an individual interview, as "the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion . . ." See *supra* note 102 at ¶ 29.

¹¹⁰ Case of *T.Z. and Others v. Poland*, *supra* note 107.

¹¹¹ Chain refoulement is defined as "being shuttled back to their country of origin without having had the possibility to submit an asylum application or having had the asylum claim reviewed in any of the countries through which they pass." Assembly debate on 22 June 2010 (22nd Sitting) (see Doc. 12168, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs. Strik).

¹¹² Case of *T.Z. and Others v. Poland*, *supra* note 107, at ¶ 19.

¹¹³ Case of *N.D. and N.T. v. Spain*, 8675/15 Eur. Ct. H.R. (2020).

¹¹⁴ *Id.* at ¶ 81.

¹¹⁵ *Id.* at ¶ 168. See Regulation (EU) 2016/399 OJ (L 77) (2016).

¹¹⁶ See Treaty on European Union, *supra* note 102.

¹¹⁷ Case of *N.D. and N.T. v. Spain*, *supra* note 113, at ¶ 208.

into Spain”¹¹⁸ and did so by “taking advantage of their large number.”¹¹⁹

4. *Possible National Security Non-Refoulement Exception*

The one main exception to non-refoulement is national security, as per Article 32(2) of the Convention.¹²⁰ It states that “[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.”¹²¹ An individual’s potential of ill-treatment should be weighed against the policy objective of national security.¹²² National security is analyzed in light of context, looking at the potential implications of admitting a controversial applicant, in comparison to the country’s policy objectives.

In *Chanhal v. the United Kingdom*, the court claimed, “[t]he greater the risk of ill-treatment, the less weight should be accorded to the threat to national security.”¹²³ Here, a Sikh applicant, with a history of alleged criminal activities and previous violent advocacy, was going to be deported despite claiming asylum.¹²⁴ The court held that this was a violation of Article 3 as the applicant would likely be subject to ill-treatment at the hands of Punjab police for being a supporter of Sikh separatism.¹²⁵ The applicant’s safety was weighed against the United Kingdom’s role in the war against terrorism.¹²⁶ *Chanhal* created a controversial precedent that foreigners could not be sent back to their country when they are highly likely to endure torture, even if they could be considered a threat to national security.¹²⁷

The national security exception has also been assessed in

118 Case of N.D. and N.T. v. Spain, *supra* note 113, at ¶ 229.

119 Case of N.D. and N.T. v. Spain, *supra* note 113, at ¶ 231.

120 See Case of Chahal v. United Kingdom, 22414/93 Eur. Ct. H.R. (1996).

121 U.N. Convention Relating to the Status of Refugees, *supra* note 50 at art. 32(2).

122 Case of Chahal v. United Kingdom, *supra* note 120, at ¶ 63.

123 Case of Chahal v. United Kingdom, *supra* note 120, at ¶ 76.

124 Case of Chahal v. United Kingdom, *supra* note 120, at ¶¶ 23–24.

125 Case of Chahal v. United Kingdom, *supra* note 120, at ¶ 107.

126 Case of Chahal v. United Kingdom, *supra* note 120, at ¶ 75.

127 JUSTICE, Deportation on Grounds of National Security, <https://justice.org.uk/deportation-grounds-national-security/> [https://perma.cc/56PD-NEQH] (last visited Dec. 19, 2023).

national rulings. In *Suresh v. Canada*,¹²⁸ the court recognized the right to asylum but upheld that deportation can still occur under “exceptional circumstances.” In *Ramzy v. Netherlands*,¹²⁹ multiple countries asked the ECHR to overturn *Chanhal*.¹³⁰ Eventually, the case was dropped because the complainant defected, with the Netherlands assuming the complainant’s loss of interest in the case.¹³¹ Though similar opposition was seen in *A. v. the Netherlands*, the ECHR nonetheless reiterated there is no exception to the prohibition of refoulement.

The potential national security exception gets a bit blurrier when the complainant does not qualify as a refugee as per the Convention.¹³² Though non-refoulement under the refugee context cannot be claimed, non-refoulement arguably continues to be a rule of international customary law independent of such context.¹³³ Whether a national security exception exists in non-refugee non-refoulement law depends on whether non-refoulement is seen as a “peremptory norm.”¹³⁴ Preemptory norms are fundamental legally binding principles of international law that no state can deviate from.¹³⁵ If it is not, exceptions may be considered; some scholars have called for a balancing test to determine an individual’s right against national security.¹³⁶ Still, such a proposal leads to an endless array of questions that may be abused by state discretion.

¹²⁸ *Suresh v. Canada*, 1 S.C.R. 3 (2002).

¹²⁹ *Ramzy v. Netherlands*, Application no. 25424/05, Eur. Ct. H. R. (2008).

¹³⁰ International Commission of Jurists, *Netherlands: Non-refoulement Principle Challenged Before European Court*, <https://www.icj.org/ebulletin/netherlands-non-refoulement-principle-challenged-before-european-court/> [https://perma.cc/H42P-BNGB] (last visited Dec. 19, 2023).

¹³¹ Press Release, Eur. Ct. H.R., *Afghan Woman and Libyan Man Risk Ill-Treatment if Returned to Country of Origin* (July 20, 2010).

¹³² Ingrid Holm, *Non-refoulement and National Security* (2015) (LLM thesis, Lund University).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ LEGAL INFO. INST., *Preemptory Norm*, https://www.law.cornell.edu/wex/peremptory_norm [https://perma.cc/FQ7T-6H7H] (last visited Dec. 18, 2023).

¹³⁶ *Id.*

5. *Third Country Duties and the Dublin Regulation*

In 2013, the European Commission, a part of the European Union executive branch, passed the current Dublin Regulation¹³⁷ (the Regulation), a series of procedures to determine which Member State is responsible for a migrant's asylum application if a migrant goes through multiple Member States.¹³⁸ For example, a Member State is responsible for a minor if the minor's family members are legally present in their state.¹³⁹

For the purposes of this paper, general principles primarily concerning irregular entry will be considered. As per Article 3(1) of the Regulation, "Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones."¹⁴⁰ Moreover, Member States can send applicants to a safe third country as per the regulations in Directive 2013/32/EU.¹⁴¹

In assessing the safety of a third country, the Member State must assess the general civil, legal, and political circumstances of a country and whether the specific applicant would be safe there.¹⁴² Member States are also encouraged to conduct regular reviews of third countries to ensure a country previously deemed as safe continues to be so.¹⁴³

Under Article 8 of the 2013/32/EU Directive, Member States are required to provide migrants in detention facilities or border crossing points with information regarding international protection, when they request such protection.¹⁴⁴ Moreover, Member States are to grant organizations and individuals who can help with acquiring international protection materials access to both detention facilities

¹³⁷ 2013 O.J. (L 180) 31.

¹³⁸ EUR. COMM'N, Country Responsible for Asylum Application (Dublin Regulation) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en [<https://perma.cc/5JQH-8T7A>] (last visited Dec. 19, 2023).

¹³⁹ Regulation 2013/604/EU, 2013 O.J. (L 49) art. 8(1).

¹⁴⁰ *Id.*

¹⁴¹ Council Directive 2013/32/EU, 2013 O.J. (L 180) 60.

¹⁴² *Id.* at art. 38.

¹⁴³ *Id.* at ¶ 48.

¹⁴⁴ *Id.* at art. 8.

and border crossing points.¹⁴⁵

6. *Friendly Relations Doctrine*

In light of Poland and Lithuania's allegations against Belarus's weaponization of migrants, it is also imperative to mention international relation expectations set in relevant treaties. The UN enacted the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (the Friendly Relations Doctrine) in 1970 to promote international peace, security, and amicable relations.

For the purpose of this paper, I will focus on Principle 1 which states, "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of United Nations."¹⁴⁶ States have the duty to "refrain from acts of reprisal involving use of force."

The Friendly Relations Doctrine inspired the Treaty on Good Neighborly Relations and Friendly Cooperation between Poland and Belarus in 1992 and Good-Neighborliness and Cooperation treaty between Belarus and Lithuania signed in 1995. In both treaties, Article 1 states parties must adhere to principles of "sovereign equality, the non-force or the threat of force, the inviolability of borders, territorial integrity, the peaceful settlements of disputes . . . [and] respect for human rights and fundamental freedoms."¹⁴⁷ The 1992 Polish-Belarus treaty marked a critical turning point in the countries' dynamic as Poland embraced its newfound connection to the West. While Polish and Lithuanian leaders saw the treaty as a stepping stone towards a new democratic Belarus state, Polish-Belarus relations worsened in the early 2000s.¹⁴⁸

¹⁴⁵ *Id.* at art. 8(2).

¹⁴⁶ G.A. Res. 2625 (XXV) (Oct. 24, 1970) at 122.

¹⁴⁷ *Id.*

¹⁴⁸ See Łukasz Wojcieszak, *Specifics of the Polish-Belarusian Economic Relations in the 21st Century*, 613-27 (C. Eurp. Studies, Working Paper ISSN 2067-7693, 2017); See also Justyna Olędzka, *Deadlock or New Opening? Current State and Prospects for Development of Lithuanian-Belarusian Relations*, 19 *Rocznik Instytutu Europy Środkowo-Wschodniej* 121-41 (2021).

C. Background Domestic Refugee Law in Poland and Lithuania

1. Polish Refugee Law

Multiple amendments have been made to Polish refugee law in the past two decades. The 2003 Aliens Act, which has been amended most recently in 2021, repealed the 1997 Aliens Act, most notably in specifying the definition of a refugee.¹⁴⁹ Today, the Act states, “[a] foreigner is granted refugee status if, due to a well-founded fear of persecution in the country of origin due to race, religion, nationality, political beliefs or membership in a specific social group, he is unable or unwilling to benefit from the protection of that country.”¹⁵⁰

Under Article 40(1) of the Aliens Act, an alien can be detained despite applying for refugee status during border control if he does not have the right of entry.¹⁵¹ Under Article 40(2), an alien can also be detained if he crosses the border illegally, despite trying to apply for refugee status afterwards.¹⁵² Instead of detention, an “arrest for the purpose of expulsion” can be ordered by the Border Guard if the guard deems the individual a threat to public safety.¹⁵³

The 2013 Act on Foreigners amended the 2003 Aliens Act;¹⁵⁴ for the purposes of this paper, I will primarily focus on the changes to detention criteria in Section 6. There are two types of facilities in Poland that migrants can be placed in: guarded centers or detention centers.¹⁵⁵ Typically, asylum seekers will be first placed into guarded centers and may be moved to a detention center if a guard deems that the migrant will not obey the rules in the guarded center.¹⁵⁶ Detention centers are more prison-like than guarded

¹⁴⁹ Act of 13 June 2003 on Granting Protection to Aliens Within the Territory of the Republic of Poland (2003 Dz. U. 1176) (2003).

¹⁵⁰ *Id.* at art. 13.

¹⁵¹ *Id.* at art. 40(1).

¹⁵² *Id.* at art. 40(2).

¹⁵³ *Id.* at art. 41.

¹⁵⁴ Act of 12 Dec. 2013 on Foreigners (2013 Dz. U. 1650) (2013).

¹⁵⁵ ASYLUM INFO. DATABASE, Place of Detention: Poland (May 22, 2023), <https://asylumineurope.org/reports/country/poland/detention-asylum-seekers/detention-conditions/place-detention/> [https://perma.cc/VCW9-SKFK] (last visited Dec.19, 2023).

¹⁵⁶ *Id.*

centers.¹⁵⁷ Section 6 outlines a migrant's rights in both cases.

Under Article 398, a foreigner is to be placed in a guarded center if there is a chance that a decision regarding a return obligation will be or has been issued without a specified period for voluntary return.¹⁵⁸ However, a foreigner shall not be placed in neither a guarded nor detention center if it could “pose threat to the life or health of a foreigner” or “the foreigner’s physical and psychological condition could justify a presumption that a foreigner has experienced violence.”¹⁵⁹

In deciding a foreigner's placement, the court must take steps to protect the foreigner's property.¹⁶⁰ Within a guarded center, foreigners are entitled to get in touch with Polish state authorities, as well as NGOs, international organizations, and their own attorneys.¹⁶¹ Foreigners are also entitled to medical care, including hospitalization,¹⁶² proper sanitation facilities and cleaning products, as well as clothing free of charge if their own clothing is “not suitable for use.”¹⁶³

A court of law shall order a foreigner to spend more than 3 months in either a guarded or detention center, though according to Article 403(2)(3) the total stay “must not exceed 12 months, where each subsequent ruling of the court in their case shall be issued for a period not longer than three months.” Additionally, that 12-month benchmark does not include the time in which a foreigner is waiting for a refugee ruling.¹⁶⁴ Foreigners are also entitled to receive compensation for wrongful placement in either a guarded center or detention facility.¹⁶⁵

The October 14, 2021 Act amending the Act on foreigners and certain other Acts is colloquially known as the “disposal act.”¹⁶⁶ The

¹⁵⁷ *Id.*

¹⁵⁸ Act of Dec. 12, 2013 About Foreigners, 2013 (Dz. U. 1650) art. 398 (2013).

¹⁵⁹ *Id.* at art. 400.

¹⁶⁰ *Id.* at art. 402.

¹⁶¹ *Id.* at art. 415.

¹⁶² *Id.* at art. 415–17.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at art. 403.

¹⁶⁵ *Id.* at art. 407.

¹⁶⁶ Ewa Siemiatkowska, *The Migration Crisis on the Poland-Belarus Border: How Prejudice and Nationalism Lead to Grave Violations of International and Human Rights Law*, COLUM. UNDERGRAD. L. REV. (2023).

most striking amendments were in Article (1) and (3), which essentially stated illegal border crossings will result in an alien being expelled from Poland and prohibited from re-entering Poland or other countries in the Schengen Zone for 6 months to 3 years.¹⁶⁷ The 2021 Act also added a section to Article 33(1) stating that

The Head of the Office may leave the application for granting without consideration international protection application, which was submitted by a detained foreigner immediately after crossing the border contrary to the provisions of applicable law external . . . unless this foreigner came directly from the territory in which he lives or freedom was threatened by danger of persecution or risk of harm serious harm, and provided credible reasons for illegal entry in the territory of the Republic of Poland and submitted an application for protection international immediately after crossing the border.¹⁶⁸

The 2021 Act also adds that anyone who destroys or damages any part of the state border, such as fences or barbed wire, can be punished for 6 months to 5 years.

2. *Lithuanian Refugee Law*

The Law on Refugee Status in the Republic of Lithuania (the Law) outlines proper conditions and procedure for asylum seekers. The Law defines refugee similarly to the UN and Poland, stating a refugee is someone who

has well-founded reasons to fear persecution because of his/her racial origin, religion, nationality, membership in some social group, or political views and cannot, or fears to, enjoy the protection of the country of which he/she is a citizen, or if he/she has no corresponding citizenship and is outside the territory of the country where he/she used to reside, and due to above reasons cannot, or fears to, return home.”¹⁶⁹

Article 8 of the Law states that a foreigner cannot be penalized for entering Lithuania illegally “if he/she comes to the Republic of Lithuania from a country where his/her life or freedom has been exposed to danger” and introduces himself to proper authorities

¹⁶⁷ Act of Oct. 14, 2021 Amending the Act on Foreigners and Certain Other Acts (Dz. U. 1650) art. 1(3) (2021) (translated by Maciej Kaluta).

¹⁶⁸ *Id.* at art. 3(1a).

¹⁶⁹ Republic of Lithuania Law on Refugee Status (I-1004), art. 2 (1995) (amended 1997).

“within 48 hours.”¹⁷⁰ Furthermore, foreigners seeking refugee status shall not be returned to their home country if “his/her life or freedom is exposed to danger.”¹⁷¹ Lithuania agreed to implement provisions from the Convention and 1967 Protocol as well as provide proper statistics and information on refugees who enter its borders.¹⁷²

The 2004 Aliens Act (the Aliens Act) further specifies foreigner rights and procedures and was amended in 2023. Once again, Article 70 reaffirms Article 8 of the Law, in which illegal entry to Lithuania cannot be penalized if the foreigner was fearing for his life.¹⁷³

The Aliens Act also lays out the procedure for determining a safe third country.¹⁷⁴ The Migration Department has 48 hours after an asylum application is filed to decide what country is responsible for the migrant.¹⁷⁵ Only after Lithuania is determined to be the responsible state is the asylum application to be examined “as to substance.”¹⁷⁶ Under Article 77, “[i]f an asylum applicant comes from a safe third country . . . he shall be refused temporary territorial asylum and his asylum application shall not be examined as to substance . . . he shall be expelled or re-fouled to [the safe third country].”¹⁷⁷

The Aliens Act also lays out grounds for detention of aliens in Article 113. Amongst the reasons given, an alien can be detained “if a decision on the expulsion of the alien” has been decided and when the alien’s presence in Lithuania is “a threat to national security, public policy, or public health.”¹⁷⁸ Aliens detained over 48 hours must go to the Foreigner’s Registration Centre, unless alternative measures for detention are used.¹⁷⁹ At the Foreigners’ Registration Centre, aliens have the right to “obtain legal assistance guaranteed by the state,” as well as “apply for medical services,” recruit a paid

¹⁷⁰ *Id.* at art. 8.

¹⁷¹ *Id.* at art. 9.

¹⁷² *Id.* at art. 19.

¹⁷³ Republic of Lithuania, Law on the Legal Status of Foreigners (IX-2206), art. 70 (2004) (amended 2023).

¹⁷⁴ *Id.* at art. 2.

¹⁷⁵ *Id.* at art. 5.

¹⁷⁶ *Id.* at art. 76.

¹⁷⁷ *Id.* at art. 77.

¹⁷⁸ *Id.* at art. 113.

¹⁷⁹ *Id.* at art. 114–15.

attorney, and speak with the “head of State Border Protection Service” regarding any disciplinary sanctions.¹⁸⁰ Aliens are allowed to have access to cellular devices if the head of the Center determines cell phone access will not threaten “security of the State [or] public order.”¹⁸¹

Similarly, to Poland, Lithuania passed the Resolution No. 517 in 2021 allowing the Lithuanian government to announce a state-level emergency in light of the “massive influx of foreigners.”¹⁸² Furthermore, Parliament passed the Resolution on Countering Hybrid Aggression which granted Lithuania the power to take “all measures to contain and prevent the threat of hybrid aggression,” in reference to the hijacking of a civil aircraft by Belarus as well as the influx in illegal border crossings.¹⁸³

The Lithuanian government amended the Aliens Act in response to tensions rising with Belarus, most notably for detention conditions.¹⁸⁴ During a state of emergency or emergency relating to the influx of migrants, asylum seekers may be gathered in “temporary accommodation designated for that purpose.”¹⁸⁵ The typical 28-day maximum period of stay also was extended to six months, in a migrant-influx emergency.¹⁸⁶

In April 2023, Lithuania passed an infamous “pushback law” allowing border guards to “temporarily limit or stop movement across the state border or certain border checkpoints” during a migrant-influx emergency.¹⁸⁷ The “pushback law” also allows border agents to detain migrants who illegally cross the border and

¹⁸⁰ Government of the Republic of Lithuania, Decree No. 103 of 2001 on Approval of Order and Conditions of Temporary Accommodation of Foreigners at Foreigners’ Registration Center (Decree No. 103) art. 17 (2001) (Lith.).

¹⁸¹ *Id.* at art. 21.

¹⁸² Government of the Republic of Lithuania, Resolution on the Declaration of the State-Level Emergency and the Appointment of the State-Level Emergency Operations Commander (517) (2021).

¹⁸³ *Id.*

¹⁸⁴ See UNHCR, *UNHCR Legal Observations on the Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens* (No XIV-506), at 2 (July 28, 2021).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 3.

¹⁸⁷ Republic of Lithuania, Law Amending Articles 1, 2, 4, 10, 11, 14, 15, 16, 18, 23, 26 of the Law of the State Border and its Protection No. VIII-1666 and Supplementing the Law with Article 23-1 and a New Chapter IX (XIV-1891) (2023).

deport them without the right to appeal.¹⁸⁸ Although there is a built-in exception for asylum seekers, in practice, individuals are unable to raise an asylum claims during the detention and detainment process.¹⁸⁹

IV. Legal Analysis

A. Analysis

1. Refugee Law

Polish and Lithuanian law both follow the standard international law definition of refugee as per the Convention. Asylum claims must be assessed on an individualized basis yet both countries continue to reject asylum claims without any proper inspection. By not providing individualized asylum assessments, Poland and Lithuania are violating the Convention and Article 3(1) of the Dublin Regulation.¹⁹⁰ Though a general refugee analysis is difficult because of its individualized nature, it is evident from interviewed individuals that their claims, upon further inspection, would present a valid asylum case.

One of the most frequent backgrounds of Human Rights Watch interviewees were Kurdish men and women coming from Syria and Iraq, two countries known for their decades long disdain for the Kurds.¹⁹¹ The Committee Against Torture has held on multiple accounts that States have an obligation to refrain from sending back Kurdish refugees due to the potential risk of torture;¹⁹² further inspection by Polish and Lithuanian officials, that truly abided by the refugee definition, would most likely lead to greater application approvals. Of course, asylum applications require more due process, as seen in the Dublin Regulation, and just being from a specific demographic is not sufficient for entry, as seen in Article 3 in CAT.

¹⁸⁸ Parliamentary Question E-001539/2023, Eur. Parliament (2023).

¹⁸⁹ *Id.*

¹⁹⁰ See U.N. Convention Relating to the Status of Refugees, *supra* note 50; See also EUR.COMM'N, *supra* note 138.

¹⁹¹ *Kurds & the Refugee Crisis*, THE KURDISH PROJECT, <https://thekurdishproject.org/infographics/kurds-and-the-refugee-crisis/> [<https://perma.cc/98YE-W3GN>] (last visited Dec. 18, 2023).

¹⁹² See, e.g., R.H. v. Sweden, Decision, Comm. No. 750/2016, U.N. Doc. CAT/C/63/D/750 (June 7, 2018); See also *Pelit v. Azerbaijan*; *X and Z v. Finland*. Decision, Comm. No. 483-85/2011, U.N. Doc. CAT/C/52/D/485/2011 (May 12, 2014).

Poland and Lithuania have further legitimized their international law violations through codification of “pushback laws” in the name of national emergencies. However, it is clear that the excuse of “a national emergency” has become an empty vessel to validate the retaliatory measure against Belarus, and in turn Russia. Poland and Lithuania’s “pushback laws” violate non-refoulement under Protocol 4 as both countries are collectively contributing to the textbook definition of collective expulsion of aliens. Asylum seekers are turned away immediately and sent back to Belarus in masses where the cycle of violence continues. Migrants are being continually pushed back and forth by border control on both sides, resulting in further devastating trauma.

Poland and Lithuania may argue that the illegal entry of certain migrants through broken chain-linked fences is not a violation of Protocol 4 as seen in *Case of N.D. and N.T. v. Spain* but this is incorrect. Migrants are not given the same “genuine and effective” access to proper legal entry into Poland and Lithuania as was afforded to migrants in Spain. In multiple cases Belarusian border guards were the ones cutting the border fence and ordering migrants to get through to the other side.¹⁹³ Though such crossings are technically illegal, the migrants are coerced into breaking respective domestic law against their will. Desperate for safety, these migrants should not be punished for abuse of Belarussian guards. Similarly, Poland and Lithuania cannot take away proper legal entrance across their borders and deny all illegal border crossings. This cuts off any possibility of claiming asylum, an international right that both Poland and Lithuania signed onto. Lithuania has also codified in its 2004 Aliens Act that foreigners cannot be penalized for illegal crossings if they occurred out of fear, which was amended in light of increased migrant crossings. Additionally, Poland and Lithuania have the responsibility of assessing the safety of Belarus as a “safe third country,” as per Directive 2013/32/EU.¹⁹⁴ Yet there is no evidence that either country has made any effort to do so.

Poland and Lithuania may also argue no violation of nonrefoulement because of the potential national security exception that has been arising in recent years; yet there is no evidence that these migrants, if individually assessed, present any type of threat

¹⁹³ See HUMAN RIGHTS WATCH, *supra* note 27.

¹⁹⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013.

to either country. The exception is seldomly used and has been mostly applied to terrorist circumstances. In *Chanhal*, the UK Court assessed the complainant's criminal past and violent activism against the United Kingdom's interest in the war against terrorism, in addition to the complainant's alleged expected torture if he was sent back to India.¹⁹⁵ On one hand, the Russian invasion of Ukraine has put Poland and Lithuania on high alert, especially on their borders with Russian ally, Belarus. The two countries are wary of what Russia may do next, given Soviet history. On the other hand, both countries are part of NATO and have had no active threat from Russia in the past three decades. There is no active war against terrorism that Poland and Lithuania are fighting in. If there are individuals that have controversial pasts, they can be examined upon further inspection. But inspection requires individualized review and the national security exception does not protect Poland and Lithuania in their attempts to push out whole masses of asylum seekers.

2. *Detention Conditions*

Poland and Lithuania are violating both international and domestic law through their refugee guarded centers. Contrary to the requirements of the 2013 Polish Act on Foreigners and 2004 Lithuanian Aliens Act, migrants are not receiving adequate access to NGOs, international organizations, nor their own lawyers.¹⁹⁶ Migrants across multiple centers reported extremely limited access to Internet and phone services.¹⁹⁷ Migrants also report poor sanitation, overcrowding, and improper access to critical medical services.¹⁹⁸

Polish and Lithuanian detention centers may also violate Article 3 of the ECHR, which qualifies degrading treatment as one which victims feels fear, anguish, and humiliating inferiority. In Poland, migrants are re-traumatized, referred to by their case number instead of their names and punished for simple request such as asking for more food. In Lithuania, women are subject to humiliating and invasive body searches, in some cases guards leveraging sex for

¹⁹⁵ See *Case of Chahal v. United Kingdom*, *supra* note 120.

¹⁹⁶ See *Paluchowska*, *supra* note 47.

¹⁹⁷ See HUMAN RIGHTS WATCH, *supra* note 18.

¹⁹⁸ See AMNESTY INT'L, *supra* note 21.

freedom.¹⁹⁹ These conditions also violate Article 16 of CAT. *Khalifia* defined degrading treatment as, (1) the purpose behind the ill-treatment; (2) the ill-treatment's context, and (3) whether "the victim is in a vulnerable situation" exceeding the inherent level of suffering involved in being detained."²⁰⁰ The court held that the detention centers were not a violation of Article 3".²⁰¹ Here, there is no purpose to the ill-treatment besides enforcing fear in all detainees. These cases are completely different than *Khalifia*, in which some violence treatment is valid in high-pressure scenarios. Detainee isolation as a response to a plea for more food is neither legally-sound nor moral. Ill-treatment through rape and abuse cannot ever be justified either, flatly failing the *Khalifia* framework.

V. Conclusion

Poland and Lithuania are bound by both UN and ECHR legislation and must provide adequate asylum procedures for migrants crossing through the Belarus border. Polish and Lithuanian "pushback laws" present a dangerous precedent that directly contradicts decades long refugee and asylum law. The countries violate international protocol by refusing individualized application reviews under the façade of a national security threat.

Circumstantial "pushback laws" also exemplify Poland and Lithuania's long line of institutional racism. There is a stark difference in treatment between Poland and Lithuania's response to the Ukrainian migrant crisis versus the Belarussian one. Of course, the main difference between the two migrant groups is race, in which Ukrainians were crossing the border seeking refuge from Russian invasion, as opposed to Middle Eastern and North African migrants who are using Belarus as a gateway into Europe. Ukraine, Poland, and Lithuania all share the common enemy of Russia as opposed to its ally, Belarus. Yet, even with foreign politics aside, migrants coming through Belarus are not affiliated with the Belarus/Russian alliance at all. Instead, they are individuals desperately seeking refuge and in turn are being punished for their courage. Institutional racism is not new to either country, especially in Poland where the far-right government frequently scapegoats

¹⁹⁹ See AMNESTY INT'L, *supra* note 26.

²⁰⁰ See *Khalifia and Others v. Italy*, *supra* note 88 and accompanying text.

²⁰¹ *Khalifia and Others v. Italy*, *supra* note 88, at ¶ 199 (2016).

immigrants.²⁰² Even within the Ukrainian refugee crisis, people of color were treated vastly different than their white counterparts.²⁰³

By providing such terrible conditions in the asylum process, Poland and Lithuania are using “coercive violence” to discourage more migrants for coming; yet, migrants are pushed back by Belarussian officials and are often left with no choice but to continue trekking in the woods and hope that NGO workers see them before Polish or Lithuanian border guards. This “coercive violence” is neither discouraging migrant crossing nor diminishing tensions with Belarus. Instead, migrants are further tortured in their numerous attempts towards safety, some getting badly hurt or even dying.²⁰⁴ While it might not be possible to immediately cut tensions with Belarus, Poland and Lithuania can mitigate the migrant crisis by providing humane conditions in detention centers. The international community can apply greater pressure to both countries by withholding international aid until conditions change.

Belarus also continues to directly violate the Friendly Relations Doctrine by vandalizing Polish border fences and indirectly by using migrants as a forced proxy-army to wreak havoc on the borders. Weaponization of migrants is not new. Forced emigration has been used by aggressor countries to induce greater economic negotiations with its neighboring countries and respective international tribunals.²⁰⁵ Most recently, President Recep Tayyip Erdogan threatened to loosen Turkey’s border policy to “flood” the European Union with Middle Eastern migrants, until he received additional European Union financial assistance.²⁰⁶ Unfortunately, history has shown that for forced migration to be halted, the coercer’s demands are typically met. Regardless of how Belarusian

²⁰² Michael Duffin, *Poland’s Evolving Violent Far-Right Landscape*, 15 CTC SENTINEL 19, 20–21 (2022).

²⁰³ Lorenzo Tondo & Emmanuel Akinwotu, *People of Color Fleeing Ukraine Attacked by Polish Nationalists*, GUARDIAN (Mar. 2, 2022), <https://www.theguardian.com/global-development/2022/mar/02/people-of-colour-fleeing-ukraine-attacked-by-polish-nationalists> [<https://perma.cc/Z2UK-QD8D>]

²⁰⁴ See AMNESTY INT’L, *supra* note 21; See also EUROPEAN COUNCIL ON REFUGEES AND EXILES, *supra* note 46.

²⁰⁵ Myron Weiner, *Security, Stability, and International Migration* (MIT, Working Paper 90-2, 1990).

²⁰⁶ Kelly Greenhill, *When Migrants Become Weapons*, MIT CENTER FOR INT’L STUDIES, <https://cis.mit.edu/publications/analysis-opinion/2022/when-migrants-become-weapons> [<https://perma.cc/7RQZ-6XYV>] (last visited Dec. 19, 2023).

relations are resolved, Poland and Lithuania have a legal obligation to properly take in migrants. Even if the migrants do not stay in Poland, their applications must be assessed thoroughly and due diligence must be taken in assessing proper third safe countries to ensure harm is minimized.