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PUBLIC INTERNATIONAL LAW IN THE TIMES OF NEW CHALLENGES AND A NEW TYPES OF CONFLICT

MIĘDZYNARODOWE PRAWO PUBLICZNE W DOBIE NOWYCH WYZWAŃ I NOWEGO TYPU KONFLIKTÓW

Abstract: There is no legal definition of a hybrid war in international public law, but what is happening on the Polish border with Belarus can be called a new type of border conflict. The situation on the Polish, Lithuanian and Latvian borders is evolving in a dangerous direction for the security of these countries and the security of the European Union, but it is also a humanitarian crisis. Public international law contains norms which give guidance on what steps should be taken. However, the development of the situation depends on the decisions of the countries involved in this border conflict. This conflict on the eastern border of the European Union has many aspects. This paper will provide an overview and explanation of the most important of them. Provisions of public international law and Polish national solutions related to migration and resolving such conflict situations are also discussed. This conflict is shown in a broader perspective of other hybrid actions used by Russia.

Zarys treści: W prawie międzynarodowym publicznym nie ma legalnej definicji wojny hybrydowej, ale to, co dzieje się na granicy Polski z Białorusią, można nazwać nowym typem konfliktu granicznego. Sytuacja na granicy Polski, Litwy i Łotwy ewoluuje w niebezpiecznym kierunku dla bezpieczeństwa tych krajów i bezpieczeństwa Unii Europejskiej, ale jest to również kryzys humanitarny. Prawo międzynarodowe publiczne zawiera normy, które dają wskazówki, jakie kroki należy podjąć. Jednak rozwój sytuacji zależy od decyzji państw zaangażowanych w ten konflikt graniczny. Konflikt na wschodniej granicy Unii Europejskiej ma wiele aspektów. Niniejszy artykuł zawiera przegląd najważniejszych z nich. W artykule omówiono przepisy prawa międzynarodowego publicznego, prawa Unii Europejskiej oraz polskie rozwiązania krajowe związane z kryzysem migracyjnym. Konflikt ten pokazano w szerszej perspektywie innych działań hybrydowych stosowanych przez Rosję.

Keywords: international law, hybrid conflicts, aggression, internal and external security

Słowa kluczowe: prawo międzynarodowe, konflikty hybrydowe, agresja, bezpieczeństwo wewnętrzne i zewnętrzne

Overview of the situation on the border with Belarus in 2021 and 2022

Before 24 February 2022, we could not imagine the situation that is currently taking place in Ukraine. The war has changed our reality and will have a huge impact not only on Europe but also on the world for many years to come.

However, in 2021 our attention was focused on a new type of conflict which began in autumn on the eastern border of Poland. This phenomenon, although on a smaller scale, is also observed today. Though the issue of the Polish-Belarusian border has disappeared from the media, Polish officers detain dozens of people who want to cross the border every day. Most of the migrants/refugees come from various countries in Asia, i.e. from Afghanistan, from the Middle East countries and from Africa. Refugees are people fleeing war or persecution. They are defined and protected by international law, such as the 1951 Geneva Convention Relating to the Status of Refugees, its 1967 Protocol and the 1969 Organization of African Unity Refugee Convention, and many other regulations at the international, regional or national level. A fundamental principle in international law is that refugees may not be expelled or returned to places where their life or freedom would be endangered. They must also have access to an objective and efficient asylum procedure. These are the duties of the authorities of individual states. Migrants are those who decide to leave their country not because of the immediate threat of death or persecution, but to improve their quality of life by finding a better job, school or joining family members. Migrants can safely return to their homes, whereas refugees cannot.

The regimes of Russia and Belarus organize the bringing of people from various countries to the eastern external border of the European Union. First, they arrange the travel of people to Belarus, and then the Belarusian authorities organize the expulsion of migrants to the border of Poland, Lithuania or Latvia. Migrants / refugees are encouraged by the prospect of easily crossing the border. They are not prepared for survival in the forest and for the conditions prevailing in the forest where they spend many days without food or water in bad weather conditions. They are forced out by the Belarusian authorities without the possibility of crossing the EU border. Winter, for obvious reasons, reduces the number of migrants/refugees who want to cross the border in this way, but the situation continues and there is still a lack of cooperation between NGO activists and state services working on the border (Border Guards, the Polish Army and the Police). For example, from information published by the NGO "Salvation Foundation" we have learned about the situation of a 16-year-old boy from Yemen, who was allegedly lying unconscious on the Belarusian side of the border for two days. "He was beaten by the Belarusian services, his condition was getting worse. Doctors who managed to video connect with his group

estimated that the boy must be hospitalized immediately, otherwise he might die. There are 4 adults in the group and 4 children (Yemeni citizens)”.¹ Later, in another publication, we learned that Polish soldiers did not help the boy and his group, they did not even give them the water they asked for. We have heard a lot of similar stories, or even worse, about the so-called pushback, i.e. expelling migrants (adults and children) back to the forest to the border with Belarus. Due to the smaller scale of the problem and the war in the Ukraine, this problem has now become less visible. The Border Guard has reported attacks by Belarusian authorities. For instance, in the area of Czeremcha in Podlasie, Belarusian soldiers attacked Polish officers. As a result of the incident, two people were injured: a Border Guard officer and a soldier. A Border Guard vehicle was also damaged.² However, this kind of information is of secondary importance now.

It was very difficult to assess the situation with migrants and refugees because the actions of the Polish authorities were not transparent. The Polish authorities did not want to allow Frontex to become involved in regulating this situation, and at the time of greatest pressure, the Polish authorities made unfortunate statements about banning journalists from entering the border area. Former Deputy Minister of Foreign Affairs, Piotr Wawrzyk, a deputy from the ruling Law and Justice party in Poland, said that the journalists may go to Belarus and report situation from there. Moreover, it was said the ban on journalists staying in the border zone was for their safety. This cannot be taken seriously because journalists work in more dangerous places, even where active hostilities are taking place.³

In addition, from the beginning of the crisis at the border to the present day the legal situation at the border has been changing significantly. The ban on staying in 183 localities near the border with Belarus, effective from 1 December 2021, was extended until 30 June 2022. As the Polish Constitution did not allow for another extension of the state of emergency, the government amended The Border Protection Act, which made it possible to introduce a temporary ban on staying in the border area. The ordinance of the Minister of the Interior and Administration confirmed the existing restrictions in this area, and the appendix contained a list of the zones that was subject to the ban. The list included 115 localities in the Podlaski Region and 68 in the Lubelski Region. Then, on 1 July 2022, a ban was introduced on approaching the Polish-Belarusian border in the Podlasie region at a distance of less than two hundred metres, first valid until 15 September, then extended until 30 November and finally until the end of 2022. This ban replaced wider restrictions related to

¹ Grupa Granica: Nieprzytomny nastolatek leży od dwóch dni pod granicą, po stronie Białorusi, <https://wiadomosci.gazeta.pl/wiadomosci/7,114883,28332360,grupa-granica-nieprzytomny-nastolatek-lezy-od-dwoch-dni-pod.html>, [accessed: 08.12.2021].

² Białoruskie służby zaatakowały polskich funkcjonariuszy Straży Granicznej, <https://www.msn.com/pl-pl/wiadomosci/polska/bia%C5%82oruskies%C5%82u%C5%BCby-zaatakowa%C5%82y-polskich-funkcjonariuszy-stra%C5%BCy-granicznej/ar-AAW4JW0?li=BBr5KbO>, [accessed: 13.07.2022].

³ Wiceszef MSZ: Polscy dziennikarze mogą jechać na Białoruś i stamtąd relacjonować kryzys na granicy, <https://www.rp.pl/polityka/art19087821-wiceszef-msz-polscy-dziennikarze-moga-jechac-na-bialorus-i-stamtad-relacjonowac-kryzys-na-granicy>, [accessed: 15.08.2022].

the migration crisis on the border with Belarus. Regulations on the border road strip have been in force since 2023.⁴

The government claims these regulations are to ensure the effectiveness of actions taken by the Border Guard. However, this was nothing more than a state of emergency introduced by other means. Moreover, this was a permanent state of emergency, which significantly limited the possibility of movement on the territory of Poland, not only limited to migrants. Exceptions to these regulations applied, for example, to people who permanently reside in the indicated area. The introduced prohibition was marked with boards with the words: “Area prohibited from entering – entry prohibited.” The provisions stipulated that, in justified cases, the locally competent commander of the Border Guard unit could allow other persons, in particular journalists within the meaning of the Press Law, to stay in the prohibited area for a specified period and on certain terms.

The amendment to the ordinance of the Minister of Interior and Administration extended the competences of the Border Guard officers. They were allowed to use chemical paralyzing agents, including handheld and knapsack gas throwers and tear-gas grenades. So instead of using legal methods to solve the situation the state was preparing for forceful solutions. This situation may seem even more surprising because some of these migrants/refugees did not want to stay in Poland. Some already had their own families in Western Europe, and not all of them would be covered by international protection and so would be sent back to their country of origin. Therefore, long-standing procedures should be used. These people should be admitted to refugee centres where their requests will be considered and where they could await for decisions, rather than being pushed across the border and wandering in the forest.

The Polish Ombudsman has made critical comments regarding the response of the Polish authorities to the humanitarian crisis on the Polish-Belarusian border. Particularly critical remarks concerned the regulations introduced into the Polish legal system which established previously unknown procedures in Poland and in public international law for returning foreigners to the border or the issuing of orders by the Border Guard to leave the territory of the Republic of Poland in this specific way. Both these procedures the Polish Ombudsman considered contrary to the provisions of the Geneva Convention on the Status of Refugees, the EU Charter of Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Polish Constitution. All these acts of law prohibit the collective expulsion of foreigners. Neither of these procedures guarantees the right of every foreigner to submit an application for international protection. Moreover, it is not possible to analyse the individual facts of a situation of a foreigner, including, for example, an analysis of the risk of violation of his right to life or freedom, as well as freedom from torture and inhuman treatment. Foreigners are still being returned to the border and forced to enter the territory of Belarus, despite the war in Ukraine

⁴ Fiłończuk, R., *Zakaz zbliżania się do granicy polsko-białoruskiej na 200 metrów nie będzie przedłużony*, <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8621162,bialorus-zakaz-zblizania-sie-do-granicy.html>, [accessed: 01.10.2022].

and the active involvement of Belarus on the side of the aggressor. The Ombudsman has asked for an immediate suspension of the use of pushback, and then for steps to be taken to eliminate these procedures from the Polish legal system.⁵

Every person who wishes to apply for international protection at the border should be admitted to Poland, and Border Guard officers are required to provide an appropriate application form to them. Otherwise, the provisions of the Convention relating to the Status of Refugees, 28 July 1951, cannot be fulfilled. The Convention obliges states/parties to ensure fundamental rights and freedoms to people who are seeking protection from persecution in their home country. In 2020, the European Court of Human Rights issued a judgment in the case of *M.K. and others v. Poland* (applications no. 40503/17, 42902/17 and 43643/17). It was a complaint by Russian citizens of Chechen origin regarding the lack of access to the refugee procedure at the Terespol (Poland) border.

The European Court of Human Rights found that Poland had committed human rights violations – decisions in the applicants' cases had been taken without consideration of their individual circumstances. They were part of a broader policy of not accepting applications for international protection from people arriving at the Polish-Belarusian border and returning them to Belarus in violation of domestic and international law. This policy constituted the collective expulsion of foreigners.⁶ Despite this judgment, such decisions are still common practice today.

The activities of Belarus and Russia in this regard are a part of a destabilization policy towards Poland and the European Union. Therefore, it can be predicted with high probability that this humanitarian crisis will be prolonged by Russia and Belarus for a long time. We can no longer count on any diplomatic cooperation with Russia and Belarus. Efforts, therefore, need to be stepped up in the migrants' countries of origin. EU diplomacy must act and inform people and persuade them that illegally crossing the EU border is impossible. When they are at the border, it is too late. More often than not, migrants have travel related debts and nothing to go back to. No service in the world can cope with thousands of desperate people, so problems must be dealt with in their countries of origin, and not at the border where they will be trapped.

So far many people have died in the forests at the border, on both the Polish and Belarusian sides, because of cold and exhaustion. This should not have happened in the 21st century in the centre of Europe.

Currently, there is a physical barrier on the Polish-Belarusian border. It is a 5.5 m high fence made of steel spans and it is 186 km long. The border is also protected by an electronic barrier. It protects a longer distance, including part of the border waters. The 206 km electronic barrier is equipped with 3,000 day-night and thermal cameras, as well as 400 km of detection cables and 11 telecommunications containers.

⁵ Wstrzymać stosowanie pushbacków i wydawanie postanowień o opuszczeniu terytorium RP na granicy polsko-białoruskiej. RPO pisze do MSWiA, <https://bip.brpo.gov.pl/pl/content/RPO-wstrzymac-stosowanie-push-backow-granica-bialorus>, [accessed: 10.09.2022].

⁶ Ograniczony dostęp migrantów do procedury uchodźczej w Polsce. Informacje RPO dla Specjalnego Sprawozdawcy ONZ, <https://bip.brpo.gov.pl/pl/content/ograniczony-dostep-migrantow-do-procedury-uchodzczej-informacje-rpo-dla-sprawozdawcy-onz>, [accessed: 10.09.2022].

However, the problem of illegal migration on the Polish-Belarusian border has still not been solved. Alexander Lukashenko's regime continues to bring migrants from the Middle East to send them to the border with Poland. The humanitarian crisis at the border is not over and, with another winter coming, it could again take on a very dramatic scenario.⁷

The essence of hybrid conflicts

The situation described above, the border conflict on the eastern border of the European Union, may be classified as a hybrid conflict. In international law there is no legal definition of a hybrid conflict or a hybrid war, it is rather a journalistic, popular-scientific concept which has certain characteristic features. The concept itself is quite new but, from the earliest times, certain elements characteristic of hybrid conflicts have been present in historical conflicts and wars. This concept is becoming more and more popular nowadays and it is used in many different situations.

There are a number of hybrid conflict definitions under debate. Col. Gian Gentile of the U.S. Military Academy posed a number of unique insights into the debate about future threats in essay in which hybrid warfare was labelled "vague." In another monograph out of the Army War College, the hybrid threat concept was simply truncated to blurring of regular and irregular warfare. Neither author found the construct clear or of much value.

Nathan Freier of the Center for Strategic and International Studies was one of the originators of the hybrid warfare construct. According to his definition, hybrid threats are represented by the now famous "quad chart" of four threats – traditional, irregular, catastrophic terrorism and disruptive – that exploit revolutionary technology to negate military superiority. This strategy noted that in the future the most complex threats would be combinations of these four. Freier's version defines a hybrid threat as any actor who uses two of the four modes of conflict.

Frank G. Hoffman modifies the definitions used by the military. This definition is adapted from the national defence strategy and focuses on the adversary's modes of conflict. It explicitly eliminates "disruptive technology" and incorporates "disruptive social behaviour" or criminality as the fourth modality.⁸

Therefore, using many different sources, it can be assumed that hybrid conflicts are:

- a modern version of guerrilla warfare;
- a combination of four types of aggression: traditional, irregular, terrorist and cybernetic;
- a type of asymmetric conflict, including military operations, irregular warfare and propaganda;

⁷ „Plot” na granicy z Białorusią ukończony. Ostatni odcinek przechodzi odbiór, <https://www.money.pl/gospodarka/plot-na-granicy-z-bialorusia-ostatecznie-ukonczone-ostatni-odcinek-przechodzi-odbior-6904368464075648a.html>, [accessed: 04.07.2022].

⁸ Hoffman, F.G., *Hybrid vs. compound war*, Armed Forces Journal, <http://armedforcesjournal.com/hybrid-vs-compound-war/>, [accessed: 10.07.2022].

- a combination of elements of traditional warfare, irregular war, civil war, artificially induced insurrection and terrorism and criminal behaviour for political gain.

It should be added here, based on the latest experience, that actions seemingly unrelated to a serious interstate conflict can also seriously destabilize society and the state, threaten economic development and seriously disturb public order. Activities such as: spreading disinformation, conspiracy theories about, for example, a global conspiracy or using vaccines to cause depopulation around the world, using propaganda, manipulating the results of political elections in various countries and, of course, causing migration crises, can also be classified as hybrid activities. These do not have a military character, but they contribute to the serious destabilization of the politics and economies of countries. They have a similar effect to a terrorist threat, causing fear and panic in societies.

Conflicts Below the Threshold of Armed Conflict

As long as actions do not exceed the threshold of armed conflict, in principle, actions are legal according to international law, even if they are hostile. In such conflicts, the following may be noticeable: hostile destabilizing actions, triggering a migration crisis, simulated shots, intense disinformation, cyberattacks, infiltration, hostile propaganda, manipulation – nowadays with the use of mass media and the Internet, exerting an unnoticed psychological influence on society, causing targeted hostility, financing of political parties, politicians and organizations, which builds political influence and support, and even foreign electoral intervention. In these situations, migrants/refugees are treated instrumentally and it is irrelevant how bad their situation is. In order to manipulate one's own society, lies and dehumanizing terminology are used. Only political goals count. Over time, the probability of an escalatory action increases, both by the side which started hostile actions and also by the side under attack.

From the beginning, this border conflict has had many aspects which we did not appreciate before – it was the beginning of the execution of a bigger plan and it foreshadowed something much worse – the war that Russia started six months later. The border situation can be summarized thus: apart from the obvious goal of destabilizing the European Union states, other important goals were: analysis of reaction of states, analysis of cooperation within the European Union, assessments of the reactions media of individual societies and finally, creating an atmosphere of hostility towards refugees. This was potentially supposed to create hostility towards future Ukrainian refugees and, in a broader context, was a Russian attempt to create a new world order and to establish new zones of Russian influence on the European continent.

Hybrid warfare

Hybrid warfare is a theory of military strategy, first proposed by the already mentioned Frank G. Hoffman,⁹ which employs political warfare and blends conventional warfare, irregular warfare, and cyberwarfare with other influencing methods, such as fake news, enemy propaganda, diplomacy, influencing society and foreign electoral intervention.

“To put it simply, hybrid warfare entails an interplay or fusion of conventional as well as unconventional instruments of power and tools of subversion. These instruments or tools are blended in a synchronised manner to exploit the vulnerabilities of an antagonist and achieve synergistic effects. The objective of conflating kinetic tools and non-kinetic tactics is to inflict damage on a belligerent state in an optimal manner. Furthermore, there are two distinct characteristics of hybrid warfare. First, the line between war and peace time is rendered obscure. This means that it is hard to identify or discern the war threshold. War becomes elusive as it becomes difficult to operationalise it”.¹⁰ It is difficult for a regular army to respond adequately to this type of hostile action.

In July 2014, the North Atlantic Treaty Organization officially announced that the war in southeastern Ukraine (annexation of Crimea by Russia and war in Donbas) was a hybrid war. This was carried out by using armed force (Russian soldiers without insignia, the so-called green men). In the war in Donbas there were also no clashes between regular army units. It was an armed conflict between pro-Russian separatists from eastern Ukraine, with the Russian Federation supporting them, and forces loyal to the legal authorities of Ukraine. In addition to military operations, terrorist attacks were carried out, such as the shooting down of a Malaysia Airlines passenger plane or the imprisonment of OSCE representatives.

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⁹ Hoffman, F., *Conflict in the 21st Century: The Rise of Hybrid Wars*, Arlington, Virginia: Potomac Institute for Policy Studies, 2007, https://www.potomacinstitute.org/images/stories/publications/potomac_hybridwar_0108.pdf, [accessed: 10.09.2022].

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Summary

It is a new version of the old Machiavellian concept that the end justifies the means. This is particularly painful for Europe now when the war in Ukraine has become regular and extremely cruel. The Kremlin’s earlier actions, such as the militarization of social media, propaganda, hostility towards Ukraine, repeating lies about alleged Ukrainian Nazis, one-my propaganda against the European Union, rewarding and supporting useful politicians, and then the occupation of Crimea and the war in Donbas – referred to as a hybrid war – all these activities prepared the ground for the present war. Putin dreams of a new world order. An old man with a mania for grandeur and the belief that he can subjugate Europe will use every opportunity to achieve his goals. Using a hybrid conflict strategy is very effective in this pursuit.

How effective these activities were can be proved by, for example, the support for Putin’s policy by some European politicians, a high level of support for the war in Russian society and the minds of a large part of the younger generation of Russians hypnotized by propaganda. The opinion of a young Russian is an anecdote: they prefer to live in Russia and not Switzerland because Switzerland is such a small country. Russia is indeed a very large country. However, instead of dreaming of an empire, young people should care about the country’s economic development. Russia has a lot to do in this area.

It turns out propaganda is a very effective weapon in a hybrid conflict and it is not regulated by international law. Public international law reacts quite slowly to changing situations. As there is no international legislator, agreements are created by arrangements between states.

The long ratification procedures make the process even longer. On the other hand, the international community can respond quite quickly to threats by creating strategies and structures for cooperation. A good example relating to hybrid threats is the cooperation between the EU and NATO within Hybrid CoE. Because the speed, scale and intensity of hybrid threats have increased in recent years, being prepared to prevent, deter, counter and respond to hybrid attacks, whether by state or non-state actors, is also a top priority for NATO. The loyal cooperation of states is the best answer to the hybrid threats posed by contemporary authoritarian regimes.

The situation on the eastern border of the European Union also requires a similar approach. The basis for actions towards Russia and Belarus should be joint actions of border states and assistance from the European Union.