

## IRREGULAR MIGRANTS IN LITHUANIA IN THE CONTEXT OF THE READMISSION AGREEMENT WITH LATVIA

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**Abstract.** *Due to the Lithuanian “push-back” policy, the number of persons irregularly crossing the Lithuanian-Belarusian border is decreasing. However, irregular migration remains significant in Lithuania. Migrants who irregularly cross the EU border in Latvia use Lithuania as a transit country to reach other EU countries. Such migrants in secondary migration found in Lithuania can be returned to Latvia following the readmission agreement and/or Dublin III Regulation. The paper aims to identify whether Lithuanian law and practice regarding irregular migrants in secondary migration from Latvia comply with international and EU law requirements. To achieve this aim, the paper defines the meaning of secondary migration of irregular migrants from Latvia, determines the International, EU and Lithuanian law and provisions of the Readmission agreement with Latvia applicable to secondary migration, and presents a practice of Lithuanian authorities in organising and performing the return to Latvia of migrants in secondary migration.*

**Keywords:** *irregular migrants, readmission agreement, Dublin III Regulation*

### Introduction

Due to the Lithuanian “push-back” policy, the number of persons irregularly crossing the Lithuanian-Belarusian border is decreasing. However, irregular migration remains significant in Lithuania. Migrants who irregularly cross the EU border in Latvia use Lithuania as a transit country to reach other EU countries. Such migrants found in Lithuania can be returned to Latvia following the Readmission agreement with Latvia and/or the Dublin III Regulation.

When assessing the situation, questions arise about what rights of irregular migrants should be protected, how those rights should be protected, and how the rights of irregular migrants are ensured in practice during return/transfer proceedings. What is the legal status of these migrants in Lithuania? Do Lithuanian authorities' actions comply with international obligations and EU law?

**The object of the research** – the law and practice regarding irregular migrants in secondary migration from Latvia.

**The research aims** to identify whether Lithuanian law and practice regarding irregular migrants in secondary migration from Latvia comply with the International and EU law requirements.

**The objectives of the research:** To define the meaning of secondary migration of irregular migrants from Latvia; To determine the International, EU and Lithuanian law and provisions of the Readmission agreement with Latvia applicable to secondary migration; To present the practice of Lithuanian authorities in organising and performing the return to Latvia of migrants in secondary migration.

**Methodology of the research:** Analysis, comparison and generalisation methods were applied to the study. International, EU, and Lithuanian law, the Readmission Agreement with Latvia, the European Human Rights Court and the EU Court of Justice decisions were analysed.

By applying the generalisation method, the work summarises and highlights the gaps in the Lithuanian practice of transferring irregular migrants to Latvia. This method is also applied to present the conclusions.

## **Irregular migrants in secondary migration from Latvia**

### ***Irregular migrant and irregular migration***

International, regional, or national laws do not define *irregular migration*. However, this term is used in theory and practice to describe the movement of people, not in a way defined by the countries' laws. Various international and EU organisations similarly define irregular migration and irregular migrants.

At the international level, IMO defines irregular migration as the movement of persons “that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit, or destination” (IOM, 2024) and speaking about irregular migrants, the UN General Assembly indicates that irregular migrants are those who cross the border of another country without authorisation to enter or stay in that country pursuant to that country's law and to international agreements to which that country is a party (UN General Assembly, 1990, Art. 5).

At EU level, the European Commission describes irregular migration as the movement of persons “to a new place of residence or transit that takes place outside the regulatory norms of the sending, transit, and receiving countries” (European Commission, 2024) and the Directorate of Migration and Home Affairs of the European Commission indicates that an irregular migrant is “a person who, owing to irregular entry, breach of a condition of entry or the expiry of their legal basis for entering and residing, lacks legal status in a transit or host country” (European Commission, 2024a).

The Law of the Republic of Lithuania on The Legal Status of Foreigners describing irregular migration or irregular migrants uses the words “foreigners illegally staying in Lithuania,” “a foreigner, shortly after illegally crossing the state border of Lithuania,” “has entered Lithuania illegally,” etc. (Seimas, 2004, Art. 3 (5), 5 and 140<sup>8</sup>). The Law indicates that the arrival of asylum seekers outside the procedure established by the Schengen Borders Code is considered illegal (Seimas, 2004, Art. 10 and 70). Such an approach does not correspond to the opinion of the IMO and the European Commission. In the opinion of the IMO and European Commission, the term “illegal” should not be used in relation to irregular migration or irregular migrants, especially those whose intent for crossing the border is to request asylum. Refugees, victims of trafficking, or unaccompanied migrant children should not be considered illegally crossing the state border (IOM, 2024).

There are many reasons for irregular migration. Poverty and social and political instability force people to migrate. According to the European Commission, the limited availability of legal migration routes often pushes people towards criminal networks to facilitate their unauthorised entry, transit, or stay in the EU. Most irregular migrants originally enter the EU legally on short-stay visas but remain in the EU for economic reasons once their visa expires (European Commission, 2024b).

### ***Secondary migration from Latvia***

At the beginning of the summer of 2021, irregular migrants began to flow to Lithuania across the Lithuanian-Belarusian border. On 1 July 2021, the number of such irregular migrants

reached 150 people per day (BNS and lrytas.lt, 2021). To manage the migrant crisis, Lithuanian authorities declared a state-level extraordinary situation on 2 July 2021 due to a mass influx of migrants at the Lithuanian-Belarusian border (Government, 2021).

A couple of months later, construction of a physical barrier on the Lithuanian border with Belarus began. The barrier was completed in August 2022. A physical barrier—a fence and cutting wire—has been installed in sections of about 502 kilometres. The total length of the Lithuanian border with Belarus is 679 km. More than 100 km of the border runs along the banks of rivers and lakes (BNS, 2022).

The practice of “push-back” was established by the Decision of the Minister of Interior and State Commander of National Emergency Operations on 2 August 2021. The State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania was responsible for executing the “push-back” from the border.

According to the Decision, persons could only cross the external land border at border checkpoints. Persons were not allowed to cross the state border in other places, and those who attempted to do so had to be directed (required to go) to the nearest border checkpoint (Minister of Interior and State Commander of National Emergency Operations, 2021).

It should be noted that the number of border points through which migrants could cross the border was constantly reduced. As of 1 May 2022, twelve border points were closed and movement was restricted in one border point (Government, 2022). From 18 August 2023, two more border points were closed (Government, 2023). As of 1 March 2024, four more border points were closed. In this way, the options for migrants to enter Lithuania through border points were constantly reduced (Government, 2024).

The aim of the Government to protect the European external border is understandable; however, implementing the measures created significant fundamental rights issues. On 30 June 2022, the European Court of Justice made a landmark judgment in case *C-72/22 (PPU) M.A. v State Border Guard Service*, indicating that immediate detention, denial of access to asylum, and practice of collective pushbacks on the Lithuanian-Belarus border are considered the grave violations of EU and International law.

The Court of Justice's decision regarding the practice of collective “push-back” at the Lithuanian-Belarus border and other remarks of EU and Lithuanian institutions and NGOs involved in protecting fundamental rights led to changes in Lithuanian legislation. However, Lithuania has not abandoned the collective “push-back” policy. Lithuanian legislation provides that this measure can be applied during a mass influx of migrants. In particular, the amendments of the Law on the State Border and its Protection, which came into force on 3 May 2023, foresee that the policy of “push-back” of irregular migrants may be applied in the event of a state-level extraordinary situation due to a massive influx of foreigners (Seimas, 2023, Art. 3)

According to the Law on the State Border and its Protection (Seimas, 2000, Art. 4 (13)), in cases where a state-level extraordinary situation is declared due to a massive influx of foreigners and the aim is to ensure the national security and public order of Lithuania, the Government, on the proposal of the National Security Commission, may decide that foreigners are not allowed into the territory of Lithuania when they are crossing the state border in violation of the state border crossing procedure. The presence of these persons in the border section is not considered to be in Lithuania's territory. The border section is a territory up to 5 km into the territory of Lithuania from the state border, across land and border waters (Article 11 (3)). The Government has defined the boundaries of the border section (Government, 2007). On 3 May 2023, the Government of Lithuania issued a Resolution *Regarding the state border protection of the Republic of Lithuania in the event of a state-level extraordinary situation*, declaring that foreigners are not allowed into the territory of Lithuania when they are crossing

the state border in violation state border crossing procedure and are in the border section (Government, 2023a).

The “push-back” policy continues to this day. Since the beginning of the migration crisis in 2021, border guards of the State Border Guard Service have prevented 22166 irregular migrants from entering the country (State Border Guard Service, 2024).

The implemented measures have decreased the number of irregular migrants willing to cross the Lithuanian border. In 2024, border guards did not allow 206 irregular migrants from Belarus to enter Lithuania. Meanwhile, in 2023, 2,643 migrants were not allowed to cross the border between Lithuania and Belarus, and in 2022, 11,211 migrants were not allowed to cross the border (State Border Guard Service, 2024).

However, such a change does not mean that there are no more irregular migrants in Lithuania. It has been noticed that more and more irregular migrants are coming to Lithuania from Latvia, having crossed the border between Latvia and Belarus. Migrants who illegally cross the EU border in Latvia use Lithuania as a transit country to reach other EU member states. Such migration is called ‘secondary migration.’

The problem is that no one, except the Border Guard Service and possibly the Ministry of the Interior, knows the real number of irregular migrants from Latvia. These statistical data are not available publicly. However, the general trend can be observed from the statements of authorities' representatives in the media. In particular, the Minister of Interior, on 27 September 2023, in a press release, said that “[t]he number of irregular migrants arriving in Lithuania from Latvia has increased twentyfold this year” (BNS, 2023). The State Border Guard Service representative on 28 April 2024 said that the flow of secondary migration has slowed down this year; last year, over 1 thousand migrants from Latvia were intercepted in Lithuania during illegal secondary migration (ELTA, 2024). The State Border Guard Service's regular press releases in 2024 about intercepted irregular migrants show that migration from Latvia to other ES states through Lithuania as a transit country continues. (State Border Guard Service, 2024a) (State Border Guard Service, 2024b) (State Border Guard Service, 2024c). It should be noted that in crossing Lithuania, not only Lithuanian citizens but also migrants from non-EU countries who live in Lithuania assist the irregular migrants.

Summarising the analysis, irregular migrants from Latvia in secondary migration are those who crossed the Latvian–Belarus border in violation of Latvian law and are crossing Lithuania as a transit country to reach other EU member states. The number of such irregular migrants correlates with the strictness of the Lithuanian “push-back” policy. These irregular migrants intercepted in Lithuania have rights protected by International and EU law.

### **International, EU, and Lithuanian law and Readmission agreement with Latvia applicable to secondary migration**

The fact that the above-mentioned migrants migrate irregularly does not relieve States from the obligation to protect their rights. There is no doubt that even when in an irregular situation, migrants are entitled to the respect, protection and fulfilment of their human rights embedded in international and EU documents as well as national laws and bilateral agreements. Considering that, the paper analyses international and EU law requirements in protecting the rights of irregular migrants and organising their reception and transfer to the states responsible for examining the asylum application.

### *International universal guarantees for migrants*

The first international document aiming to protect irregular migrants' rights is the *Universal Declaration of Human Rights*. United Nations General Assembly in Paris on 10 December 1948, by General Assembly resolution 217 A, proclaimed the Universal Declaration of Human Rights as "a common standard of achievement for all peoples and all nations" (UN General Assembly, 1948).

The Declaration does not guarantee everyone's right to freely enter another country's territory. The Declaration foresees four rights for everyone in migration: 1) the right to freedom of movement and residence within the borders of each state, 2) the right to leave any country, including his own, 3) the right to return to his country, 4) the right to seek and to enjoy in other countries asylum from persecution. (Articles 13 and 14).

The provisions of the Declaration show that at least those who seek asylum from persecution should be able to enter and stay in other countries' territories. Therefore, to ensure that those seeking asylum from persecution are not overlooked, procedural safeguards for situation screening must be implemented in each State, including everyone's right to appeal any decision made against them.

Describing safeguards, the Declaration provides that everyone "has the right to recognition everywhere as a person before the law" (Article 6), everyone is entitled "without any discrimination to equal protection of the law" (Article 7) and "in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations" (Article 10) And finally, the Declaration indicates that "[n]o one shall be subjected to arbitrary arrest, detention or exile" (Article 9).

The second international document, the *Convention Relating to the Status of Refugees (1951)* and its *Protocol Relating to the Status of Refugees (1967)*, focuses on the rights of refugees who not only can arrive in the country of asylum following the established procedure but also can apply for asylum after arrival as irregular migrants.

According to Article 1 of the Convention and Article 1 of the Protocol, everyone can ask for asylum in another country if they have a well-founded fear of being persecuted in the country of nationality or home country for reasons of race, religion, nationality, membership of a particular social group or political opinion. That State is obliged not to expel or return such refugee to the country where his life or freedom would be threatened because of the listed reasons (Article 33 (1)).

Every state is committed to not imposing penalties on refugees who enter and stay in its territory without authorisation when they come directly from a territory where their life or freedom is threatened. Only such migrants must promptly present themselves to the authorities and show good cause for their illegal entry or presence (Article 31(1)).

States cannot restrict the movements of such refugees except when it is necessary for good cause until decisions on their status in the country are made or another country allows them to enter and stay in its territory. The state can expel a refugee only after making a decision in due process of law. Refugees must be able to appeal the decision, submit evidence to clear themselves, and represent themselves before a competent authority or authorised person (Article 31(2)). They also must have free access to the court (Article 16 (1)).

The third document, the *International Covenant on Civil and Political Rights* (UN General Assembly, 1966), provides a list of rights, some of which must also be guaranteed for irregular migrants.



First, irregular migrants cannot be subjected to torture or cruel, inhuman, or degrading treatment or punishment (Article 7). It should be noted that deviation from protecting this right is prohibited under any circumstances (Article 4 (2)).

The Covenant also states that everyone has the right to liberty and security. Arbitrary arrest or detention is prohibited, according to Article 9 (1). Everyone who is deprived of his liberty by arrest or detention must have the possibility to take proceedings before a court that court may decide on the lawfulness of their detention (Article 9 (4)). Those deprived of their liberty must be treated humanely and respectfully (Article 10 (1)).

Notably, the Covenant requires that each state must ensure the protection of these rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2 (1)). Anyone whose rights or freedoms listed in the Covenant are violated must have access to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (Article 2 (3)(a)).

In addition, the Covenant specifies that a state can expel a foreigner only following the decision reached under the law. The foreigner must be able to submit the reasons against his expulsion, except where compelling reasons of national security otherwise require, and be allowed to have his case reviewed by the competent authority or an authorised person (Article 13).

However, it should be noted that in exceptional cases, states may not guarantee the protection of the rights provided for in this Covenant (except for the prohibition of torture or cruel, inhuman, or degrading treatment or punishment). Article 4 (1) of the Covenant specifies that in case of an officially proclaimed public emergency threatening the nation's life, the states may derogate from their obligations under the Covenant to the extent strictly necessary for dealing with the situation. Such actions must be in accordance with the state's other obligations under international law, and they cannot discriminate based on race, colour, sex, language, religion, or social origin.

The last universally applicable document to irregular migrants is the *Convention on the Rights of the Child (1989)*. This document is exclusively dedicated to protecting children, including accompanied and unaccompanied children, in migration.

The main requirement under this document is that a state must consider the best interests of the child when performing any action concerning children (Article 3 (1)). Following this, states must respect the child's opinion and create conditions for the child to be heard in any judicial and administrative proceedings (Article 12 (2)), as well as to ensure that a child who is an asylum seeker receives appropriate protection and humanitarian assistance (Article 22 (1)).

### ***Regional international guarantees for migrants***

In addition to the universally applicable international documents, Europe also has regional documents applicable to irregular migrants in secondary migration.

*The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), with additional protocols* (hereinafter – ECHR), is the core document regarding the protection of the human rights of all persons, including the rights of irregular migrants. A group of rights stands out from the catalogue of rights presented in the convention and should be considered in the case of irregular migration.

Firstly, like the International Covenant on Civil and Political Rights, ECHR prohibits torture. Following Article 3, no one can be subjected to torture or inhuman or degrading treatment or punishment.

Secondly, respect for private and family life enshrined in Article 8 should be ensured for people in irregular migration. However, this right has limitations. A public authority can interfere with exercising this right when it is required by law and is necessary for the interests of national security, public safety, the economic well-being of the country, or the prevention of disorder or crime.

Regarding freedom of movement, the ECHR, like the Declaration of Human Rights, does not guarantee everyone's right to enter another country's territory freely. Article 2 of Protocol No. 4 of the ECHR indicates that everyone has a right to leave any country but with similar limitations as applicable to the right to respect for private and family life. Article 4 of Protocol No. 4 only prohibits the collective expulsion of foreigners. Article 1 of Protocol No. 7 foresees procedural safeguards against expulsion only for lawfully resident foreigners in a state's territory. Unfortunately, not all irregular migrants can enjoy the protection of this right.

In addition, the ECHR does not prohibit the deprivation of liberty of irregular migrants. Article 5 (1) (f) states that, following a procedure prescribed by law, the lawful arrest or detention of a person is allowed when the state is aiming to prevent his/her unauthorised entry into the country or of a person against whom action is being taken regarding deportation or extradition. However, it is worth noting that ECHR foresees some safeguards in the proceedings of deprivation of liberty. Article 5 (2) requires that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. Everyone arrested or detained must be brought promptly before a judge or other designated authority for a decision on their arrest or detention. Within a reasonable time, they must also have access to court to assess the lawfulness of their arrest or detention in speedily proceeding (Article 5 (3)).

Article 6 of the ECHR provides the right to a fair trial. This article clearly shows that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law to determine his civil rights and obligations or to scrutinise any criminal charge against him. The right to a fair trial applies to civil rights protection in administrative proceedings. The Grand Chamber of the European Court of Human Rights, in the case *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, on 9 April 2024, provided such explanation regarding the applicability of Article 6 § 1 to administrative proceedings:

*595. For Article 6 § 1 in its civil limb to be applicable, there must be a “dispute” (“contestation” in French) over a right which <...> to be recognised under domestic law, irrespective of whether that right is protected under the Convention. <...>. The dispute must be genuine and serious <...>; and <...> the result of the proceedings must be directly decisive for the right in question <...>. Lastly, the right must be a “civil” right.*

Regarding civil rights, the court said:

*597. <...> the classification of the legislation (civil, commercial, administrative or other), or of the competent tribunal (ordinary, administrative court or other) are not as such decisive. What matters is that the right is exercisable by the person in question and can be characterised as a “civil” right.*

If the proceeding in its nature is punitive, the criminal limb of Article 6 § 1 is applicable (ECtHR, 2022) following the “Engel criteria” (ECtHR, 1976).

Finally, the ECHR prohibits discrimination. Article 14 of ECHR and Article 1 of Protocol 12 specify that any public authority cannot discriminate on grounds such as sex, race, colour,

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Although the ECHR lists a considerable number of guarantees, it should be noted that the requirement to ensure the rights listed above (except the prohibition of inhuman or degrading treatment or punishment) is not strict. Article 15 of the ECHR foresees the possibility of derogation in times of emergency. The article states that, in times of war or other public emergency threatening the nation's life, any state may derogate from its obligations under ECHR to the extent strictly required by the exigencies of the situation.

The second regional document applicable in Europe is the *Council of Europe Convention on Action against Trafficking in Human Beings (2005)*. As the title of the convention shows, this international treaty is dedicated to protecting the victims of human trafficking. Notably, irregular migration is often intertwined with human trafficking. Therefore, this document should be considered when analysing the protection of the rights of irregular migrants.

Article 10 (1) of the Convention lays down the obligation for a state to have trained and qualified persons for preventing and combating trafficking and identifying and helping victims, including children. Each State must ensure that if the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking, that person shall not be removed from its territory until the victim identification process is completed and suitable assistance is provided to the victim (Article 10 (2)). If the victim of trafficking is a child, special protection measures for the best interest of the child should be implemented (Articles 10, 14 and 28).

In addition, the states must foresee, in their internal law, a recovery and reflection period of at least 30 days for the victims of trafficking. During this period, victims can stay in the state territory, and any expulsion order against the victim cannot be enforced (Article 13).

### ***EU law applicable to secondary irregular migration***

The foundation for EU law and policy regarding irregular migration is embedded in two so-called “constitutional” treaties: the *Treaty on European Union (2016)* and the *Treaty on the Functioning of the European Union (2016)* (TFEU).

*The Treaty on European Union* stresses in Article 2 that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. In Article 3 specifying the EU’s aims, the EU Treaty indicates that the EU promotes peace, its values, and the well-being of its people. The EU offers its citizens an area of freedom, security, and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures regarding external border controls, asylum and immigration. The EU contributes to peace, security, solidarity, mutual respect among peoples, the protection of human rights, and respect principles of the UN Charter. In Article 6, the EU Treaty states that the EU recognises the rights, freedoms, and principles set out in the *Charter of Fundamental Rights of the EU*, which have the same legal value as the Treaties. Finally, in Article 6 (3), the EU Treaty indicates that fundamental rights, as the ECHR guarantees, constitute general principles of the Union's law.

The TFEU in Article 67 specifies that the EU constitutes an area of freedom, security, and justice where fundamental rights are respected. The EU ensures the absence of internal border controls for persons and defines a common policy on asylum, immigration, and external border control, which is fair towards third-country nationals. In Article 78 (1), the TFEU indicates that, following the Refugee Convention and other relevant treaties, the EU develops a common policy on asylum, subsidiary protection, and temporary protection while ensuring



compliance with the principle of nonrefoulement. For this purpose, the EU institutions, among other things, adopt measures for a uniform status of asylum for nationals of third countries, define criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection, and establish standards concerning the conditions for the reception of applicants for asylum or subsidiary protection (Article 78 (1)).

The *Charter of Fundamental Rights of the European Union (2016)*, which, as already mentioned above, has the same legal power as the EU Treaties, provides a list of rights to be protected under the Charter. The Charter defines general rights applicable to all people, including migrants, and specific rights exclusively dedicated to protecting people in migration. General rights include rights to the inviolability of human dignity (Article 1), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), and respect for private and family life (Article 7). Specific rights applicable to people in migration are the right to asylum following the Refugee Convention (Article 18) and protection in the event of removal, expulsion or extradition. Article 19 states that collective expulsions are prohibited. A migrant cannot be returned to a State where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. In cases where migration involves a child, in all proceedings related to him, the child's best interests must be a primary consideration (Article 24). Finally, Article 47 of the Charter foresees everyone's, including irregular migrants in secondary migration, right to an effective remedy and a fair trial. Everyone is entitled to a fair and public hearing by an independent and impartial tribunal within a reasonable time. Everyone must have access to a lawyer and legal representation. Those who lack sufficient resources must have access to legal aid.

To implement Article 67 of TFEU requirements to ensure the absence of internal border controls for persons in the EU area and beyond, the *Regulation (EU) 2016/399 (Schengen Borders Code)* was enacted. The Regulation provides for the absence of border control for persons migrating inside the EU and lays down rules governing border control for persons crossing the external EU borders (Article 1). Article 6 of the Code specifies entry conditions for third-country nationals. When applying this Regulation, Member States must comply with EU law, including the Charter of Fundamental Rights and International law (Article 4).

However, it should be noted that free movement in the Schengen area is not without limitations. Article 25 of the Code foresees Member States' right to reintroduce border control at all or specific parts of its internal borders when there is a serious threat to public policy or internal security in the State. The restrictions should be for a limited period and shall not exceed what is strictly necessary to respond to the serious threat. Such measures should only be reintroduced as a last resort.

The Schengen Borders Code does not have provisions dealing with secondary irregular migration issues. Therefore, countries deal with those issues on an *ad hoc* basis. To implement uniform practice in EU countries, the European Commission prepared a proposal to amend the Schengen Borders Code (European Commission, 2021), introducing a new transfer procedure to address unauthorised movements.

Proposed changes to Article 23 would allow police or other authorities in the Member State to perform checks, inquiries, or investigations regarding possible threats to public security or public policy in combating cross-border crime or irregular residence or staying linked to irregular migration. New Article 23a specifies what could be done when in the territory of the Member State, the irregular migrant in secondary migration is found, who has no right to stay on its territory. Following this Article, the responsible authorities of that Member State can decide to immediately transfer the person to the Member State from which the person arrived.

New Article 25 specifies when a Member State may exceptionally reintroduce border controls at all or specific parts of its internal borders. Following this Article, the internal border can be reinstated in a situation of large-scale unauthorised movements of third-country nationals between the Member States, which would risk the area's overall functioning without internal border control. Such a measure can be established only when it is necessary and proportionate, and it must be the last resort (European Commission, 2022).

A new Annex XII to the Schengen Borders Code defines the procedure for transferring irregular migrants apprehended at the internal borders. First, the State authorities must make a decision in a standard form stating the grounds for finding that a person has no right to stay. Such a decision has effect immediately. A copy of this decision must be given to the migrant. The migrant must have the right to appeal the decision. The appeals should be conducted under national law. The lodging of an appeal does not have a suspensive effect. The migrant must be transferred to the competent authorities of the neighbouring Member State within 24 hours.

The EU institutions also enacted several directives aiming to develop the EU common policy on asylum, subsidiary protection, and temporary protection while ensuring compliance with the principle of nonrefoulement, as foreseen in Article 78 (1) of the TFEU.

Directive 2011/95/EU specifies conditions for providing international protection, such as refugee status, subsidiary protection and the scope of the protection granted. The Directive foresees special conditions for children.

Directive 2013/32/EU provides common procedures for granting and withdrawing international protection. Among other things, the Directive provides in Article 33 that Member States may consider an application for international protection as inadmissible when another Member State has granted international protection, a non-EU country is considered as a first country of asylum for the applicant or non-EU country is considered as a safe third country for the applicant. However, it should be noted that applying the concept of a safe third country is in line with the spirit of the Refugee Convention only when asylum is not refused solely on the ground that it could be sought from another State (Executive Committee of the High Commissioner's Programme, 1979, para. (h)(iv)). When a State is considering applying a "safe third country" concept, asylum seekers must have an opportunity within the procedure to be heard and have the possibility to rebut any presumption showing that the state is not safe, considering circumstances related to the applicant (UN High Commissioner for Refugees, 2016, p.2).

Directive 2008/115/EC (Return Directive) sets out common standards and procedures for Member States regarding the return of illegally staying third-country nationals, including protecting fundamental rights as general principles of Community law and international law (Article 1).

Member States can decide not to apply the Return Directive to migrants who are apprehended or intercepted in connection with the irregular crossing by land, sea, or air of that State's external border and who have not subsequently obtained an authorisation or a right to stay in that State (Article 2 (2)(a)). However, such irregular migrants do not remain without any guarantees. The Directive provides a list of basic safeguards for them as well. Such safeguards are required to ensure that their treatment and protection are on a certain level, limitations on the use of coercive measures, postponement of removal, emergency health care and considering needs of vulnerable persons, and suitable detention conditions. In addition, the state must respect the principle of non-refoulement (Article 4 (4)).

Finally, it should be noted that the current version of the Return Directive does not provide for states' cooperation under bilateral or tripartite readmission agreements concluded by states. However, such cooperation takes place in practice. To close this gap, the European

Commission initiated amendments to the Directive. The proposal to amend Directive 2008/115/EC allows Member States to revise existing or conclude new bilateral readmission agreements (Article 4) (European Commission, 2018).

Unlike already discussed areas on irregular migration where the state authorities make decisions unilaterally, considering the conditions set in the directives, the state responsible for examining the application of irregular migrants is determined based on Regulation (EU) No 604/2013 (Dublin III Regulation). In addition, the Regulation foresees safeguards for protecting the rights of irregular migrants in secondary migration.

According to Article 3 (1) of the Dublin III Regulations, one Member State can examine an irregular migrant's application for any international protection. The responsible Member state is determined considering criteria set in Article 7 of the Regulation. Article 7 (3) explains that any Member State, after receiving a request from a migrant for any form of international protection, must check whether there are no family members or relatives in any form of family relations of the applicant in another Member State. When another Member State does not have the migrant's family members, then the Member State whose external border the migrant crossed irregularly is responsible for examining the application for international protection (Article 13 (1)). The border crossing should be proved by circumstantial evidence.

When an irregular migrant flees to another Member State after crossing the EU external border in one Member State, the first state remains responsible for examination 12 months after the date on which the irregular border crossing occurred (Article 13 (1)). In addition, when the irregular migrant lived for a continuous period of at least five months in the Member State before lodging the application for international protection, that Member State is responsible for examining the application (Article 13 (2)).

When the above-mentioned criteria are not applicable or are no longer applicable, or where it is impossible to transfer the migrant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the EU, the Member State which received the irregular migrant's application for any international protection is considered responsible for examining the application (Articles 3 and 13). However, it should be mentioned that by derogating from Article 3(1), any Member State may decide to examine an application for international protection when it receives it. In such a situation, this Member State becomes responsible for the examination of the application for international protection (Article 17 (1)).

Article 18 of the Dublin III Regulation foresees that when an irregular migrant is found in any Member State, he/she is transferred to the responsible Member State, and the responsible Member State cannot refuse to accept that migrant.

The Dublin III Regulation also foresees safeguards for protecting the rights of irregular migrants in performing their transfer to the responsible Member State.

The first safeguard is the right to information (Article 4). This right foresees that the Member State, after receiving the irregular migrant's application for any international protection, must provide information about the objectives of the Dublin III Regulation, the consequences of making another application in another Member State, and the consequences of leaving the country during the determination of responsible Member State or examination of his/her application; the criteria for determining the Member State responsible; the personal interview and the possibility of submitting information about family members staying in the Member States; the possibility to challenge a transfer decision and, where applicable, to apply

for a suspension of the transfer; and other. Information must be provided in writing in a language the applicant understands or is reasonably supposed to understand.

The second safeguard foreseen in Article 5 is the requirement to interview the applicant to determine the responsible Member State and understand the information supplied by the applicant. The interview must be conducted in a language that the applicant understands or is reasonably supposed to understand and in which he or she can communicate. Where necessary, Member States must provide an interpreter. The interview must be conducted under conditions of appropriate confidentiality. The written interview summary must be provided to the applicant and/or his or her legal advisor in a timely manner.

The third safeguard in Article 6 foresees special guarantees for children. Legal provisions require ensuring the child's best interests in all procedures related to the child. Qualified representation and/or assistance must be ensured for an unaccompanied child.

The fourth safeguard in Article 26 requires the applicant and/or his or her legal advisor to be notified about the decision to transfer the applicant to the responsible Member State.

The fifth safeguard in Article 27 requires ensuring conditions for the applicant to appeal the transfer decision before a court or tribunal. Member States must provide a reasonable period of time for the migrant to exercise his or her right effectively. The migrant must have access to an interim measure to suspend the transfer until the final decision is made. They also must have access to legal and, where necessary, linguistic assistance. If a person cannot afford a lawyer, the State must ensure access to legal aid.

Finally, the Regulation foresees requirements for accommodating irregular migrants waiting for return/transfer. Article 28 of the Regulation specifies that a person cannot be detained for the sole reason that he or she is subject to the return/transfer procedure. Member States may detain the person only when there is a significant risk of absconding, and this can be done only based on an individual assessment, and only when detention is proportional and other less coercive, alternative measures cannot be applied effectively. The detention must be as short as possible, which is required to organise the return/transfer.

### *Lithuanian Law*

As mentioned above, to manage the migrant crisis, Lithuanian authorities declared a state-level extraordinary situation on 2 July 2021 due to a mass influx of migrants at the Lithuanian-Belarusian border (Government, 2021). Therefore, special legal regulation is in place during the state-level extraordinary situation. When the state-level extraordinary situation due to the mass inflow of foreigners is declared in Lithuania, Chapter X<sup>2</sup> of the Lithuanian Law on the Legal Status of Foreigners shall apply (Seimas, 2004).

Following Article 140<sup>8</sup> of the Law on the Legal Status of Foreigners, if an irregular migrant applies for asylum, the Migration Department decides within 48 hours of the submission of this application to admit the asylum seeker to Lithuania and accommodate him without restricting his right to move freely in the territory of Lithuania. However, when the Migration Department decides to examine the application for granting asylum in a speedy proceeding or decides not to examine the application, and there are no special circumstances related to the asylum seeker's age, state of health, marital status or other, then the state authorities can make a decision to temporarily accommodate the asylum seeker in a designated place without the right to move freely in the territory of Lithuania. The law also provides the right to appeal institutions' decisions regarding accommodation.

During the procedure for finding the responsible Member State for processing the asylum application, asylum seekers have the right to remain in the territory of Lithuania until they are transferred to the responsible Member State (Article 140<sup>9</sup>).

Article 125 (3) of the Law specifies that a decision on the return of a foreigner to another country or an obligation to leave Lithuania may not be taken when, following the international agreement concluded by Lithuania on the return (readmission) of illegally staying persons, an EU member state accepts back an illegally staying foreigner. The agreement must have entered into force before 13 January 2009.

Finally, Article 144 of the Law specifies that when the provisions of the international treaties of the Republic of Lithuania are different from those in this Law, the provisions of the international treaties shall apply.

### ***Readmission agreement with Latvia***

On 30 June 1995, the Governments of Lithuania, Estonia, and Latvia signed an agreement *On the return of persons living illegally*. Following Article 3 (1) of the agreement, if a person who crossed Latvia's external border with Belarus is found on the territory of Lithuania, Latvia undertakes to accept this person without any formalities after proving or having reasonable grounds to believe that the returned person entered the territory of Lithuania from Latvia.

Following Article 5 of the agreement, Latvia must submit a response to Lithuania within 15 days of receiving Lithuania's request to return persons intercepted in Lithuania. If Latvia expresses its consent to return these persons, the return must take place within 30 days from the receipt of the request. At Lithuania's request, this deadline can be extended for as long as it takes to remove legal and practical obstacles. Under this procedure, Lithuania must request Latvia accept/return a person within one year of Lithuania determining the illegal presence of that person in its territory (Article 6).

It should be noted that this agreement is valid for an indefinite period (Article 12).

### **Lithuanian practice regarding irregular migrants to be returned to Latvia**

In 2023, 1,193 irregular migrants who came to Lithuania from Latvia were detained in Lithuania. 937 arrived in Lithuania directly after crossing the Latvian border and 256 after submitting the request for asylum in Latvia. Most of these foreigners were transferred to Latvia under the readmission agreement (Lithuanian Red Cross, 2024, p. 29). The fact that Lithuania prefers to carry out the transfer of irregular migrants not following the Dublin III Regulation but under the signed readmission agreements is partially confirmed by the data of the Asylum Information Database AIDA. The data shows that in 2022, Lithuania had 2,119 incoming requests but only 70 outgoing requests (Asylum Information Database, 2024, p. 7).

No one, except state institutions, knows precisely where and how many such persons were/are in Lithuania. NGOs such as the Lithuanian Red Cross can communicate with asylum seekers only. They cannot access those waiting to transfer to Latvia under the Readmission agreement (Lithuanian Red Cross, 2024, pp. 6 and 30).

Those irregular migrants who were intercepted in Lithuania cannot apply for asylum. Legal acts allow such requests to be not registered. In particular, as already mentioned above, Article 144 of the Law on the Legal Status of Foreigners (Seimas, 2004) specifies that when the provisions of the international treaties of the Republic of Lithuania are different from those in this Law, the provisions of the international treaties shall apply. Article 125 (3) of the Law indicates that a decision on the return of a foreigner to another country may not be made when,



following the international agreement, an EU member state accepts back an irregular migrant in secondary migration. Under the Readmission agreement with Latvia, Latvia must accept irregular migrants from Latvia in secondary migration without any formalities. In such a way, neither the request for asylum must be registered in Lithuania nor a decision regarding the transfer to Latvia must be made.

The Lithuanian Red Cross, in the Monitoring Report 2023, has indicated that information about the number of such irregular migrants is not publicly available. Information on whether these people apply for asylum and whether their requests are responded to is not collected. It is unknown whether the obligation to explain the asylum application procedure was followed in cases where there are indications that a migrant may wish to apply for asylum (Lithuanian Red Cross, 2024, p. 30).

The Lithuanian Red Cross also indicated that legal aid was not provided to these irregular migrants, and they were not guaranteed access to a lawyer. No one had access to such irregular migrants (or information about them). They were often detained incommunicado based on administrative decisions until handed over to Latvian border guards. As already mentioned, volunteers of NGOs such as the Lithuanian Red Cross were not allowed to contact these migrants; they could monitor living conditions and communicate with asylum seekers only (Lithuanian Red Cross, 2024, p. 30).

The requirements for conditions and procedures in organising transfer to Latvia under the Readmission agreement are unknown. If such regulation exists, it is not publicly available. It should be noted that most of the Orders of the Commander of the State Border Guard Service regarding standard operational protocols related to irregular migration are confidential. No one can access them; therefore, no one can evaluate whether regulation facilitates the protection of the fundamental rights of irregular migrants in secondary migration.

When discussing an accommodation issue, it should be said that migrants were usually accommodated at the State Border Guard Service's border checkpoints. They could not communicate with border guards in understood languages, and their vulnerability was not assessed (Lithuanian Red Cross, 2024, p. 32).

In Monitoring Report 2023, Lithuanian Red Cross observers identified cases where persons were kept in living conditions that did not satisfy at least the minimum personal needs. For example, irregular migrants discovered after a car accident were *de facto* detained and spent nine days in the container house located at the Padvarionis border checkpoint. For nine days, migrants could not brush their teeth or take a shower because they were not given essential hygiene items and were not allowed to use a shower. Only the portable toilet and sink were available. The State Board Guard Service officer explained that they "do not have information about the expressed desire of foreigners to take a bath", so access to the shower was not granted. In that situation, people also could not contact their loved ones for at least nine days after the car accident because they could not use their phones. The comment of the State Board Guard Service officer was similar: "State Board Guard Service has no information about the expressed desire of foreigners to contact their relatives" (Lithuanian Red Cross, 2024, p. 32).

The Lithuanian Ombudsperson for Child's Rights considerably analysed the issue regarding children in secondary migration. *In the Report on the Initiative of the Investigation of the Ombudsperson for Child's Rights on Ensuring the Rights and Legitimate Interests of Unaccompanied Foreign Children Passing Through Lithuania from Another European Union Country* (Ombudsperson for Child's Rights, 2023), on 8 August 2023 the Ombudsperson for Child's Rights indicated problems with the situation when the officers of the State Border Guard Service, after detaining unaccompanied children who came to Lithuania from Latvia, which they entered after crossing the Belarus-Latvia border, did not inform the Child Rights Protection

and Adoption Service about the arrival of these children or informed them about the children but refused to hand over the children to the service's employees or do not transfer them to the children's accommodation place designated by the Child Rights Protection and Adoption Service. These children immediately or after being detained for 1-2 days at the border checkpoint of the State Border Guard Service were handed over to Latvian officials without any inspection, following the Readmission Agreement. The State Border Guard Service officers mainly did not register or interview children. Accordingly, children's identity, legal status or family ties were not established, and they were not introduced to their rights. When children were transferred to Latvia based on the Readmission Agreement, the State Border Guard Service did not determine their legal status in Lithuania; therefore, the State Border Guard Service did not have statistical data about the number of children transferred to Latvia. The Ombudsperson for Child's Rights of Lithuania found that such a situation violated the child's rights.

When the Ombudsman started the investigation, only on 9 June 2023 did the State Border Guard Service and the Service agree that the State Border Guard Service will inform the Service about unaccompanied children who stay in Lithuania for more than one day. However, the Ombudsperson for Child's Rights stated that such an agreement is unacceptable, as the State Border Guard Service must notify about an unaccompanied child immediately. The Ombudsperson for Child's Rights of Lithuania also found other violations: Border guards at the Border checkpoints did not always allow unaccompanied children to meet representatives of NGOs or international organisations; It could not be determined whether the children were getting the help they needed (for example, on whether the unaccompanied children from Cameroon, one of whom may have experienced sexual abuse and was expecting a baby, were given the necessary help) and other.

The Ombudsperson for Child's Rights proposed that the Ministry of the Interior, the State Border Guard Service and the State Child Rights Protection and Adoption Service take measures to eliminate identified work deficiencies.

After this decision, the situation regarding unaccompanied children in secondary migration has improved significantly. Statistical data shows that the number of registered unaccompanied children in irregular migration increased more than threefold. From 1 January 2023 to 31 August 2023, 7 unaccompanied children were registered, whereas from 31 August 2023 to 31 December 2023, 21 unaccompanied children were registered. (Child Rights Protection and Adoption Service, 2024).

The decision in the *Supreme Administrative Court Case No. eAS-78-442/2024*, adopted on 31 January 2024, shows that the State Border Guard Service transfers migrants to Latvia, even in cases where the court establishes temporary protection measures, i.e. suspends the execution of the decision to transfer migrants to Latvia.

In this case, two migrants appealed to the court, asking for the annulment of the Migration Department decisions dated 24 November 2023, in which it was decided to hand them over to Latvia following the Dublin III Regulation. The Vilnius District Administrative Court applied temporary protection measures, i.e. suspended the execution of the decisions. The Migration Department appealed the temporary protection measures to the Supreme Administrative Court. Without waiting for the Supreme Administrative Court to decide on this issue, the transfer of the migrants to Latvia was finished on 18 December 2023. On 31 January 2024, the Supreme Administrative Court confirmed that the temporary protection measures applied by the Vilnius District Administrative Court were correct and must be enforced. However, since the migrants have already been handed over to Latvia, the court-ordered temporary protection measures could not be implemented.

Such a situation clearly shows that the fundamental rights of these persons are not ensured. Urgent implementation of new measures should be at national and EU levels.

## Conclusions

Migrants who irregularly cross the EU border in Latvia use Lithuania as a transit country to reach other EU states are considered irregular migrants in secondary migration from Latvia. Irregular migrants are persons who move to a new residence or transit outside the regulatory norms of the sending, transit, and receiving countries. Such migrants should be called irregular migrants instead of illegal migrants. In Lithuania, the number of irregular migrants from Latvia is increasing due to the Lithuanian collective “push-back” policy and the established physical barriers at the Lithuanian-Belarusian border.

Safeguards for human rights protection of irregular migrants in secondary migration are defined at various levels: International, regional, EU and national. Safeguards established at various levels, starting with generally protected values foreseen in international and regional conventions and ending with the regulation of specific actions defined by EU regulations and directives, complement each other, forming a multifaceted protection of irregular migrants, including irregular migrants in secondary migration from Latvia.

The EU legal framework shows that the transfer of an irregular migrant to Latvia can be carried out under the Dublin III Regulation or the Readmission Agreement concluded with Latvia. Lithuanian practice shows that Lithuania prefers the Readmission Agreement to be followed in organising the transfer of irregular migrants to Latvia. Under the Readmission Agreement, Latvia has to accept irregular migrants without any formalities. In such a way, when the State is in a state-level extraordinary situation due to the mass influx of foreigners, Lithuania performing irregular migrant transfers to Latvia under the Readmission Agreement does not have to ensure access to safeguards established by EU law. Practice shows that sufficient protection of human rights is not ensured. Such a position is clearly inconsistent with Lithuania's obligations as an EU Member State. Such practices that do not protect human rights as defined in EU and International law should be abandoned. Urgent new measures are required at national and EU levels.

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