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VALSTYBINIO KOMUNALINIŲ ATLIEKŲ TVARKYMO REGULIAVIMO LIETUVOJE PERSPEKTYVOS

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Anotacija. *Straipsnyje analizuojami buitinių vartotojų komunalinių atliekų tvarkymo reguliavimo Lietuvoje pokyčiai ir pateikiamos naujo modelio privalumų ir trūkumų prognozės. Nuo 2023 m. sausio 1 d. modifikuojama buitinių vartotojų komunalinių atliekų tvarkymo sistema Lietuvoje, įtvirtinamas valstybinis reguliavimas. Valstybinio reguliavimo modelio esmė yra ta, kad dalį kainos už komunalinių atliekų tvarkymą nustato valstybinis reguliuotojas, o kitą dalį – savivaldybė. Tiriama, ar tokio komunalinių atliekų tvarkymo reguliavimo modelis turi tik teigiamų ar ir prieštaringų bruožų. Šio straipsnio tikslas – atskleisti buitinių vartotojų komunalinių atliekų tvarkymo reguliavimo ypatumus Lietuvoje ir pateikti prognozes, ar naujasis modelis turės įtakos efektyvesnei komunalinių atliekų tvarkymo paslaugų apmokestinimo sistemai. Tyrimo dalyką sudaro du aspektai: a) valstybinio reguliavimo, kaip tarifų (rinkliavų) nustatymo metodo buitiniams vartotojams už komunalinių atliekų tvarkymą, turinio analizė; b) komunalinių atliekų tvarkymo reguliavimo teisinio reglamentavimo ypatumai dviejose jurisdikcijose: Lietuvoje ir Latvijoje. Daroma išvada, kad valstybinio reguliuotojo įtraukimas į komunalinių atliekų tvarkymo reguliavimą ir regioninės kainos, kaip dalies kainos už komunalinių atliekų tvarkymą, nustatymo mechanizmas vertintinas ir kaip teigiamas pasirinkimas: mažinamas kainų skirtumas tarp atskirų savivaldybių, kainodaros skaidrumo tikimybė ir kt., ir kaip neigiamas faktorius: savivaldos autonomijos ribojimas, papildomas subjektas (valstybinis reguliuotojas) sąlygoja papildomą administravimo išlaidų poreikį.*
Lietuvos, kaip ir Latvijos, teisės aktai, reglamentuojantys komunalinių atliekų tvarkymą, komunalinių atliekų tvarkymo sistemų diegimą, antrinių žaliavų surinkimo ir perdirbimo organizavimą, sąvartynų įrengimą ir eksploatavimą priskiria savivaldybių kompetencijai. Latvijoje ir Lietuvoje taikomas valstybinio komunalinių atliekų tvarkymo kainų reguliavimo modelis iš esmės nesiskiria, t. y. valstybinis reguliuotojas nustato būtinąsias sąnaudas, kurios reikalingos atliekoms tvarkyti sąvartyne, tačiau nereguliuoja atliekų surinkimo / vežimo bei sistemos / rinkliavos (ar įmokų) administravimo sąnaudų. Galutinę kainą vartotojams už komunalinių atliekų tvarkymą (įmoką / rinkliavą) nustato savivaldybės. Pažymima, kad optimistinis siekis – naujai įtvirtintu valstybinio reguliavimo modeliu pasiekti komunalinių atliekų susidarymo ir šalinimo sąvartynuose kiekio mažinimo gali būti nepasiektas, nes Latvijoje šį modelį taikant jau daugiau nei dešimt metų, faktiškai minėti rodikliai yra analogiški Lietuvos rodikliams.

Pagrindinės sąvokos: *aplinkosauga, atliekų tvarkymas, komunalinės atliekos, valstybinis reguliavimas, Latvija*

Įvadas

Lietuvos Respublikos atliekų tvarkymo įstatymą (toliau – ATĮ) papildžius naujomis nuostatomis (Lietuvos Respublikos atliekų tvarkymo įstatymo Nr. VIII-787 2, 112, 12, 28, 30, 301, 302, 351 straipsnių pakeitimo ir įstatymo papildymo 251, 303, 304, 305, 306, 307, 308, 309 straipsniais, septintuoju[1] ir septintuoju[2] skirsniais įstatymas) nuo 2023 m. sausio 1 d. buitinių vartotojų komunalinių atliekų tvarkymo reguliavime įvyko esminiai pokyčiai. Teisiniu reguliavimu įtvirtintas iki šiol Lietuvoje nenaudotas modelis, kurio esmė yra ta, jog dalį būtinųjų kaštų, reikalingų komunalinėms atliekoms tvarkyti, pavedama reguliuoti Valstybinei

energetikos reguliavimo tarybai (toliau – VERT). Valstybinis reguliuotojas įgyja kompetenciją nustatyti dalį vartotojų mokamos galutinės kainos už atliekų tvarkymą, t. y. reguliuoti atliekų tvarkymo sąvartyne kaštus; valstybinis reguliuotojas nenustatys kitos mokesčio dalies, kuri siejama su atliekų surinkimu, vežimu ir sistemos/rinkliavų administravimu. Antra, keičiantis rinkliavų (įmokų) nustatymo mechanizmui – mažėja savivaldybių reikšmė nustatant rinkliavos už atliekų tvarkymą dydį.

Europos Sąjungos šalys turi diskrecijos teisę įtvirtinti ir taikyti skirtingus tarifų (rinkliavų) nustatymo metodus. Išskirtini trys vyraujantys tarifų (rinkliavų) nustatymo metodai: fiksuoto dydžio rinkliava (įmokos), „Mokėk, kiek išmeti“ (kitaip – atliekų kiekio, angl. *Pay-As-You-throw*) ir valstybinis reguliavimas (Latvija, nuo 2023 m. sausio 1 d. Lietuva). ES valstybės narės palaipsniui atsisako fiksuotų rinkliavų (įmokų) modelio, nes jis sulaukia kritikos ir laikytinas neefektyviu.

Lietuvos teisės mokslininkai pastaruoju metu skiria vis didesnį dėmesį atliekų tvarkymo reguliavimo problemoms identifikuoti. Doktrinoje komunalinių atliekų tvarkymas, kaip atliekų tvarkymo sudėtinė dalis, atskleidžiama įvairiais aspektais, pvz., žiedinės ekonomikos kontekste (Stankevičius, 2020), (Žilinskienė, 2017) ir kt.; apibrėžiant komunalinių atliekų sąvoką (Vasiliauskas, 2011), (Stankevičius, 2020), (Žilinskienė, 2022) ir kt.; nacionalinio saugumo kontekste (Novikovas, Stankevičius), atskleidžiant atliekų tvarkymo principus, pvz., „teršėjas moka“ (Žilinskienė, 2022) ir kitais aspektais.

Pažymėtina, kad nuo 2023 m. sausio 1 d. pasikeitęs teisinis reglamentavimas, įnešdamas didelius pokyčius buitinių vartotojų komunalinių atliekų tvarkymo sistemoje, suponuoja išsamesnio tyrimo poreikį.

Atliekų tvarkymo gerinimas yra vienas iš 5 Europos žaliojo kurso prioritetų. Tinkamas komunalinių atliekų tvarkymo paslaugų kainodaros už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymo nustatymas gali turėti keletą praktinių reikšmių, pvz., skatinti vengti atliekų, rūšiuoti atliekas. Taigi, atliekų tvarkymo gerinimas tiesiogiai susijęs su komunalinių atliekų tvarkymo kainodaros modelio parinkimu, pagal kurį būtų aišku, kuri institucija ir kokiais terminais tvirtina kainos už komunalinių atliekų tvarkymą apskaičiavimo metodiką, kuri institucija ir kokiais terminais apskaičiuoja šių kainų projektus, kokie yra kainodaros nustatymo pagrindai ir principai bei kokie kainų peržiūros ir pakeitimo pagrindai.

Šio straipsnio tikslas – atskleisti buitinių vartotojų komunalinių atliekų tvarkymo reguliavimo ypatumus Lietuvoje ir pateikti prognozes, ar naujasis modelis turės įtakos efektyvesnei komunalinių atliekų tvarkymo paslaugų apmokestinimo sistemai.

Tyrimo dalyką sudaro du aspektai: a) valstybinio reguliavimo – tarifų (rinkliavų) nustatymo metodo buitiniams vartotojams už komunalinių atliekų tvarkymą, teisinio reguliavimo analizė; b) komunalinių atliekų tvarkymo reguliavimo teisinio reglamentavimo ypatumai dviejose jurisdikcijose: Lietuvoje ir Latvijoje.

Latvijos Respublika lyginamajai analizei pasirinkta dėl keleto priežasčių: analogiška sovietinė patirtis; panašiu metu atgauta valstybės nepriklausomybė (1990 m. kovo 11 d. Lietuvos Respublikos Aukščiausiosios Tarybos aktu „Dėl Lietuvos nepriklausomos valstybės atstatymo“; 1990 m. gegužės 4 d. „*Deklarācija Par Latvijas Republikas neatkarības atjaunošanu)*, sąlygojusi požiūrio į atliekų tvarkymą ir bendrąją aplinkos apsaugos reikšmę esmines rekonstukcijas; abi valstybės turi panašius geopolitinius, demografinius bei ekonominius rodiklius, abi valstybės tuo pačiu metu – 2004 m. gegužės 1 d. – tapo Europos Sąjungos šalimis.

Nors šiuo metu abi valstybės pasirinkę valstybinį komunalinių atliekų tvarkymo reguliavimo modelį ir jo turinys yra reguliuojamas panašiai, tačiau šis modelis Latvijoje veikia nuo 2009 m. lapkričio 1 d., o tuo tarpu Lietuvoje nuo 2023 m. sausio 1 d. Publikacija siekiama

ne tik pateikti valstybinio komunalinių atliekų tvarkymo teisinio reguliavimo palyginimą, bet ir pateikti prognozes, įvertinant Latvijos praktiką ir Lietuvos bendrąjį komunalinių atliekų tvarkymo reguliavimo kontekstą (mokesčio už atliekų tvarkymą mechanizmo apimtyje).

Darbe taikyti kokybinio tyrimo metodai: sisteminės analizės, teisinių šaltinių analizės. Išvadoms ir apibendrinimams taikytas loginis metodas. Lyginamojo metodo pagalba atlikta Lietuvos Respublikos ir Latvijos Respublikos valstybinio komunalinių atliekų tvarkymo reguliavimo lyginamoji analizė, nagrinėjami abiejų šalių teisės aktai, reglamentuojantys komunalinių atliekų tvarkymo ypatumus, siekiant išryškinti bendrus teorinius pagrindus, panašumus ir/ar skirtumus, ieškota gerosios praktikos pavyzdžių bei teisinio reguliavimo alternatyvų.

Komunalinių atliekų tvarkymo kainodaros modelio nustatymo teisinės prielaidos

Europos Sąjunga pasiryžusi išvengti nepalankių klimato padarinių dėl visuotinio atšilimo ir išlaikyti tinkamą gyvenimui klimatą pasauliui bei demonstruoja aukštą atsakomybės lygį: įsipareigoja iki 2050 m. pasiekti poveikio klimatui neutralumą. Vieni šį tikslą laiko ambicingu, kiti – neišvengiamu, treti – kritikuoja. Akivaizdu, kad šiam tikslui pasiekti būtina transformuoti Europos visuomenę ir ekonomiką, panaudojant ekonomiškai efektyviausias, teisingas bei socialiniu požiūriu subalansuotas priemones. Pamatinė priemonė – Europos žaliojo kurso komunikatas. 2019 m. patvirtintos veiksmų gairės (Annex *To The* Communication...), kuriomis siekiama užtikrinti ES ekonomikos tvarumą, klimato ir aplinkos problemas paverčiant galimybėmis visose politikos srityse ir užtikrinant, kad pertvarka būtų visiems teisinga ir įtrauki. Gairėse nustatomos teisėkūros ir ne teisėkūros iniciatyvos, skirtos pasiekti šį ES tikslą. Veiksmai apima įvairius sektorius. Atliekų tvarkymo gerinimas yra vienas iš 5 Europos žaliojo kurso prioritetų. Europos žaliojo kurso tikslų įgyvendinimo kontekste svarbu aptarti ES valstybėms narėms keliamus uždavinius atliekų tvarkymo srityje.

Europos Komisija 2021 m. gegužės 12 d. priėmė ES veiksmų planą, kuriuo siekiama nulinės oro, vandens ir dirvožemio taršos ir jame nustatė pagrindinius 2030 m. taršos mažinimo jos susidarymo vietoje tikslus. Vienas iš šių tikslų – sumažinti atliekų susidarymą ir 50 proc. sumažinti galutinių komunalinių atliekų kiekį (Europos Komisijos komunikatas, 2021).

Ypatingas dėmesys skiriamas komunalinių atliekų tvarkymui, kurios, nors savaime nėra pavojingos ir sudaro mažiau nei dešimtadalį kasmet ES susidarančių atliekų kiekio (apie 2,5 mlrd. t), tačiau dėl tiesioginės priklausomybės nuo visuomenės vartojimo įpročių yra labiausiai matomos (Europos Parlamentas, 2018). Buityje susidarančios komunalinės atliekos – atliekų rūšis, kuri dažniausiai siejama su įtaka klimato kaitai, vandenynų taršai plastiku ir yra neatsiejama nuo kitų aktualių aplinkosaugos problemų, pvz., išteklių tausojimo.

ES valstybės narės, įgyvendindamos ES politiką atliekų tvarkymo srityje, laikosi bendrų aplinkos teisės principų (atsargumo, prevencijos, žalos aplinkai ištaisymo ten, kur yra jos šaltinis), *inter alia*, principo „teršėjas moka“. Tačiau ES keliami ambicingi tikslai – iki 2025 m. perdirbti ne mažiau kaip 55 proc. komunalinių atliekų, iki 2035 m. ne daugiau kaip 10 proc. komunalinių atliekų šalinti sąvartynuose (Europos Parlamentas, 2018) – skatina valstybes nares ieškoti naujų priemonių numatytiems tikslams pasiekti.

2004 m. gegužės 12 d. Europos Komisijos komunikate Europos Parlamentui, Tarybai, Europos ekonominių ir socialinių reikalų komitetui ir Regionų komitetui „Baltoji knyga dėl bendro intereso paslaugų“ (KOM(2004) 374 galutinis) (Europos Komisija, 2004), nurodoma, kad lemiamą įtaką ES šalių piliečių gyvenimo kokybei, aplinkai ir ES įmonių konkurencingumui turi gerai funkcionuojančios, prieinamos, įperkamos ir aukštos kokybės bendro intereso paslaugos. Komunikate transliuojamas požiūris dėl ES vaidmens skatinant

aukštos kokybės bendro intereso paslaugų teikimą ir nustatant pagrindą užtikrinant, kad visi ES šalių piliečiai ir įmonės galėtų naudotis aukštos kokybės ir įperkamomis paslaugomis. Bendro intereso paslaugų koncepcija atspindi Bendrijos vertybes, tikslus ir ją sudaro šie bendrieji principai: visuotinumas, tęstinumas, paslaugų kokybė, prieinamumas ir vartotojų apsauga. Komunikate nurodoma, kad bendro intereso paslaugas turi nustatyti, organizuoti, finansuoti ir stebėti jų vykdymą atitinkamos nacionalinės, regioninės ir vietos valdžios institucijos (Komunikato 2.3 dalis). Bendro intereso paslaugų srityje pagrindinis vaidmuo tenka valstybėms narėms ir vietos valdžios institucijoms (Komunikato 3.1 dalis). ES tvarios plėtros politika įpareigoja atsižvelgti į bendro intereso paslaugų vaidmenį, susijusį su aplinkos apsauga, bei į specifines bendro intereso paslaugų ypatybes, tiesiogiai susijusias su aplinkosaugos, *inter alia* atliekų, sektoriais (Komunikato 3.4 dalis). Komunikate, be kita ko, siekia, kad būtų užtikrinta galimybė visoje ES teritorijoje ir visoms gyventojų grupėms naudotis paslaugomis, užtikrintas paslaugų įperkamumas, įskaitant specialias priemones mažas pajamas gaunantiems gyventojams, paslaugų saugumas, apsauga, patikimumas, tęstinumas, aukšta kokybė, galimybė rinktis, skaidrumas ir galimybė iš teikėjų ir priežiūros institucijų gauti informaciją (Komunikato 3.5 dalis).

ES valstybių narių valdžios institucijas principas „teršėjas moka“ imperatyviai įpareigoja užtikrinti, jog atliekų tvarkymo išlaidas apmokėtų atliekų turėtojas. Teisinis šio principo pagrindas – Europos Bendrijos steigimo sutarties 174 straipsnio 2 dalis (Europos Bendrijos steigimo sutartis) ir Sutartis dėl Europos Sąjungos veikimo 191 straipsnio 2 dalis (Sutarties dėl Europos Sąjungos..).

Europos Parlamento ir Tarybos direktyvos 2004/35/ET dėl atsakomybės už aplinkos apsaugą siekiant išvengti žalos aplinkai ir ją ištaisyti (atlyginti) 1 straipsnyje apibrėžiamas tikslas „*sukurti atsakomybės už aplinkos apsaugą sistemą pagal „teršėjas moka“ principą, siekiant išvengti žalos aplinkai ir ištaisyti (atlyginti) ją*“ (2004 m. balandžio 21 d. Europos Parlamento...).

Europos Parlamento ir Tarybos direktyvos 2008/98/EB dėl atliekų ir panaikinančios kai kurias direktyvas 14 straipsnio 1 dalyje reglamentuojama, kad atliekų tvarkymo išlaidos padengiamos pagal principą „teršėjas moka“, t. y. atliekų tvarkymo išlaidas, įskaitant reikiamai infrastruktūrai ir jos veiklai, turi padengti pirminis atliekų gamintojas arba esami ar ankstesni atliekų turėtojai (2008 m. lapkričio 19 d. Europos Parlamento...).

Konkretaus modelio, kaip nacionalinėje teisėje turėtų būti įgyvendinamas principas „teršėjas moka“, ES teisės aktai nenustato – valstybėms narėms yra suteikiama diskrecijos teisė parinkti valstybei palankiausią principo įgyvendinimo formą.

Komunalinių atliekų tvarkymo valdymo funkcijas valstybė įgyvendina per sukurtą ir funkcionuojančią institucinę sistemą. L. Žilinskienė valstybinį komunalinių atliekų valdymą apibrėžia kaip „valstybės ir savivaldybės institucijų sistema, struktūra ir kompetencija reguliuoti ir valdyti komunalinių atliekų tvarkymą“ (L. Žilinskienė, 2022:167).

Lietuvoje atliekų tvarkymo teisinio reguliavimo gaires nustato Lietuvos Respublikos Konstitucija, įtvirtindama pareigą valstybei ir kiekvienam asmeniui saugoti aplinką nuo kenksmingų poveikių (53 straipsnio 3 dalis) ir imperatyvizuoja draudimą niokoti žemę, jos gelmes, vandenis, teršti vandenis ir orą, daryti radiacinį poveikį aplinkai bei skurdinti augaliją ir gyvūniją (54 straipsnio 2 dalis) (Lietuvos Respublikos Konstitucija, 1992).

Esminės komunalinių atliekų tvarkymo nuostatos įtvirtintos Lietuvos Respublikos atliekų tvarkymo įstatyme. Šiame įstatyme pateikiamas komunalinių atliekų apibrėžimas – tai mišrios ir atskirai surinktos buitinės (buityje susidarančios) atliekos, įskaitant popieriaus ir kartono, stiklo, metalų, plastiko, biologines, medienos, tekstilės, pakuočių, elektros ir elektroninės įrangos, baterijų ir akumuliatorių, taip pat stambiąsias atliekas, įskaitant čiužinius ir baldus, ir

atliekos, surinktos iš kitų šaltinių, kai jos savo pobūdžiu ar sudėtimi yra panašios į buitines atliekas. Prie komunalinių atliekų nepriskiriamos gamybos, sveikatos priežiūros veikloje susidarančios atliekos, žemės ūkio, miškininkystės, žvejybos, septikų, taip pat kanalizacijos ir nuotekų valymo atliekos, įskaitant nuotekų dumblą, eksploatuoti netinkamos transporto priemonės ir statybinės atliekos (Atliekų tvarkymo įstatymas, 2 straipsnio 39 dalis, 1998).

Komunalinių atliekų tvarkymo paslaugos ES laikomos bendrojo intereso paslaugomis, Lietuvoje priskiriamos viešųjų paslaugų grupei. Atliekų tvarkymo įstatymo 2 straipsnio 40 dalyje nustatyta, kad komunalinių atliekų tvarkymo paslauga – viešoji paslauga, apimanti komunalinių atliekų surinkimą, vežimą, naudojimą, šalinimą, šių veiklų organizavimą, stebėseną, šalinimo vietų vėlesnę priežiūrą; minėto straipsnio 43 dalyje pateikiama komunalinių atliekų tvarkymo sistemos definicija – tai organizacinių, techninių ir teisinių priemonių visuma, susijusi su savivaldybių funkcijų įgyvendinimu atliekų tvarkymo srityje (Atliekų tvarkymo įstatymas, 1998).

Lietuvos Respublikos viešojo administravimo įstatymo 2 straipsnio 18 dalyje apibrėžta viešoji paslauga – tai valstybės ar savivaldybių kontroliuojamų juridinių asmenų veikla teikiant asmenims socialines, švietimo, mokslo, kultūros, sporto ir kitas įstatymų numatytas paslaugas (Viešojo administravimo įstatymas, 1999).

Lietuvos Respublikos vietos savivaldos įstatymo 6 straipsnio 31 punkte nustatyta, kad viena iš savarankiškų savivaldybių funkcijų yra „*komunalinių atliekų tvarkymo sistemų diegimas, antrinių žaliavų surinkimo ir perdirbimo organizavimas, sąvartynų įrengimas ir eksploatavimas*“ (Vietos savivaldos įstatymas, 1994).

Lietuvos Respublikos rinkliavų įstatymo 11 straipsnio 1 dalies 8 punkte reglamentuojama, kad savivaldybės taryba savo teritorijoje turi teisę nustatyti rinkliavą už „*komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą*“ (Rinkliavų įstatymas, 2000).

Kitos komunalinių atliekų tvarkymo teisinės ir politinės priemonės yra Valstybinis atliekų prevencijos ir tvarkymo 2021–2027 metų planas, Atliekų tvarkymo taisykles, kurios nustato bendrus atliekų tvarkymo reikalavimus, Vietinės rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydžio nustatymo taisykles, kt.

ES nenustato konkretaus modelio, kaip valstybėse narėse turi būti organizuojamas komunalinių atliekų tvarkymas, įskaitant vartotojų (komunalinių atliekų, susidarančių namų ūkyje, turėtojų) apmokestinimą taikant principą „teršėjas moka“.

Valstybėse narėse ir (ar) atskirose jų savivaldybėse (vietos savivaldos administraciniuose vienetuose) taikomi skirtingi kriterijai, nustatant kainodarą vartotojams už atliekų tvarkymą. Kainodaros sandarai reikšmingi tokie rodikliai: nekilnojamojo turto plotas, atliekų kiekis, konteinerių dydis, surinkimo dažnumas, namų ūkio dydis, pajamos, vertė, suvartojamo geriamojo vandens kiekis ir kt.). Dažniausiai komunalinių atliekų tvarkymas priskiriamas vietos savivaldos savarankiškai teikiamoms viešosioms paslaugoms.

ES valstybėse taikomi (vyraujantys) trys kainodaros už komunalinių atliekų tvarkymą nustatymo modeliai, kuriais siekiama įgyvendinti principą „teršėjas moka: a) valstybinis reguliavimas (Latvija nuo 2009 m. lapkričio 1 d. , Lietuva nuo 2023 m. sausio 1 d.); b) fiksuotos rinkliavos dydžio/ įmokos nustatymas, c) „Mokėk, kiek išmeti“ arba atliekų kiekio (angl. Pay-As-You-throw).

„Mokėk, kiek išmeti“ arba atliekų kiekio modelio esmė – subjektai už buityje susidarančių komunalinių atliekų išvežimą moka pagal atiduotų tvarkyti atliekų kiekį. Nors tai būtų arčiausiai principo „teršėjas moka“ esmei (kuo mažiau sugeneruojama atliekų, tuo mažiau mokama už jų tvarkymą), tačiau tai suponuoja pradinių investicijų (pvz., atliekas sveriančių konteinerių) poreikį. Nors „Mokėk, kiek išmeti“ (angl. *Pay-as-you-throw)* sistema

aplinkosauginiu požiūriu vertinama labai teigiamai, tačiau vis dar diegiama tik įgyvendinant atskirus projektus miestuose /savivaldybėse.

ES valstybės narės palaipsniui siekia atsisakyti fiksuotų rinkliavų/įmokų, kaip neefektyvaus modelio.

Valstybinio reguliavimo modelio esmė yra ta, kad dalį kainos už komunalinių atliekų tvarkymą nustato valstybinis reguliuotojas, o kitą dalį – savivaldybė. Tai galima vertinti ir kaip teigiamą pasirinkimą: mažinamas kainų skirtumas tarp atskirų savivaldybių, kainodaros skaidrumo tikimybė ir kt., ir kaip neigiamą faktorių: savivaldos autonomijos ribojimas (nors įstatymu savivaldybei perduodama komunalinių atliekų sistemos organizavimo funkcija, tačiau nustatant rinkliavos dydį – į procesą įtraukiamas valstybinis reguliuotojas), papildomas subjektas (valstybinis reguliuotojas) sąlygoja papildomą administravimo išlaidų poreikį.

Latvijoje ir Lietuvoje nuo 2023 m. sausio 1 d. (Lietuvos Respublikos atliekų tvarkymo įstatymo Nr. VIII-787 2, 11^2, 12, 28, 30, 30^1, 30^2, 35^1 straipsnių pakeitimo ir įstatymo papildymo 25^1, 30^3, 30^4, 30^5, 30^6, 30^7, 30^8, 30^9 straipsniais, septintuoju^1 ir septintuoju^2 skirsniais įstatymas), siekiant užtikrinti viešųjų paslaugų kainodaros skaidrumą, komunalinių atliekų tvarkymo kainų reguliavimo procese kartu su savivaldybėmis dalyvauja ir valstybinis reguliuotojas: Viešųjų komunalinių paslaugų komisija (angl. *Public Utilities Commission*) Latvijoje ir Valstybinė energetikos reguliavimo taryba (angl. *National Energy Regulatory Council*) Lietuvoje.

Komunalinių atliekų tvarkymo paslaugų kainodaros nustatymo ypatumai Lietuvoje

ATĮ papildžius naujomis nuostatomis (Lietuvos Respublikos atliekų tvarkymo įstatymo Nr. VIII-787 2, 11^2, 12, 28, 30, 30^1, 30^2, 35^1 straipsnių pakeitimo ir įstatymo papildymo 25^1, 30^3, 30^4, 30^5, 30^6, 30^7, 30^8, 30^9 straipsniais, septintuoju^1 ir septintuoju^2 skirsniais įstatymas), nuo 2023 m. sausio 1 d. buitinių vartotojų komunalinių atliekų tvarkymo reguliavime įvyko esminiai pokyčiai. Teisiniu reguliavimu įtvirtintas komunalinių atliekų tvarkymo paslaugų kainodaros modelis, kurio esmė yra ta, kad komunalinių atliekų tvarkymo regioninių reguliuojamųjų kainų ir bendro atliekų deginimo įrenginio, atliekų deginimo įrenginio valdytojų deginamų po rūšiavimo likusių, perdirbti ir pakartotinai panaudoti netinkamų energetinę vertę turinčių komunalinių atliekų deginimo 1 tonos įkainio viršutinių ribų nustatymą, priežiūrą, jų nustatymo metodikų tvirtinimą, investicijų derinimą, išankstinių ginčų sprendimo ne teisme tvarka nagrinėjimą, reguliuojamų veiklų sąnaudų atskyrimo kontrolę, kad būtų veiksmingai atskirtos reguliuojamųjų veiklų sąnaudos nuo kitų sąnaudų, informacijos teikimo taisyklių tvirtinimą, techninės užduoties tvirtinimą pavesta vykdyti Valstybinei energetikos reguliavimo tarybai (VERT), t. y. dalį būtinųjų kaštų, reikalingų komunalinėms atliekoms tvarkyti, pavedama nustatyti VERT.

ATĮ įtvirtintas principų paketas, kuriais privaloma vadovautis nustatant komunalinių atliekų tvarkymo paslaugų kainodarą: solidarumo, proporcingumo, nediskriminavimo, sąnaudų susigrąžinimo, skaidrumo principais ir atliekų tvarkymo srityje taikomu principu „teršėjas moka“.

Solidarumo principas grindžiamas nuostata, kad nustatant rinkliavą ar kitą įmoką už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą, būtina įvertinti, jog dėl tam tikrų objektyvių priežasčių turintys palankesnes sąlygas (dėl ekonominių, gyvenamosios vietos, atstumo iki atliekų tvarkymo įrenginių ir kt.) komunalinių atliekų turėtojai prisidėtų prie komunalinių atliekų tvarkymo finansavimo, siekiant sudaryti prieinamas sąlygos naudotis komunalinių atliekų tvarkymo paslaugomis komunalinių atliekų turėtojams, kurie tokių sąlygų

neturi ir kuriems rinkliava ar kita įmoka už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą tampa didesne našta.

Proporcingumo principas. Esmė – siekiama užtikrinti, kad rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydis neviršytų to, kiek yra būtina komunalinių atliekų tvarkymo sistemos eksploatavimo ir komunalinių atliekų tvarkymo paslaugos finansavimo tikslui pasiekti. ATĮ išplečiant šio principo turinį nurodoma, jog principas reikalauja, kad komunalinių atliekų turėtojams nustatyta rinkliava ar kita įmoka už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą būtų proporcinga galinčiam susidaryti ar susidarančiam komunalinių atliekų kiekiui dėl atliekų turėtojų nekilnojamojo turto ir jo panaudojimo paskirties ir (ar) veiklos.

Nediskriminavimo principas skirtas garantuoti, kad nustatant rinkliavą ar kitą įmoką už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą tos pačios kategorijos komunalinių atliekų turėtojams, turi būti taikomi vienodi rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą nustatymo ir apskaičiavimo metodai, tvarka ir dydis.

Sąnaudų susigrąžinimo principas reiškia, kad už suteiktą paslaugą gautos pajamos padengtų būtinąsias su komunalinių atliekų tvarkymu susijusias sąnaudas, reikalingas tai paslaugai teikti. Šio principo įgyvendinimas reikalauja nustatyti tokį rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydį, kuris užtikrintų, kad komunalinių atliekų turėtojai padengtų būtinąsias su komunalinių atliekų tvarkymu susijusias sąnaudas, kurios patiriamos siekiant užtikrinti, kad komunalinių atliekų tvarkymo sistema atitiktų teisės aktuose nustatytus reikalavimus. Šio principo esmė – komunalinių paslaugų tvarkymas negali būti nuostolingas.

Skaidrumo principas suponuoja informacijos apie rinkliavas ir kitas įmokas viešumą (turi būti viešai prieinama informacija apie apskaičiavimo metodus, tvarką ir dydį).

Nustatant komunalinių atliekų tvarkymo paslaugų kainą, svarbu įvertinti šiuos aspektus: ar mokamas dydis užtikrins ilgalaikį komunalinėms atliekoms tvarkyti skirtos infrastruktūros eksploatavimą ir atnaujinimą; ar bus užtikrinta reali galimybė komunalinių atliekų turėtojams dalyvauti tvarkant komunalines atliekas. Prioritetinis aspektas – komunalinių atliekų tvarkymo paslaugų kaina turi sąlygoti aplinkos taršos mažinimą.

Įstatymas nustato pareigą savivaldybės tarybai nustatyti rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydį, tačiau įtvirtina ribas – šis dydis negali viršyti Valstybinės energetikos reguliavimo tarybos nustatyto regioninės kainos dydžio. Pagal ATĮ 25^1 straipsnį, Valstybinės energetikos reguliavimo taryba tvirtina Komunalinių atliekų tvarkymo regioninių kainų nustatymo metodiką ir prižiūri, kaip ji taikoma; nustato regionines kainas ir prižiūri, kaip jos taikomos.

Nustatant rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydį, Savivaldybės taryba privalo vadovautis Vyriausybės patvirtintomis vietinės rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą taisyklėmis ir savivaldybių vietinės rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydžio nustatymo teisės aktais.

ATĮ 30^2 straipsnio 6 dalyje nustato regioninės kainos sudarymo mechanizmą ir principus: įskaitant protingumo kriterijų atitinkančią investicijų grąžą, kaina grindžiama būtinosiomis su komunalinių atliekų tvarkymu susijusiomis pagrįstomis sąnaudomis, reikalingomis komunalinių atliekų tvarkymo paslaugai suteikti, ilgalaikiam komunalinėms atliekoms tvarkyti skirtų regioninių komunalinių atliekų tvarkymo įrenginių eksploatavimui, jų atnaujinimui, plėtrai užtikrinti, priimtinos komunalinių atliekų tvarkymo paslaugos teikimo užtikrinimui ir aplinkos taršos mažinimui.

Į būtinąsias sąnaudas neįeina: komunalinių atliekų tvarkymo administravimo, komunalinių atliekų tvarkymo lėšų administravimo sąnaudos bei komunalinių atliekų surinkimo ir vežimo iš atliekų turėtojų paslaugų kaina.

Nustatant regioninės kainos būtinąsias sąnaudas, įvertinama ir atskirų komunalinių atliekų tvarkymo paslaugų sutartys, būtinos investicijos ir atidėjinių sąvartynų uždarymui poreikis nenutrūkstamam ir aplinkosauginius reikalavimus atitinkančiam komunalinių atliekų tvarkymui užtikrinti. Į būtinąsias sąnaudas taip pat įeina: Regioninio atliekų tvarkymo centro atliekų deginimo sąnaudos, patiriamos atsiskaitant su bendro atliekų deginimo įrenginio ir (ar) atliekų deginimo įrenginio valdytoju už po rūšiavimo likusias netinkamas perdirbti ar kitaip panaudoti energinę vertę turinčias sudegintas komunalines atliekas.

Pažymėtina, kad VERT nustatytos regioninės kainos gali būti koreguojamos kartą per metus.

Skaidrumo ir viešumo užtikrinimui galiojančios regioninės kainos privalo būti skelbiamos VETR interneto svetainėje ir kitomis priemonėmis.

Savivaldybių tarybos, tvirtindamos rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydžius, įvertina: a) VERT nustatytas regionines kainas; b) Vyriausybės patvirtintų vietinės rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą taisyklių reikalavimus; c) savivaldybių vietinės rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų ir atliekų tvarkymą dydžio nustatymo teisės aktų reikalavimus; d) atliekų turėtojų (fizinių asmenų) mokama suma už paslaugas neviršys 1 procento vidutinių mėnesio statistinių savivaldybės namų ūkio pajamų (jei sudėjus viršija šį dydį – savivaldybės iš naujo turi įvertinti komunalinių atliekų tvarkymo administravimo, komunalinių atliekų tvarkymo lėšų administravimo sąnaudas ir perskaičiuoti rinkliavos ar kitos įmokos už komunalinių atliekų surinkimą iš atliekų turėtojų (fizinių asmenų) ir atliekų tvarkymą dydį, kad jis neviršytų vieno procento vidutinių mėnesio statistinių savivaldybės namų ūkio pajamų). Prideda: a) savivaldybės komunalinių atliekų tvarkymo administravimo, komunalinių atliekų tvarkymo lėšų administravimo sąnaudas; b) komunalinių atliekų surinkimo iš atliekų turėtojų ir vežimo paslaugų kainą.

Įstatymų leidėjas, įtvirtinęs nuostatą, kad atliekų turėtojų (fizinių asmenų) mokama suma už paslaugas neviršys 1 procento vidutinių mėnesio statistinių savivaldybės namų ūkio pajamų, iš teisų nuosekliai laikosi pozicijos, kad ši paslauga turi būti įperkama. Analogiška nuostata yra ATĮ 30 straipsnio 17 dalyje – savivaldybės privalo užtikrinti, kad komunalinių atliekų tvarkymo paslauga būtų visuotinė, geros kokybės, prieinama (įperkama) ir atitiktų aplinkosaugos, techninius-ekonominius ir visuomenės sveikatos saugos reikalavimus. Reiktų sutikti su L.Žilinskiene, kuri svarsto ar tokiu reguliavimu nepaneigiama principo „teršėjas moka“ esmė: „Principas „teršėjas moka“ pirmiausia orientuotas į išlaidų padengimą, todėl tokiu būdu nustatytas mokestis gali nederėti su reikalavimu, kad paslauga būtų įperkama. ATĮ nepateikia jokio paaiškinimo, kaip derinti paslaugų įperkamumo reikalavimą su principu „teršėjas moka“, ar tai reiškia, kad komunalinių atliekų tvarkymo srityje principas „teršėjas moka“ taikomas tik iš dalies. Viešosios paslaugos koncepcija taip pat nepateikia atsakymo į šį klausimą, tačiau galime spręsti, kad dideli mokesčiai už atliekų tvarkymą gali nebeužtikrinti savo paskirties, t. y. teikti naudą visuomenei“ (Žilinskienė, 2022: 241).

ATĮ reglamentuojama, kad taikant rinkliavą ar kitą įmoką už komunalinių atliekų surinkimą iš atliekų turėtojų (fizinių asmenų) ir atliekų tvarkymą savivaldybėje, turi būti užtikrinamas savivaldybėje surenkamų komunalinių atliekų tvarkymo sąnaudų, apskaičiuojamų pagal galiojančią regioninę kainą, kompensavimas regioniniam atliekų tvarkymo centrui ir atliekų surinkėjams. Savivaldybės taryba gali teikti lengvatas atliekų turėtojams (fiziniams

asmenims) savivaldybės biudžeto sąskaita. Lengvatos atliekų turėtojams teikiamos savivaldybės tarybos nustatyta tvarka.

Taigi, ATĮ pakeitus nuostatas, valstybinis reguliuotojas įgyja kompetenciją nustatyti dalį vartotojų mokamos galutinės kainos už atliekų tvarkymą, t. y. reguliuoti atliekų tvarkymo sąvartyne kaštus; valstybinis reguliuotojas nenustatys kitos mokesčio dalies, kuri siejama su atliekų surinkimu, vežimu ir sistemos/rinkliavų administravimu. Antra, keičiantis rinkliavų (įmokų) nustatymo mechanizmui – mažėja savivaldybių reikšmė nustatant galutinį rinkliavos už atliekų tvarkymą dydį.

Valstybinio komunalinių atliekų tvarkymo reguliavimo modelis Latvijos Respublikoje

Latvijos Atliekų tvarkymo įstatymo (Waste Management Law) 1 straipsnio 3 punkte pateikiama komunalinių atliekų definicija, kuri iš esmės atskleidžia šios rūšies atliekų sudėtį: nerūšiuotos komunalinės atliekos ir atskirai iš namų ūkių surinktos atliekos, įskaitant popierių ir kartoną, stiklą, metalus, plastiką, biologines atliekas, medieną, tekstilę, pakuotes, elektros ir elektroninės įrangos atliekas, baterijų ir akumuliatorių atliekas, dideles atliekas, pvz., čiužinius ir baldus, taip pat nerūšiuotos atliekos ir atskirai iš kitų šaltinių surinktos atliekos, kurių savybės ir sudėtis panašios į namų ūkių atliekų. Komunalinėmis atliekomis nelaikomos gamybos atliekos, žemės ūkio atliekos, miškininkystės ir žuvininkystės veiklos atliekos, septikų ir nuotekų kanalizacijos tinklų ir valymo atliekos, įskaitant nuotekų dumblą, eksploatuoti netinkamos transporto priemonės arba atliekos, susidariusios vykdant statybos darbus ir griaunant statinius.

Buitinių vartotojų komunalinių atliekų tvarkymas – viešoji paslauga, už kurios organizavimą atsakingos savivaldybės (Waste Management Law, 8 straipsnis). Tai – savarankiška savivaldybių funkcija: vietos valdžios institucijos gali pačios rinktis komunalinių atliekų tvarkymo paslaugų teikėją ir nustatyti mokestį už komunalinių atliekų tvarkymą.

Latvijoje komunalinių atliekų tvarkymo sektoriuje dalyvaujančio valstybinio reguliuotojo – Viešųjų komunalinių paslaugų komisijos veiklą reglamentuoja atskiras teisės aktas – Įstatymas dėl komunalinių paslaugų reguliuotojų (On Regulators of Public Utilities). Tai instituciškai ir funkciškai nepriklausoma, visateisė, savarankiška, viešosios teisės reglamentuojama įstaiga (On Regulators of Public Utilities, 5 straipsnis), kuri reguliuoja viešąsias paslaugas energetikos, elektroninių ryšių, pašto, komunalinių atliekų tvarkymo ir vandentvarkos sektoriuose (On Regulators of Public Utilities, 2 straipsnio 2 dalis).

Mokestis už nerūšiuotų komunalinių atliekų tvarkymą, išskyrus komunalinių atliekų naudojimą, pradiniam atliekų gamintojui ar turėtojui susideda iš dviejų dalių: 1) savivaldybės tarybos sprendimu patvirtinta rinkliava už komunalinių atliekų tvarkymą, į kurią įskaičiuojamos visos nerūšiuotų ir atskirai surinktų atliekų surinkimo, vežimo, perkrovimo ir rūšiavimo bei kitų įstatymų ir kitų teisės aktų nustatytų veiksmų, kurių imamasi iki atliekų naudojimo ir dėl kurių sumažėja šalinamų atliekų kiekis, sąnaudos, mokestis už atliekų saugojimą ir šiai veiklai reikalingų infrastruktūros objektų įrengimą bei priežiūrą, taip pat nerūšiuotų ir atskirai surinktų biologinių atliekų tvarkymo sąnaudų ir nurodytos rinkliavos skirtumas; 2) komunalinių atliekų šalinimo sąvartynuose tarifas, patvirtintas Viešųjų komunalinių paslaugų komisijos (On Regulators of Public Utilities, 39 straipsnio 1 dalis).

Komunalinių atliekų šalinimo sąvartyne tarifas apskaičiuojamas pagal Viešųjų komunalinių paslaugų komisijos patvirtintą metodiką, į jį įskaičiuojamos išlaidos, susijusios su sąvartyno įrengimu ir eksploatavimu, atliekų paruošimu šalinti, reguliariu atliekų sluoksnio padengimu inertiniu sluoksniu, taip pat sąvartyno uždarymo ir rekultivavimo bei uždaryto sąvartyno stebėsenai ir priežiūrai bent 30 metų po jo uždarymo reikalingos išlaidos, gamtos

išteklių mokestis už šalinamas atliekas, kurio dydis nurodytas įstatymuose ir kituose teisės aktuose. Pažymėtina, kad į tarifą, be kita ko, įtraukiamos ir išlaidos, skirtos finansuoti visuomenės švietimo priemones, mokslinių tyrimų ir technologinės plėtros veiklą (On Regulators of Public Utilities, 41 straipsnio 1 dalis).

Teisinio reguliavimo analizė parodė, kad įstatyminiu lygmeniu nėra įtvirtintas konkretus modelis, kaip turi būti nustatomas komunalinių atliekų tvarkymo tarifas. Tai reglamentuoja Viešųjų komunalinių paslaugų komisijos patvirtinta Kietųjų atliekų šalinimo paslaugų tarifo apskaičiavimo metodika (Methodology for the Calculation of Solid Waste Disposal Service Tariff).

Viešųjų komunalinių paslaugų komisijos patvirtintą komunalinių atliekų šalinimo paslaugos tarifą (EUR/t) atliekų tvarkytojas moka, kai nerūšiuotos komunalinės atliekos perduodamos į komunalinių atliekų sąvartyną. Tarifas nustatomas už kiekvieną į sąvartyną priimtą nerūšiuotų komunalinių atliekų toną. Į tarifą įskaičiuojamos visos išlaidos, susijusios su nerūšiuotų komunalinių atliekų srauto tvarkymu sąvartyno teritorijoje („Tarifi“, Sabiedrisko pakalpojumu regulēšanas komisija).

Latvijoje savivaldybės nustato nesutvarkytų komunalinių atliekų tvarkymo mokestį, kurį sudaro mokesčiai už operacijas, atliekamas su nerūšiuotomis komunalinėmis atliekomis iki sąvartyno vartų, ir Viešųjų komunalinių paslaugų komisijos nustatytas mokestis (tarifas) už nerūšiuotų komunalinių atliekų tvarkymą sąvartyne. Viešųjų komunalinių paslaugų komisijos nustatomas mokestis (tarifas) apima veiklą, vykdomą su nerūšiuotomis komunalinėmis atliekomis po to, kai jos patenka į sąvartyną, įskaitant gamtos išteklių mokestį už šalinamas atliekas. Perdirbimo, pakartotinio panaudojimo, energijos gavimo paslaugų kainos Latvijoje yra nereguliuojamos („Atkritumu apglabāšana“, Sabiedrisko pakalpojumu regulēšanas komisija).

Latvijoje yra 11 viešųjų paslaugų teikėjų, kurie teikia komunalinių atliekų šalinimo paslaugas 11-oje komunalinių atliekų šalinimo sąvartynų. Viešųjų paslaugų teikėjas, norėdamas teikti komunalinių atliekų šalinimo paslaugą, turi turėti priežiūros institucijos išduotą licenciją šalinti komunalines atliekas sąvartyne ir patvirtintą komunalinių atliekų šalinimo paslaugos tarifą. Kita veikla, susijusi su komunalinių atliekų tvarkymo paslaugų organizavimu ir priežiūra, priklauso vietos valdžios institucijų kompetencijai („Waste Disposal“, Public Utilities Commission).

Komunalinių atliekų šalinimo paslaugų tarifai kiekviename atliekų tvarkymo regione skiriasi, jų dydis priklauso nuo: atliekų, vežamų šalinti į sąvartyną, kiekio; naudojamų atliekų tvarkymo technologijų, įrangos ir būdų; atliekų paruošimo šalinimui; mechaniniam atliekų apdorojimui naudojamų rūšiavimo linijų; atskirtų medžiagų kokybės ir tolesnio apdorojimo galimybių; komunalinių atliekų perkrovimo stočių įtraukimo į sąvartyno infrastruktūrą; sąvartyno operatorius gaunamų (negaunamų) papildomų pajamų iš komunalinių atliekų šalinimo paslaugos, pvz., elektros ir šilumos energijos gamybos iš surinktų atliekų biodujų. Visgi, vienas iš pagrindinių veiksnių, lemiančių tarifo dydį, yra atliekų tvarkymo technologiniai sprendimai, kuriuos regiono savivaldybės pasirinko kartu su sąvartyno valdytoju, siekdamos užtikrinti buitinių atliekų šalinimo paslaugos teikimą savo atliekų tvarkymo regione („Tarifi“, Sabiedrisko pakalpojumu regulēšanas komisija).

Pažymėtina, kad nustatomas mokestis (tarifas) už komunalinių atliekų tvarkymą turi padengti viešosios paslaugos teikimo faktiškai patirtas sąnaudas, tačiau į tarifą leidžiama įskaičiuoti tik ekonomiškai pagrįstas ir su konkrečia paslauga susijusias sąnaudas – pareiga jas pagrįsti tenka paslaugos teikėjui, o leistinos gauti investicijų grąžos dydis yra apribotas valstybinio reguliuotojo.

Apibendrinant, Latvijoje ir Lietuvoje taikomas valstybinio komunalinių atliekų tvarkymo kainų reguliavimo modelis iš esmės nesiskiria, t. y. valstybinis reguliuotojas nustato būtinąsias

sąnaudas, kurios reikalingos atliekoms tvarkyti sąvartyne, tačiau nereguliuoja atliekų surinkimo / vežimo bei sistemos / rinkliavos (ar įmokų) administravimo sąnaudų. Galutinę kainą vartotojams už komunalinių atliekų tvarkymą (įmoką / rinkliavą) nustato savivaldybės.

Valstybinio komunalinių atliekų tvarkymo reguliavimo perspektyvos

Valstybinio reguliavimo modelio komunalinių atliekų tvarkymo sistemai teigiamų ir neigiamų veiksnių prognozės pateikiamos įvertinant du aspektus: a) analizuojant šio modelio taikomą praktiką bei reglamentavimą Latvijoje; b) palyginant Lietuvos ir Latvijos teisinio ir administracinio fono sutaptis ir/ar skirtumus bendrajame aplinkosauginių priemonių bei atliekų tvarkymo sistemų kontekste.

Latvijos Respublikoje valstybinio komunalinių atliekų tvarkymo reguliavimo modelis taikomas jau daugiau nei dešimt metų, tačiau, autorių nuomone, nors Lietuvoje buvo pasirinktas analogiškas modelis, įgyvendinant jį buvo rengiamas teisės aktų paketas, remiantis valstybinio reguliuotojo kitiems sektoriams (šilumos, geriamojo vandens, kt.) taikomais principais, nevertinant kaimyninės šalies teisinio reguliavimo gerosios patirties bei iššūkių, kurie padėjo atskleisti ir silpnąsias šio modelio įgyvendinimo praktikoje puses.

Latvijos patirtis taikant valstybinį komunalinių atliekų tvarkymo reguliavimą vertintina nevienareikšmiškai. Viena vertus, valstybinio reguliuotojo dalyvavimas prisideda prie kainodaros *skaidrumo*. Pažymėtina, kad būtent kainodaros skaidrumo aspektas ir yra nulemiantis faktorius šio modelio pasirinkimui Lietuvoje. Nors iki šiol nėra mokslinių tyrimų ir apibendrintų statistinių duomenų analizės, tačiau Latvijos Viešųjų komunalinių paslaugų komisijos pateikiami atskiri pavyzdžiai rodo, kad reguliuotojo sprendimu atliekų tvarkymo tarifai, nepagrindus sąnaudų, gali būti sumažinti 25 proc. (Annual Report 2015 Public Utilities Commission of Latvia).

Kita vertus, tokio modelio taikymas neužtikrina, kad skirtinguose regionuose gyventojų mokama kaina už komunalinių atliekų tvarkymą taptų analogiška – tikėtina, kad ateityje ši praktinio taikymo problema bus aktuali ir Lietuvoje (jau stebima ir šiuo metu, tačiau dėl labai trumpo šio modelio taikymo Lietuvoje termino, nuo išvadų susilaikoma). Tai aiškintina tuo, kad valstybinio reguliuotojo dalyvavimas nustatant komunalinių atliekų tvarkymo sąvartyne kainą negali daryti įtakos tokiems veiksniams, kaip, pavyzdžiui, ar yra įsteigtas atliekų pirminio apdorojimo centras sąvartyne, gyventojų tankumui, atskirų atliekų tvarkymui, nuo kurio priklauso bendras sąvartyne deponuojamų atliekų kiekis, naudojamoms technologijoms ir kt., kurie lemia tarifų skirtumus (Annual Report 2016 Public Utilities Commission of Latvia).

Pažymėtina, kad nors Latvijoje valstybinis komunalinių atliekų tvarkymo reguliavimas taikomas gerokai seniau nei Lietuvoje, tačiau pagal sąvartynuose šalinamų atliekų kiekį abi valstybės mažai skiriasi: Latvija – 31 proc., Lietuva – 33 proc. (2017 m.), ES tikslas – iki 2035 m. pasiekti 10 proc. ir mažesnį rodiklį (Europos Parlamentas, 2018).

Išvados

Valstybinio reguliuotojo įtraukimas į komunalinių atliekų tvarkymo reguliavimą ir regioninės kainos, kaip dalies kainos už komunalinių atliekų tvarkymą, nustatymo mechanizmas vertintinas ir kaip teigiamas pasirinkimas: mažinamas kainų skirtumas tarp atskirų savivaldybių, kainodaros skaidrumo tikimybė ir kt. Tačiau yra ir neigiamų aspektų: savivaldos autonomijos ribojimas, papildomas subjektas (valstybinis reguliuotojas) sąlygoja papildomą administravimo išlaidų poreikį (toks poreikis nurodytas ir Įstatymo projekto aiškinamajame rašte).

Lietuvos ir Latvijos teisės aktai, reglamentuojantys komunalinių atliekų tvarkymą, komunalinių atliekų tvarkymo sistemų diegimą, antrinių žaliavų surinkimo ir perdirbimo organizavimą, sąvartynų įrengimą ir eksploatavimą priskiria savivaldybių kompetencijai.

Latvijoje ir Lietuvoje taikomas valstybinio komunalinių atliekų tvarkymo kainų reguliavimo modelis iš esmės nesiskiria, t. y. valstybinis reguliuotojas nustato būtinąsias sąnaudas, kurios reikalingos atliekoms tvarkyti sąvartyne, tačiau nereguliuoja atliekų surinkimo / vežimo bei sistemos / rinkliavos (ar įmokų) administravimo sąnaudų. Galutinę kainą vartotojams už komunalinių atliekų tvarkymą (įmoką / rinkliavą) nustato savivaldybės. Tyrimas parodė, kad Latvijoje šio modelio taikymas neužtikrina, kad skirtinguose regionuose gyventojų mokama kaina už komunalinių atliekų tvarkymą taptų analogiška.

Manytina, kad optimistinis siekis – naujai įtvirtintu valstybinio reguliavimo modeliu pasiekti komunalinių atliekų susidarymo ir šalinimo sąvartynuose kiekio mažinimą gali būti nepasiektas, nes Latvijoje šį modelį taikant jau daugiau nei dešimt metų, faktiškai minėti rodikliai yra analogiškai Lietuvos rodikliams.

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PERSPECTIVES OF STATE REGULATION OF MUNICIPAL WASTE MANAGEMENT IN LITHUANIA

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Summary

The article analyzes the changes in the regulation of municipal waste management of household users in Lithuania and provides forecasts of the advantages and disadvantages of the new model. European Union members have the right of discretion to establish and apply different methods of setting tariffs (tolls). There are three prevailing methods of setting tariffs (tolls): fixed-rate toll (payments),

"Pay-as-you-throw" and state regulation (Latvia, from January 1st, 2023, Lithuania). EU member states are gradually phasing out of fixed fees (payments) as it is criticized and considered ineffective. From January 1st, 2023, the municipal waste management system of household users is being modified in Lithuania, and a state regulator is being established. The essence of the state regulation model is that part of the price for municipal waste management is determined by the state regulator, and the other part by the municipality. It is investigated whether such a regulatory model of municipal waste management has only positive or contradictory features.

Improving waste management is one of the 5 priorities of the European Green Deal. Appropriate pricing of municipal waste management services for municipal waste collection from waste holders and waste management can have several practical implications, such as encouraging waste avoidance and recycling. Thus, the improvement of waste management is directly related to the selection of a municipal waste management pricing model, according to which it would be clear which institution and in what terms approves the methodology for calculating the price for municipal waste management, which institution and in what terms calculates the projects of these prices, what are the bases for pricing and principles and what are the bases for price review and change.

The purpose of this article is to reveal the peculiarities of the regulation of municipal waste management for household users in Lithuania and to provide predictions as to whether the new model will have an impact on a more efficient system of taxation of municipal waste management services. The subject of the research consists of two aspects: a) analysis of the content of state regulation as a method of setting tariffs (fees) for household consumers for municipal waste management; b) peculiarities of municipal waste management regulation in two jurisdictions: Lithuania and Latvia.

It is concluded that the inclusion of the state regulator in the regulation of municipal waste management and the mechanism for determining the regional price as a part of the price for municipal waste management can be evaluated as a positive choice: the price difference between individual municipalities is reduced, the possibility of pricing transparency, etc., and as a negative factor : restriction of self-government autonomy, an additional entity (state regulator) results in an additional need for administration costs.

The legal acts of Lithuania, as well as of Latvia, which regulate the management of municipal waste, the implementation of municipal waste management systems, the organization of the collection and processing of secondary raw materials, the installation and operation of landfills belong to the competence of municipalities. The model of state price regulation of municipal waste management applied in Latvia and Lithuania is not fundamentally different, i.e. the state regulator determines the necessary costs that are required for handling waste in a landfill, but does not regulate the costs of waste collection/transportation and system/toll (or fee) administration. The final price to consumers for municipal waste management (fee) is set by the municipalities. It is noted that the optimistic goal of reducing the amount of municipal waste generated and disposed of in landfills with the newly established state regulation model may not be achieved, because this model has been applied in Latvia for more than ten years, and the aforementioned indicators are actually analogous to the indicators in Lithuania.

The Republic of Latvia was chosen for comparative analysis for several reasons: analogous Soviet experience; the independence of the state was regained at the same time, which led to fundamental reconstructions of the approach to waste management and the general importance of environmental protection; both states have similar geopolitical, demographic and economic indicators, both states became European Union members at the same time - on 1st of May, 2004. Although both countries have currently chosen a state regulatory model for municipal waste management and its content is regulated similarly, this model has been operating in Latvia since November 1st, 2009, while in Lithuania since January 1st, 2023. This publication presents a comparison of the state legal regulation of municipal waste management, and discusses Latvian practice.

Qualitative research methods applied in the work: systematic analysis, analysis of legal sources. A logical method was used for conclusions and generalizations. With the help of the comparative method, a comparative analysis of the state regulation of municipal waste management of the Republic of Lithuania and the Republic of Latvia was carried out, the legal acts of both countries regulating the

peculiarities of municipal waste management were examined in order to highlight common theoretical bases, similarities and/or differences, examples of good practice and alternatives to legal regulation were sought.

Keywords: *environmental protection, waste management, municipal waste, state regulation, Latvia*

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HISTORICAL RELATIONSHIP BETWEEN OPERATIONAL ACTIVITIES AND CRIMINAL INTELLIGENCE: THE CASE OF LITHUANIA

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Abstract. *The information presented in this article allows us to reveal the historical connection between operational activities and criminal intelligence. The object of the research is the historical connection between operational activities and criminal intelligence in Lithuania. The aim of the study is to reveal the historical development of the concepts of operational activity and criminal intelligence in Lithuania, emphasizing the increasing importance of ethics for criminal intelligence. Operational activity is usually associated with ¬the activities of criminal services, which are concerned only with gathering information and ¬detecting crime and take this for granted and not analysed. The history of operational activities from 1918 to the present day shows a fundamental similarity: secret services have been in existence throughout history. Whether in order to preserve the state or in the face of changes in governance, the principle of operational activity has remained similar. After Lithuania regained its independence, the most important date for criminal intelligence is 2013-01-01, when the Law on Criminal Intelligence of the Republic of Lithuania was adopted. The article emphasizes that it aims to ensure the protection of human rights and freedoms, regulate the bases of operational activities, etc. The expressed thoughts do not raise any doubts about the need for ethics in criminal intelligence. Ethics becomes a necessary part of the concept of criminal intelligence when comparing it with operational activities, therefore the article briefly presents two essential ways of how criminal intelligence in Lithuania functions whilst facing ethical issues. First are actions imitating a criminal act and second, secret surveillance. The conclusions state that experienced painful historical facts, the creation of a democratic state influenced the change of the name of the operative activity of the Republic of Lithuania to the name of the criminal intelligence of the Republic of Lithuania. Criminal intelligence officers perform their functions legally, i.e., in accordance with legislation. Every legal act protects human constitutional and natural rights. However, there are exceptions that these rights may be violated if it is required to stop a crime, protect the state or human rights and freedoms. Every action of criminal intelligence can be considered moral if it does not violate legal norms.*

Keywords: *operative activity, criminal intelligence, historical development, independence of Lithuania.*

Introduction

In today's society, the ways in which crimes are committed are increasingly sophisticated and are carried out with the help of new technologies that make it possible to carry out a crime without leaving large marks. However, any crime violates the rights and freedoms of society and its members, and it is therefore important that people's natural rights and freedoms are protected from violation. Operational activities are a special type of law enforcement activity. Traditionally, the ¬content of operational activities is defined as the totality of the means of operational search¬, which cannot be made public. Actions can be neutral and have some coercive elements in the exercise of governmental powers that restrict some of the constitutional rights of citizens, as stated by Laurinavičius (2001).

As the governments of the states change, so do the enforcement of laws and the basis of their application. One of the historically changed legal acts is criminal intelligence, which has long been known and used when discussed as an operational activity. Anušauskas (2014) reviews historical facts in operational activities, criminal intelligence. The history of criminal intelligence has its most important historical dates, which adjusted the composition, operation, subjects and functions of intelligence to adapt to the problems of that time. Gutauskas (2019, 2022) discusses the application of the measures enshrined in the law on criminal intelligence and the protection of human rights in today's modern world, Bučiūnas (2022), Kraujalis & Malewski (2022) focuses on the application of the latest scientific and technological achievements in criminal intelligence when investigating criminal acts, and on the use of technical measures Tarasevičius (2017) discusses the legality of its use in criminal intelligence. Markevičius (2021) is interested in the effective protection of the right to private life by applying criminal intelligence measures, Šakalienė (2021) analyses the legitimacy of using criminal intelligence data in the investigation of official and/or disciplinary offenses.

Since its inception, when it was still called an operational activity, criminal intelligence has been a constant subject of debate among legal researchers and legal practitioners. Some of the authors who examined it in their publications expressed sympathy for it, stating that criminal intelligence ensures a better detection and investigation of a criminal offense and at the same time is an irreplaceable opportunity to better prepare a case for trial (Ancelis, 2009), that criminal intelligence and pre-trial investigation generally cannot function without each other (Liutkevičius, 2006), therefore, criminal intelligence, as a means of fighting crime and an instrument of information gathering, is necessary and must be implemented as efficiently as possible both by improving its legal regulation and methods and forms (Andrejevas, 2011). Another part of the authors expressed an obvious criticism of criminal intelligence, warning that this activity is characterized by unclear legal regulation (Lankauskas, Mulevičius & Zaksaitė, 2013) and drawing attention to the fact that criminal intelligence, like every secret surveillance system, is characterized by the threat of abuse (Gutauskas, 2019).

In order to avoid such ethical problems as abuse, ethics becomes a necessary part of the concept of criminal intelligence, as noted by Greičiūtė and Paurienė (2022). Palidauskaitė's (2011) overview of the professional ethics standards of civil servants helps highlight the professional ethics aspects of criminal intelligence officers. Mulevičius and Petrošius, discussed the moral and ethical evaluations related to the special means and methods used in operational activities, as well as certain restrictions on human rights and freedoms, possible during certain operational actions.

The object of the research is the historical connection between the concepts of operative activity and criminal intelligence in Lithuania.

Goal of the research. To reveal the historical development of the concepts of operative activity and criminal intelligence in Lithuania, emphasizing the growing importance of ethics.

Research tasks. To implement the objective, the following tasks were set out: to conduct analysis of scientific literature on theoretical aspects of concept of operational activity and changes in criminal intelligence in Lithuania; to conduct a study of historical dates that changed operational activities into criminal intelligence, to identify methods of operation of criminal intelligence, facing ethical problems.

In order to protect society from danger and to safeguard people's natural rights, it is important to amend and apply legislation in a way that protects human rights and freedoms. The operation of operational activities is the laying of the foundations for the operation of criminal intelligence, and it is therefore important to talk about how the operation of these two concepts has changed in the attempt to combat the criminal world.

Concept of operational activity and changes in criminal intelligence in Lithuania

This part of the article is concerned with the history, the facts of which make it possible to highlight the differences and similarities between operational activities and criminal intelligence, establishing the commonality between these concepts. In order to understand the concept of operational activities, it is important to analyse the legislation governing these activities, which is legally constituted and accessible to the public, and to understand the functions of operational activities. The Law of the Republic of Lithuania on Operative Activities states that operative activities are public and secret activities of an intelligence nature carried out by the subjects of operative activities in accordance with the procedure laid down by this Law. It is noted that this legislation is now obsolete, but it is one of the legal sources that defines this concept precisely.

It is necessary to emphasise the principles that guide operational activities in the exercise of their functions. The principles set out in the legislation reveal the values that operational activities are aimed at protecting. Operational activities are based on the principles of legality, the safeguarding of human and civil rights and freedoms, the protection of the public interest, conspiracy, confidentiality, and a combination of public and secret means and methods. These principles make it clear to the public that the most important values protected by operational activities are the human being and all that is involved in ensuring his or her security. The principle of legality makes it clear that operational activities are guided by legal norms, despite the implementation of their tasks, which are not infrequently carried out through secrecy. Mulevičius and Petrošius, in their review of the principles of operational activity, add that operational activity is guided by additional principles that are not mentioned in the law, but which are also important - the principles of humanism, scientificity, equality of people before the law, morality, autonomy, etc. (Mulevičius and Petrošius, 2005). The upholding of principles is an expression of the morality of operational activity, as it protects the values that have been formed in society, and therefore such activity is seen as ethical and moral towards citizens whose values, rights and freedoms are protected.

Operational activity is one of the functions of law enforcement in the fight against evil that is directed against good. Although operational activities are carried out lawfully, not all attempts to deal with evil succeed on the basis of actions that do not violate human constitutional rights. Mulevičius and Petrošius (2005) add that operational activities, in order to fight crime in a noble way, use methods and means that may be judged negatively. In the process, operational activities make use of conspiracy and disinformation measures, establish relations of secret cooperation, interfere with a person's private life, secretly obtain information about residential and non-residential premises, use technical means for special procedures, etc. (Mulevičius and Petrošius, 2005). It is precisely these features that reveal that operational activities are confronted with a line of right and wrong that can easily be crossed.

When choosing the method of operational activity that is necessary to protect the State and its society from criminal attempts, it is essential to assess that the method chosen is appropriate to the objective to be achieved. In the case of a mode of action which affects human rights and freedoms, it is important to be guided throughout the process by the law, which is inseparable from the observance of morality.

An overview of the concept of operational activity allows us to compare this law enforcement activity with the current criminal intelligence activity established in 2013. The comparison between these two activities in the fight against the criminal world is relevant because criminal intelligence is a new legal act replacing operational activities. It is therefore

important to disclose both the legal changes and the historical facts that influenced the change in the law.

The most important change took place when the Republic of Lithuania regained its independence and the functioning of operational activities had to change, both in the principle of legal regulation and in the sense of changing the concept. The most noticeable difference is therefore in the names 'operational activities' and 'criminal intelligence', which are different from each other but have a commonality both in terms of function and history. Šimkus and Tarasevičius point out that the change in the theory of 'operational activity' was influenced by changes in both social and economic relations, and that, as the state became democratic, the old totalitarian practices of governance could not be adequately adapted to the new one (Šimkus and Tarasevičius, 2002). Society was changing, human rights were evolving, cooperating institutions, their subjects and the functioning and functions of operational activities were changing. It is also added that in Lithuania the theory of operational activity, as well as operational activity itself, is a stereotyped transposition of the term "*оперативно-розыскная деятельность*", used in the Soviet Union's theory of operational activity. The authors add that this term is not acceptable in Lithuania, because in some countries the term "operative activity" is not used - it is not well understood, or it is given a completely different meaning (Šimkus and Tarasevičius, 2002). In view of these facts, it was important to change the concept of operational activity to criminal intelligence, adapting it to the new democratic state. The change of name is in line with the norms of moral behaviour towards citizens, reinforces values and traditions, and reveals values that uphold human rights and freedoms.

It is necessary to pay attention to the changes in the Law on Operative Activities of the Republic of Lithuania and the Law on Criminal Intelligence of the Republic of Lithuania , which are the most revealing of the changes in the content of the law. The first noticeable difference is in the definitions in the law. The Law on Operative Activities states that "*operative activities - public and secret activities of an intelligence nature carried out by the subjects of operative activities in accordance with the procedure laid down in this Law*". It may be noted that criminal intelligence is more broadly regulated in its presentation of the concept. The Law states that it is "the activity of criminal intelligence entities in collecting, recording, evaluating and using available information on criminal intelligence objects, carried out in accordance with the procedure established by this Law." It should be noted that these laws present subjects and objects differently. The list of subjects in the context of operational activities is regulated in a broad manner, specifying exactly who has special powers, whereas the Law on Criminal Intelligence does not specify who can carry out criminal intelligence activities, but simply states that this can be carried out by authorised units, and that the list of these units is established and the scope of their activities is determined by the Government of the Republic of Lithuania. However, in both criminal intelligence and operational activities, the institutions remain the same, but criminal intelligence is not mentioned in the law. It should be noted that the law on criminal intelligence broadens the rights of the subjects and defines them more clearly, and the duties of the subjects are also changing, increasing in number and responsibility.

It is obvious that an analysis of the concept of operational activities reveals the most important essence of this law, which is to protect the state and the rights and freedoms of society. Although the chosen method of protection is fraught with possible violations of human rights and freedoms and the crossing of moral boundaries, in each case, the operational activity seeks the greater good and, by its action, prevents the development of evil. Human rights and freedoms are one of the most important values in the state, and in view of this, the historical facts and shortcomings of the law on operational activities have led to the renaming of the law on operational activities as criminal intelligence.

Historical dates that changed operational activities into criminal intelligence

Deriving the concept of operational activities from the legislation, it can be argued that the establishment of operational activities is related to the fight against the criminal world and the defence of human and public rights and fundamental human values. In the historical development of operational activities, there are several important historical dates: the inter-war period, from 1918-02-16 to the occupation of the Soviet Union on 1940-06-15, the second period, which coincides with the period of the occupation of the Soviet Union, from 1940-06-15 to 1990-03-11, and the third period, which begins with the Act of restoration of Lithuanian statehood on 1990-03-11 and continues until the present. In these historical periods, the actions of the operational activities have been instrumental in ensuring secrecy and contributing to the preservation of the State.

The Lithuanian Secret Services 1918-1940. In analysing this historical period of intelligence, several key historical moments are identified - when intelligence began and how it functioned. "The specifics of the first stage of the establishment of the independent Lithuanian state (1918-1922) meant that the secret service was first established in the army. <...> The secret service in the army expanded from a small part of knowledge to a well-organised body - the Intelligence Department. The employees of this division united the functions of intelligence, counterintelligence and political surveillance, and in 1918-1923 they performed a much-needed work in defence of Lithuania's independence" (Anušauskas, 2014:318). In this period, the planning of covert actions, the formulation of tasks and objectives, and the way in which what is to be achieved through the performance of covert or public functions is highlighted. As intelligence and counter-intelligence were entrusted to the military, the security domain was greatly strengthened and military intelligence became increasingly professional in its employment. "From a front-line intelligence organisation, which had neither experienced intelligence officers nor the technical means, the intelligence section was transformed into a foreign intelligence service by 1922. " (Anušauskas, 2014:318). Becoming a foreign service enabled not only Poland to receive information, but also Soviet Russia, Germany, Latvia and other countries. The military intelligence consisted of educated officers, and in addition there was a border police, which had its own functions, according to which it brought secret agents across the state border. Lithuanian intelligence exchanged information with other countries and maintained friendly relations between states.

With the changes in society, economy and politics, another phase in the history of operational activities becomes important, which coincides with the period of occupation of the Soviet Union from 15 June 1940 to 11 March 1990. One of the most secret services is the KGB. This service has been able to work in extreme secrecy because most of the historical facts about its activities were destroyed when the KGB withdrew, and the traces of its activities have been thoroughly eradicated. The Soviet Union's Special Service began operating in Lithuania on 13 March 1954. Analysing this historical period, "it can be said that the KGB was a tripartite organisation whose main functions were foreign intelligence, the fight against the intelligence and subversive activities of foreign (i.e. "enemy") special services ("counter-intelligence"), and the struggle against "nationalism and anti-Soviet activities" (Anušauskas, 2014:37). The KGB emerged after Stalin's death, when a modernised state security service was gradually created and renamed KGB. "This structure in the post-Stalin period attempted to influence the society of occupied Lithuania by coercion and covert control, more indirectly (of course, there was also direct control). The KGB, censorship, repression, psychiatric coercion - these were the distinctive features of that time" (Anušauskas, 2014:13). As the political atmosphere became freer, Lithuania managed to liberate itself from the Russian army, which was an important step

not only in restoring Lithuania's independence, but also in changing the functioning of the intelligence services. An important date for the collapse of the KGB in Lithuania was 27 March 1990, when a resolution was signed proposing that the KGB agency cease its clandestine work, and some of the agents ceased their activities.

Restoration of the Lithuanian State. This is one of the most important periods in the history of operational activity (now criminal intelligence) and in the way it has changed. "The restoration of independence after 11 March 1990 in Lithuania was accompanied by a complex political, economic and legal situation. A period of transition from communist totalitarianism to a democratic civil society had begun" (Tarasevičius, 2016:83). Thus, with the advent of Lithuania's independence, the intelligence services also underwent changes. As the political, economic and social situation in Lithuania improved, so did the number of crimes, and it was important to start tackling them as soon as possible in order to prevent the spread of crimes in the country. In view of the rising crime trends, the tasks of fighting crime were entrusted to law enforcement institutions, whose activities, as Tarasevičius notes, were directly affected by the reforms of the organisational and legal framework of their activities at that time (Tarasevičius, 2016:83). In the search for solutions for the proper application of legislation in the fight against crime in Lithuania, the Law on Police of the Supreme Council of the Republic of Lithuania of 11 December 1990 was adopted. Article 20 of the Law stipulated that "in carrying out operational activities, the police may, in accordance with the established procedure, use special equipment, voluntary public or secret assistance of citizens, as well as intelligence interrogation, operational inspection and examination, surveillance, intelligence and other methods of special control". In order to define the precise tasks and functions of operational activities in distinction from other institutions working in secret, on 15 July 1992 the Council adopted the following provisions The Supreme Council of the Republic of Lithuania adopted the first Law of the Republic of Lithuania on Operational Activities on 15.07.1992. However, this law has not been fully completed and properly applied to society. The law stated that acts imitating a criminal offence could be carried out, but it provided for criminal liability and criminal proceedings. This loophole in the legislation was one of the most damaging to legal norms and human rights. Consequently, until the last law on operational activities, which was issued for the last time on 20 June 2002, the legislation had many amendments and additions.

The most important event in the history of operational activities was the renaming of operational activities as criminal intelligence. The explanatory note on the draft Law on Criminal Intelligence of the Republic of Lithuania and the draft amendments to the other laws related to this law give the reasons that influenced the renaming of operational activities as criminal intelligence. This Act states that:

„1) The Law on Operative Activities of the Republic of Lithuania (Žin., 2002, No. 65-2633), which is currently in force, does not sufficiently ensure the protection of human rights and freedoms, the control of the activities of the subjects of operative activities, does not sufficiently regulate the bases for carrying out operative activities and does not correspond to the realities of the time, and therefore it must be improved, taking into account practical problems of the application of the current Law on Operative Activities.

2) The current legal framework for the use of operational procedures in intelligence and counter-intelligence activities is inadequate, as the content of operational activities is aimed at the detection of crime, while intelligence and counter-intelligence are aimed at identifying risk factors, dangers and threats and providing information on them to the authorities responsible for national security.

3) In most foreign democracies, the term "operational activity" is not used - it is not well understood or given a different meaning. Taking into account the need of Lithuanian law

enforcement authorities to cooperate more and more frequently with foreign officials, it is appropriate that the provisions of 2 Lithuanian legal acts should be similar in legal and terminological terms to the concepts used in democratic foreign states. "

The above-mentioned reasons led to the amendment of the Law on Operational Activities of the Republic of Lithuania into the Law on Criminal Intelligence of the Republic of Lithuania. The amendment of the Law introduced concreteness and clarity in intelligence.

After examining the history of operational activities since 1918 to the present day, a fundamental similarity can be observed - secret services have been active in all eras. Whether in order to preserve the state or in the face of changes in governance, the principle of operation has remained similar. The history of operational activities (now called criminal intelligence) has its own key historical dates, which have adjusted the composition, operation, subjects and functions of intelligence to the issues of the time. The most important dates in the development of operational activities are 15.07.1992, when the first Law on Operational Activities of the Republic of Lithuania was adopted, and the second date, which is significant for the beginning of criminal intelligence, is 1.01.2013, when the Law on Criminal Intelligence of the Republic of Lithuania was adopted. A review of the legislation shows that operational activity is a public and secret intelligence activity by entities and is the oldest institution that has started to fight the criminal world by using covert methods of operation.

Methods of operation of criminal intelligence, facing ethical problems

When determining the methods of operation of covert means against a person who commits a criminal act, it is important to pay attention to ethical and moral issues that may be violated in the course of covert actions of criminal intelligence. Crime simulation activities (CSA) and covert surveillance violate the rights and freedoms of the person being investigated, but these actions are motivated by the greater good of protecting society from the criminal world.

Permission to perform crime simulation activities (CSA). The Law on Criminal Intelligence of the Republic of Lithuania describes the crime simulation activity provided as one of the ways of collecting criminal intelligence information, formally having the signs of a criminal act or other violation of the law and simulating a criminal act, carried out in order to defend an object from a criminal attempt. Actions imitating a criminal act are sanctioned by the prosecutor based on a reasoned submission by the head of the criminal intelligence entity or the authorized deputy head. This way of gathering information faces a potential provocation that violates human natural rights.

Gutauskas (2019), reviewing criminal intelligence and the private life of a person, while delving into the application of procedural coercive measures, emphasises that the most important criterion when applying procedural coercive measures is formal legality. The aforementioned scientist points out that when detailing the formal legality of the application of such measures, the following is necessary: a legal reason; proper sanctioning; adherence to the limits of sanctioned action and prohibition of provocation. It should be noted that the acts of crime simulation activities (CSA) can be carried out by officers who do not reveal their identity, according to the Code of Criminal Procedure of the Republic of Lithuania (Art. 158-2) and in special cases, when there are no other possibilities to identify persons committing crimes, the investigation can also be carried out by persons who are not pre-trial investigation officers, according to the Code of Criminal Procedure of the Republic of Lithuania (Art 158-6).

„The European Convention for the Protection of Human Rights and Fundamental Freedoms" protects a person's natural rights; the articles of this convention also protect a person

from secret actions against him. However, the articles provide additional avenues for authorities to intervene in these rights to prevent violations of the law or crime, as well as to protect the health or morals of the population or the rights and freedoms of other people. Laws protect human natural rights, but in every case, if a person chooses a pattern of bad behavior, he violates not only his own, but also the ethical values of the rest of society, which are related to a person's inner beliefs, customs, vices and all other natural rights that a person protects.

When analysing CSA, it is important to take into account the regulation of provocation and the arguments for this absence in court practice. According to Article 159 of the Code of Criminal Procedure of the Republic of Lithuania. in point 3, during CSA, it is prohibited to provoke a person to commit criminal acts. It is possible to notice complaints submitted in judicial practice regarding provocations committed during the process of carrying out CSA, so it is important to review how court practice argues provocations related to CSA in cases. On 27 February 2020 the Supreme Court of Lithuania (SCL) adopted a ruling in which the court heard the criminal case with the complaints submitted by the convicts in the procedure of cassation written procedure. "The pre-trial investigation in the case was started on 20 October 2014, after the information received confirmed that R.D. was possibly distributing the psychotropic substance - methamphetamine. <...> According to a separate ruling of this court, R.D. was also allowed during the mentioned period to implement the procedural coercion measure specified in Article 158 of the Code of Criminal Procedure of the Republic of Lithuania against D.K., J.L. and their possible accomplices, establishing contacts, obtaining data on the trade in psychotropic and narcotic substances, secretly recording such actions audio and video recordings, using all kinds of technical means to make such recordings." (According to the "Decision of the Supreme Court of Lithuania in the case (No. 2K-1-719/2020)"). From the submitted case material, it can be seen why CSA is appointed and the person who will act as a procedural coercive measure is indicated.

However, the use of procedural coercion lasted for a long period of time and, as an argument, the applicants submit a complaint, in which they indicate that the imitation of a criminal act was based on the intervention and provocation of the officers and this continued over a long period of time, which forced the possession of drugs in increasingly large quantities and, as a result, was significantly aggravated legal status of the assesses, i.e. CSA were implemented improperly (according to the SCL ruling in case No. 2K-1-719/2020). It is added that the investigation included persons who had no previous interest in breaking the law. However, it must be understood that persons who have nothing to do with the criminal world are not punished or followed, so during the CSA, all the persons involved are not random and had their role in this case. The prosecutor, arguing the complaints, emphasizes the facts of the case and explains them by proving that the work performed by the officers is legal and that the imitation of a criminal act did not lead to provocation. The CSA proved successful because individuals who had previously distributed drugs and psychotropic substances and committed other crimes were exposed but were not identified. It was the long period of time that allowed to reveal the persons who contributed to the execution of these criminal acts.

The presented theoretical arguments and an example of judicial practice allow us to understand that the actions of simulating a criminal act face a possible provocation in order to reveal criminal acts. After evaluating the possible risks in performing the actions of simulating a criminal act, it can be concluded that the courts must consistently evaluate the entire procedure of the process, from the application of the coercive measure to its termination.

Covert surveillance

When examining ethical aspects in criminal intelligence, it is important to delve into covert surveillance, during which the subject of surveillance is not informed about the latter, and as a result, the problem of possible violations of human rights and freedoms arises. Covert surveillance involves the use of technical means to gather important information.

It is important to emphasize that secret surveillance as such concept is not regulated in the Criminal Intelligence Law, the concept of secret surveillance is presented in the Criminal Procedure Code of the Republic of Lithuania. The Law on Criminal Intelligence regulates that tracking is a method of gathering criminal intelligence information, when information is obtained by distinguishing, identifying or observing an object. The legislator describes tracking as one of the ways of obtaining information and specifies what procedural steps are necessary for tracking to be applied to an object. It is understood from the Criminal Intelligence Act that surveillance is carried out against persons who are in one way, or another connected with the criminal world. However, the legal act further mentions vehicles, premises, locations, persons and things against which it is also possible to apply this procedural coercion measure. The concept of covert surveillance provided by the Criminal Procedure Code of the Republic of Lithuania should be taken into account, which states that surveillance is carried out against persons, vehicles or an object. It is clear that there is a significant connection between the information provided by these two legal acts regarding secret surveillance, but the Code of Criminal Procedure of the Republic of Lithuania, explaining the concept, provides more clarity in advance on what secret surveillance can be carried out, in addition to vehicles, persons and separate objects. Bučiūnas (2012), after analysing the features of covert surveillance, presents the meaning of the concept of covert surveillance, that it is not only a method of collecting information, but also a procedural coercive measure of a non-public nature, which is carried out legally and using technical means to record the information obtained, but it is also an action that respects the natural human rights and freedoms and it is carried out in accordance with the Code of Ethics of Intelligence Officers, the Constitution and laws.

It would be appropriate to note that every legal act, mentioning the personal security of life, adds that information about a person's private life can be collected only by reasoned court decision and only in accordance with the law. This is also confirmed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is recognized that states are not prohibited from using procedural coercive measures in the fight against crime reduction and the mentioned secret surveillance does not contradict Article 8 of the Convention. We should not forget the fact that after the end of the secret surveillance, the person is informed about the procedural coercive measures applied against him without his knowledge. Article 161 of the Code of Criminal Procedure of the Republic of Lithuania states that „a person who was subjected to a procedural coercion measure without his knowledge must be notified of it after the application of such a measure has ended. It is necessary to report as soon as possible without compromising the success of the investigation.” Covert surveillance has its own legally sanctioned beginning against the individual and its legalistic end.

After analysing the implementation of procedural coercive measures carried out by criminal intelligence, the problem of ensuring human rights and freedoms is revealed. Therefore, acts of imitation of a criminal act and secret surveillance require careful attention of officers, knowledge of legal acts and cultivation of morals. Defending human rights and freedoms is the most protected value of society. In the application of CSA or covert surveillance, ethical considerations must be upheld in each case, as well as natural human rights and freedoms.

Conclusions

After Lithuania regained its independence, more and more attention were paid to the defence of human rights and freedoms. Experienced painful historical facts, the creation of a democratic state influenced the change of the name of the operative activity of the Republic of Lithuania to the name of the criminal intelligence of the Republic of Lithuania. The values of the amended legal act remained the same - to protect a person from crime. Criminal intelligence, in the performance of its functions, uses procedural coercive measures, such as - acts of simulating a criminal act, secret surveillance. Criminal intelligence officers perform their functions legally, i.e., in accordance with legislation. Every legal act protects human constitutional and natural rights. However, there are exceptions that these rights may be violated if it is required to stop a crime, protect the state or human rights and freedoms. Every action of criminal intelligence can be considered moral if it does not violate legal norms.

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ARTIFICIAL INTELLIGENCE IN FINTECH AND ITS SUSTAINABLE SECURITY NETWORK

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Abstract. *Artificial intelligence in relation to the skyrocketing, inter alia, financial technologies brings about a considerable positive potential for humankind in general, none-the-less, along with the clearly associated risks. The impacts of artificial intelligence, Internet of Things and robotics in general have a fundamental impact on public as well as individual security and its guarantees. The financial industry is one of the largest investors in artificial intelligence, with its goal of assuming a primary position in global markets. The conceptual support for artificial intelligence in the scope of its connectivity with the global world against the subtext of its own autonomy, while respecting sustainable development in itself for the future, risk assessment as well as prospective prevention in the area concerned, including lex ferenda, is thus the primary task of a responsible society of the 21st century.*

Keywords: *Artificial Intelligence, Financial Technologies, Responsibility, Security, Sustainability*

Introduction

Artificial Intelligence (hereinafter referred to as "AI"), robotics, and the Internet of Things are integral parts of today's times. Their interconnection alongside their own autonomy, conditioned only by data supplied by man, is a typically finalised product of the human society of the 21st century. AI is a constantly evolving system with a very wide scope of effect and its very existence is demanding due to the complexity of terminological definition and compliance. The European Commission states that: *"AI systems are man-made software and hardware systems that, depending on the intended purpose, operate in a physical or digital dimension, perceiving the environment from data, interpreting structured or unstructured data collected, making causal relationships or processing information derived from that data, and making decisions on the best course of action to be taken to achieve the objective pursued. AI systems can use rules or learn a numerical model, and they can adapt their behaviour by analysing how the environment affects their past actions."*[1] The ability of AI is characterised by imitating human thinking, learning, planning, or creativity, where AI systems are able to work independently and adapt their behaviour based on an evaluation of effects of previous actions.[2] In a way, the cyclical process of AI life learns more the more it performs and gradually leads to "total perfection", engaging in many activities of everyday life. However, the positive benefits are bring along also many pitfalls and threats and it is a challenge for a responsible society to think about the development of AI in the context of adopting responsible limits to its existence.

[1] KOLAŘÍKOVÁ, Linda and Filip HORÁK. *Umělá inteligence & právo*. Praha: Wolters Kluwer, 2020. Legal monograph (Wolters Kluwer ČR). ISBN 978-80-7598-783-9., p. 7

[2] For more detail, cf. *What is artificial intelligence and how is it used?* europarl.europa.eu [online]. European Parliament, 2023, 4. 9. 2020 [cit. 2023-04-04]. Available from: https://www.europarl.europa.eu/news/en/headlines/priorities/artificial-intelligence-in-the-eu/20200827STO85804/what-is-artificial-intelligence-and-how-is-it-used

In relation to financial technologies (hereinafter referred to as "*FinTech*"), AI represents the current challenge for the future, which is why the financial sector is one of the largest investors in the development and progress of AI. New FinTech technologies based primarily on fast and accurate descriptive big data analytics[3] offer significant innovations in the area concerned, new methods of business models, cost reduction as well as increase in efficiency, all of which is reflected in practical form, for example, in automated trading, creditworthiness assessment, detection of fraudulent actions,[4] in the billing process using the so-called Optical Character Recognition, in the implementation of chatbots/voicebots, innovative hubs, regulatory sandboxes, in the risk management process, etc. In specific areas of FinTech, these include, for example, Blockchain, Cryptocurrencies, WealthTech, InsurTech, RegTech, BigTech, Payments, Banking, Crowdfunding, etc.

The purpose of effective AI networking, also within FinTech, is to sustainably support the interconnection, systematicity, continuity, and creation of effective and efficient cooperation not only of the system itself, but also of its related components within a variable process in terms of the quantity of individual components of networking, as well as their quality. The main objectives of sustainable AI networking can be formulated as follows:

- Support the transformation of the AI system into a sustainable practice / risk identification;
- Strengthen interdepartmental and multidisciplinary cooperation in the development of sustainable AI;
- Establish and support control and supervisory authorities and other key entities in the defined areas of networked AI security and its development;
- Establish and support uniform national and international legal regulations in the field of AI;
- Establish, support, and develop other key entities in the defined areas of networked AI security and its development at the local, national, international level;
- Create, support, and develop tools leading to setting up, identification, and development of quality of key entities in the defined areas of networked AI security and its development;
- Set up and support training modules of key sub-entities in the defined areas of networked AI security and its development.

Secure AI networking in the field of legal regulation

The creation of a secure legal background for AI is a fundamental and paramount task, as AI is considerably faster in its development and the society at the national and international levels is unable to respond adequately to such turbulent pace of development.

The European debate on AI was essentially launched in 2018 and historically includes two key documents - the "Artificial Intelligence for Europe" and the "Coordinated Plan for Artificial Intelligence" from 2018.[5] *"In April 2019, the European Commission followed up with*

[3] For more detail, cf. *Jaký je rozdíl mezi deskriptivní, prediktivní a preskriptivní analýzou?* [online]. [cit. 2023-03-28]. Available from: https://ca-ra.org/cs/jaký-je-rozd%C3%ADl-mezi-deskriptivn%C3%AD-prediktivn%C3%AD-a-preskriptivn%C3%AD-analýzou/

[4] For more detail, cf. *Artificial intelligence: threats and opportunities*. europarl.europa.eu [online]. European Parliament, 2023, 23. 9. 2020 [cit. 2023-04-10]. Available from: https://www.europarl.europa.eu/news/en/headlines/society/20200918STO87404/artificial-intelligence-threats-and-opportunities

[5] *National AI Strategy of the Czech Republic*. In: . Also available from: https://www.vlada.cz/assets/evropske-zalezitosti/umela-inteligence/NAIS_kveten_2019.pdf

the communication 'Building Trust in Human-Centric AI', based on the 'Ethical Guidelines for Ensuring AI Credibility', wherein the High-Level Expert Group on Artificial Intelligence (HLEG AI) listed 7 requirements for trusted AI: human factor and supervision; technical reliability and security; privacy and data protection; transparency; diversity, non-discrimination and justice; good social and environmental conditions and, last but not least, accountability."[6]

At the beginning of 2020, a report on the impact of artificial intelligence, the Internet of Things, and robotics on security and responsibility was published in the White Paper on Artificial Intelligence. In the same year, EU's vision of building trust in AI research was introduced. Following up on the previous documents, in 2021, the European Commission issued the so-called AI package, including a Coordinated Plan on AI and harmonised standards for AI in the internal market.[7]

Over the short history, the significant year for the Czech Republic was 2018, when the Office of the Government of the Czech Republic together with the Technology Agency of the Czech Republic prepared the Analysis of the Development Potential of Artificial Intelligence in the Czech Republic[8] and subsequently the concept of the Digital Economy and Society and the *Innovation Strategy of the Czech Republic* 2019–2030, part of which is also the Coordinated Plan and the National AI Strategy of the Czech Republic.[9]

Due to the wide scope of legislative networking, AI is characterised by an overlap in other legal regulations and disciplines, which may not be primarily an object of interest of AI, but they certainly include it. Specifically, it is necessary to mention AI in connection with the threat of cybercrime. The main legislation is Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA,[10] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data,[11] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of electronic communications data, Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) 526/2013, or Directive (EU) 2022/2555 of the European Parliament and of the

[6] For more detail, see Government of the Czech Republic. *Umělá inteligence* [online]. 06. 12. 2021 [cit. 2023-04-05]. Available from: https://www.vlada.cz/cz/evropske-zalezitosti/umela-inteligence/umela_inteligence/umela-inteligence-192765/

[7] For more detail, see Government of the Czech Republic. *Umělá inteligence* [online]. 06. 12. 2021 [cit. 2023-04-10]. Available from: https://www.vlada.cz/cz/evropske-zalezitosti/umela-inteligence/umela_inteligence/umela-inteligence-192765/

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[9] For more detail, see *Národní strategie umělé inteligence v České republice*. In: . Also available from: https://www.vlada.cz/assets/evropske-zalezitosti/umela-inteligence/NAIS_kveten_2019.pdf

[10] For more detail, see European Parliament, Council of the European Union. Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA in criminal proceedings. 2013. Available from: https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX%3A32013L0040.

[11] For more detail, cf. European Parliament, Council of the European Union. (2016). Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Available from: https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX%3A32016R0679.

Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148.

In terms of Czech national legislation applicable to AI and FinTech, Act No. 253/2008 Coll., on selected measures against legitimisation of proceeds of crime and financing of terrorism, as amended, should be mentioned. Obligated persons pursuant to the provisions of Section 2 of the aforementioned act include also those who provide services related to virtual assets within cyberspace. Other legislation to be mentioned includes Act No. 181/2014 Coll., on cyber security, as amended, regulating the rights and obligations of individuals as well as powers and competences of public authorities in the field of cyber security. The NIS2 Directive will now impact the area concerned with the requirements to define the basic forms of security measures, to improve the detection of cyber incidents, and to introduce incident reporting along with a system of measures to respond to cyber threats.

Secure AI networking in cyberspace, including the emergence of crime

The term cyberspace first appeared in 1984 in the book Neuromancer by William Gibson, who metaphorically described it as: *"A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts… A graphic representation of data abstracted from banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the nonspace of the mind, clusters and constellations of data.* Like city lights, receding…*"*[12] The effort to interpret the concept has been going on for almost 40 years and its definition is still difficult to express, because the scope of cyberspace and its operation are basically intangible. Act No. 181/2014 Coll., on cybersecurity, as amended, understands it as *"a digital environment enabling the creation, processing, and exchange of information, which is formed by information systems and electronic communications networks."*

Due to the diversity of cyberspace in connection with AI and FinTech, significant threats of committing cybercrime[13] and other crimes perpetrated in cyberspace come forward[14]. Asa type of sophisticated crime, cybercrime takes place in the cyberspace environment through modern technologies, anonymously, with a global reach, with remote access, and, in principle, in the short term. In most cases, cybercrimes are very fast and effective, which means that they have the potential to cause extensive damage within a short time, at a relatively low cost. Probably the most prominent specific of cybercrime is the complexity and technical skills that the perpetrators must possess when carrying out primarily cyber-attacks on financial resources and classified information or cyber terrorist attacks.[15]

As part of the classification of types of cybercrime,[16] the Police of the Czech Republic lists fraudulent acts (acts related to fraudulent e-shops, possibly fraudulent advertisements,

[12] GIBSON, William. *Neuromancer*. Translated by Ondřej NEFF. Plzeň: Laser, 1992. Golden sci-fi. ISBN 80-85601-27-3.
[13] Committed in the environment of information and communications technologies, where the main target is the area of IT technologies and their data itself.
[14] General and economic crime committed in cyberspace, where the main object is health, life, morality, or human dignity.
[15]For more detail, see Kaspersky. The Evolution of Cybercrime. [online]. [cit. 2023-03-23]. Available from: https://www.kaspersky.com/resource-center/threats/evolution-of-cybercrime.
[16] For more detail, cf. Police of the Czech Republic. Jednotlivé druhy kyberkriminality [online]. [cit. 2023-03-24]. Available from: https://www.policie.cz/clanek/jednotlive-druhy-kyberkriminality.aspx. Or Podvody v kyberprostoru – Police of the Czech Republic. Úvodní strana – Policie České republiky. [online]. [cit. 2023-02-18]. Available from: https://www.policie.cz/clanek/podvody-v-kyberprostoru.aspx

fundraising, etc.),[17] hacking, blagging, moral crimes (crimes related to the dissemination of child pornography, its production and other use), crimes against copyright (sharing of music, films, and software in violation of copyright), expressing violence and hate crime (dangerous threats, dangerous persecution, spreading of alarm messages).

Secure AI networking in the field of cybersecurity

The policy of secure AI networking from the cybersecurity perspective consists in the overall protection of the participating networks against cyber-attacks and threats. The above can be comprehensively achieved actively responding to negative perceptions and potential threats in the framework of mutual international cooperation and subsequent national coordination.[18] The EU's cybersecurity strategy is to jointly support cybersecurity resilience and the ability to collectively combat cybercrime, which, with a future vision of its sophistication, targets key sectors and critical infrastructure components that are increasingly dependent on digital technologies and their action in the context of AI.

The NIS2 Directive on Network and Information Security aims to respond to the rapidly changing threat environment conditioned by the digital transformation and to ensure a high level of cybersecurity for the EU member states. The Czech Republic will be affected in the planned draft of a new act on cybersecurity in force from the second half of 2024. The Czech Republic presents its attitudes to cybersecurity in the National Cybersecurity Strategy for 2015-2020, and subsequently for 2021-2025[19] with the main task of building and strengthening the cyber defence. The Action Plan on this strategy sees as the responsible entity the Military Intelligence, which is developing the National Cyber Operations Centre for this purpose.

Secure AI networking in the field of supervisory authorities

The supervisory authorities at the national and European levels are characterised by a significant inconsistency, where in the case of one infringement in the form of a cyber-attack (including the participation of AI), the person concerned is obliged to report the incident to several state authorities.

From the position of the European Union, the key supervisory authority is the European Banking Authority (EBA), which oversees the legal regulation of the banking sector, including proposals in the field of crypto-activity, crowdfunding, RegTech, etc.[20,21]

[17] These include, for example, offences endangering the upbringing of a child (Section 201 of Act No. 40/2009 Coll., Criminal Code, as amended, hereinafter referred to as the *"Criminal Code"*), the dissemination of pornography (Section 191 of the Criminal Code), the production and other handling of child pornography (Section 192 of the Criminal Code), the abuse of a child in the production of pornography (Section 193 of the Criminal Code), participation in a pornographic performance or establishing illegal contacts with a child (Section 193b of the Criminal Code), all of the above in addition to new trends such as cybergrooming or cyberbullying. For more detail, cf. Kybergrooming – Prevence kriminality. [online]. [cit. 2023-02-20]. Available from: https://prevencekriminality.cz/kybergrooming/

[18] For more detail, cf. Kybernetická bezpečnost | Government of the Czech Republic. [online]. [cit. 2023-03-20]. Available from: https://www.vlada.cz/cz/evropske-zalezitosti/umela-inteligence/kyberneticka_bezpecnost/kyberneticka-bezpecnost-192766/

[19] For more detail, cf. Vojenské zpravodajství | Kybernetická obrana. [online]. [cit. 2023-03-21]. Available from: https://vzcr.cz/kyberneticka-obrana-46

[20] For more detail, cf. *Shrnutí výroční zprávy orgánu EBA za rok 2021* [online]. [cit. 2023-03-24]. Available from: https://www.eba.europa.eu/shrnut%C3%AD-výročn%C3%AD-zprávy-orgánu-eba-za-rok-2021

[21] Other European institutions include the *European Securities and Markets Authority* (ESMA) and the *European Insurance and Occupational Pensions Authority* (EIOPA).

To secure cyberspace in the Czech Republic, the National Cyber and Information Security Authority was established in 2017 as the central authority for cybersecurity, including classified information in the field of information and communication systems and cryptographic protection. The National Cyber Security Centre was established as the executive part of the authority, primarily for risk assessment and handling of cyber incidents. The National Security Authority is included in the list of supervisory authorities primarily from its position of cooperation at the international level and education. However, the Action Plan for the National Cybersecurity Strategy identifies the Military Intelligence, the unified intelligence service of the armed forces, as the responsible entity for cybersecurity. In the field of legalisation of proceeds of crime and financing of terrorism, authorities are obliged to report, unlike others, to the Financial Analytical Office.

Secure AI networking in the field of protection of intellectual rights

The Czech legislation does not provide protection for works created by AI, because Act No. 121/2000 Coll., on copyright, as amended, defines the author in the provision of Section 5 (1), where *"the author is a natural person who created the work" and also "works created by independent action of computers or other devices that are capable of self-organization or learning, e.g. in the field of artificial intelligence, are not considered to be the result of creative activity, because they are not the intellectual results of an original creation by a natural person (author)."*[22]

Thus, if AI now creates a "work", the Czech legal order is not ready to apply copyright protection to it and probably the only possible solution is in an amendment to the Copyright Act, which would regulate the protection of AI-related copyright.

The report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the impact of artificial intelligence, the Internet of Things, and robotics on safety and responsibility has raised the issue of the need for consistent regulation, at least regarding the basic rules of operation, not only in relation to the individual interests of individuals, but also within the framework of society-wide systems in which AI is involved and is a common part of the creative process and creation of works. This connection, within any defined author's work, thus establishes a connection with the functional dependence of the "individual" on the AI-generated, which constitute the joint final author's work. The share of liability for damages, including qualified infringement of copyright in the process of creating copyright works, is thus quite obvious, as AI is the co-author of the resulting work. In order to regulate the establishment of liability in relation to AI in the future, it is necessary to unambiguously resolve the method of interference with copyright (i.e., the use of the work, or the handling of the work), the grounds of responsibility for the work (when several authors may participate in the creation of the work itself to varying degrees, with varying degrees of legitimate involvement in the process), and furthermore the liability regime (in principle, predetermining the final form of the original work itself, including the decision to involve AI). The final responsibility can be assumed in the administrative, criminal, and civil spheres (liability in the framework of compensation for damages and the issue of unjust enrichment in the form of financial compensation, satisfaction most often considered in the form of damages from operational activity or damages caused by a thing). Despite the fact that in the case of AI, the general type of liability cannot be applied to all plausible ways of using

[22] For more detail, cf. *Výzkum potenciálu rozvoje umělé inteligence v České republice: Souhrnná zpráva* [online]. 10 December 2018, p. 41. [cit. 2023-03-23]. Available from: https://www.vlada.cz/assets/evropske-zalezitosti/aktualne/AI-souhrnna-zprava-2018.pdf

AI, the most commonly assumed type of AI liability for damage is based on the manufacturer's objective liability, precisely in view of the unpredictability of the actions of autonomously deciding AI systems.

Secure AI networking in the area of responsibility for AI caused damage

Within the automated decision-making processes, AI demonstrates considerable independence on human actions, its own decision-making without the will of a person, thus displaying elements of the application of liability, including causing damage. In connection with the claimed AI authorship of the work, there is also an obvious link to the need to pay attention not only to the appropriate type of liability and responsible "entity", but also to the approach of compensation for damages.

The European Parliament actively addressed the brief history in its reflection from 2020, proposing a civil liability regime for AI, identifying the liability of the objectively responsible operator for the damages caused by AI.[23] At the end of 2022, the European Commission published recommendations for the future regulation of liability for damages caused by AI and liability for damages caused by a product defect. The conclusions of the recommendation showed a clear tendency toward the increased protection of the damaged party in the case of proving the damage caused, establishing the obligation of the AI operator to disclose all data on the operated system, including the introduction of the so-called rebuttable presumption of a causal relationship between the provider's failure to observe due diligence and the damage caused by AI.

In the case of criminal liability, it is based on the fact that AI has no legal personality or free will, therefore, it cannot have legal capacity, whereas any criminal liability is attributed to its manufacturer or programmer.[24] The proposal for compulsory insurance, including the guarantee scheme, has already been discussed in the European Parliament, including Insurance Europe. However, compelling arguments for the general obligation of insurance argue in the opposite that there are not enough representative conclusions about AI and associated risks and that it is not yet possible for one universal insurance for all technologies using AI to exist.[25]

Conclusions

AI constitutes a new phenomenon of the current time with a significant potential to dominate a significant part of human capacities. However, in addition to the obvious benefits that AI exhibits, responsible control of the situation requires the coordination and interconnection of all segments involved in the AI action and the adoption of adequate and appropriate tools for implementation.

In connection with the trend of global trading, AI creates process automation, facilitates the processing of complex problems, and currently becomes established in the field of increasing automation by machine learning, expanding chat bots, developing Quantum AI, integrating AI into IoT, or developing humanoid robots. However, along with very obvious

[23] For more detail, cf. *Změna v odpovědnosti za inteligentní systémy* [online]. [cit. 2023-03-22]. Available from: https://www.epravo.cz/top/clanky/zmena-v-odpovednosti-za-inteligentni-systemy-115449.html
[24] For more detail, cf.: *Justicna revue: Umelá inteligencia a trestná zodpovednosť*? 71. 2019. ISSN 1335-6461., p. 78
[25] For more detail, cf.: *Insurance Europe: Je předčasné zavádět povinné pojištění umělé inteligence* [online]. [cit. 2023-03-24]. Available from: https://www.opojisteni.cz/spektrum/insurance-europe-je-predcasne-zavadet-povinne-pojisteni-umele-inteligence/c:19935/

positives, we are already facing an increased number of constantly improved cyber-attacks against fundamental targets of secure critical infrastructure of high importance, including threats, loss, or misuse of classified data and information,[26] or an increase in new forms of cybercrime.

The challenge for a responsible society of the 21st century using AI consists mainly in sophisticated procedures in relation to the handling of AI, in proper and unified legislation (including joint reflection, for example, on the creation of a completely new subject of rights), supervisory bodies, ethics, moral standards, transparency of safe use of AI, continuous education, and cooperation aimed at prospective fight against cybercrime and abuse of AI.[27]

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VALSTYBĖS SUVERENITETO IR ŽMOGAUS TEISIŲ KONKURENCIJA LIETUVOS RESPUBLIKOS PASIENYJE KILUSIOS MIGRANTŲ KRIZĖS KONTEKSTE

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Anotacija. *Straipsnyje aptariant valstybės suvereniteto ir žmogaus teisių sąvokas analizuojama šių dviejų teisės konstruktų sąveika bei konkurencija pabėgėlių teisės srityje. Straipsnyje išskiriamos žmogaus teises, kurias siekiama užtikrinti pabėgėlių teisės srityje.*

Straipsnio tikslas įvertinti su kokiomis konkrečiomis žmogaus teisėmis konkuruoja valstybių, tame tarpe ir Lietuvos Respublikos suvereni galia pabėgėlių teisės srityje bei kokioms žmogaus teisėms kelia pavojų Lietuvos Respublikos veiksmai atlikti siekiant sukontroliuoti 2021 metais Lietuvos Respublikos ir Baltarusijos Respublikos pasienyje prasidėjusią migrantų krizę. Tyrimo rezultatai ir Lietuvos Respublikos taikytų veiksmų analizė beijų palyginimas su Vengrijos Respublikoje veiksmais taikytais 2015 metais kilusios migrantų krizės metu leidžia prieiti prie pagrįstos išvados, jog Lietuvos Respublikos veiksmai įgyvendinant suverenią galią kontroliuoti asmenų patekimą į valstybės teritoriją ir buvimą joje konkuruoja su asmenų teise prašyti prieglobsčio bei asmens teise į laisvę, t. y. nebūti sulaikytam.

Pagrindinės sąvokos: *žmogaus teisės, suverenitetas, pabėgėlių teisė, prieglobsčio prašytojas, migracijos krizė.*

ĮVADAS

2021 metais vasarą Lietuvos Respublikos ir Baltarusijos Respublikos pasienyje prasidėjo migrantų krizė, kurios metu į Lietuvos Respublikos teritoriją plūdo neteisėti migrantai. Remiantis Lietuvos oficialiosios statistikos portalo duomenimis 2021 metų birželio mėnesį į Lietuvos Respubliką patekdavo kelios dešimtys neteisėtų migrantų per dieną (Oficialiosios statistikos portalas, 2023). Liepos mėnesį per dieną į Lietuvos Respubliką nelegaliai patenkančių asmenų skaičius išaugo iki kone šimto per parą. Rugpjūtį buvo pasiektas migracijos pikas, o rekordas užfiksuotas 2021 metų rugpjūčio 1-ąją dieną, kai į Lietuvos Respubliką pateko 294 nelegalūs migrantai. Per visus 2021 metus užfiksuota daugiau kaip 4 200 nelegalios migracijos atvejų, kai tuo tarpu per 2020 metus – 81, o per 2019 metus – vos 46 atvejai. Visiškai suprantama, jog tokio didelio masto migracija nebuvo įprasta ir Lietuvos Respublika susidūrė su sunkumais bei iššūkiais valdant migrantų srautus.

Minėta migracijos krizė iššaukė būtinybę Lietuvos Respublikai imtis atitinkamų veiksmų siekiant sukontroliuoti užsieniečių patekimą į valstybės teritoriją. Lietuvos Respublikos taikyti veiksmai puikiai iliustruoja, jog valstybės yra linkusios aktyviai ginti ir saugoti savo interesus. Iš esmės, valstybės, kliudydamos patekti potencialiems prieglobsčio prašytojams į valstybių teritoriją, dėl vienokių ar kitokių priežasčių išreiškia savo suverenią galią riboti asmenų patekimą ir buvimą valstybės užimamoje teritorijoje bei įgyvendina pareigą apsaugoti savo tautos interesus. Kita vertus, asmenys, kurie dėl pavojaus gyvybei, sveikatai ar laisvei, turi bėgti iš savo šalies yra labai pažeidžiami, todėl jų teisių apsaugai turi būti skiriamas ypatingas

dėmesys. Tokiu būdu pabėgėlių teisės srityje susiduria du teisės konstruktai – valstybės suvereniteto ir žmogaus teisių, kurie tarpusavyje tiek sąveikauja, tiek ir konkuruoja.

Straipsnio aktualumą pagrindžia tai, jog Lietuvos Respublikoje 2021 metais vykusi migrantų krizė yra tik vienas iš daugelio atvejų, kai valstybės siekdamos sukontroliuoti asmenų patekimą į valstybės teritoriją imasi tam tikrų veiksmų. Negali būti ginčo dėl to, jog tokių atvejų pasitaikys ateityje, kadangi kuo toliau, tuo labiau neišsivysčiusiose valstybėse gyvenantys ir persekiojimą patiriantys asmenys pasiryžta palikti savo kilmės valstybę ir išvykti ieškoti saugaus prieglobsčio užsienyje, ypatingai Europoje.

Straipsnio tikslas – įvertinti su kokiomis žmogaus teisėmis konkuruoja valstybių, tame tarpe ir Lietuvos Respublikos suvereni galia pabėgėlių teisės srityje bei kokioms žmogaus teisėms kelia pavojų Lietuvos Respublikos veiksmai atlikti siekiant sukontroliuoti 2021 metais prasidėjusią migrantų krizę.

Tyrimo objektu pasirinkta 2021 metais Lietuvos Respublikos pasienyje su Baltarusijos Respublika vykusi migrantų krizė, kurios metu Lietuva susidūrė su sunkumais kontroliuojant užsieniečių patekimą į valstybės teritoriją.

VALSTYBĖS SUVERENITETO IR ŽMOGAUS TEISIŲ KONKURENCIJA LIETUVOS RESPUBLIKOS PASIENYJE KILUSIOS MIGRANTŲ KRIZĖS KONTEKSTE

Siekiant įvertinti su kokiomis žmogaus teisėmis konkuruoja Lietuvos Respublikos (ir kitų valstybių) turima suvereni galia kontroliuoti užsieniečių patekimą ir buvimą šalyje, būtina trumpai aptarti šių dviejų sąvokų (valstybės suvereniteto ir žmogaus teisų) reikšmę ir šiuolaikinę sampratą, kurios bus laikomasi šiame darbe.

„Suverenitetas – absoliuti ir amžina Respublikos galia“ – taip vieną iš politikos ir teisės mokslų konstruktų, apibūdina XVI-ojo amžiaus prancūzų teisininkas ir filosofas Žanas Bodenas. Daugelio šaltinių nuomone, jis pirmasis pradėjo naudoti *suvereniteto* sąvoką (Mesonis, 2002).

Pirmą kartą istorijoje suvereniteto samprata praktikoje pasireiškė ir įgijo teisinį statusą 1648 m. įtakingiausioms to meto valstybėms - pasirašant Vestfalijos taikos sutartį ir pripažįstant viena kitos teritorinį integralumą (vientisumą) bei valstybių lygybę. Nors suvereniteto koncepcija išsivystė XVI-XVII amžiuje iškilus pirmosioms modernios valstybėms, ji laikui bėgant kito bei evoliucionavo. Šiuo metu, teisės ir politikos mokslų literatūroje egzistuoja terminas Vestfalijos suverenitetas (*Westphaliansovereignty*), reiškiantis, jog kiekviena valstybė turi suverenitetą teritorijoje, kurią apima valstybė bei galią spręsti vidinius valstybės klausimus, tačiau neturi teisės kištis į kitos valstybės vidaus reikalus bei kad visos valstybės, nepriklausomai nuo jų dydžio ir galios yra lygios.

Šiuo metu, daugelio pasaulio valstybių aukščiausiuose, pagrindiniuose įstatymuose yra įtvirtinta suvereniteto sąvoka. Suvereniteto sąvoką randame ir dabartinėje Lietuvos Respublikos Konstitucijoje (Lietuvos Respublikos Konstitucija, 1992) - 2-4 jos straipsniuose. Lietuvos teisės mokslininkas, konstitucinės teisės specialistas, buvęs Lietuvos Respublikos Konstitucinio Teismo teisėjas Gediminas Mesonis suverenitetą apibūdino kaip valstybinės valdžios bruožą, pasireiškiantį valstybės nepriklausomybe santykiuose su bet kuria kita valdžia šalies viduje bei tarptautiniuose santykiuose (Mesonis, 2002, p 37.)

Pateiktame G. Mesonio suvereniteto apibrėžime, minimi du suvereniteto veikimo lygmenys – šalies viduje ir tarptautiniuose santykiuose. Šie du lygmenys teisės moksle yra išskiriami dažnai. Pavyzdžiui, Allan Rosas, publikacijoje „State Sovereignty and Human Rights: towards a Global Constitutional Project“ vidinį šalies suverenitetą apibūdina kaip

aukščiausią galią naudoti jurisdikciją apibrėžtoje teritorijoje, o išorinį suverenitetą apibūdina kaip laisvę nuo kitų valstybių kišimosi bei valstybių lygybę santykiuose viena su kita (Rosas, 1995 p. 63).

Apibendrinant aptartą, matyti, jog jau nuo minėtos Vestfalijos taikos sutarties pasirašymo dienos, dviem esminėmis suvereniteto normomis laikytos - teritorijos integralumas (vientisumas) ir draudimas kištis į valstybės vidaus reikalus. Svarbiausias dabartinis dokumentas, kuriame įtvirtinta valstybės suvereniteto apsauga yra 1945 m. priimta Jungtinių Tautų Chartija, kurios 2 straipsnio 4 dalyje nurodyta: „Visos narės tarptautiniuose santykiuose susilaiko nuo grasinimo jėga ir jos panaudojimo tiek prieš kurios nors valstybės teritorinį vientisumą arba politinę nepriklausomybę, tiek kuriuo kitu būdu, nesuderinamu su Jungtinių Tautų tikslais“ (Jungtinių Tautų Chartija, 2002).1965 m. Jungtinių Tautų Generalinė Asamblėja priėmė Rezoliuciją 2131, kurioje dar griežčiau įtvirtinta suvereniteto apsauga: „Jokia valstybė neturi teisės tiesiogiai ar netiesiogiai, nepaisant jokių priežasčių kištis į kitos valstybės vidinius ar išorinius reikalus“(Jungtinių Tautų Generalinės Asamblėjos rezoliucija 2131).

Šio straipsnio kontekste ypatingai svarbu pažymėti, jog tarptautinės teisės teorijoje, suverenitetas taip pat pasireiškia ir kaip valstybės pareiga: „Pirmiausia, tai [suverenitetas] reiškia, jog valstybinės institucijos yra atsakingos už funkcijas ginant savo piliečių saugumą ir gyvybes bei gerinant jų gerbūvį“ (International Commission OnIntervention And State Sovereignty, 2001, p. 13). Taigi, suvereniteto sąvoka valstybei sukuria ne tik teises valstybę apimančioje teritorijoje, bet ir pareigą ginti savo piliečių interesus. Būtent šis suvereniteto atributas dažniausiai lemia, tai jog valstybės kliudo potencialiems prieglobsčio prašytojams patekti į valstybės teritoriją.

Lietuvoje vykusios migrantų krizės metu, Lietuvos Respublika akivaizdžiai pasinaudojo savo suverenia teise kontroliuoti užsieniečių patekimą į valstybės teritoriją. Remiantis aukščiau aptartais šaltiniais, negali būti ginčo dėl to, jog Lietuvos Respublika tokią teisę turi. Tačiau taip pat svarbu pabrėžti, jog aptarta valstybių turima suvereni galia kontroliuoti užsieniečių patekimą ir buvimą šalyje, sąveikauja ir neišvengiamai konkuruoja su žmogaus teisėmis. Tais atvejais, kai valstybės imasi veiksmų sukliudyti asmenims patekti į valstybės teritoriją dažniausiai grėsmė kyla pabėgėlių teisėms. Tačiau taip pat akcentuotina, jog pabėgėlių teisė yra tik viena iš žmogaus teisių teisės sistemos sudedamųjų dalių, reglamentuojanti santykius tarp valstybės ir užsieniečio, kuris ieško apsaugos nuo savo kilmės valstybėje gresiančio pavojaus. Analogiškos pozicijos laikosi ir Lyra Vysockienė nurodydama, jog „pabėgėlių teisę bendrąja prasme galima apibūdinti kaip žmogaus teisių teisės dalį, reglamentuojančia santykius, kylančius tarp valstybės ir jos teritorijoje esančio ar jurisdikcijai priklausančio užsieniečio, kuris ieško apsaugos nuo savo kilmės valstybėje gresiančio pavojaus (Vysockienė, 2005, p 18).

Atsižvelgiant į tai, jog pabėgėlių teisė yra sudedamoji žmogaus teisių teisės dalis, akivaizdu, jog žmogaus teisių teisė yra daug platesnė ir daugiau apimanti nei vien tik pabėgėlių teisė. Kaip minėta, šiame straipsnyje siekiama įvertinti valstybių suvereniteto ir žmogaus teisių koliziją. Dėl šios priežasties darbe nebūtų teisinga apsiriboti tik pabėgėlių teisėje įtvirtintais reikalavimais ir asmenų apsaugos garantijomis, tačiau būtina vertinti ir valstybių veiksmų atitiktį žmogaus teisių reikalavimams plačiąja prasme. Jau minėtos Lyros Vysockienės teigimu: „Pirmiausiai tais atvejais, kai pabėgėlių teises gina ir pabėgėlių, ir žmogaus teisių teisė, galima teigti, kad žmogaus teisių teisė sustiprina pabėgėlių teisės vaidmenį“ (Vysockienė, 2005, p. 19). Papildant šį teiginį galima pasakyti, jog tais atvejais, kai asmens nesaugo pabėgėlio teisės, jis nepraranda kitų žmogaus teisių garantuojamos apsaugos.

Šiame straipsnyje siekiama nustatyti kokioms žmogaus teisėms kelia pavojų, valstybių, tame tarpe ir Lietuvos Respublikos veiksmai realizuojant turimą suverenią galią kontroliuoti užsieniečių patekimą į valstybės teritoriją. Normos apibrėžiančios žmogaus teises įtvirtintos

konvencijose, chartijose, sutartyse, tarptautinių teismų praktikoje, tarptautinės teisės principuose. Akcentuotina, jog valstybės pasirašydamos tarptautinius susitarimus, ratifikuodamos konvencijas, chartijas ir kitus tarptautinės teisės dokumentus savanoriškai apriboja savo suverenitetą bei įsipareigoja savo šalies interesus užtikrinti nepažeidžiant prisiimtų įsipareigojimų.

Pažymėtina, kad pati tarptautinė pabėgėlių teisė, kaip viena iš žmogaus teisių šakų atsirado po Antrojo Pasaulinio karo, kurio padariniai privertė valstybes susirūpinti nuo pavojaus bėgančių žmonių teisių apsauga. Nuo pat atsiradimo, tarptautinė pabėgėlių teisė sparčiai vystėsi, o šis vystymasis atsispindi priimtuose įvairiuose teisės šaltiniuose.. Duotuoju atveju ypač aktuali 1951 m. liepos 28 d., Ženevoje priimta Jungtinių Tautų Organizacijos (toliau ir - JTO) Konvencija dėl pabėgėlių statuso (toliau – Konvencija dėl pabėgėlių statuso), kuri 1967 m. sausio 31 d. buvo papildyta bei pakeista Niujorko Protokolu dėl pabėgėlių statuso (toliau ir - Niujorko Protokolas). Būtent šių aktų pagrindu buvo priimti ir kiti regioniniai susitarimai. Konvencijoje dėl pabėgėlių statuso ir Niujorko Protokole įtvirtinti šiam darbui itin aktualūs pabėgėlių teisės principai – draudimas grąžinti asmenį į šalį, iš kurios jis atvyko (non-refoulement principas) bei draudimas bausti už neteisėtą sienos kirtimą.

Asmens teisė į prieglobstį yra įtvirtinta ir viename iš pagrindinių žmogaus teisių apsaugos dokumentų – 1948 m. gruodžio 10 d. JTO Generalinės Asamblėjos (toliau - ir GA) priimtoje Visuotinėje žmogaus teisių deklaracijoje. Šios deklaracijos 14-ame straipsnyje įtvirtinta: „Kiekvienas turi teisę kitose šalyse ieškoti prieglobsčio nuo persekiojimo ir juo naudotis (Visuotinė žmogaus teisių deklaracija, 2006). Taigi, iš karto po Antrojo Pasaulinio karo Jungtinių Tautų Organizacija susirūpino žmogaus teisių apsauga, o asmens teisė į prieglobstį pradėta vertinti kaip viena iš žmogaus pagrindinių teisių. Nors minėtas Visuotinės žmogaus teisių deklaracijos straipsnis ir yra labai reikšmingas bei aktualus, tačiau susilaukia daug kritikos. Pavyzdžiui, H. Lauterpacht, teigia, jog esama straipsnio konstrukcija nesukuria asmeniui teisės gauti prieglobstį, o tiesiog dar kartą konstatuoja ir taip žinomą asmens teisę ieškoti prieglobsčio, nenumatant valstybei pareigos prieglobstį suteikti (Lauterpacht, 1950 p. 417). Pasitelkus lingvistinį teisės normos originalo kalba (anglų) aiškinimo metodą galima prieiti prie išvados, jog Deklaracijos 14 straipsnis yra labiau rekomendacinio, o ne privalomo pobūdžio – „Everyone has the right to seek and to enjoy in other countries asylum from persecution"(Visuotinė žmogaus teisių deklaracija, 14 str.). Šios deklaracijos rengėjai buvo numatę, jog straipsnis turėtų skambėti taip – „Everyone has the right to seek and to be granted in other countries asylum from persecution" (liet. kiekvienas turi teisę kitoje šalyje siekti ir gauti prieglobstį nuo persekiojimo) (Boed, 1994, p. 9-10). Tačiau kelių galingų valstybių (Didžiosios Britanijos, Australijos) atstovams prieštaravus, žodžiai „to be granted" (liet. "gauti"), kurie numato valstybės pareigą suteikti asmeniui prieglobstį, buvo pakeisti į privalomojo pobūdžio neturinčius žodžius „to enjoy" (liet. naudotis). Roman Boed, aptardamas deklaracijos rengimo procedūrą, nurodo, jog Didžiosios Britanijos, Saudo Arabijos ir Australijos atstovai, siekdami, jog valstybei nebūtų sukurta pareiga suteikti asmenims prieglobstį, pasiūlė, atlikti minėtą žodžių pakeitimą (Boed, 1994, p. 9-10). Būtent dėl to, jog dabartinė straipsnio konstrukcija nenumato valstybei pareigos užtikrinti prieglobsčio suteikimo ji yra kritikuojama teisės mokslininkų. Reikėtų nepamiršti, jog ir pati Visuotinė žmogaus teisių deklaracija yra rekomendacinio pobūdžio, todėl net ir palikus pradinį straipsnio variantą, valstybėms vis tiek nekiltų teisinė pareiga suteikti prieglobstį, tačiau tai būtų buvęs labai didelis žingsnis link pareigos suteikti prieglobstį valstybei sukūrimo.

Minėtas non-refoulement (draudimo grąžinti) principas yra įtvirtintas Konvencijos dėl pabėgėlių statuso 33 straipsnio 1 dalyje. Šis principas yra draudimas grąžinti/išsiųsti asmenį į šalį, kurioje jam gresia pavojus. Atkreiptinas dėmesys, jog šiame straipsnyje minimas terminas

pabėgėlis, reiškia ne asmenį, kuriam jau suteiktas pabėgėlio statusas, o atitinka Konvencijos dėl pabėgėlių statuso 1 straipsnyje pateiktą asmens apibrėžimą, t.y. non-refoulement principas taikomas ir prieglobsčio prašytojams.

Kitas, straipsnio kontekste labai svarbus principas pabėgėlių teisės srityje –baudimo draudimo principas reiškiantis draudimą bausti neteisėtai į valstybės teritoriją patekusius asmenis siekiančius gauti prieglobstį, kuris yra įtvirtintas Konvencijos dėl pabėgėlių statuso 31 straipsnio 1 dalyje.

Lietuva yra ratifikavusi tiek Visuotinę žmogaus teisių deklaraciją, tiek Konvenciją dėl pabėgėlių statuso bei Niujorko Protokolą, todėl turi teisinę pareigą užtikrinti šiuose tarptautiniuose teisės aktuose įtvirtintų teisių tinkamą įgyvendinimą. Be to, Lietuvos Respublika taip pat yra saistoma ir Europos Sąjungos institucijų priimtų teisės aktų. Atkreiptinas dėmesys, jog2015 metais įsigaliojo Europos Sąjungos teisės aktų pabėgėlių teisės srityje pakeitimai, padaryti atsižvengiant į kilusią pabėgėlių krizę, kurių bendras pavadinimas – Bendra Europos Prieglobsčio Sistema (Common European Asylum System). Siekiant sukurti minėtą sistemą, buvo priimti šie teisės aktai:

- Dublino Reglamentas III (Europos Parlamento ir Tarybos reglamentas (ES) 604/2013, 2013). Europos Komisija nurodo, jog pagrindinis Dublino reglamento principas yra tas, kad atsakomybė už prašymo suteikti prieglobstį, nagrinėjimą pirmiausia tenka valstybei narei, kuri labiausiai susijusi su prašytojo įvažiavimu į ES arba jo gyvenimui ES (Europos Komisija, 2014 p. 7).
- Prieglobsčio procedūrų direktyva (Europos Parlamento ir Tarybos direktyva 2013/32/ES, 2013) - reguliuoja prieglobsčio prašymo procesą, nustato kaip turi būti pateikiamas prašymas, kaip jis nagrinėjamas, skundžiamas, kokias teises turi prieglobsčio prašytojas. Taip pat numatyta, nagrinėjamos temos kontekste aktuali, trečiosios saugios šalies sąvoka, kuri reiškia, jog asmens atvykusio iš valstybės, kuri yra pripažinta saugia trečiąja valstybe, prašymas gali būti nenagrinėjamas, o asmuo grąžinimas į tą valstybę.
- Priėmimo sąlygų direktyva (Europos Parlamento ir Tarybos direktyva 2013/33/ES, 2013) - numato minimalius prieglobsčio prašytojų priėmimo standartus. Siekiama užtikrinti, jog prieglobsčio prašytojams bus suteikta gyvenamoji vieta, maistas, drabužiai, medicininė pagalba. Taip pat numato, jog sulaikymas būtų taikomas tik esant būtinybei.
- Priskyrimo direktyva (peržiūrėta) (Europos Parlamento ir Tarybos direktyva 2011/95/ES, 2011) – nustatyti pagrindai suteikti prieglobstį. Konvencijos dėl pabėgėlių statuso pirmame straipsnyje numatyti pagrindai papildomi (rasė, religija, pilietybė polinių įsitikinimų, priklausymas tam tikrai socialinei grupei) dar vienu pagrindu - sunkus pagrindinių žmogaus teisių pažeidimas Europos Parlamento ir Tarybos direktyva 2011/95/ES, 2011, 9 str.).

Išvardintų Europos sąjungos teisės aktų preambulėse nurodyta, jog šie Europos Sąjungos teisės aktai, sudaryti remiantis visapusišku Konvencijos dėl pabėgėlių statuso ir Niujorko Protokolo taikymu. Minėtų Europos Sąjungos lygmeniu priimtų teisės aktų turinio analizė, dar labiau pagrindžia teiginį, jog daugiau nei penkiasdešimties metų senumo tarptautinės teisės aktai – Konvencija dėl pabėgėlių statuso ir Niujorko protokolas yra vis dar aktualūs, kuriant dabartinius teisės aktus pabėgėlių teisės srityje.

Nagrinėjamu atveju svarbu aptarti pabėgėlių teisės srityje dažniausiai sutinkamas, asmens teisinį statusą apibrėžiančias sąvokas. Šios sąvokos svarbios dėl to, jog konkretus asmens teisinis statusas lemia jam taikytinas garantijas ir apsaugos ribas. Pirmiausia, reikėtų aptarti *pabėgėlio* sąvoką, kuri yra įtvirtinta Konvencijos dėl pabėgėlių statuso 1 straipsnyje numatančiame, jog pabėgėlis yra asmuo, kuris dėl visiškai pagrįstos baimės būti persekiojamam dėl rasės, religijos, pilietybės, priklausymo tam tikrai socialinei grupei ar politinių įsitikinimų yra už šalies, kurios pilietis jis yra, ribų ir negali arba bijo naudotis tos šalies gynyba; arba

neturėdamas atitinkamos pilietybės ir būdamas už šalies, kurioje anksčiau buvo jo nuolatinė gyvenamoji vieta, ribų dėl tokių įvykių negali ar bijo į ją grįžti. Taigi, Konvencija dėl pabėgėlių statuso išskiria penkias aiškias ir konkrečias persekiojimo priežastis: rasė, religija, pilietybė, priklausymas tam tikrai socialinei grupei ar politiniai įsitikinimai. Kaip minėta, Europos Sąjungos teisėje - Priskyrimo direktyvoje yra numatytas papildomas persekiojimo pagrindas – sunkus pagrindinių žmogaus teisių pažeidimas.

Be to, svarbu pažymėti, jog *persekiojimas*, nuo kurio saugo Konvencija dėl pabėgėlių statuso suprantamas kaip šiurkštus pagrindinių žmogaus teisių pažeidimas dėl kurios nors (ar kelių) jau aptartų penkių priežasčių. Praktikoje *persekiojimu* pripažįstamas teisės į asmens gyvybę, laisvę ar saugumą pažeidimas, taip pat kankinimai, žiaurus, žmogaus orumą žeminantis elgesys ar bausmė.

Kita nemažiau svarbi pabėgėlių teisės sąvoka yra *prieglobsčio prašytojas*. Jungtinių Tautų Pabėgėlių Agentūros (toliau – ir JT Pabėgėlių agentūra) internetiniame puslapyje nurodoma, jog prieglobsčio prašytojas yra asmuo, kurio tarptautinės apsaugos prašymas dar turi būti apsvarstytas (Jungtinių Tautų pabėgėlių agentūra, 2023). Papildant šį teiginį reikia pastebėti, jog prieglobsčio prašytojas yra asmuo, kuris ne savo kilmės valstybei yra pateikęs prašymą dėl prieglobsčio suteikimo, tačiau tokio prašymo nagrinėjimo procedūra dar nėra baigta. Vadovaujantis tokiu vertinimu, asmuo kuris nėra pateikęs prašymo dėl prieglobsčio suteikimo, formaliai nėra laikomas prieglobsčio prašytoju ir jam gali būti netaikomos prieglobsčio prašytojo garantijos įtvirtintos Priėmimo sąlygų direktyvoje.

Apibendrinant aptartus teisės šaltinius pažymėtina, jog pabėgėlių teisės srityje siekiama užtikrinti žmogaus teisę į asmens neliečiamumą ir laisvę, teisę prašyti prieglobsčio, teisę nebūti grąžintam į pavojaus šalį, teisę nebūti baudžiamam už neteisėtą sienos kirtimą, teisę nebūti kankinamam. Šio straipsnio tikslas įvertinti su kokiomis žmogaus teisėmis konkuruoja valstybių, tame tarpe ir Lietuvos Respublikos suvereni galia pabėgėlių teisės srityje bei kokioms žmogaus teisėms kelia pavojų Lietuvos Respublikos veiksmai atlikti siekiant sukontroliuoti migrantų krizę.

Prieglobsčio prašytojo sąvoka yra svarbi aptariant veiksmus, kurių Lietuvos Respubliką ėmėsi 2021 metų vasarą kilusios migrantų krizės metu. Reikėtų pastebėti, jog Lietuva aptariamos migrantų krizės metu fiziniais veiksmais kliudė į Lietuvos Respublikos teritoriją patekti potencialiems prieglobsčio prašytojams. Dar daugiau, pasitaikė atvejų, kai į Lietuvos Respubliką faktiškai patekę asmenys buvo nedelsiant grąžinami atgal už Lietuvos Respublikos teritorijos ribų.

Pažymėtina, jog tokios priemonės buvo numatytos atliekant ir procedūrinius veiksmus priimant naujus bei pakeičiant jau galiojančius teisės aktus. 2021 m. rugpjūčio 2 d. Lietuvos Respublikos vidaus reikalų ministro Valstybės lygio ekstremaliosios situacijos operacijų vadovas priėmė Sprendimą dėl masinio užsieniečių antplūdžio pasienio ruožo teritorijose prie Lietuvos Respublikos valstybės sienos su Baltarusijos Respublika valdymo ir valstybės sienos apsaugos sustiprinimo Nr. 10V-20 (toliau – Sprendimas). Minėto Sprendimo esmė, jog asmenys, Lietuvos Respublikos išorės sieną sausumoje kirstų tik per pasienio kontrolės punktus, o asmenys mėginantys sieną kirsti kitose vietose nebūtų įleidžiami į valstybės teritoriją. Be to, Sprendimu nuspręsta sieną ne per pasienio kontrolės punktus kirtusius asmenis grąžinti už valstybės sienos ribų.

Vertinant Sprendimo dalį, kuria nuspręsta ne per pasienio kontrolės punktus Lietuvos Respublikos sieną kirtusius asmenis grąžinti už valstybės sienos ribų, svarbu aptarti Europos Sąjungoje galiojančią prieglobsčio prašymo pateikimo sampratą. Atkreiptinas dėmesys, jog Europos pasienio ir kranto apsaugos agentūros (taip pat žinoma kaip FRONTEX) išleistame „Praktinis vadovas „Teisė pasinaudoti prieglobsčio procedūra“ apibūdinant prieglobsčio

prašymo formą bei turinį yra nurodoma, jog prašymu turėtų būti laikomas „bet koks pareiškimas žodžiu ar raštu apie tai, kad asmuo bijo persekiojimo ar didelės žalos, kurie jam gresia, jei jam nebus leista atvykti, turi būti vertinamas kaip toks prašymas. Nebūtinai turi būti pavartotas būtent žodis „prieglobstis“ ar „pabėgėlis“. Jei jums kyla abejonių, turėtumėte daryti prielaidą, kad prašymas suteikti prieglobstį pateiktas” (Frontex, 2017).

Taigi, remiantis Europos Sąjungos institucijų pateikiamu išaiškinimu, prieglobsčio prašymo pateikimas yra suprantamas labai plečiamai, o pats prašymas dėl prieglobsčio suteikimo gali būti pateiktas žodžiu, o prieglobsčio prašantis asmuo gali netgi nenaudoti žodžių „prieglobstis“ ar „pabėgėlis“. Kaip jau buvo minėta aukščiau, nuo prašymo dėl prieglobsčio suteikimo pateikimo momento, prieglobsčio prašytojas įgauna tam tikrų teisių, o Priėmimo sąlygų direktyvos pagrindu jam turi būti užtikrintos tinkamos apgyvendinimo, maitinimo, sveikatos priežiūros ir kitos sąlygos.

Tokiu būdu, atgal už valstybės sienos grąžintam asmeniui įrodžius, jog jis pateikė prašymą dėl prieglobsčio suteikimo, jį apgręžusi valstybė būtų pripažinta pažeidusia prieglobsčio prašymo nagrinėjimo procedūrą ir asmens teisę prašyti prieglobsčio. Atkreiptinas dėmesys, jog 2018 m. gruodžio 11 d. Europos Žmogaus Teisių Teismo sprendimu byloje M. A. ir kiti prieš Lietuvą (Peticija Nr. 59793/17) Lietuvos Respublika jau yra buvusi pripažinta pažeidusia 1950 m. lapkričio 4 d. pasirašytą Žmogaus teisių ir pagrindinių laisvių apsaugos konvenciją (toliau – Europos žmogaus teisių konvencija), kadangi nevertino asmenų pateiktų prašymų, kaip prašymų dėl prieglobsčio suteikimo. Šis Europos Žmogaus Teisių Teismo sprendimas patvirtina prielaidą, jog kliudymas asmenims patekti į valstybės teritoriją, kai asmenys yra nedelsiant grąžinami už valstybės teritorijos ribų gali reikšti asmens teisės prašyti prieglobsčio pažeidimą.

Pažymėtina, jog aptartas Lietuvos Respublikos vidaus reikalų ministro Valstybės lygio ekstremaliosios situacijos operacijų vadovo priimtas Sprendimas nebuvo vienintelis procedūrinis veiksmas, kurį atliko Lietuvos Respublika. Migrantų krizė taip pat privertė priimti skubius Lietuvos Respublikos įstatymo dėl užsieniečių teisinės padėties (toliau – ĮDUTP) pakeitimus. Atlikti ĮDUTP 5 straipsnio pakeitimai, kurie galio nuo 2021 m. liepos 23 d. iki 2021 m. gruodžio 31 d. įgalino Lietuvos Respubliką esant karo padėčiai, nepaprastajai padėčiai, dėl masinio užsieniečių antplūdžio paskelbtai ekstremaliajai situacijai ar ekstremaliajam įvykiui, prieglobsčio prašytojus, pateikusius prašymus suteikti prieglobstį, iki nepriimtas sprendimas įleisti juos į Lietuvos Respubliką, laikinai apgyvendinti pasienio kontrolės punktuose, tranzito zonose, Valstybės sienos apsaugos tarnyboje ar kitose tam pritaikytose vietose, nesuteikiant jiems teisės laisvai judėti Lietuvos Respublikos teritorijoje (ĮDUTP 5 6 d.). ĮDUTP 5 str. 8 d. numatė, jog toks laikinas apgyvendinimas gali trukti ne ilgiau kaip 6 mėnesius.

Laikotarpiu nuo 2021 m. rugpjūčio 12 d. iki 2021 m. gruodžio 31 d. galiojusi ĮDUTP 67 straipsnio redakcija numatė, jog paskelbus karo padėtį, nepaprastąją padėtį, taip pat ekstremaliąją situaciją ar ekstremalųjį įvykį dėl masinio užsieniečių antplūdžio, užsieniečio prašymas suteikti prieglobstį gali būti pateiktas: 1) pasienio kontrolės punktuose ar tranzito zonose – Valstybės sienos apsaugos tarnybai; 2) Lietuvos Respublikos teritorijoje, kai į Lietuvos Respubliką užsienietis atvyko teisėtai, – Migracijos departamentui; 3) užsienio valstybėje – užsienio reikalų ministro nurodytose Lietuvos Respublikos diplomatinėse atstovybėse ar konsulinėse įstaigose. Be to, 67 str. 1^2 buvo įtvirtinta, jog užsieniečio prašymas suteikti prieglobstį, pateiktas nesilaikant šio 67 str. 1^1 dalyje nurodytos tvarkos, nepriimamas. Pažymėtina, jog nuo 2022 m. sausio 1 d. šios įstatyminės normos (ĮDUTP 5 str. 6 d., 8 d., 67 str. 1^1 d., 1^2 d.) neteko galios.

Apibendrinant šio straipsnio kontekste aktualius migrantų krizės metu priimtus teisės aktus (jų pakeitimus) išskirtinos šios priemonės, kurių ėmėsi Lietuvos Respublika: pirma, buvo leista prašymą dėl prieglobsčio suteikimo pateikusį asmenį 6 mėnesiams apgyvendinti laikino apgyvendinimo vietose, nesuteikiant jiems teisės laisvai judėti Lietuvos Respublikos teritorijoje, antra, prašymai dėl prieglobsčio suteikimo galėjo būti pateikiami tik tam tikrose vietose (pvz. pasienio punktuose), o prašymai dėl prieglobsčio suteikimo iš neteisėtai Lietuvos Respublikos sieną kirtusių asmenų nebuvo priimami.

Svarbu pastebėti, jog panašių veiksmų siekiant kontroliuoti migrantų srautus 2015 metais ėmėsi Vengrijos Respublika. 2015-08-28 Vengrijos parlamentas išleido pranešimą, kuriame pasisakydamas dėl masinio prieglobsčio prašytojų plūdimo į valstybės teritoriją nurodė „Mes turime teisę ginti mūsų kalbą, mūsų kultūrą, mūsų vertybes ir tęsti ekonominę plėtrą be nepakeliamos naštos, kurią sukelia masinis nelegalių imigrantų plūdimas“ (Vengrijos parlamentas, 2015).Ši citata puikiai iliustruoja straipsnio problemą – suvereniteto ir žmogaus teisių konkurenciją pabėgėlių teisės srityje.

Siekdama apsaugoti savo šalies interesus Vengrija priėmė teisės aktų pakeitimus numačiusius, jog asmenys į valstybės teritoriją gali teisėtai patekti tik per dvi įrengtas tranzito zonas - Roskės ir Tompos miesteliuose. Tuo tarpu asmenys pateikę prašymus dėl prieglobsčio suteikimo, per visą jų prašymų nagrinėjimą ir net teismui nagrinėjant dėl sprendimo atmesti prašymą pateiktą skundą privalėjo likti minėtose tranzito zonose.

Europos Komisija abejodama tokių veiksmų atitiktimi tarptautiniams įsipareigojimams ir Europos Sąjungos teisės aktų reikalavimams, Europos Sąjungos Teisingumo Teisme (toliau – ESTT) pareiškė ieškinį prieš Vengriją dėl valstybės įsipareigojimų neįvykdymo. Šios analizės kontekste svarbu, tai jog 2020-12-17 Europos Sąjungos Teisingumo Teismo sprendimu priimtu byloje Komisija prieš Vengriją (C-808/18), Vengrija buvo pripažinta neįvykdžiusia įsipareigojimų pagal Prieglobsčio procedūrų direktyvą bei Priėmimo sąlygų direktyvą. Be to, šiuo sprendimu Vengrija taip pat buvo pripažinta neužtikrinusia asmens grąžinimo procedūros garantijų.

ESTT pažymėjo, jog Vengrija nustatydama, kad asmenys į valstybės teritoriją gali teisėtai patekti tik per dvi įrengtas tranzito zonas - Roskės ir Tompos miesteliuose nesuteikė asmenims objektyvių galimybių prašyti prieglobsčio. Tokia išvada buvo prieita atsižvelgiant į tai, jog šiuose tranzito centruose per dieną prašymus galėjo pateikti labai ribotas asmenų skaičius (2018 m. tik dviem asmenims per dieną buvo leidžiama patekti į kiekvieną iš šių tranzito zonų).

Be to, ESTT nurodė, jog Vengrijos priimtos teisės normos numatančios, kad prieglobsčio prašytojai privalo likti Roskės ir Tompos tranzito zonose per visą jų prašymų nagrinėjimą ir net teismui nagrinėjant dėl sprendimo atmesti prašymą pateiktą skundą, o ne tik siekiant patikrinti, ar jų prašymai gali būti atmesti dėl vieno iš pirmesniame punkte nurodytų pagrindų, neatitinka Prieglobsčio procedūrų direktyvos reikalavimų. Pažymėtina, jog pagal Prieglobsčio procedūrų direktyvos 43 straipsnio 2 dalį reikalaujama, kad tarptautinės apsaugos prašytojo sulaikymo trukmė pagal šį straipsnį neviršytų keturių savaičių nuo tarptautinės apsaugos prašymo pateikimo dienos. Vadovaudamasis šia nuostata ESTT pripažino, jog Vengrija iš esmės taikė asmenų sulaikymą.

Apibendrinant ESTT Sprendimą priimą byloje Komisija prieš Vengriją C-808/18, pastebėtina, jog Vengrijos veiksmai siekiant suvaldyti kilusią migracijos krizę neužtikrino žmogaus teisių prašyti prieglobsčio bei pažeidė asmens teisę į laisvę. Šis Vengrijos Respublikos pavyzdys, neabejotinai turi panašumų su Lietuvos atveju. Kaip minėta, Sprendimu buvo nuspręsta, jog asmenys, Lietuvos Respublikos išorės sieną sausumoje gali kirsti tik per pasienio kontrolės punktus, o asmenys mėginantys sieną kirsti kitose vietose nėra įleidžiami į valstybės teritoriją. Be to, Sprendimu nuspręsta sieną ne per pasienio kontrolės punktus kirtę asmenys

būtų grąžinami už valstybės sienos ribų. Tokia valstybės politika, atsižvelgiant į aptartą ESTT Sprendimą priimą byloje Komisija prieš Vengriją C-808/18, gali tinkamai neužtikrinti asmenų teisės prašyti prieglobsčio.

Be to, ĮDUTP pakeitimai leido asmenis pateikusius prašymus suteikti prieglobstį laikyti 6 mėnesius laikino apgyvendinimo vietose, nesuteikiant jiems teisės laisvai judėti Lietuvos Respublikos teritorijoje. Vengrijos pavyzdys rodo, jog tokie valstybių sprendimai gali būti pripažinti neužtikrinančiais asmens teisės į laisvę, t. y. nebūti sulaikytam ilgiau keturių savaičių laikotarpį nuo tarptautinės apsaugos prašymo pateikimo dienos, kaip tai numatytą Prieglobsčio procedūrų direktyvos 43 straipsnio 2 dalyje.

Šie konkretūs Lietuvos Respublikos ir Vengrijos Respublikos pavyzdžiai puikiai parodo, jog pabėgėlių teisės srityje valstybių turima suvereni galia kontroliuoti asmenų patekimą į valstybės teritoriją ir buvimą joje susiduria su žmogaus teisėmis, tame tarpe ir pabėgėlių teisėmis. Aptarta ESTT byla patvirtina, jog valstybių, tame tarpe ir Lietuvos Respublikos turima suvereni galia nėra absoliuti, o valstybės įgyvendindamos savo teises privalo laikytis prisiimtų įsipareigojimų ir užtikrinti, jog tokiais veiksmais nebus pažeistos žmogaus teisės.

IŠVADOS

Galiojančių teisės aktų analizė bei temai aktualios teismų praktikos analizė parodė, jog pabėgėlių teisės srityje siekiama užtikrinti žmogaus teisę į asmens neliečiamumą ir laisvę, teisę prašyti prieglobsčio, teisę nebūti grąžintam į pavojaus šalį, teisę nebūti baudžiamam už neteisėtą sienos kirtimą, teisę nebūti kankinamam. Iškilus migracijos krizei, valstybės, siekdamos apsaugoti savo interesus pasinaudoja turima suverenia galia kontroliuoti užsieniečių patekimą į valstybės teritoriją bei buvimą joje, tuo sukeldamos grėsmę aukščiau aptartoms žmogaus teisėms.

Atlikto tyrimo ir 2021 metų Lietuvos Respublikoje kilusios migrantų krizės metu valstybės taikytų veiksmų analizė leidžia spręsti, jog Lietuvos Respublika priėmė teisės aktus, kuriais nustatė, jog prašymai dėl prieglobsčio suteikimo galėjo būti pateikiami tik tam tikrose vietose (pvz. pasienio punktuose), o prašymai dėl prieglobsčio suteikimo iš neteisėtai Lietuvos Respublikos sieną kirtusių asmenų nebuvo priimami. Be to, Lietuvos Respublikos priimti teisės aktai numatė galimybę prašymą dėl prieglobsčio suteikimo pateikusį asmenį 6 mėnesiams apgyvendinti laikino apgyvendinimo vietose, nesuteikiant jiems teisės laisvai judėti Lietuvos Respublikos teritorijoje.

Pritaikius lyginamąjį metodą bei Lietuvos Respublikos taikytus veiksmus palyginus su Vengrijos Respublikoje veiksmais taikytais 2015 metais kilusios migrantų krizės metu ir byloje Komisija prieš Vengrija ESTT priimtu sprendimu prieitina prie pagrįstos išvados, jog Lietuvos Respublikos veiksmai įgyvendinant suverenią galią kontroliuoti asmenų patekimą į valstybės teritoriją ir buvimą joje konkuruoja su asmenų teise prašyti prieglobsčio bei asmens teise į laisvę, t. y. nebūti sulaikytam.

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COMPETITION BETWEEN SOVEREIGNTY OF THE STATE AND HUMAN RIGHTS IN THE CONTEXT OF THE MIGRATION CRISIS OF THE STATE BORDER OF THE REPUBLIC OF LITHUANIA

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Summary

The purpose of the article is to assess with which specific human rights the sovereign power of the state competes in the field of refugee law, and which human rights are endangered by the actions of the Republic of Lithuania in order to control the migrant crisis at the border of the Republic of Lithuania and the Republic of Belarus.

The results of the research, analysis and comparison of the actions taken by the Republic of Lithuania with the actions taken by the Republic of Hungary during the migrant crisis in 2015 lead to the reasonable conclusion that the actions of the Republic of Lithuania in exercising its sovereign power to control the entry and stay of persons in the state territory compete with the right to request asylum and individual rights to freedom, i.e. right not be detained.

Keywords*: human rights, sovereignty, refugee law, asylum seeker, migration crisis.*

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THE ROLE OF ICC PROSECUTOR IN THE AFGANISTAN SITUATION

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Abstract: *The present paper is concentrated on the analysis of the role of Prosecutor from a procedural and substantive point of view in the ICC according the sentence of the Appeal Chamber of 5 March 2020. The Pre-Trial Chamber has denied authorization to continue and open investigations in Afghanistan that can be prosecuted by the Prosecutor. The Appeal Chamber after Prosecutor's question overturned the preliminary ruling by deciding to continue the evaluation of the investigation into crimes against humanity and war in the Afghan territory. So are these judgments political or legal? Are the Chambers based on the ICC statute or on the commands of US foreign powers? What is the Prosecutor's role in these admissibility cases or investigations? These are some of the questions that this paper discusses and tries to clarify.*

Keywords: *ICC, Prosecutor, StICC, art. 53StICC, art. 17StICC, art. 15 StICC*

INTRODUCTION

The Afghan situation and the investigation of crimes against humanity and war[1] dates back to about 2003 when for the first time American military, CIA agents, Taliban and a strong debate of the international community in global version[2] came to conclude with the authorization of investigations and the related judgment of the Appeal Chamber of the International Criminal Court (ICC) of 5 March 2020[3].

It is the first time the Pre-Trial Chamber has not accepted the request for authorization to open the investigation proposed by Prosecutor Fatou Bensouda. Up to now, all the authorizations for the opening of investigations based on initiatives and within the limits of the powers of the Prosecutor of the court date back to art. 15, par. 3 Statute of the International Criminal Court (StICC)[4]. The open debate is not so much based on procedural bases and principles but within a wider and at the same time narrow circle of the notion of interests of justice, rectius interests of justice and substantive international criminal law[5].

[1]D. Liakopoulos, *"Justicia dura: anatomia e interpretaciòn en la exclusiòn de la responsabilidad penal individual en la justicia penal internacional",* in Revista Eletrònica de Estudios Penales y de la Seguridad, 2019, n. 4. R.J.A. Morales, *"Definiciòn de los crimenes internacionales y responsabilidad penal internacional",* ed. Juridicos Olejnik, Santiago de Chile, 2020.

[2]For more comments see: C. Ankersen, W. Pal Singh Sidhu, *"The future of global affairs. Managing discontinuity, disruption and destruction",* Palgrave Macmillan, Springer Nature, Basel, 2020, pp. 141ss.

[3]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Decision of 5 March 2020. R. Vogel, *"Situation in the Islamic Republic of Afganistan",* in International Legal Materials, 60 (1), 27, 2020. Y. Ihiil, *"Situation in the Islamic Republic of Afganistan"*, in American Journal of International Law, 115 (4), 2021, pp. 650ss.

[4]D. Liakopoulos, *"The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence",* ed. Maklu, Antwerp, Portland, 2019 (second edition).

[5]A. Heinze, V.E. Dittrich (eds.), *"The past, present and future of the International Criminal Court",* TOAEP, Bruxelles, 2021. J. Tchinda Kenfo, A. Zozime Tamekamta, *"La Cour pènale internationale",* Presses de l'Universitè du Quèbec, Quèbec, 2022. F. Klose, "*In the cause of humanity. A history of humanitarian intervention in the long Nineteenth century",* Cambridge University Press, Cambridge, 2022.

THE SENTENCE OF THE PRELIMINARY CHAMBER

Is it a political or legal sentence? In reality, the question of the Pre-Trial Chamber regarding the authorization of the investigations that date back to the Prosecutor himself from 2007 to 2017 not only in the afghan territory[6] but also in the general relationship of the afghan conflict certainly also has a political character, of an international nature. Hence, an Afghan conflict and the participation of military from states such as Poland, Romania and Lithuania. Crimes committed by countries that do not belong to the circle of great powers but are simply members of the Security Council of the United Nations[7] and certainly such investigations have not been well received even by international doctrine[8].

It is true that any kind of investigation was opposed by the United States[9], not a member of the ICC and also because they were involved both politically and militarily in the afghan situation, going so far as to openly accuse the ICC as meddling in questions concerning their own sovereignty. On the other hand, the ICC was not bound since the United States is not part of the Rome Statute[10] and does not constitute an obstacle to the repression of crimes committed by American soldiers and CIA agents. Furthermore, Afghanistan has ratified the statute as early as 10 February 2003[11].

The competence of the ICC deals with crimes against humanity and war and includes crimes committed on the territory of a Member State regardless of the nationality of the perpetrators as well as those crimes committed by the nationals of the Member States[12] also on the territory of a third state. We are talking about territorial as well as personal competence concerning our case of the investigations proposed by the Prosecutor[13].

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[6]M. Vagias, *"The territorial jurisdiction of the International Criminal Court",* Cambridge University Press, Cambridge, 2014, pp. 90ss.

[7]J. Marc De La Sablière, *"Le Conseil de sècuritè des Nations Unies",* ed. Larcier, Bruxelles, 2018. D. Liakopoulos, *"Autonomy and cooperation within the International Criminal Court and United Nations Security Council",* W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020.

[8]S. Maupas, *"La Cour pénale internationale face aux critiques",* in Revue Internationale et Stratégique, (4) 2019, pp. 84ss

[9]M. Jorgensen, *"American foreign policy ideology and the international rule of law",* Cambridge University Press, Cambridge, 2020.

[10]M. Cormier, *"The jurisdiction of the International Criminal Court over nationals of non-States parties",* Cambridge University Press, Cambridge, 2020, pp. 95ss.

[11]For further analysis see also: A.M. Hazim, *"A critical analysis of the Rome statute implementation in Afghanistan",* in Florida Journal of International Law, 31 (1), 2019, pp. 10ss.

[12]See also in argument: ICC, Prosecutor v Muthaura, Kenyatta and Ali, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute", ICC-01/09-02/11-274, Appeals Chamber, 30 August 2011, para 40 (Muthaura and Others, Appeals Chamber Judgment on Admissibility); Yekatom, Trial Chamber v Decision on Admissibility (n. 13) para 21 ("(…) the Chamber concludes that the CAR authorities, including the SCC, are presently inactive insofar as Mr Yekatom's Case is concerned. For this reason alone, and irrespective of the CAR authorities' hypothetical willingness or ability to investigate and prosecute, the Chamber is of the view that the case against Mr Yekatom is admissible. Consequently, the Chamber will not address the question of willingness and ability (...).
51ICC, Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Sensussi, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case against Saif Islam Al-Gaddafi', ICC-01/11-01/11 OA 4, Appeals Chamber, 21 May 2014, para 73; Gaddafi and al-Senussi, Appeals Chamber Judgment on Admissibility (n 40) para 119.

[13]L. Badaågård, M. Klamverg, *"The gatekeeper of the ICC: Prosecutorial strategies for selecting situations and cases at the International Criminal Court",* in Georgetown Journal of International Law, 48, 2017, pp. 640 (noting that "Office of the Prosecutor (OTP) policy and strategy straddles law and politics at multiple levels and describing the evolving relationship with domestic processes"). In argument see also: M.A. Newton, A synthesis of community-based justice and complementarity, in C.D. Vos, S. Kendall, C. Stahn (eds), *"Contested justice: The politics and practice of International Criminal Court interventions"*, Cambridge University Press, 2015, pp. 122ss.

By decision of 12 April 2019 the Pre-Trial Chamber based on article 15 par. 4 StICC[14] had denied the authorization justifying its sentence based on the total lack of the interests of justice ignoring from the procedural point of view and the Statute according to art. 53 relating to the Prosecutor's action to open investigations proposed by a Member State or by the United Nations Security Council itself. We can mention this situation (rectius, the jurisprudence) as an extremely elastic situation, which allows the prosecution body to balance the exercise of the punitive pretension with other requirements expressly provided for by the Statute, such as the protection of victims and the seriousness of crimes, or implicitly inferred from the system, such as the compatibility of the procedure with the experiment of national reconciliation processes. In this case, the Pre-Trial Chamber, if it considers that the prejudice to the interests of the prosecutor's alleged justice does not justify the renunciation of the action, can review (review), even ex officio, the decision of the prosecuting body and obliging him to start an investigation or to prosecute (article 53 paragraph 3 letter b) Statute and Rule 110 RPP)[15].

The Prosecutor of the ICC can only exceptionally refuse the opening of investigations if he considers that the grounds of a reasonable nature for a judicial action are absent and always based on the principles and competences of the ICC. Therefore, admissibility according to art. 17 StICC (inadmissibility)[16] and that the investigations are not contrary to the interests of justice according to art. 53, par. 1 letter c) StICC, which refers to the concept of gravity only in generic terms[17]. In these cases, therefore, the Pre-Trial Chamber, if it does not agree with the reasons justifying the decision of the prosecution body, may force it to start an investigation. It is, in fact, a not very satisfactory explanation-and, moreover, denied by the practice given that[18]-, while aiming at the shared objective of ensuring a more stringent control over the prosecutor's discretion, in fact does not clarify the scope of application art. 53 par. 1 lett. c) and of the art. 17 par. 1 lett. d). StICC[19]. Art. 17 (1) as well as art. 53 StICC[20] is an expression of the principle of subsidiarity, which is the cornerstone of the system and is one of the distinctive aspects of

[14]M.M. Degman, V. Oosterveld, *"The Elgar companion to the International Criminal Court",* Edward Elgar Publishers, Cheltenham, 2020, pp. 328-330.

[15]G. Sluiter et al. (eds), *"International criminal procedure-Principles and rules",* Oxford University Press, Oxford, 2013.

[16]W.A Schabas, *"The International Criminal Court: A commentary on the Rome Statute",* 2nd edn, Oxford University Press, Oxford 2016, "(…) prosecutorial decision making does not derive from] apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity. According to this approach, a State would be judged on its compliance with the duty to prosecute by an analysis of its motives rather than its actions.

[17]As we can just see in the past cases (Katanga, Appeals Judgment on Admissibility (n 41) para 78): "(…) Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.

[18]In fact, the Pre-Trial Chamber invited the Prosecutor to review his decision not to open an investigation, considering that the prosecution body had wrongly assessed the seriousness of the crimes. The Court considered it appropriate to apply the art. 17 lett. d) of the RPE, omitting any reference to art. 53 par. 1 lett. c). Specifically, the affair concerned the clashes between activists of some non-governmental organizations and Israeli soldiers on the ship Mavi Marmara, which, together with other vessels, had tried to force the naval blockade imposed by Israel with the aim of bringing humanitarian aid. in Gaza. On that occasion, nine people had lost their lives. See, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

[19]G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappalà (eds), *"International Criminal Procedure. Principles and Rules",* Oxford University Press, Oxford, 2013, pp. 1299-1374.

[20]K. Ambos, *"Rome statute of the International Criminal Court",* Hart/Beck/Nomos, Cheltenham, Baden-Baden, 2022.

the process before the ICC compared to other international criminal tribunals, which exercise primary jurisdiction over the crimes under their jurisdiction. Article 17 StICC identifies a series of situations in which the Prosecutor must refrain from exercising the indictment function. This happens when they are in progress (letter a) or there have been investigations on the same facts and the national judicial authority has decided not to exercise criminal prosecution (letter b); when the investigated or accused person has already been judged by a national court (letter c); when the criminal conduct is not sufficiently serious (letter d)[21]. It is therefore necessary to clarify the relationship between these rules, given that the application of one or the other implies significant consequences on the level of jurisdictional checks that the Pre-Trial Chamber exercises on the Prosecutor's decision not to open an investigation. In fact, if we consider the seriousness of the crimes as a situation that determines the inadmissibility of the case before the ICC, the Pre-Trial Chamber will only have the power to review the decision of the prosecution body, without this is bound by the decisions of the judging body[22]; if, on the other hand, the seriousness of the crimes is considered an indication of the potential opposition to the interests of justice, the StICC recognizes to the Pre-Trial Chamber, if it does not agree with this assessment the power to oblige the Prosecutor to open an investigation.

Returning to the first decision of 2019 of rejection that was subjected to scrutiny by the Pre-Trial Chamber, we can say that a denial from a jurisprudential point of view was based on the general idea that opening the investigation would not favor the interests of justice. For the Pre-Trial Chamber, an investigation can be considered favorable to the interests of justice when it is necessary that there are prepositions and the possibility that it will end with a positive outcome[23]. But in which investigation is a preliminary investigation always able to have a favorable and procedural outcome?

The interest of justice and the evaluation, opening, authorization of investigations for the Prosecutor means the guarantee for the pursuit and purposes of the StICC. The related Policy paper on the interests of justice dates back to 2007 from the Prosecutor's Office which underlined the nature of the circumstances justifying the final decision not to open investigations in the name of the interests of justice[24], despite the relative evaluation criteria[25] but specifying the not exhaustive nature of the specificity of the cases submitted to the Prosecutor based on criteria based on the StICC or on clearly political reasons?.

The Prosecutor should explicitly acknowledge the possible assessment that the final investigation will be successful and according to the "Paper on some policy issues before the Office of the Prosecutor", should have every investigation: "Feasibility of conducting an effective investigation in a particular territory"[26] according to the "Policy paper on preliminary examinations". It is obvious that the evaluation of "feasibility" cannot constitute an autonomous criterion for the purpose of deciding on the opening of investigations[27].

[21]W. Joecks, K. Miebach (Hrsg.), "*Münchener Kommentar zum Strafgesetz-buch"*, C.H. Bech, München, 2017.

[22]M.A. Newton, *"Absolutist admissibility at the ICC: Revalidating authentic domestic investigations",* in Israel Law Review, 54, 2021, pp. 147ss.

[23]ICC, Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision of 12 April 2019, par. 89-90.

[24]For a further analysis see also: L.M. Keller, *"Comparing the "interests of justice". What the International Criminal Court can learn from New York law",* in Washington University Global Studies Law Review, 12 (1), 2013, pp. 6ss.

[25]According to the paper: "(…) as a pragmatic matter, the OTP concedes that it suffers from "overall basic size and capacity constraints (…)".

[26]Annex to the Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 1

[27]Policy papers on preliminary examinations, November 2013, par. 70. An important recognition of the new policy paper is the adoption of a new approach to evidence. As discussed above, accusations of sexual violence before international criminal trials have often failed, not because of problems related, for example, to the evidence of international crimes or to the choice of the

The ICC invoked through the evaluation criteria the relative time elapsed between the Commission of the crimes and the request for authorization to open the investigations, as well as the cooperation of the states involved[28] and the availability of acquisition and acceptance of the relevant evidence as well as the possibility of apprehending potential perpetrators[29] and their witnesses if they exist. The absence of such conditions, such as the reference to the ten years elapsed between the start of the preliminary investigations and the submission of the request for authorization to open the investigations, and the political changes that have taken place in the states involved would have made the cooperation between the latter with the ICC, according to par. 92-94 of the related sentence, particularly difficult[30].

It is obvious that the Pre-Trial Chamber has decided in this way to avoid other pressures of a political nature from the United States, but legal arguments also remain. Arguments relating to the reasons on which the Appeal Chamber accepted the appeal of the Prosecutor, thus authorizing the opening of the investigation, and will be analyzed below.

INTEREST OF JUSTICE...

When we talk about the "interests of justice" we must distinguish a double dimension: A procedural and a substantial one. The Prosecutor based the appeal against the first instance decision on the substantive aspects and in the appeal sentence the evaluation of the procedural dimension is instead central. The procedural nature took on a preliminary character in ICC's reasoning and was decisive for the purpose of overturning the contested decision.

The Appeal Chamber accepted the Pre-trial Chamber's control over the Prosecutor's requests for authorization to open investigations and ruled on the relative competence of the "interests of justice" as the fundamental elements on the basis of which it had to decide whether to accept or reject the application. This is a question based on the ways in which the ICC should keep a balance between the Prosecutor's prosecution and the control of the Pre-Trial Chamber according to the StICC. The Appeal Chamber introduced a clear distinction between the bases in which the ICC is seized on the initiative of a Member State or the United Nations Security Council and that in which the Prosecutor acts motu proprio[31].

There is thus the possibility of opening investigations for which the authorization of the Pre-Trial Chamber is not required. Possibility in which the Prosecutor could intervene and at the same time should ascertain the absence of a reasonable basis for a judicial action following the criteria established by art. 53 StICC and oppose the opening of investigations.

Within this reasoning, the Appeal Chamber clearly demonstrates the specular significance of the assessment made by the judicial body with respect to that of the Prosecutor. In order to deny the opening of the investigations, the Chamber will be able to assess whether these are actually unfavorable to the "interests of justice" according to the requirements of the StICC or to guarantee a fair and rapid process, which allows him to reach a "just" solution for the specific case. This is a peculiar aspect for a criminal justice system and that opens up many problematic

appropriate form of liability of the accused. See also in argument: M. Varaki, *"Revisiting the "interests of justice" policy paper",* in Journal of International Criminal Justice, 14 (3), 2017, pp. 458ss

[28]D. Liakopoulos, *"International cooperation, legal assistance and the case of lacking states collaboration within the International Criminal Court",* in Revista CES Derecho, 10 (1), 2019, pp. 374-417.

[29]ICC, Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan, op. cit., par. 91.

[30]O. Turlan, L'efficacité de l'enquête et la coopération avec les Etats: l'accès aux preuves et aux personnes d'intérêt, in T. Herran, *"Les 20 ans du Statut de Rome. Bilan et perspectives de la Cour Pènale Internationale",* ed. Pedone, Paris, 2020, pp. 263ss.

[31]ICC, The Appeals Chamber, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Decision of 5 March 2020, par. 33ss.

profiles also on the level of the independence of the Public Prosecutor's Office. In fact, if the system of checks and balances required by the Rome Statute guarantees a certain balance of the system, which aims to prevent the Prosecutor from exercising arbitrarily the discretion that is recognized, the distortions caused by the creative work of the judges involve, instead, an undue alteration of the relationship between the Chambers and the indictment body, whose autonomy spaces are significantly reduced. On the other hand, the role attributed to the control of the Pre-Trial Chamber is different when, according to the former art. 15, the Prosecutor decides on her own initiative to submit a request to open investigations which, as provided for in art. 48 of the Rules of Procedure of the ICC, also in this case its decision is based on the evaluation of the same elements set forth by art. 53[32]. Although in this case the intervention of the Chamber is essential[33], according to the Appeal Chamber (which denied the previous practice, and in particular the decisions of the Pre Trial Chambers relating to the situations in Kenya, Côte d'Ivoire, Georgia, Burundi and Myanmar)[34] the examination must be based on art. 15 par. 4 StICC[35], that is, on the verification of the existence of a reasonable basis for judicial action "(...) in the limited sense that crimes have been committed - and of the fact that the situation appears to fall within the competence of the ICC (...)"[36].

According to the relevant ruling, art. 15, par. 4, does not contain any reference to the "interests of justice" or to art. 53 StICC1[37]. In particular, gravity in its relative sense under the art. 53 StICC "interests of justice" provisions can be considered by the prosecutor when exercising prosecutorial discretion. Before the Pre-Trial Chamber decision in the Comoros

[32]See also: D. Kaye, *"Who's afraid of the International Criminal Court? Finding the Prosecutor who can set it straight"*, in Foreign Affairs, 118, 2011, pp. 124ss. A.S. Weiner, *"Prudent politics: The International Criminal Court, international relations and prosecutorial independence",* in Washington University Global Studies Law Review 12 (3), 2013, pp. 549ss. According to the author: "(...) Prosecutors' legitimate interests in issuing indictments against the most senior leaders in a situation over which the Court has jurisdiction does not mean they should ignore the potential practical political implications of their actions in deciding when the time is right to issue those indictments. Prosecutors need not alter their decisions about who should be indicted based on political factors, but it may be appropriate for them to alter their position about which particular charges to bring, or to think carefully about potential domestic political impacts in determining how to draft an indictment so as to minimize controversy or domestic backlash. Though the Court's prosecutors should be skeptical of claims that the Court's efforts to secure justice will interfere with attempts to make peace, they should at the same time not categorically reject the possibility that this may be true in some cases, and they should in such cases calibrate their prosecutorial strategies so as to minimize threats to international peace and security (...)".

[33]See also from past jurisprudence when the Chamber did note that it considered the term "case" to be a broad term (ICTR, Prosecutor v. Bagaragaza, Decision on Rule 11bis Appeal, ICTR-05-86-AR11bis, Appeals Chamber, 30 August 2006, para 17). In particular the Appeals Chamber: "(...) agrees with the Prosecution that the concept of a "case" is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before this Tribunal (…)".

[34]ICC, Situation in the Republic of Côte d'Ivoire, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC- 02/11-14, Pre-Trial Chamber III, 3 October 2011, para 206 (Côte d'Ivoire, Admissibility Decision); ICC, Situation in the Republic of Kenya, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, Pre-Trial Chamber II, 31 March 2010, para 54 (Kenya, Admissibility Decision). For further details see also: D. Liakopoulos, *"International Criminal Court: Impunity status and the situation in Kenya",* in International and European Union Legal Matters, 2014. "(…) this issue was not prioritised in the Kenya and Côte d'Ivoire situations and Kenya. With respect to Kenya, the use of "inaction" or inactivity to determine Kenya's challenge of jurisdiction represented a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in proprio motu proceedings. The adoption of "inaction" or inactivity as a basis of the intervention of the ICC under article 15 of the Statute raises fundamental questions for the Prosecutor during preliminary examinations (…)".

[35]S. Gless, "*Internationales Strafrecht. Grundiss für Studium und Praxis",* Helbing Lichtenhahn Verlag, Basel, 2021.

[36]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit. par. 34-35.

[37]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit. par. 34.

island situation[38], it was established and emphasised that the prosecutor in effect exercised a broad discretion, which we could called legal interpretive discretion; In relation to the prosecutor's proprio motu power, the extent of prosecutorial discretion the prosecutor can exercise is not clear. Art. 15 (1) StICC clearly authorises the prosecutor to exercise prosecutorial discretion[39]. However, paragraph (3) of the same Article contains an obligatory language enforcing the prosecutor to proceed with the investigation. The ICC has not made any clear judgment on this question, and the matter is still debated; With respect to the selection of admissible cases, the StICC are silent. According to the Appeal Chamber, this is not a check on the investigation activity of the Prosecutor's Office but a verification of the minimum conditions so that an intervention by the ICC "can be considered reasonable"[40]. The basis of the complaint against the decision on appeal on this argument clearly of a procedural nature, excludes the possibility that the assessment of the Chamber goes beyond what is literally required by art. 15, par. 4, and the appeal relating to "the content of the notion of interests of justice" and in particular the elements used at first instance in order to assess their existence in the context of the investigation in question"[41].

In the light of the criticisms which had accepted the contested decision, the Appeal Chamber considered it appropriate to make certain observations as well[42]. The Chamber contested the positive meaning attributed by the Pre-Trial Chamber to judicial control relating to the "interests of justice", thus helping to reduce its scope. Regarding the Prosecutor's proposal for the opening of investigations, the verification does not consist in the search for investigations "that actually pursue these interests but rather whether the fact of conducting them could conflict with them (...)"[43]. The Appeal Chamber without dwelling specifically on the meaning of the "interests of justice"-and without analyzing analytically the approach adopted by the Pre-Trial Chamber with the scope of the notion resulting from the relevant documents of the Prosecutor's Office-the Appeal Chamber limited itself to interpreting the reasoning of the Pre-Trial Chamber as "cursory, speculative"[44], highlighting it as "did not refer

[38]Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

[39]T. De Souza Dìas, *"Interests of justice: Defining the scope of prosecutorial discretion in art. 53 (1) (c) and (2) (c) of the Rome Statute of the International Criminal Court",* in Leiden Journal of International Law, 30 (3), 2017. in particular was stated that: "(...) The Chamber sets forth three guidelines for determining if the jurisdictional standard is met: Thus, the Chamber considers that for a crime to fall within the jurisdiction of the Court, as stated in Article 53, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute (jurisdiction ratione materiae); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction ratione temporis); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction ratione loci or ratione personae). The latter entails either that the crime occurs on the territory of a State Party to the Statute or a State which has lodged a declaration (...), or be committed by a national of any such State (...) then articulates the guidelines for assessing a "potential case" (...) admissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation (...)".

[40]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 45.

[41]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 47

[42]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 48

[43]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 48

[44]The same expression was used in the past case: ICC, Prosecutor v Simone Gbagbo, Judgment on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo", ICC-02/11-01/12 OA, Appeals Chamber, 27 May 2015, para 131.

to information capable of supporting it" and highlighted the lack of consideration of the gravity of the crimes and the interests of the victims[45].

On the contrary, it seems more correct to consider that the "legislator" intended to emphasize the importance of the concept of sufficient gravity, which must be understood as a fundamental criterion for the division of jurisdiction between the States and ICC, which must restrict its intervention only in relation to the most serious crimes. However, this causes considerable uncertainty, given that the application of one or the other provision is left to the full discretion of the bodies of ICC and, in particular, of the Prosecutor, who may opt for a solution from which a more on its decision not to open investigations[46].

In addition to the seriousness of the crime and the protection of victims, which are indexes expressly identified by the StICC, the judgment of balancing the interests of justice also involves needs implicitly inferable from the system. It alludes to the compatibility of the procedure with the experiment of national reconciliation processes, the realization of which could be hindered by the intervention of international criminal justice[47].

The Prosecutor of the ICC often intervenes during or at the end of an armed conflict. These are extremely delicate situations, which may involve two or more states, their government authorities, the civilian population. In a similar context, the prosecutor's action, called to select only those responsible for international crimes, could jeopardize the process of national reconciliation, if, for example, it deems to pursue only one of the parties to the conflict.

The protection of interests of justice, it should be emphasized that the Prosecutor carries out an activity that has a significant impact on a community, which may not be interested in the celebration of a proceeding before the ICC, but the development of alternative solutions to international criminal justice that allow a more adequate protection of the interests at stake. The need to protect the victims, who could be in danger if they were involved as witnesses and allow the realization of national reconciliation processes, could be considered, in fact, prevailing needs regarding the ascertainment of the criminal responsibilities of those who have committed international crimes, thus justifying a waiver of prosecutor prosecution even after the prosecution has been promoted.

SPECIFICITY, SUBSTANCE AND INTERPRETATION OF THE SENTENCE

Analyzing the sentence under two different profiles, namely one of a general nature and one more specific, both linked to the particular situation in Afghanistan, we must note that the important contribution, of a general nature and aimed at the future activity of the ICC investigations, always based on and respect to the question of the relationship between art. 15 and 53 of the Statute that the Appeal Chamber has interpreted this position in the expression of a "delicate balance regarding the Prosecutor's discretionary power to initiate investigations and the extent to which judicial review of these powers would be permitted"[48]. From a general point of view, as well as, the Appeal Chamber was based on the effects on the present case and on the intervention of the ICC with respect to the crimes committed in Afghanistan and certainly punishable and therefore prosecutable by the Prosecutor.

[45]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 49
[46]E. Fry, *"Legal recharacterization and the materiality of facts at the International Criminal Court: Which changes are permissible?",* in Leiden Journal of International Law, 29 (2), 2016, pp. 578ss.
[47]P. Webb, "The ICC Prosecutor's discretion not to proceed in the "interests of justice"", in Criminal Law Quarterly, 51 (2), 2005, pp. 340ss.
[48]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 26.

The Appeal Chamber has ruled out that the Pre-Trial Chamber is referred to by the Prosecutor in order to obtain authorization to open the investigation and can assess the conditions set by art. 53 StICC, subsequently noting the possible opposition of the investigations according to the "interests of justice", and on this basis denied the authorization. The Appeal Chamber recognized and relied on the absolute freedom of the Prosecutor who decides, motu proprio, to open the investigations according to the ex art. 15 StICC[49]. The role of the Pre-Trial Chamber is limited only to the mere verification of the elements explicitly established by art. 15, par. 4 StICC. The reasoning of the Appeal Chamber is centered on the different nature, i.e. from the formulation of the position of the Statute and related provisions[50], between the control of the Pre-Trial Chamber, pursuant to art. 53, on the refusal of the Prosecutor to open investigations in the face of a positive presumption of opening, and "(...) the one concerning the discretionary decision of the Attorney to present an application for authorization. Confirming the limits set on the intervention of the Pre-Trial Chamber, the sentence also notes the summary nature of the information that the Prosecutor is required to provide at this stage of the procedure, therefore incompatible with a more in-depth judicial review (...)"[51].

The Appeal Chamber admitted that the Pre-Trial Chamber for the purposes of the decision can certainly include the elements of art. 53 StICC and the latter would thus carry out an assessment on the admissibility of the case which for the above reasons "would necessarily have a limited and therefore partial scope"[52]. This interpretation of the reading of the Statute clearly seems to have "locked" the initiative of the Prosecutor pursuant to art. 15 StICC[53]. It is not clear, except in cases of manifest unreasonableness, in what circumstances the Chamber could oppose the opening of the investigation. The Prosecutor's discretion is no longer limited to proposing the opening of investigations but, de facto, to opening them. We speak about a "temperate" discretion, since an elaborate system of checks and balances on the discretional choices of the Prosecutor is envisaged[54]. The Prosecutor in his role of discretion has made no decision on the basis of prosecutorial discretion to select the current situations. As we can saw in the African situations have been selected on the basis of the satisfaction of the legal requirements, but not prosecutorial discretion. In speciem, the situations that were rejected were dismissed on the basis of the non-satisfaction of the legal requirements. Accordingly, the focus of the examination of the charges of politicisation, derived from the exercise of selective justice, in fact, informs as technically the Prosecutor has not made any situational decision so far on the basis of prosecutorial discretion. For this reason, this study sought a different approach to analyse why the Prosecutor receives the charges of politisation, derived from the exercise of discretion. The problem may lie with the hidden sense of discretion that has been effectively and widely exercised by the Prosecutor when interpreting the legal requirements for initiating investigations or prosecuting cases. In particular, on the term "sufficient gravity" that constitutes the key legal admissible criterion for initiating investigations or prosecuting cases.

However, in our case the interest of this sentence lies in the innovative position adopted by the Appeal Chamber, with respect to the previous jurisprudence of the Pre-Trial Chambers, regarding the introduction of the "interests of justice" which go back to the parameters of the

[49]S. Gless, *"Internationales Strafrecht. Grundiss für Studium und Praxis",* op. cit.
[50]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 33.
[51]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 38ss.
[52]ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, op. cit., par. 40.
[53]S. Gless, *"Internationales Strafrecht. Grundiss für Studium und Praxis",* op. cit.
[54]Of course with a similar also limits to the discretion of the Public Prosecutor in the ad hoc Tribunals are set by Rule 72 bis (D) and (E), which allows the Judges of the Chamber of Deputies to reduce, after consultation with the Prosecutor, the number of charges for fairness requirements and speed of the procedure.

control of the Pre-Trial Chambers. Trial Chamber on the Prosecutor's request to open the related investigations. The Appeal Chamber rejected the constant interpretation of the relationship between art. 15, par. 4, and 53, par.1 StICC[55], which we first noticed in the decision concerning the situation in the Republic of Kenya. In this case, the Pre-Trial Chamber had reached the conclusion that the judicial review[56] on the Prosecutor's decision is based on the same criteria considered by the latter. This approach of enhancing the identity of the criteria indicated in art. 15, par. 3 and 4, and 53, par. 1, for the purpose of the existence of a reasonable basis for initiating the investigations, as well as the close link between the two articles that would emerge during the drafting of the Statute and from the interpretation of art. 15 StICC as directed to attribute to the Pre-Trial Chamber a real control function on the Prosecutor's decision[57].

The two opposing orientations of both the Pre-trial Chambers and the Appeal Chamber are equally reflected in doctrine[58].

In fact, the control of the Pre-Trial Chamber extends to all elements considered by the Prosecutor. This approach is based on the interpretation of the expression "reasonable basis for a judicial action" as inclusive of the three criteria mentioned in art. 53 par. 3-jurisdiction of the Court, admissibility and interests of justice- "regardless of the different wording of the three provisions"[59].

There is also a second position of a negative nature of the assessment relating to the "interests of justice" referred to in art. 53 par. 1StICC compared to that of the other criteria, the Pre-Trial Chamber is competent to evaluate the "interests of justice" only and within the nature and spirit of the control over the Prosecutor's decision not to open the investigation. Some other arguments also remain open and debatable, such as the reference to the preparatory works[60] from which we can deduce that the sole purpose of the Pre-Trial Chamber's control over the Prosecutor's request is to avoid opening investigations of an abusive nature. It appears consistent that the Chamber only carries out a verification of the existence of the minimum requirements for introducing a judicial criminal action[61].

Another way seems feasible and consists in admitting the competence of the Pre-Trial Chamber to carry out an evaluation of the "interests of justice", underlining a necessary self-restraint by the latter with respect to the evaluation of the proposal to open the Prosecutor's investigations.

The considerable extent of the contribution of the sentence with regard to the definition of the relationship between the Prosecutor and the Pre-Trial Chamber is evident. Without diminishing the importance of opening investigations as such, the effects of the sentence in relation to it are at least in a position to relativize some other points of research. The Appeal Chamber, while authorizing the opening of the investigations, also highlighted the possible subsequent examination of the admissibility of the case and the competence of the ICC according to the various provisions of the Statute that allow to take into consideration circumstances such as, for example (but not only), "certains agreements entered between the

[55]S. Gless, *"Internationales Strafrecht. Grundiss für Studium und Praxis",* op. cit.

[56]For further analysis see also: V.V. Suhr, *"Rainbow jurisdiction at the International Criminal Court. Protection of sexual and gender minorities under the Rome statute",* Springer, Basel, 2022, pp. 214ss.

[57]ICC, Pre-Trial Chamber II, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the autorization of an investigation into the situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision of 31 March 2010, par. 21-24.

[58]L. Poltronieri Rossetti, *"The Pre-Trial Chamber's Afghanistan decision-A step too far in the judicial review of prosecutional discretion?",* in Journal of International Criminal Justice (17) 2019, pp. 586, 593ss.

[59]Art. 15, par. 3 and par. 4, and art. 53 StICC.

[60]S. Gless, *"Internationales Strafrecht. Grundiss für Studium und Praxis",* op. cit.

[61]T. Mariniello, *"Judicial control over prosecutorial discretion at the International Criminal Court"*, in International Criminal Law Review, (19), 2019, pp. 979-991

United States and Afghanistan" with reference to the peace agreements concluded between the two states on 29 February 2019[62]. The Chamber refers in particular to art. 19StICC which allows Member States to challenge the competence of the ICC. Moreover, regardless of the origin of the notitia criminis, art. 19 StICC recognizes the power to raise a question of procedural suitability pursuant to art. 17 StICC (challenge to the admissibility) for only once each and before the beginning of the trial, unless there are exceptional circumstances that justify its promotion after the first hearing. The hearing can be held even when the defendant has renounced the right to appear, or has escaped or is untraceable and all the necessary measures have been taken to ensure its presence and to inform it of the accusations. Thirty days before the confirmation of hearing charges, the indictment, together with the minutes of the evidence on which it is based, is notified to the suspect. For its part, the defense has a duty of disclosure of the evidence that it intends to bring to support its thesis, to which it must comply no later than fifteen days before the date set for the hearing (Rule 121 para 3 and 6 of Statute of Rules of Procedure and Evidence)[63].

Also according to art. 97 and 98 StICC which, in the context of cooperation between the ICC and the states[64], allow the latter to oppose the ICC's requests by invoking further obligations of an international nature that are incompatible with them[65]. While not strictly speaking of the same aspects of a political nature invoked by the Pre-Trial Chamber in order to justify the rejection-and that the latter had unduly linked (according to the Appeal Chamber) to the notion of "interests of justice" -, it appears evident that these are concrete circumstances that could constitute obstacles to the continuation of the procedure.

According to the sentence of the Appeal Chamber, the assessment of elements that can be provided by the related articles of the StICC is excluded only in the context of the control to be carried out at the stage of authorization for the opening of the investigations. It does not seem useless to highlight that at the outcome of this sentence, the fact of having authorized the opening of investigations on the basis of the general and non-specific redefinition of the role of the Prosecutor and of having censored the content given by the Pre-Trial Chamber to the notion of the "interests of justice", does not exclude that the mechanisms established by the relevant articles of the StICC and indicated by the Appeal Chamber itself, considerations (including political considerations), may prevent the further exercise of the Court's jurisdiction.

We can see how the action of the ICC fits into a context of growing tension between the actors involved. The reference is based on the concretization of threats of restrictive measures against ICC personnel, both economic (such as the freezing of assets located in the United States and the prohibition of using the American financial system) and to the free movement in some territories as in in particular, the ban on entering the United States[66].

[62]Joint Declaration between The Islamic Republic of Afghanistan and the United States of America for bringing peace to Afghanistan

[63]D. Liakopoulos, *"The right of disclosure in hybrid Tribunals"*, in Juris Gradibus, 2016.

[64]D. Liakopoulos, ***"Types of international cooperation and legal assistance in the ICC",* in Revista de Derecho Ciencias Sociales y Politicas. Universidad San Sebastiàn, n. 25, 2019, pp. 104ss.**

[65]ICC, The Appeals Chamber, Situation in the Islamic Republic of Afghanistan, op. cit., par. 44.

[66]Executive Order (E.O.) 13928 on Blocking Property of Certain Persons Associated with the International Criminal Court (ICC). See: White House Executive Order on the Termination of Emergency With Respect to the International Criminal Court, 1 Apri 2021. But the U.S. has continuously reiterated its refusal to accept the ICC exercise of jurisdiction over nationals of States non-parties, because in contrast with the fundamental principle of the law of treaties according to which pacta tertiis neque nocent neque prosunt. In revoking E.O. 13928, President Biden indicated that [t]he United States continues to object to the International Criminal Court's (ICC) assertions of jurisdiction over personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council and will vigorously protect current and former United States personnel from any attempts to exercise such jurisdiction.

According to material obstacles to investigations, the measures in question raise questions in terms of compatibility with public international law[67]. Especially, with the 1947 headquarters agreement between the United Nations and the United States. In fact, ICC officials, being the latter with observer status at the United Nations, have the right to access the organization's headquarters and therefore enter US territory. The possibility has also been advanced that in reaction to the adoption of the aforementioned restrictive measures, the ICC may resort as provided for in art. 70 par. 1 StICC which gives it the competence for crimes against the administration of justice[68].

Overall, in evaluating the sentence in question, the involvement of the ICC, especially at the investigative stage, in the context of the crimes committed in the afghan conflict, as well as the attempt by the Appeal Chamber to circumscribe the negative effects of the first decision, can certainly be welcomed. degree also through an innovative interpretation of the relationship between the activity of the Prosecutor and the judicial control to which it is subjected.

CONCLUDING REMARKS

The development of the international criminal law, rectius justice and the jurisprudence of international prosecutors all contributed to developing the role of an international prosecutor, as a new international player within the international legal arena and international politics. For instance, when the prosecutor stops the criminal proceedings, using her discretionary power, based on "the interests of justice", the prosecutor, in fact, may be addressing other values, such as stability or peace-related considerations. This process confesses the prosecutor's new roles to play alongside with her main mandate in delivering justice. Accordingly, the current international Prosecutor can/should exercise a multifunction of roles in order to promote those values. With the establishment of the ICC, we have begun to see a dramatic development in the idea of the prosecution in terms of both the legal level and practical level. It is a multi-functional prosecution. The creation of the ICC witnessed a formal emergence of a new sense of prosecution, where the role of the prosecutor has been formally widened, accordingly. Article 53 StICC was a product of the historical development of the exercise of the discretionary power by the previous prosecutors. Although this form of power was not clear enough either theoretically or practically in the work of the Military Tribunals, it was clear enough in the practice of the Special Criminal Tribunals. With the arrival of the ICC, we have begun to see that these developments have been embedded in the law.

According to our opinion, the consideration of peace processes (a political influence) on the basis of "the interests of justice" can be accounted for only when such processes are associated with some sort of justice mechanisms. This is often the case when international justice of the ICC is not attainable due to some obstacles, then other justice mechanisms might be more meaningful and needed. The use of the apologist considerations as a tool to achieve the utopian end, which is justice, in its broad sense, is the approach that may legitimately help justify the consideration of political factors. As the prosecutor is expected to be independent, respecting the rule of law when exercising her discretion, she is also expected to be flexible, as discretion is in nature a power that stands outside the law. The prosecutor may need to give

[67]See in particular: L.A. Aledo, *"Le droit international public"*, Dalloz, Paris, 2021. D. Alland, *"Manuel de droit international public",* PUF, Paris, 2021. C. Tomuschat, C. Walter, *"Völkerrecht",* Nomos, Baden-Baden, 2021. P. Daillier, M. Forteau, A. Miron, A. Pellet, N. Quoc Dinh, *"Droit international public",* ed. LGDJ, Paris, 2022.

[68]D. Liakopoulos, *"The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence",* op. cit.

weight to considerations that are not warranted in law. The ignorance of one of these premises posed the prosecutor in the dyadic criticisms.

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THE VALUE OF NON-LINGUISTIC COMPETENCES: LEARNING ENGLISH FOR BETTER EMOTIONAL AND SOCIAL WELLBEING

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Summary: *There is a growing body of research on language didactics that recognizes the potential of innovative methodologies, which may develop both linguistic and non-linguistic skills of language learners. In CEFR Companion Volume (2020), traditional language competences (listening, reading, speaking and writing) have been re-defined and replaced by four modes of communication: reception, production, interaction and mediation. Such a shift in language teaching has proposed an idea that language learning is much more than developing the linguistic competence of the target language; in particular, a variety of non-linguistic skills may contribute to one's better cultural, social or emotional well-being, higher self-esteem, career opportunities and acculturation in a host country. Therefore, attempts have been made to measure language students' non-linguistic achievements, trying to examine the added value of such innovative teaching. The current study aims at: (1) exploring the experiences and needs of language students of Vytautas Magnus University (VMU), Lithuania in regard to the development of non-linguistic competences; (2) analyzing what non-linguistic skills research participants need for a successful integration into the global multilingual society and better individual wellbeing; (3) overviewing the potential of mediation and Tandem language learning as useful methodologies to improve students' non-linguistic skills. To achieve the research aims, a quantitative research methodology was applied and short semi-structured interviews were conducted with three samples: (1) 256 VMU students from different faculties and study-years; (2) 23 ESOL students from Boston English Academy, Great Britain and 15 students of the Lithuanian language for foreigners, delivered at VMU (mediated language lessons) and (3) 14 Tandem participants (learning Ukrainian or Lithuanian). This study has identified that international students, economic or war migrants need a number of cognitive, social and emotional non-linguistic skills for a successful integration into a host country and the preservation of their national identity, language and culture. Current research has revealed that mediated language teaching has a great potential to help develop these non-linguistic competences and become a useful tool of learning a foreign language and improving personal, intrapersonal, social, cognitive or emotional non-linguistic competences. Finally, the research has proved that such non-linguistic competences, as empathy, mediation skills, intercultural competence, ability to summarise information and tolerance have been developed during Tandem language learning.*

Keywords: *non-linguistic competences; mediated language teaching; Tandem language learning; acculturation.*

Introduction

Recent focus on plurilingualism and the need to possess competences in languages other than English are changing established attitudes and methodologies of teaching English. Although it cannot be denied that the competence of English is still an important asset for most students in order to find success in academic and professional career, new benefits of learning English and other languages have recently appeared. Current EU language policy emphasizes respect for linguistic diversity, the creation of intercultural dialogue and new opportunities to improve learning performance (Iskra, 2022). In this context, attention is placed not only on social agents as individuals but also on social groups and interaction during the teaching / learning process (Language Education Policy, 2022).

Growing interest in languages has created new attitudes towards language policies, methodologies and skills: language competences have become important not only for mobility, education and employment, but also for "strengthening democratic citizenship and social cohesion" (Language Education Policy, 2022). Traditional language competences (listening, reading, speaking and writing) have been re-defined and replaced by four modes of communication: reception, production, interaction and mediation (*CFR Companion Volume*, 2018). New competences, such as mediation and plurilingual / pluricultural competence, described in *CFR Companion Volume* (2020), have suggested an idea that both linguistic and non-linguistic competences could be improved in the language classroom. Experienced language educators and policy makers stress the potential of real-life oriented teaching and learning or an 'action-oriented approach', which may offer both linguistic and non-linguistic benefits for a language learner (Piccardo et al, 2022). It has been proved that some non-linguistic competences acquired by learning a foreign language may contribute to better learning abilities, such as better "executive functioning', 'creativity', 'decision-making skills' and 'memory retrieval skills' (Wallin, 2019). In this context, researcher Wallin claims that empathy, developed by learning a language, may contribute to better social wellbeing as learners realize that things can be represented in more than one way: "they need to match their language to the language of others (interlocutors) for successful communication, so they better understand the others' mental states" (Wallin, 2019, p. 6).

Language researchers and practitioners describe a variety of methodologies that may help develop students' non-linguistic competences during language lessons. The study conducted by Sayer and Ban (2013) illustrates the added value of non-linguistic competences improved during the English program on primary school students (Sayer and Ban, 2013). Instead of measuring students' linguistic achievements, the researchers focused on examining their non-linguistic skills, using the '5 Cs' as an analytic framework: communication, cultures, connections, comparisons, and communities. The research findings showed that the activities during the English classes had changed the children's worldview on multilingualism, had reinforced learning across other subject areas, connected the students to their migrant family members and had increased their intercultural awareness (Sayer and Ban, 2013). Describing an innovative approach to inclusive plurilingual education at primary level, Little and Kirwan (2019) conclude that the inclusion of children's home languages in the language classroom has become an important instrument to improve their non-linguistic competences, such as their autonomy, self-esteem, collaboration, transferring other skills to other areas of learning, openness and self-awareness, creativity, increased motivation and translanguaging (Little and Kirwan, 2019).

Mediation, another recent innovation in the didactics of languages, can also be applied to improve non-linguistic skills. According to *The Common European Framework of Reference for Languages* (2020), the mediator 'acts as a social agent who creates bridges and helps to construct or convey meaning, sometimes within the same language, sometimes across modalities (e.g. from spoken to signed or vice versa, in cross-modal communication) and sometimes from one language to another (cross-linguistic mediation)' (CEFR, 2020, p. 90). In such a way, the mediator (a language student) uses the language for real communication and interaction, frequently focusing more on his / her peers' needs and creating / interpreting real-life situations. As mediation involves making communication possible between two or more people who are unable to communicate directly with one another, such interaction requires not only linguistic but also non-linguistic skills. Some examples of mediation could be "paraphrasing what a politician said on the news, summarising what a friend wrote in an email,

or explaining a story in a language more familiar to the learner" (Hunter, 2019, p. 23). Paraphrasing, summarising or explaining are the essential skills in both linguistic and non-linguistic subjects, not to speak about the need to be empathetic with your partner in order to bring intelligibility into the conversation. Such learning conditions promote creative, critical and empathetic thinking, drawing upon the existing knowledge and making decisions and choices. Morozova et al. (2021) observe that in negotiation activities a mediator needs to possess "professional culture, ethics, etiquette and communication skills as well as negotiation" (Morozova et al, 2021, p. 686). North and Piccardo (2016), internationally recognized researchers on mediation, conclude that mediated teaching has completely changed traditional language pedagogy, moving from the level of an individual and focused on acquiring grammatical or lexical knowledge to the social level, focused on constructing meaning with the help of linguistic and non-linguistic competences (North and Piccardo, 2016).

Despite of growing numbers of innovative English teaching methodologies and research on students' linguistic achievements, empirical research addressing the non-linguistic benefits of language learning and their relation to the increase of learners' self-esteem, social wellbeing and better career opportunities is lacking. The idea to use the language as a resource and a tool for developing useful non-linguistic skills and simultaneously improve students' linguistic competence is still new in most language classrooms. What is more, debate still continues about the best strategies for the management of a multilingual and multicultural classroom frequently managed by a monolingual and monocultural teacher.

Methodology

The study aims at exploring the experiences and needs of language students of Vytautas Magnus University (VMU), Lithuania in regard to the development of non-linguistic competences. Addressing the following research questions in the present paper, it also overviews the potential of mediation and Tandem language learning as useful methodologies to improve students' non-linguistic skills:

1. What non-linguistic skills do students need for a successful integration into the global multilingual society and better individual wellbeing?
2. What non-linguistic competences have students of different languages improved in language learning classes at university?
3. How can mediation strategies and activities organized during language classes improve learners' non-linguistic skills?
4. What non-linguistic skills can be developed in Tandem language learning?

To achieve the research aim, a quantitative and qualitative research methodology was applied and three studies related to the acquisition of non-linguistic competences were conducted.

The first online questionnaire was handed to 256 learners of different languages at VMU. The extensive survey was designed to gather data about general language learning practices and experiences at the university mentioned above. However, this particular paper focuses only on the data indicating the participants' linguistic background, their opinion on the relevance of the English courses to their professional career, non-linguistic competences improved in language classes at university and their preference to participate in Tandem language learning. All aspects of the research procedure were conducted in Lithuanian (the native language of most students) and, when needed, in English.

In order to develop insight into the role of mediation in learning the host country's language in Great Britain and Lithuania, the second study was carried out. The research aimed

to explore how mediation activities and strategies can be applied in ESOL and the Lithuanian language for foreigners courses. Among its other objectives, the study was carried out to explore the enhancement of mediated language teaching, leading to new opportunities to develop students' non-linguistic competences and soften linguistic/cultural barriers in a host country. All aspects of the research procedure were conducted in Lithuanian, English or Russian, depending on the language the respondents were most comfortable with. The study was based on the analysis of quantitative and qualitative research data, obtained using an opinion survey and semi-structured interviews with students after mediated language lessons.

The third and final study intended to explore how Tandem language learning could help international students better integrate into the community of a host country. The study used a survey to research: (1) the development of the Lithuanian and Ukrainian students' non-linguistic competences; (2) learners' attitudes towards such form of learning as the means of overcoming emotional and social barriers in a host country. For these reasons, a survey, involving a group of 14 Tandem participants, was conducted in the Lithuanian and Ukrainian languages.

Finally, the results of all three surveys were analyzed and an attempt was made to answer the final questions: (1) which non-linguistic skills students consider as the most important for better professional and social wellbeing; (2) which non-linguistic skills can be improved during mediated language lessons and Tandem learning activities. After having found the answers to the above-mentioned questions, the researcher aimed to establish new understanding of the use the target language and different language teaching methodologies as resources and tools for developing useful non-linguistic skills and simultaneously improving students' linguistic competence of the target language.

Sample

Survey 1. Non-linguistic competences of VMU language students. The research sample for the first survey was selected on the basis of the following criteria: all the participants were the students of different language courses, delivered at VMU.

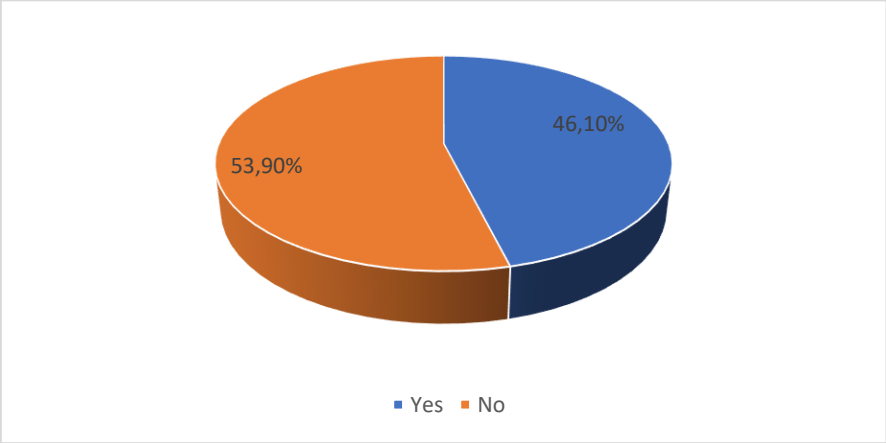

Figure 1. Other than English language learning experience at VMU

The survey involved 256 students, aged 18-26, from different faculties and study-years. The students were asked to self-evaluate which non-linguistic competences they had improved in different language courses at VMU. The respondents' language learning experience at VMU, which is presented in Figure 1, demonstrates that more than half of the research participants

have studied another language (other than English) at VMU. It is worth noticing that all VMU students have a broad choice of over 30 languages to learn and 24 credits for language learning at VMU. As Figures 2 shows, Russian, Spanish, Italian and German have been indicated as the most popular languages to learn.

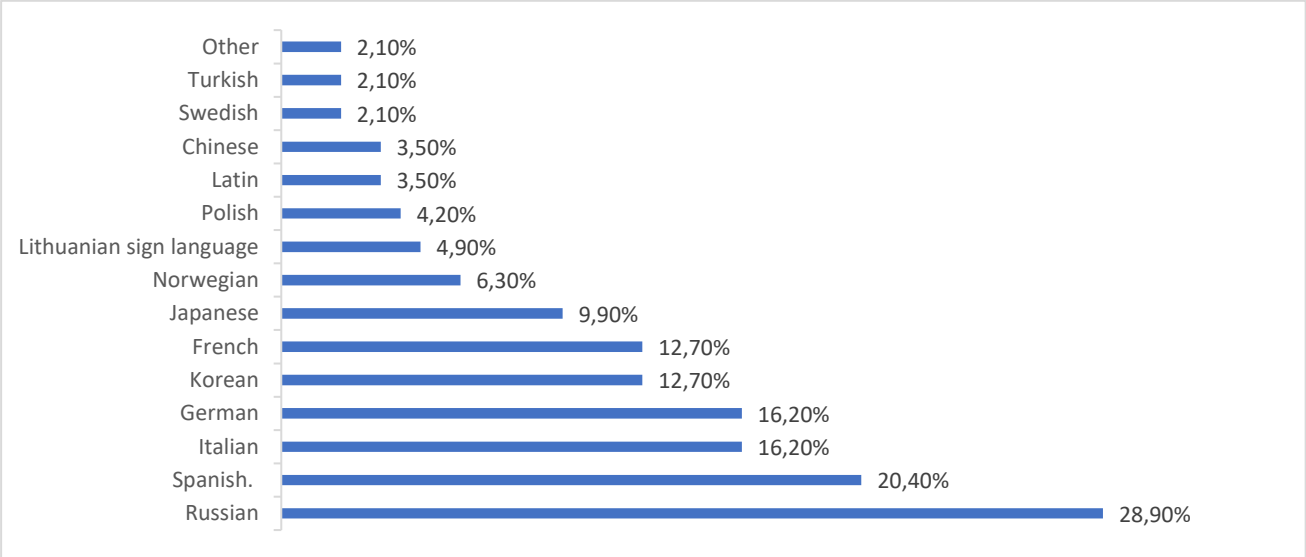

Figure 2. VMU students' language choice

Survey 2. The use of mediation to improve students' non-linguistic competences. The participants were 23 ESOL students from Boston English Academy, Great Britain and 15 students of the Lithuanian language for foreigners, delivered at Vytautas Magnus University, Lithuania. The respondents' age varied from 20 to over 60 and they had come from a diverse range of cultural backgrounds (Lithuanian, Russian, Polish (ESOL students) and Belarusian, Russian, Ukrainian, French, Norwegian, Chinese, Kazakh, Indian, Kurd and Malaysian (the students of the Lithuanian language). The research sample was selected on the basis of three criteria. Firstly, all research participants were learning the host country's language (English or Lithuanian). Secondly, to explore how mediation helps to improve non-linguistic skills at different levels, the research subjects' competence of the target language was different: the students of the Lithuanian language for foreigners were at the elementary or pre-intermediate levels (levels A1 and A2 according to the Common European Framework of Reference for Languages (CEFR)) and ESOL students were at the pre-intermediate and intermediate levels (levels A2 and B1 according to CEFR). Thirdly, the respondents had come from a diverse range of cultural backgrounds.

Survey 3. The development of non-linguistic competences in Tandem language learning. The research sample for the last survey was a group of 14 Tandem participants (7 Lithuanian and 7 Ukrainian), aged from 17 to 50. The social status of the respondents varied as secondary school pupils and teachers, university students and lecturers had participated in Tandem. Figures 3 and 4 show the linguistic repertoire of the research subjects:

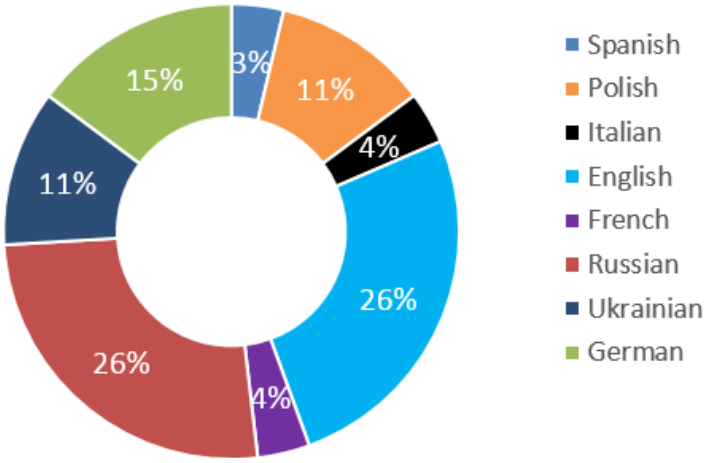

Figure 3. Linguistic repertoire of Lithuanian students (Lithuanian L1 - 100 %)

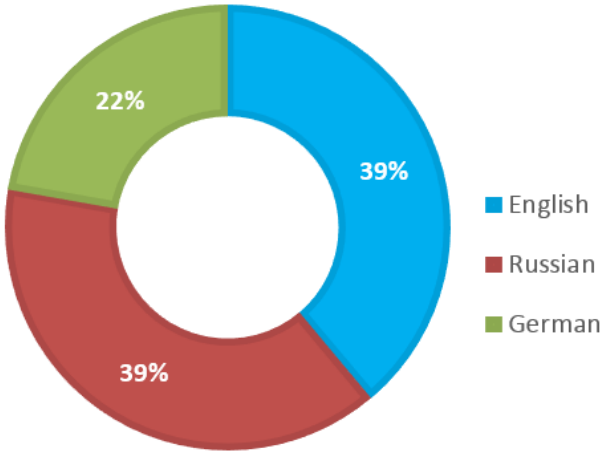

Figure 4. Linguistic repertoire of Ukrainian students (Ukrainian L1 - 100 %)

The research subjects were selected on the basis of two criteria. Firstly, all participants were learning their partner's home language and teaching their partner their native language in Tandem. Secondly, to explore how such form of non-formal language learning / teaching helps to improve non-linguistic skills, the learners had been pre-taught to use real-life oriented learning / teaching methods, such as mediation, before they started language learning / teaching with their partner. The most important criteria for making Tandem pairs were the students' linguistic competence of the language of instruction (English or Russian) and their place of living to ensure face to face learning / teaching possibilities. To ensure the validity of the measurement, the researcher of the current paper turned to two experts in language teaching asking them to consider the content validity of the questionnaires and questions for the semi-formal interviews.

Results

Survey 1. Non-linguistic competences of language students of VMU

The study aimed at exploring the experiences of language students of VMU in regard to the development of non-linguistic competences. To achieve the research aim, the students were asked to self-evaluate which non-linguistic competences they had improved in different language courses at VMU (Figure 5):

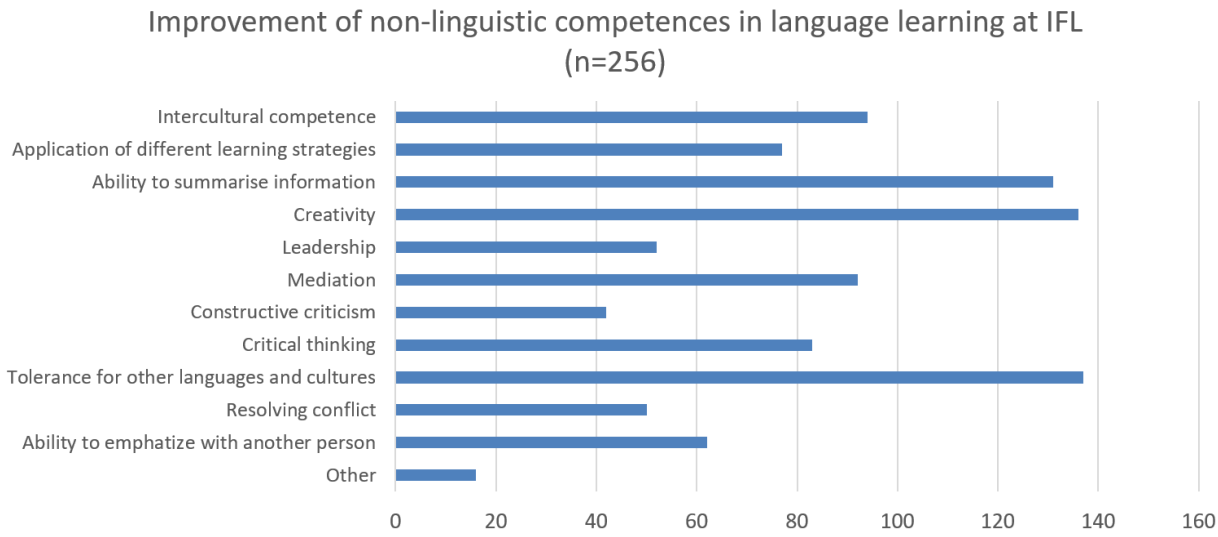

Figure 5. The improvement of non-linguistic competences in language classes at VMU

It is important to note that language teachers of VMU were not instructed to specifically use any teaching strategies, developing non-linguistic skills for this particular research. Some of the students had confessed that it was the first time they contemplated the improvement of non-linguistic competences during language lessons. As the results indicate, more than half of the respondents admitted that they had become *more tolerant to other languages and cultures*, which is quite logical as language classrooms at VMU are quite multilingual / multicultural and VMU language teachers constantly raise their didactic competence in how to use such diverse classrooms as a powerful teaching resource. *Ability to summarise information* and *improved creativity* are also mentioned by over half of the research participants. About a third of the respondents indicated having improved other useful non-linguistic skills, such as *intercultural competence*, *mediation*, *critical thinking* and *the application of different learning strategies*. Such results might be explained by the fact that VMU language teachers are actively involved in different projects, focusing on innovative language teaching strategies, some of which promote the development of both linguistic and non-linguistic skills.

Despite quite positive and optimistic results, it might be fair to conclude that more language teaching activities could be focused on the development of positive communication competences, such as *constructive criticism*, *resolving conflict* or *ability to emphasize with another person*. This is how language lessons would improve not only students' linguistic competence and IQ, but also their EQ, which may generate physical, social, and psychological health and wellness. To achieve such aims, mediated language teaching, which helps "to manage behavior and relationships" (Lieberman, 2020), could be introduced in the language classroom.

Survey 2. The use of mediation to improve students' non-linguistic competences

The second research aimed to explore how mediation activities and strategies can be applied to develop students' non-linguistic competences and soften emotional/social barriers in a host country. The study was based on the analysis of quantitative and qualitative research data after mediated language lessons:

- *Mediating a text: relaying specific information in speech*;
- *Mediating communication: acting as an intermediary in informal situations.*

The mediated language lessons were carried out by an ESOL lecturer (Boston English Academy, Great Britain) and the lecturer of the Lithuanian language for foreigners (Vytautas Magnus University, Lithuania), who dedicated some time to define the concept of mediation and introduced the participants to the purpose of the study. The tasks for students were adapted for their particular level and focused on traditional topics, such at the restaurant, booking a hotel or in a shop. However, these common situations were practised applying mediated strategies and activities, where the students needed to:

- *summarise the main points of the written text (the restaurant meniu) in their native or target language;*
- *report the information from illustrations (the hotel brochure) in their native or target language;*
- *explain the information to their partner;*
- *provide simple and clear instructions to their partner to solve a problem or initiate a solution;*
- *resolve conflict (between a shop assistant and a client) in simple language;*
- *explain cultural differences in behaviour, attitudes or accepted manners;*
- *shift from one language to another, when needed;*
- *try to recognize their partner's emotions and feelings;*
- *show interest and empathy by asking questions;*
- *express agreement and understanding;*
- *provide their partner help with formulation in the target language, when needed.*

(adapted from mediation descriptors in *CFR Companion Volume*, 2020)

It is important to note that the students were pre-taught all necessary functional language, depending on their linguistic competence of the target language, and the tasks were designed following mediation descriptors in *CFR Companion Volume* (2020). Both lecturers noted that their students had enjoyed such mediated lessons, which seemed non-traditional, funny, more motivating and more useful and realistic. Figure 6 represents ESOL learners' and the students' of the Lithuanian language for foreigners self-evaluation of non-linguistic competences, improved during mediated lessons:

As Figure 6 presents, most respondents (especially students learning English) claimed having improved their mediation skills, which is quite a logical outcome as, in this case, both language teachers were consciously applying mediation strategies and activities during their language lessons. It seems that the students have improved their EQ as their self-evaluation of the abilities to explain and sum up, empathise with a speaker and resolve conflict is quite high. Finally, the participants claimed that they had improved their intercultural competence and had become more tolerant with other languages, which goes hand in hand with the results of the first survey.

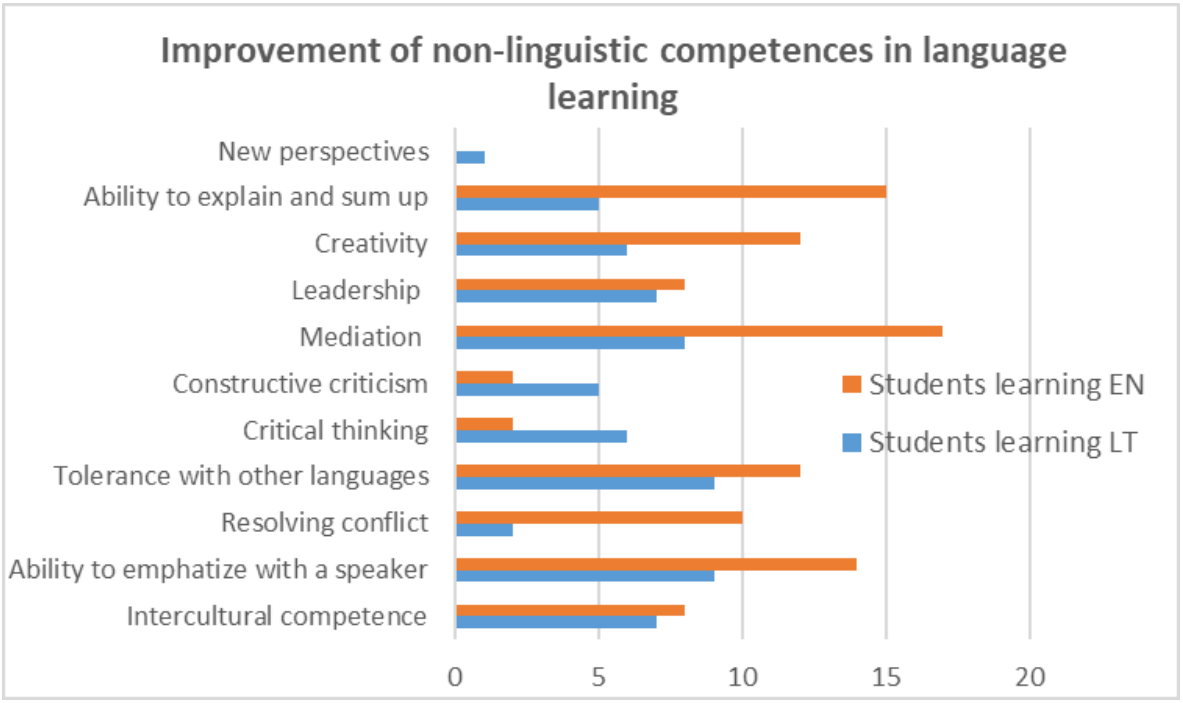

Figure 6. The improvement of non-linguistic competences in mediated language classes

The second part of the research aimed to analyse the participants' attitudes towards necessary non-linguistic skills, which could help acculturate in a host country easier and faster. Following the results of semi-formal interviews, a slight difference between two samples can be distinguished. The students of the Lithuanian language for foreigners emphasise that such non-linguistic competences, as *tolerance, patience, creativity, flexibility, teamwork, interpersonal and communication skills, the ability to empathise with another person and adapt to new things*, are the most significant in a host country. Most ESOL learners believe that *communication, respect, courtesy, tolerance to other languages and cultures, the knowledge of traditions, the political situation, the laws and rules of a host country* is a key step in understanding the British way of life, being essential non-linguistic skills for their survival in an English-speaking country. As ESOL learners were mostly economic migrants, living in Great Britain for a longer time, they had put an emphasis on the need to understand and respect the host country. Meanwhile, the students of the Lithuanian language for foreigners had concentrated on cognitive and emotional non-linguistic skills, which can help an international student acculturate in a new country faster. Furthermore, the importance of not forgetting one's own 'roots' by preserving memories and fostering the culture and history of the homeland and teaching children their mother tongue, was stressed by the participants of Boston English Academy, UK. The obtained research results reveal that it is significant for almost all language students not to lose the connection with their native country and preserve their national identity:

"It is important because more people can learn something new and fascinating about your country and culture. If my language and culture were threatened, I would want to preserve it because it is part of my identity". (a student of the Lithuanian language)

"You will always be a newcomer in another country and you will not find new roots, if you lose your native ones". (an ESOL student)

On the basis of the survey results, it might be concluded that mediated language teaching can help develop non-linguistic competences, which, according to the respondents, might soften emotional and social barriers in a host country. Both groups of the sample agree that mediation can be a useful tool of learning a foreign language and sharing one's native culture and traditions with local communities. Personal, intrapersonal, cognitive or emotional non-linguistic competences, developed during mediated language lessons, can make one be less anxious in unknown social interactions in a host country and, at the same time, respect and be proud of one's own national identity. Therefore, it would be fair to conclude that in order to enhance students' social wellbeing, the content of mediated language lessons should include the topics, connected with accepted manners and behaviour, taboos, misunderstandings, traditions, laws and rules in one's national culture and a host country. To create the space for improving learners' emotional wellbeing, mediation activities in the language classroom could focus on recognising others' emotions correctly and acting upon them, resolving conflict, being tolerant, emphasising with the speaker and, in general, "helping others understand people, texts, types of discourse or languages" (CFR, 2018, p. 126).

Survey 3. The development of non-linguistic competences in Tandem language learning

The third and final survey aimed to: (1) explore how non-formal language learning / teaching in Tandem may help improve students' non-linguistic skills and (2) analyse research participants' attitudes towards such form of learning as the means of overcoming emotional and social barriers. Although it is almost impossible to pinpoint the exact date when such form of learning appeared as it is more a "widespread practice rather than a method based on theory" (O'Rourke, 2007), Tandem learning has taken many forms and has had many aims since the late 1960s. In the present case, Tandem language learning was organised in order to help Ukrainian refugees learn Lithuanian and Lithuanians – Ukrainian. The second aim of such non-formal learning was to 'make connections' and help 'newcomers' faster acculturate and integrate into the local community in Lithuania.

Before announcing the research results, it is important to pinpoint that Tandem pairs had been introduced to useful tools, cites and apps of the Lithuanian and Ukrainian languages and had been pre-taught to use real-life oriented learning / teaching methods before they started language learning / teaching with their partner. The students were advised to choose non-formal places and activities for their meetings, such as chatting over a cup of coffee, going shopping, visiting local museums, meeting at the gym, going to the cinema or a club. Moreover, the participants were informed that they should focus on improving useful real-life skills, for example, filing in a form in the bank, getting the doctor's appointment, finding useful information, using public transport, etc. A significant aspect of such a form of learning / teaching is constant thinking about his / her partner's needs, emotions, experiences or learning outcomes, which requires good emotional intelligence. In general, such learning / teaching is closely connected with emotions as partners usually encourage each other, laugh together, speak about the things that worry them, help each other and frequently become quite good friends. Good cognitive abilities are also necessary for Tandem learning as each time one has to plan a short language lesson, make a revision, ask and answer questions or even learn one's native language better. Thus, it was expected by the researcher of the current study that Tandem

students would improve a variety of non-linguistic competences, which they had naturally needed to apply during the process of learning / teaching languages.

Figure 7 shows students' self-evaluation of non-linguistic skills, that they have improved during Tandem language learning and teaching:

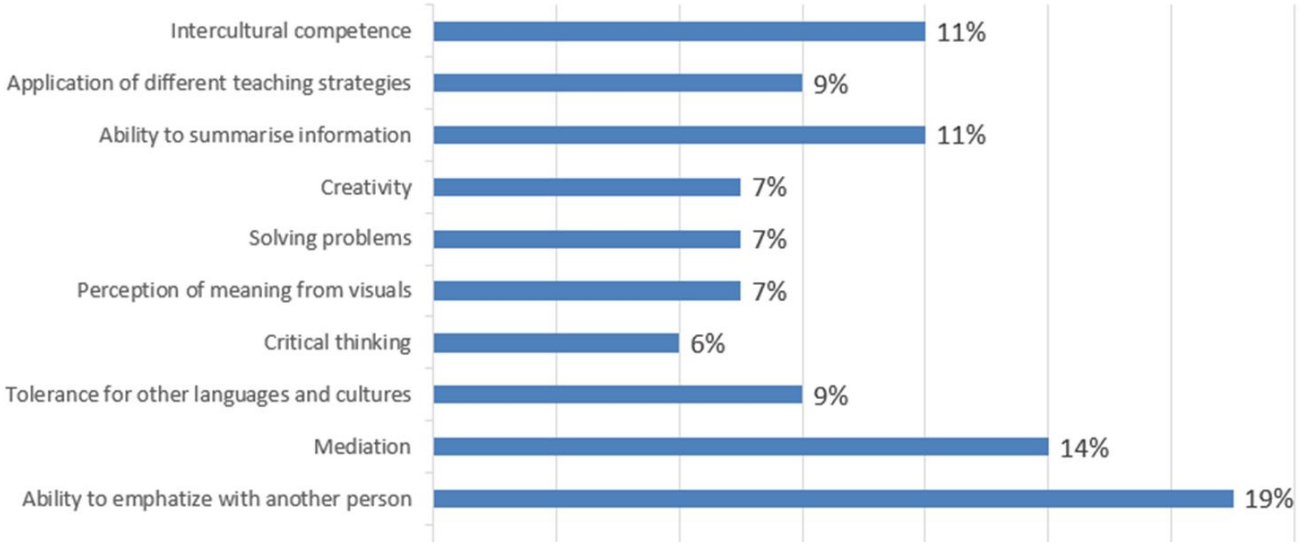

Figure 7. The improvement of non-linguistic competences in Tandem language learning

The results have proved the primary expectations that such non-formal and action-based form of language learning may develop one's empathy (19 %), mediation skills (14 %), intercultural competence (11 %), ability to summarise information (11 %), tolerance for other languages and cultures (9 %) and other necessary real-life skills. Furthermore, all the research participants had agreed that their emotional and social wellbeing had improved. Apart from recognising that learning the basics of the target language was really useful, Tandem learners had emphasised the positivity of support, emotions, learning methods and the environment. Making friends and developing relationships was something that had created an added value to the whole experience. The personal story about one Ukrainian girl is worth mentioning: the girl described her wonderful Easter experience at her Tandem partner's home, which had helped her survive that terrible situation, when her family and friends were in Ukraine, being attacked by bombs and suffering from sheer terror.

Finally, it should be noted that the improvement of a variety of non-linguistic competences had encouraged the research participants become more proud of their national identity:

"It was an incredible experience because I had an opportunity to teach fascinating things about my country and culture. If my language and culture were threatened, I would do my best to preserve it because it is part of my identity". (Lithuanian Tandem participant)

"Great shock, depression and being different. This is how I felt, when I came to Lithuania, when war in Ukraine started. My Tandem partner has helped me to calm down, learn the basics of the Lithuanian language and be strong again to fight for my identity and native country". (Ukrainian Tandem participant)

Conclusions and recommendations

On the basis of the survey results, it might be concluded that the usage of innovative language teaching methodologies can enhance not only language learners‘ linguistic competences, but also their non-linguistic skills, which may contribute to their better social and emotional well-being. Therefore, it might be claimed that constructing meaning and simulating real-life situations during a language lesson with the help of linguistic and non-linguistic skills has become a great shift in language teaching.

This study has identified a number of cognitive and emotional non-linguistic skills that international students might need for a successful integration into the host country, such as *patience, creativity, flexibility, teamwork, interpersonal and communication skills, the ability to empathise with another person and adapt to new things.* Meanwhile, economic migrants put an emphasis on the need to understand and respect the host country, which requires *communication skills, respect, courtesy, tolerance to other languages and cultures, the knowledge of traditions, the political situation, laws and rules of a host country*. The obtained research results have revealed that it is significant for new comers not to lose the connection with their native country, national identity, language and culture.

The analysis of the first study, focusing on the students of different languages, which were taught by language teachers not instructed to specifically use any teaching strategies, developing non-linguistic skills, has indicated some insights into the nature of language teaching. The data has shown that a number of students admitted having improved a variety of non-linguistic competences, being unaware of that during the language learning process. This might indicate that language learning focuses on human interaction, understanding and explaining, solving problems together, agreeing and disagreeing, trying to understand another point of view and many other cognitive and emotional skills, which make an important part of non-linguistic competences. Therefore, it would be possible to claim that with the use of special methodologies, specifically aiming to help learners’ improve both linguistic and non-linguistic skills, new opportunities for language learning could be created.

Current research has revealed that mediated language teaching has a great potential to help develop the non-linguistic competences of language learners and can become a useful tool of learning a foreign language and improving personal, intrapersonal, social, cognitive or emotional non-linguistic competences. It is important to have in mind that in order to enhance students’ social wellbeing, the content of mediated language lessons should include the topics, connected with accepted manners, behaviour, traditions, laws and rules in one’s national culture and a host country. To create the space for improving learners’ emotional wellbeing, mediation activities in the language classroom should focus on recognising others’ emotions correctly and acting upon them appropriately, solving misunderstandings and being positive.

The results of the final survey have shown that Tandem language learning, although not being an innovation in language didactics, can be used innovatively to improve learners’ non-linguistic skills. According to the research participants, such a form of learning might be the means of overcoming emotional and social barriers in a host country. This attitude has been proved by the respondents’ acknowledgement of their better emotional and social well-being at the end of Tandem language learning. Apart from recognising that learning the basics of the target language was really useful, Tandem learners had emphasised the positivity of support, learning methods, the environment and developing relationships. The resarch has proved that such non-linguistic competences, as *empathy, mediation skills, intercultural competence, ability to summarise information* and *tolerance* have been developed during Tandem language

learning. Notwithstanding the relatively limited sample, this paper offers insights into the change of the language didactics, the treatment of language learners as social agents, the shift of language teaching content from hypothetical and far from real-life situations in textbooks to meaningful tasks, focusing on the development of real-life skills. Further research could be conducted on the assessment of non-linguistic competences and their impact on the level of students' linguistic skills, students' motivation to learn the target language or even teachers' satisfaction with the language teaching process. The research results can only confirm the above-mentioned hypothesis that language teaching is much more than developing the linguistic competence of the target language; therefore, the study might be beneficial for language policy makers and language teachers, encouraging them to use this great potential of innovative content and form.

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MIGRATION PROCESSES AND PUBLIC SECURITY: THE CASE OF LITHUANIA

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Abstract*. Migration and security (human security) is not a new idea but it has remarkable revival in last decade. In the policy world, human rights and human security are the two frameworks that most reinforce each other. The human security approach shares with human rights concerns for protecting freedom, enhancing opportunities, but additionally puts focus on protection from critical and pervasive threats.*

However, sometimes the situation becomes ambiguous and states question whether the right to migrate (in the face of large, unmanageable, irregular flows) weakens the public (human) security legal framework.
The article provides an overview of the migration situation in Lithuania in the last decade, using statistical data, and assesses the challenges of decision-making in relation to the actors involved in migration processes.

Keywords: *migration, migration processes, public security.*

Introduction

Migration has existed since prehistoric times. It is not a phenomenon exclusive to modern societies. An analysis of current migration trends suggests that the issue has grown over the last decade and will continue to do so for the foreseeable future. This means that more and more people will decide to change their place of residence, and each country will become a transit or final destination country, leading to the adoption of increasingly stringent rules by countries to regulate migration flows.

And this is natural, as national security is a state of protection of people, society and the state against internal and external threats, which allows state authorities to ensure a constitutional democratic order, a standard of living in line with human rights and freedoms and the requirements of its social development, the sovereignty of the state, its territorial integrity and its sustainable development, defence and security (Šlapkauskas, 2018). The control of national borders is considered an essential aspect of a sovereign state. The main task of the article is to show, through a content analysis approach and the case of Lithuania, that migration issues remain important in today's context and require constant attention and adaptation of common measures to manage migration flows.

Migration flows in Europe in last decade

Over the last ten years, Europe has faced a number of migration crises. Migration from the Middle East, which started in 2013. In 2015, hundreds of thousands of people fleeing war flooded into Europe, with more than 1.3 million seeking asylum in the EU. Refugees from EU asylum seekers have reached the EU (see Figure 1).

2.3 million immigrants entered the EU from non-EU countries in 2021, an increase of almost 18% compared with 2020. 1.4 million people previously residing in one EU Member State migrated to another Member State, an increase of almost 17% compared with 2020. 23.8 million people (5.3%) of the 446.7 million people living in the EU on 1 January 2022 were non-

EU citizens. In 2021, EU Member States granted citizenship to 827 300 persons having their usual residence on the EU territory, an increase of around 14% compared with 2020.

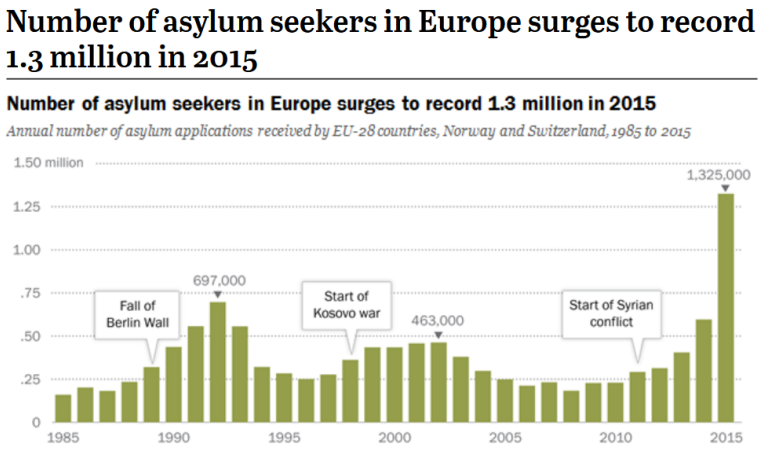

Figure 1. Asylum seekers in Europe
Sourse: Pew Research Center

According to Frontex, the overall scale of irregular migration at the 6000-kilometre-long land border between Belarus, Moldova, Ukraine, the Russian Federation and the eastern EU Member States - Estonia, Finland, Hungary, Latvia, Lithuania, Norway, Poland, Slovakia and Romania – has been much smaller than on other migratory routes (Frontex, 2023). However, this path to Europe still presents significant challenges for border control and in 2021 experienced unprecedented migratory pressure. At the Eastern land borders, a record of 8184 illegal border-crossings were detected in 2021, a more than tenfold increase in comparison to 2020. This significant increase in detections can be traced to a migrant crisis artificially created by the Lukashenko regime: there was intense migratory pressure with continuously attempted border crossings in all three EU Member States neighbouring Belarus, prompting them to declare a state of emergency.

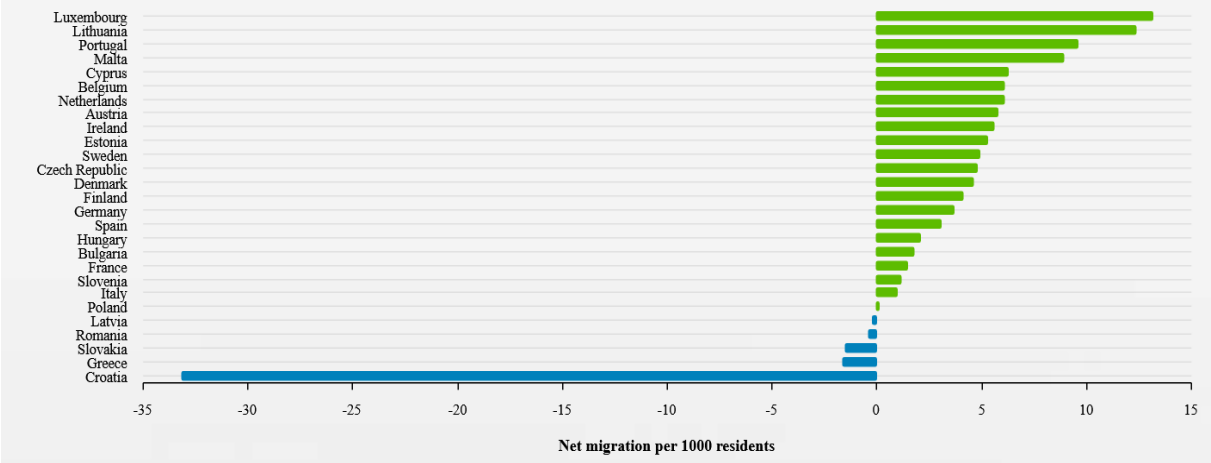

Figure 2. Lithuania in EU contects
Sourse: European Migration Network (EMN)

The number of migrants seeking to reach Europe through this route peaked in the second half of the year (Frontex, 2023).

Lithuania, as a country bordering the EU's eastern periphery, receives 12.4 thousand migrants per 1000 inhabitants (see Figure 2).

Migration crisis and its regulations in Lithuania

First of all, it is important to note that access to the Lithuania, as well as any other EU country, can be accessed through the existing border checkpoints. External borders may be crossed only at border crossing points and during the fixed opening hours. Persons wishing to enter the country must meet the following the mandatory conditions (Schengen Code, 2016).

Safety in the Schengen area is guaranteed via the enhanced control of external borders, work in close cooperation among the border guard services, police forces, and legal institutions of all Schengen Member States the implementation of a common Schengen visa policy and the functioning of the Schengen Information System. For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals have to be in possession of a valid travel document entitling the holder to cross the border; to be in possession in of a valid visa (Council Regulation (EC) No 539/2001); they justify the purpose and conditions of the intended stay; to be not persons for whom an alert has been issued in the SIS for the purposes of refusing entry; not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds (Schengen Code, 2016).

More than 21 thousand foreigners came to Lithuania in last year. In 2022, 189 411 foreigners lived in Lithuania. Most of them are foreigners with a temporary residence permit in Lithuania (see Figure 3). Their share in the total population of Lithuania continues to increase and accounts for 3,58%. Compared to the same period last year, the number of foreigners increased by almost 60%. The majority of foreign immigrants are citizens of Ukraine and Belarus (about 31 percent of all immigrants). The majority of EU citizens are coming from Latvia, Italy or Germany.

Figure 3. Lithuania in EU contects
Sourse: European Migration Network (EMN)

With the launch of hybrid attacks in 2021, not only Belarusian citizens, but also citizens of countries as- Iraq, Syria, Iran, etc. - are flocking to Lithuania. Although these numbers are nowhere near the previous crisis in 2015, migration flows have become a significant challenge for Lithuania, Latvia and Poland. Lithuania has also mobilised additional assistance to control migration flows and ensure national security. In the summer of 2021, Frontex deployed teams of European standing corps to Lithuania and Latvia to support the countries with responding to the increased migratory pressure (Frontex, 2022).

Officers of State Border Guard Service (further – SBGS) prevented 1 197 irregular migrants from entering Lithuania from Belarus at unauthorised locations. In 2022, Lithuanian border guards turned back 11 211 such persons trying to enter Lithuania. From 3 August 2021, when the right to turn away irregular migrants attempting to cross the border from Belarus at unauthorised locations was granted to SBGS officers, until 31 December 2021, 8 106 persons were refused entry into Lithuania. In total, since the beginning of the migration crisis caused by Belarus, Lithuanian border guards have prevented 20,514 migrants from entering the country illegally (SBGS, 2023).

The irregular migration crisis in 2021 saw a record-breaking change in the number of foreigners applying for asylum in Lithuania, with a total of 4 259 applications in 2021, which is more than 13 times the number in 2020. However, only one in ten asylum applicants was granted asylum - 451 foreigners, most of them from Afghanistan and Belarus (EMN, 2023).

Lithuania's policy of turning away migrants has stemmed the flow of irregular migrants, but statistics show that over 4,000 irregular migrants have still entered Lithuania, the vast majority of whom have applied for asylum. This is the highest number of asylum seekers since the introduction of the asylum institution in Lithuania (EMN, 2023).

As in previous years, the number of arrivals exceeded the number of departures. In 2021, the share of foreigners living in Lithuania in the total population increased to 3.57%. The largest groups of foreigners living in Lithuania were Ukrainian, Belarusian and Russian citizens.

The hybrid attack mentioned above has also influenced changes in migration management in our country. As an example, after the hybrid attack from Belarus, the introduction of a state of emergency, and later a state of emergency, led to the adoption of a decree of the Government of the Republic of Lithuania, on the basis of which SBGS officers, as representatives of the executive power, are allowed to turn away illegal migrants. This decision has once again sparked a lot of debate in the public sphere, and it is hoped that this provision will also be introduced at legislative level in the event of a state of emergency, state of emergency or state of war.

In the context of international law, states have the right to restrict certain human rights in exceptional cases in appropriate circumstances; however, certain fundamental principles must be upheld, such as: not turning away individuals in large groups, not refusing an asylum application, not deporting an individual where his or her life or health is at risk. In other words, international and European Union law does not leave absolute discretion at national level. The question is how to further develop the legal framework (Dawson, 2021).

Since the Court of Justice of the European Union (CJEU) and the Lithuanian court referring to it have ruled against the State in relation to the treatment of irregular migrants, the Ministry of the Interior, being responsible for the formulation, organisation and coordination of the State's policy in the field of migration, as well as the implementation of the control of the policy, is assessing whether to change the legal acts (Svahn, 2022).

The analysis and assessment of what changes should be made to the national legislation in order to ensure a fair balance between the protection of human rights and the national security interest of the State is currently underway.

At the end of June 2022, the CJEU ruled that Lithuanian law, which does not allow irregular migrants to apply for asylum and allows them to be detained simply for entering the country illegally, is contrary to European directives. The Court stressed that the directive on granting and withdrawing international protection prohibits Member States from applying legal rules which, even after the introduction of an emergency or a state of emergency in an EU country, "effectively deprive third-country nationals unlawfully present in the EU country of the possibility of having access to the procedure for examining an application for international protection on the territory of that Member State" (Svahn, 2022).

As the Court said, in order to justify detention, the Member State in which the illegally staying asylum seeker applies for international protection "must, in principle, prove that, in the light of the particular circumstances, he or she constitutes a threat to national security or to public policy" (Masiokaitė -Liubinienė, 2022).

On the basis of this interpretation, the Supreme Administrative Court of Lithuania (further - SACL) ruled in favour of the alien in his detention case, recognising his status as an asylum seeker and annulling the detention decision. However, there is no legal provision on the status to be granted to the alien after this judgment, and therefore, on the basis of the case referred to above, the State Border Guard Service applied for the detention of the irregular migrant pending the determination of his legal status in Lithuania. The Court of first instance granted the application in part, SACL ruled to adjourn the case and to refer the matter to the CJEU for a preliminary ruling on the regulation of international protection and other matters in the European Union Directives.

In the order of the SACL also referred to the reversal of the reversal of the prohibition of illegal migrants in Lithuania and their ability to apply for asylum.

According to the Court, an analysis of the existing legislation leads to the conclusion that third-country nationals in principle can only properly apply for asylum from abroad or near Lithuania border, and generally do not have that possibility if they enter the country illegally. Meanwhile, the CJEU states that in order to apply for international protection there should be no be subject to additional administrative formalities.

"Moreover, the the case-law of the Court of Justice shows that any third-country citizen or stateless person has the right to apply for international protection in the territory of a Member State, including its borders or transit zones, even even if he is unlawfully present in that territory. That right must be recognised, regardless of the likelihood that such an application will be granted', the Supreme Administrative Court said in the ruling.
(Svahn, 2022).

Home Affairs According to the Ministry of Interior, no such obstacles exist in Lithuania. We note that The legal regulation in force in the Republic of Lithuania, the established administrative and judicial practice does not exclude the possibility for foreigners – both to submit applications for the granting of asylum applications.

According to the data in this case, the foreigner has stated that he submitted a written request for asylum to an unidentified official of the SSAT, that he also requested asylum at the oral hearing before the court of first instance, and that he reiterated the same request during the oral hearing of the appeal.

He also submitted it in writing to the SBGS. This was forwarded to the Migration Department, but was returned on the grounds that the application was not submitted in accordance with the relevant legal provisions and was not submitted without delay. The Board of Judges considered that the alien should be considered to have lodged the application.

When deciding on the lawfulness of the migrant's detention, the Supreme Administrative Court noted that, under the current legislation, the mere fact that an applicant for international protection is unlawfully present in the territory of Lithuania cannot justify his/her detention. The Chamber also noted that although the alien was subjected to an alternative measure to detention - accommodation in the SSAT or in another place adapted for that purpose, with the right to move only within the territory of the place of accommodation, the person is separated from the rest of the population and deprived of the freedom of movement, and therefore he/she is considered to be a person who is subject to detention.

"The Extended Chamber of Judges, in accordance with the case-law of the Court of Justice referred to above, which requires the application of the provisions of European Union law and their full operation, finds that the mere fact of the alien's unlawful entry into the territory of the Republic of Lithuania does not in itself constitute a ground for his detention," reads the judgment.

The Ministry of the Interior, for its part, states that persons are detained or their freedom is restricted "on the grounds set out in the law - in the event of a threat to public order and public and state security, a possible risk of absconding, etc.".

However, according to the SACL, in order to justify the detention of an alien on the grounds of a threat to public or national security, it is necessary to indicate which specific conduct of the alien could give rise to such a threat.

The Extended Chamber of Judges held that the decision of the Court of First Instance did not properly assess the facts of the case in the context of the European Union and national legislation; therefore, the decision of the Court of First Instance is annulled and a new one is adopted - the application of the SSAT for the detention of the alien is rejected.

It is true that, on 15 July, a letter was received from the Alien Registration Centre in Kybartai stating that the migrant in question had left the Alien Registration Centre and that his whereabouts were unknown. The report seems to ask whether Lithuania was the person's country of destination, or whether Lithuania was just a transit country.

The Ministry of the Interior stated that it had no plans to abandon the measures taken against the migrants.

"As long as the geopolitical situation remains tense and the risk of illegal migration at the Lithuanian border with Belarus continues, Lithuania does not intend to abandon the measures of enhanced state border protection and prevention of illegal migration," it said.

The Ministry plans to submit a law to the Seimas in autumn to establish a policy to turn away irregular migrants.

This practice is currently applied by decision of the Minister of the Interior in her capacity as Head of Operations.

Lithuania started the reversal a year ago, in response to an influx of migrants at the border with Belarus and accusing the Minsk regime of organising it.

In total, more than 11 000 illegal migrants have been refused entry from Belarus to Lithuania since 3 August last year, when the Minister of the Interior authorised border guards to turn back illegal migrants by order.

Critics say that these actions can be seen as expulsions that violate international law. Officials claim that they are not pushing migrants out, but not letting them into Lithuanian territory.

The European Border and Coast Guard Agency (Frontex), although it has provided both human resources and technical assistance, and more specifically the agency's Fundamental Rights Office, has already criticised Lithuania for the collective rejection of migrants by border guards.

According to the Office, this practice is contrary to international law and the European Convention on Human Rights, and the possibility to apply for asylum at an official border checkpoint does not work in practice.

The question of how to further develop the legal framework in order to strike a balance between state security and human rights remains open. But are these EU measures taken effective? Are these measures adopted in a timely manner?

Conclusions

In Lithuania has witnessed an increase in migration flows in the last decade, especially in 2021. Largely driven by factors such as economic disparities, conflicts, and political instability in neighbouring regions. The inflow of migrants, including asylum seekers and irregular migrants, has placed pressure one the country's resources, infrastructure and social cohesion.

Lithuania has implemented various measures. There includes strengthening border control, enhancing interagency cooperation, improving the asylum process and providing support for integration initiatives.

International cooperation plays a vital role in addressing migration-related security challenges. Lithuania actively engages with regional and international organizations, sharing best practices, exchanging information and collaboration on border management and security initiatives.

The increased migration flows have generated concerns among some segments of the Lithuanian population regarding public security. These concerns encompass various aspects, including challenges in managing integration, and potential risks associated with criminal activities. It is crucial to examine these perceived security concerns critically and evaluate the extent to which they are based on empirical evidence.

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RISK ASSESSMENT DURING BORDER CHECKS

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Abstract. *As a complex mechanism, the activities of the State in all its various spheres of existence are carefully planned, both in the long and short term (Wagner, 2021). The activities of the State institutions that ensure national security and carry out the various executive functions entrusted to them are no exception. The role of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania (further – SBGS) in this context is of particular importance, since the officers of the Service - border guards - are the first to greet, or to see off, persons arriving in, or leaving, Lithuania. Despite this unique role, in addition to the other very important functions assigned to it, the SBGS also performs another function directly related to national security and the security of all of us: risk analysis and assessment. This work is carried out by the SBGS at several levels. The highest of them covers long-term monitoring, identification of risk factors, trends and their constant updating, while the lowest one is the risk assessment carried out by a specific officer, at a specific time, carrying out a border inspection, which starts the whole chain of risk assessment, which contains information on the risk factors observed and recorded by the officers during the course of their service.*

The aim of the article is to present the actions of the SBGS officers in the course of the risk assessment during the border inspection. The aim is mainly based on the provisions of the legislation and the recommendations offered by Frontex.

Keywords: *border checks, risk, threats.*

Introduction

A border checks include "an examination of persons, documents, vehicles and objects to determine the lawfulness of the movement and presence of persons, vehicles, objects, goods and goods across the state border and their presence on the border, in the territorial sea, in the territorial sea and in the border waters"(Act No. VII-1666,2017). Checks are carried out at border check posts, which may be located on roads, at international airports, at ship or river ports or at railway stations, but it is at international land border check posts that the largest migration flows are recorded and the most intensive risk assessment is carried out. It goes without saying that when crossing the state border we are obliged to present a travel document confirming our identity, and if we are travelling by car - the car documents as well, but not everybody is aware of the fact that State Border Guard Service of the Ministry of the Interior of the Republic of Lithuania officers are obliged to carry out a risk assessment and risk factor assessment of a person and a vehicle, among other things, in order to decide whether to allow a person to enter our country, whether a person poses a threat to national security, public order, or whether a person is attempting to enter Lithuania by illegal means (Land, Ricks & Ricks, 2014). The risk assessment process is provided for and guided by certain specialised internal regulations of the SBGS and the Common Integrated Risk Analysis Model "CIRAM 2.0" developed by the European Border and Coast Guard Agency (further -Frontex) and applied in

the Member States of the European Union (Neal, 2009). Although officers are familiar with the risk analysis model and procedures provided for in the legislation, each assessment case is individual, as they are dealing with different individuals from different countries, social backgrounds and with different intentions, which makes it necessary for border guards to be able to carry out risk analysis in different and often uncomfortable situations, applying the legal norms they are familiar with, in a flexible and adaptable manner. The question is therefore whether officers are strictly bound by the requirements of the legal norms when carrying out a risk assessment, or whether they are nevertheless of a recommendatory nature and the practical implementation of the risk assessment varies during border checks.

The concepts of risk and threat

The One of the main functions of the SBGS officers is to assess whether the person crossing the state border poses “they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States” (Schengen Border Code, 2016). In other words, to assess and prevent potential risks.

In a general, risk refers to some possible threat of a negative outcome, but risk and threat are not identical concepts.

Risk is defined in the Lithuanian dictionary as "a thing connected with a possible danger" (Dictionary of the Lithuanian Language, 2002). It also uses the synonym "hazard" to define the concept of threat. Obviously, this description of the above terms is acceptable in everyday language and does not fully reflect their content in the context of risk assessment in border control.

The definition of a threat in the Risk Analysis description (further - Description) is as follows: "A threat is an external factor that may adversely affect the security of the State border" (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No 4-615 of 30 December 2016). It can be safely stated that this definition is much broader and more complex than the one provided by the Lithuanian dictionary. The definition suggests that the concept of threat is seen in two ways. First of all, it is a factor which may have a negative impact on the security of the State border. Naturally, an act or process that may have a positive or neutral impact on border security is not considered a threat by the SBGS. Secondly, the factor must be external, i.e. originating not within the state but outside it and directed towards the Republic of Lithuania. The Description also establishes the concept of risk – “Risk is a combination of the likelihood and magnitude of the threat of a breach of the State border, the level of vulnerability of the State border, and the impact (consequences) of the breach” (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No 4-615 of 30 December 2016) . The fact that the definition states that the concept is a combination of several elements indicates that it is complex and requires special attention. First of all, it should be noted that threat, in the Description, becomes part of the concept of risk, which means that the concept of risk is broader and more encompassing than that of threat. Secondly, the concept of risk provides for a relationship between the likelihood of a threat and the scale of the threat, i.e. it is not only assessed whether some factor dangerous to the security of the state border is likely to occur, but it is also attempted to measure the extent to which it would occur. Thirdly, the notion of risk includes an assessment of the level of vulnerability of the border, e.g. in sections where there are fewer technical border surveillance measures, say cameras, the level of vulnerability of the border will be higher than in sections where there are more cameras, and this is important to assess. Finally, it should also be noted that the concept of risk in the Description also refers to

the impact of the violation, i.e. the assessment of the consequences for border security, national security, public order, or any other aspect of national life of the negative factor, and whether these consequences will be of a short-term or long-term nature. If the risk is confirmed and an adverse factor affecting the security of the State's borders occurs, the human and financial resources available to the State may have to be deployed in order to remedy the effects of the factor or to repair the damage. Such potential losses should also be considered in the risk assessment.

Frontex, with which the SBGS and border authorities of other EU Member States cooperate actively, also bases its activities on risk analysis. The Agency's official website identifies risk analysis as one of its main responsibilities: "Risk analysis is the starting point for all Frontex activities, from high level strategic decision-making to planning and implementation of operational activities. Frontex collects a wide range of data from Member States, EU bodies, its partner countries and organisations, as well as from open sources on the situation at and beyond Europe's borders. The data is analysed with the aim of creating a picture of the situation at the EU's external borders and the key factors influencing and driving it." The last sentence implies that the Agency's risk analysis is of the highest level, as it is the basis for the activities of the international institution (Wagner, 2021).

In the context of risk analysis, Frontex recommends the Common Integrated Risk Analysis Model (further - CIRAM 2.0). The aim of this model is to "establish a clear and transparent methodology for risk analysis which should serve as a benchmark for analytical activities, thus promoting harmonisation and the preconditions for efficient information exchange and cooperation in the field of border security" (Guidelines for Risk Analysis Units, 2013). "A threat is defined as a force or pressure acting on the external borders. It is to be characterised by its magnitude and likelihood"(Guidelines for Risk Analysis Units, 2013). There is a notable difference between the national and international levels of the concept. As Frontex is an agency of the European Union, responsible for the protection of the EU's external borders, a threat is not defined as a factor that threatens the security of a country's borders, but rather as a force that could affect the external borders of the European Union as a whole. The scale of the threat at national level is limited to a specific state, but in the context of a threat to the external borders of the European Union, the association is with a threat that is either very powerful, or one that involves a very wide range of actors (States), and which would be dealt with the help of other Member States. For example, the irregular migrant crisis in Lithuania, during which officials from various Frontex Member States were deployed to the Republic of Lithuania, humanitarian aid was provided because in the initial stages of the crisis Lithuania lacked the human resources to deal with the unusual phenomenon. Considering the threat to the security of the borders of a particular state, a localised factor is already imaginable, which the state is capable of dealing with on its own. The CIRAM 2.0 generic integrated risk analysis model also identifies the concept of risk, albeit through an international, European Union prism, and refers to it as "external border management risk". This concept is defined as "the magnitude and likelihood of a threat occurring at the external borders, given the measures in place at the borders and within the EU, which will impact on the EU internal security, the security of the external borders, on the optimal flow of regular passengers or which will have humanitarian consequences" (Guidelines for Risk Analysis Units, 2013). It can be seen that the concept is essentially similar to the one used in the SNS documents, but its content is broader, at the European Union level, referring to the security of the EU borders. This strong similarity is due to the fact that the legislation of the SBGS, which defines the risks, their analysis and the related processes, is based on the CIRAM 2.0 model developed by Frontex.

Thus, we can conclude that both national-institutional and European Union legislation define the concept of threat as a certain factor that may have a negative impact on the external borders of the state or the EU, while risk is understood as a complex concept, a combination of the concept of threat, its likelihood and scale, the possible violation of the state's or the EU's external borders, public security, public order, and the consequences of such a violation. At both national and international level, the concept of risk is broader than that of threat (Strachan-Morris, 2012; Tumalavičius & Greičius, 2017).

Levels of risk analysis and features of the risk analysis process

The risk assessment at border checks starts long before the person arrives at the border check post. This preliminary process of assessing potential risks is called risk analysis. "Risk analysis is a systematic assessment of the threat to the State border, the vulnerability of the State border and the impact (consequences) of a breach" (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No 4-615 of 30 December 2016). Obviously, the concept of risk analysis is very similar in content to the concept of risk, but the key difference in the definition is that risk analysis is a process - a long-term, consistent, analytical process of assessing threats, which produces results - a certain number of conclusions that are then used by officials. In the CIRAM 2.0 model published by Frontex, we find two definitions. One of them describes the concept of analysis as such: "analysis identifies, describes and assesses a risk, threat, vulnerability or impact" and the other one is intended to explain the concept of risk analysis in more concrete terms: "[...] a systematic study of the components of risk, with the objective of obtaining information and providing it to decision makers" (Guidelines for Risk Analysis Units, 2013). The decision-makers in this case are border guards in the course of their direct duties, carrying out border checks and assessing risks in real time.

In order for the findings of the risk analysis to reach border control officials and be used as a basis for their risk assessment, there must be a continuous process of risk analysis, which is, of course, regulated by law, as are all processes in a state governed by law. In particular, it is necessary to talk about the levels of risk analysis. "Risk analysis is carried out at three levels: strategic, operational and tactical. Risk analysis can also be tailored to the specific case as required" (Guidelines for Risk Analysis Units, 2013).

"Strategic risk analysis analyses the most strategically relevant information. It identifies potential changes and suggests courses of action. All the information is systematised and a strategic picture (relevant phenomena and key factors) is developed. The strategic risk analysis collects statistics and produces a trend and qualitative description. The results of the Frontex risk analysis are used. The strategic risk analysis shall be carried out at the headquarters of the SBGS" (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No 4-615 of 30 December 2016). Risk analysis at the strategic level does not only focus on the risks and threats prevailing in the Republic of Lithuania, but also considers the trends observed in the international arena, which the SBGS learns about by evaluating the results of the risk analysis provided by Frontex.

"Operational risk analysis is carried out at all levels of administration of the SBGS units - central, territorial and local." This is the only level of risk analysis that is carried out at both the central SBGS and at the frontier districts. "The task of operational risk analysis is to prepare qualitative and quantitative analyses of the operational conditions, objects and results of its activities". As stipulated in the Description, this level of risk analysis analyses not only the conditions under which officers work, the risks and threats that are observed during their service

or the objects that pose them, but also the performance and results of the activities of the SBGS and its officers. Thus, it can be said that at this level, the Service assesses how it is managing to deal with the identified risks and threats, and that, once assessed, "special attention must be paid to the elimination of deficiencies" (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No 4-615 of 30 December 2016). Although all three levels of risk analysis are interlinked in one way or another, operational risk analysis has a direct link to tactical risk analysis, as "operational risk analysis is used to establish risk profiles and descriptions of criminal methods for the tactical level of risk analysis."

"Tactical risk analysis is a real-time assessment of the situation in relation to the tactical situation. [...] it is an assessment of the persons and vehicles to be checked based on prior information on specific persons, risk profiles, warnings of possible offences or descriptions of criminal methods." (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No 4-615 of 30 December 2016). As tactical risk analysis is carried out in real time during border checks, it is "implemented at the local level of the administration of the Service", i.e. at the border posts within whose area of operation the border guards carry out their direct duties of checking persons and vehicles, mostly at border checkpoints and less frequently during patrols. Although the local level of administration includes the smallest structural units of the SBGS, i.e. the border crossing points, the risk analysis carried out here is of particular importance, as the results of the risk analysis are directly communicated to the officers. More details on the risk analysis at the level of the BCP and the persons responsible for it are provided in the Regulation on Border Control, which describes the assessment of the situation in the area of operation of the BCP. "Situation assessment in the area of operation of the BCP means the risk analysis of the BCP commander based on the current methodology of the CIRAM and the vulnerability assessment in accordance with Article 13 of the European Border and Coast Guard Regulation, and other available information-based activities, assessing the situation in the area of operation of the BCP, forecasting possible breaches of the State border crossing procedure, and planning actions to prevent and combat such breaches, with a view to taking the necessary decisions for the management of the force and coordination of actions to ensure border control and the apprehension of lawbreakers" (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No. 4-358 of 30 July 2019).

It should be noted that the levels of risk analysis form a chain of information exchange relevant to the performance of the Service: the results of the strategic risk analysis carried out in the central office are sent to the border guard posts, which add the results of the operational risk analysis carried out at the level of the border guard posts to the findings of the operational risk analysis carried out at the level of the border guard posts, which are guided by the strategic and the operational risk analysis and carry out the risk analysis at the local level in real time. Of course, this information chain is not one-way. In order to carry out operational risk analysis, it is important to assess the tactical risk analysis carried out by the commanders of the border crossing points at the local administrative level of the service, and to take into account the situation assessments prepared by them in the areas of operation of the crossing points. However, in order to be able to talk about the risk analysis and its conclusions at the level of the entire Service, it is necessary to look at the risk analysis carried out by the territorial units at the level of the Service's administration, i.e. the border formations, which summarises the risk analysis prepared by the commanders of the border outposts within their area of operation, and their assessments of the situation in the areas of operation of the outposts. Thus, although the conduct of risk analysis at different levels in different levels of the administration of the service may seem confusing, in essence, risk analysis is a continuous, targeted process of

collecting, processing, structuring and sharing information at the level of the entire SBGS, which can assist officers in the performance of their direct duties.

Having discussed the levels of risk analysis and at which levels of the administration of the service they are implemented, it is important to analyse the risk analysis process itself and understand its procedures. The process consists of a number of steps that are necessary for the proper preparation of a risk analysis. Paragraph 10 of the description provides that: 'Risk analysis is a cyclical process consisting of the following components, sequentially arranged on a timeline: (see Figure 1).

Figure 1. Process of risk analysis
Source: Guidelines for Risk Analysis Units, 2013

This model of the risk analysis process (see Figure 1) is adapted from the flowchart in Frontex Agency's CIRAM 2.0 model, which is referred to in the document as the "Intelligence Cycle".

The assignment of a task, in this case, means nothing else than the assignment of a task to carry out a risk analysis. Intelligence gathering is the gathering of knowledge about recurring suspicious factors, threats, risks and possible irregularities observed during the course of the service. Information assessment is the process of verifying the accuracy, relevance and validity of the information collected. Information extraction refers to the result of the step in the risk analysis process discussed above, i.e. the extracted information is the information that is selected after the information assessment. Information analysis is the study of selected relevant information on threats risks, possible infringements, etc., which identifies the possible causes of the threats, risks, groups of persons or vehicles that may pose them, or other relevant features related to the above mentioned negative factors that may help the officer to identify the sources of risk. The compilation of a certificate is the compilation of the results of the risk analysis, the conclusions drawn and the recommendations made into a document which is disseminated (dissemination of the certificate) at the service, territorial or local level, depending on the level at which the risk analysis was carried out. Finally, the results of the risk analysis are evaluated, i.e. how effectively the analysis was carried out, whether it was successful, and whether its findings and the guidance it provided helped officials to identify and prevent risks and threats,

and to identify irregularities or offenders. It should be noted that the risk analysis process can also be shorter, i.e. simplified and carried out on the basis of professional necessity.

Risk assessment during border checks "[...] allows the selection of the objects to be checked in greater detail from among the many objects crossing the border, according to the risk characteristics of those objects. The main focus and effort of the officers is on inspecting precisely those objects of suspicion. This allows to ensure the quality/efficiency of border inspections with less effort and, if necessary, the redeployment of available forces and means" (Order of the Head of the State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania No 4-615 of 30 December 2016). The number of objects crossing the state border is enormous and a thorough, in-depth inspection of each one of them, without any justification, would be superfluous, as it would make the work of the officials extremely difficult, slow down the pace of border checks, and would most likely lead to dissatisfaction on the part of the border crossers. Therefore, officers are able to identify from this large flow of objects, based on the results of the risk analysis - risk profiles, lists of risks, and knowledge of the risk characteristics - those that meet the above-mentioned profiles or characteristics, are likely to pose a risk and should be subjected to a thorough screening. However, it should be noted that risk assessment is not only about identifying and scrutinising objects that may pose a risk, but also about managing the forces and human resources that enable the most efficient performance of officials. "The creative use of materials by the Service officer can assess risk indicators and select specific persons, their possessions or the vehicles they drive for more detailed screening, thus increasing the efficiency of border checks and facilitating and speeding up the passage of honest travellers across the state border" The discretion of the official: "[…] the aim is to encourage the initiative of the officials themselves to select, without prejudice to the requirements of the legislation, persons crossing the state border, their belongings and the vehicles they drive for a more detailed check to detect possible offences." It should be stressed that all information must be obtained by lawful means. "Risk assessment" means the process by which an estimated risk is assessed against risk criteria in order to determine the significance of the risk. Risk assessment is necessary to make a decision on risk control." It can be argued that "calculated risk" in this definition refers to the risk analysis already carried out and its result, while "risk control decision" corresponds to the decision taken by an official to carry out a thorough and detailed examination of an object crossing the State border which is indicative of risk.

Although risk assessment at border checks is flexible, i.e. an officer can use the Guidelines in a very creative way and build his/her own risk assessment system on the basis of the Guidelines, there are certain peculiarities that are always present. These features are set out in point 6 of the Recommendations. "6.1. the risk characteristics may differ from one border inspection post to another or from one border inspection post to another" . Naturally, the risk characteristics will vary from one border crossing point to another. It is important to be able to react quickly to an unseen, unfamiliar threat. "6.3. the time available for an officer to communicate with a person crossing the border or other person in order to identify signs of risk is limited". This feature is linked to the objective, mentioned earlier in the Recommendations, of ensuring the smooth and swift movement of objects crossing the border in good faith. The officer cannot spend a disproportionate amount of time on selective objects, as this slows down the pace of movement at the border and distracts the officer from his/her immediate work. The officer should assess the risks in the shortest possible time, which is the purpose of the risk analysis.

Thus, risk assessment during border checks can be described as essentially the application of the results of the risk analysis known to the officer, based on his/her experience, the

information managed and various methodological materials, in order to identify the signs of risk and to decide whether the border crossing needs to be checked more closely. In addition to identifying the objects that correspond to the risk characteristics, the risk assessment also contributes to the efficient organisation of the service and the allocation of human and technical resources.

Conclusions

The concept of threat is a certain factor that may have a negative impact on the external borders of a country or the EU, and risk is understood as a complex concept, a combination of the concept of threat, its likelihood and magnitude, the possible violation of the country's or the EU's external borders, public security, public order, and the possible consequences of such violation.

Risk assessment during border checks is the application of the results of the risk analysis known to the officer on the basis of his/her service experience, managed information and various methodological materials, in order to identify the signs of risk and to take a decision on the need for a more comprehensive inspection of the border crossing, efficient organisation of the service, allocation of human and technical resources.

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STATE TERRORISM: LEGAL ASSESSMENTS OF THE CONCEPT

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Abstract. *This article will focus on a large-scale concept that is not visualized in international law, state terrorism. The phenomenon of terrorism is one of the oldest in human history. At the same time, the political contradictions that existed between the states prevented high-quality international legal qualification. The Rome Statute of the International Criminal Court did not include such a crime as "state terrorism". State terrorism is aimed at mass intimidation of the population. It is carried out through indiscriminate bombing of civilian targets, demonstrative killings and threats of physical violence, psychological impact in the information environment. In case of aggressive war of Russia against Ukraine, it serves an instrument of implementing the genocide of the Ukrainian people. These acts carried out by the Russian army units during the invasion of Ukraine starting from 2014. Russia should be recognized as a terrorist state and its high commanders as international terrorists.*

Keywords: *state terrorism; international responsibility of Russia; terrorist state; genocide; Ukraine.*

Introduction

September 11, 2001 World Trade Center bombings shook the world. The terrorists of the Islamist extreme group al Qaeda hijacked commercial aircrafts and sent them to the Twin Towers in New York City and crashed into the Pentagon in Arlington, Virginia. The Twin Towers were ruined. Almost 3,000 people were killed that time. News agencies wrote then that the world would never be the same as it was. And we, ordinary people, experienced a personal tragedy from the realization that the state – a bastion of strength and confidence – barely protected its state institutions. It seemed to us that nothing worse could happen. And could it get any worse?

On February 24, 2022 Russian troops invaded Ukraine under invented pretexts “to protect the people of the Donbas separatist region in Ukraine” (Putin Orders “Special Military Operation” for Ukraine). In 72 hours, they expected to destroy Ukrainian leadership and demoralize Ukrainian population. Demonstrating cruelty toward peaceful Ukrainians, deliberate and systematic killings of civilians, launching rocket attacks on infrastructural civilian objects, Russian troops violated every principle of international law and the laws and customs of war that we know of.

Russia began actively carrying out diverse acts of a terrorist orientation from February 20, 2014 – the beginning of Russia's aggression against Ukraine. Intimidation of the population of the sovereign part of Ukraine – the Autonomous Republic of Crimea, and later the Donetsk and Luhansk Regions, direct threats and the destruction of it by the law enforcement agencies of Russia should be qualified as state terrorism.

Further actions of the Russian state became more and more cruel, indiscriminate and daring. April 17, 2014 the Russian anti-aircraft missile system “Buk” shot down the Boeing 777 civil aviation aircraft of the Malaysian Airlines, which was following the route from Amsterdam to Kuala Lumpur, as a result of which 283 passengers and 15 crew members perished.

Terrorist acts against Ukrainians committed on the territory of Ukraine are only a part of Russia's large-scale terrorist strategy. As noted in the Statement of the Saeima of the Republic of Latvia dated August 11, 2022: "Russia has for many years supported and financed terrorist regimes and organisations, being the largest arms supplier to the Assad regime in Syria, and has carried out terrorist attacks in sovereign countries, including the poisoning of the Skripal family in the territory of the United Kingdom…" (Saeima, 2022).

In the conditions of an undeclared war with Ukraine, russian forces kill every day civilian population of Ukraine: deliberate attack on the theatre in Mariupol, the missile strikes on a residential area in Odesa Region, the attack on a shopping mall in Kremenchuk, missile strike on the city center of Vinnitsa, constant shelling of civilian infrastructure in Kharkiv, Mykolaiv, Kryvyi Rig, Dnipro and other big cities and small towns. All these actions testify to a deliberate, large-scale policy of intimidation of the inhabitants of Ukraine, which serves a means of implementing genocide of the Ukrainian people.

For an objective qualification of the acts of Russia according to international law, it is necessary to focus our research on the group of questions. What is the essence of the terrorist strategy? Are there international legal norms fixing the qualification features of state terrorism? How do national laws of the states qualify "state terrorism"? What is a practical reason of formulating and interpreting the notion "state terrorism"?

Terrorism and state terrorism: the essence of the terrorist strategy

There are many studies written about how terrorists operate. At the same time, scientists are still arguing about their motives. For our study, an understanding of terrorists' strategy is necessary in the context of qualifying the characteristics of state terrorism, which, in our view, constitutes an international crime. Moreover, we believe that the international community is ready to criminalize state terrorism, relying on the international legal instruments developed to combat terrorism as such and considering the expanding coalition against a terrorist state like Russia.

For the sake of a coherent and logical analysis, we will draw our attention on the research of scholars who best strengthen the logic of our arguments, as well as who bring new insights into the understanding of the theoretical aspects of the fight against terrorism.

Beginning her study, Cynthia C. Combs suggested to start from the broad notion, stating that the terrorism could be defined "*a synthesis of war and theater, a dramatization of the most proscribed kind of violence – that which is deliberately perpetrated on civilian noncombatant victims – played before an audience in the hope of creating a mood of fear, for political purposes*" (Combs, 2022). Here one can see its crucial components: involves an act of violence; state of fear; visualisation; civilian noncombatant victims; political motives.

Obviously, the thinking activity of the personality of the criminal involved in terrorist activity is characterized by mental deviations. Hence the acceptance and even desire for dangerous consequences.

But the description of the motives of the terrorist's actions is not only related to his personal mental disorders. A terrorist believes that such an activity will lead to a change in the political situation.

If we consider terrorism in its historical perspective, it turns out that the political motives have changed, but the strategy has not changed.

Does it have its roots in the 1st century and is it related to the religious and political struggle for Jewish liberation (Sicarii Zealots)? (Horsley, 1979). Or is it about the 11th century and the religious paramilitary formation based in Iran and Syria (Al-Hashshashin), which

carried out politically motivated murders during the Abbasid period? (Daryoush, 2019). Or is it a later phenomenon associated with the Reign of Terror of the Jacobins in France in the 18th century? Or is it even more recent, related to the terrorist activities of the "Narodnaya Volya" ("People's Will") in the 19th century in the Tsarist Russia and the assassination of Tsar Alexander 2? All of the perpetrators were united by the intent – to intimidate, and to do so in the most dangerous and "screaming" form.

What differs, perhaps, is the systematic terror policy of V. Lenin and the USSR toward their own citizens. But it differs in scale and an even greater degree of cynicism. The key feature – the desire to intimidate – remains the same.

Scientists have come to a similar conclusion before. American political scientist Martha Crenshaw and British military expert John Pimlott in 1997 described the phenomenon of terrorism in detail in their work "International Encyclopedia of Terrorism" (Crenshaw, Pimlott, 1997), pointing out the long and varied history of this phenomenon, showing the psychology of the terrorist, giving a chronology of events, naming terrorist groups and offering a detailed bibliography for further research. This work leaves no blank spots in understanding the essence of terrorist activity, where the main motive is intimidation as a means of achieving political goals. Whatever the historical period, whatever the methods of indiscriminate damage to human life, health and private property, the bombing of civilians, concentration camps, hostage-taking, punishment without trial, through terrorism the state authorities and criminal groups tried to achieve a radical change in the political situation.

The work of Martha Crenshaw and John Pimlott is noteworthy in that, it contains a definition that 81 percent of researchers agree with and indicates an established view of "terrorism" in doctrine: *"Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought"* (Crenshaw, 1997).

In addition to a comprehensive definition, the authors conclude that terrorism, as a specific policy of the French Revolution, looks different today, that the distinction between political and criminal terrorism depends on the angle of view (Crenshaw, 1997). In this context, we must make an observation: *Ex injuria jus non oritur.* A wrongful act cannot be assessed as a legal act. This Roman maxim must be interpreted generically, bearing in mind the criminality of the very intent, the terrorist strategy. When we are talking about the violation of international law, when the population is indiscriminately killed, its property destroyed, the question of the "viewpoint of the observer" cannot arise.

Reflecting on the nature of terrorist strategy, Zoi Aliozi argument is interesting.

After pointing out the fallacy of the question of the essence of terrorism, she suggested looking at the origin and context of the concept, where "state terrorism" "is the mother phenomenon and root of all forms of terrorism" (Aliozi, 2015). Having made a qualitative linguistic analysis of the term in Greek, Z. Aliozi concluded that "terrorism" as a political system stood on a par with such types as democracy, aristocracy and autocracy (Aliozi, 2015). A good illustration for understanding the author's logic is to point out that the suffix *kratos*, as described by Cornelius Castoriadis, should be translated as "raw violence" (Aliozi, 2015). It

turns out that even the most progressive political system – democracy – literally translates as "brute violence of the people". As for state terrorism, according to Z. Aliozi, it is a criminal political system (Aliozi, 2015), where "state terrorism takes the form of foreign policy, shaped by the presence and use of weapons of mass destruction" (Aliozi, 2015). And this conclusion is as succinct and accessible as possible to indicate the essence of the term, which we study in relation to its modern content.

Based on the authors' inferences, the following conclusions must be drawn regarding the essence of the terrorist strategy.

State terrorism can be seen as both a policy and a method. Politics presupposes the existence of a strategy for state behaviour, described in a political doctrine. This strategy may be clearly described in an official document, such as a foreign policy strategy, or it may contain hidden goals and be presented through the media. State terrorism as a method is a tool for implementing a criminal policy of the state, such as a policy of genocide, as in the case of Russia in Ukraine.

State terrorism: absence of workable legal qualification in international law?

The discussion of the qualifying "terrorism" in international law is one of the oldest. The codification work began with the Romanian delegation's request to the League of Nations in 1926 to consider drafting a "convention to render terrorism universally punishable" (Saul, 2006). The first working definition of "terrorism" was considered as a part of the work of International Conferences for the Unification of Criminal Law between 1930 and 1935. Such a formulation was considered: *"The intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas will be punished"* (Saul, 2005).

As we can see, the cause for such an act was expressing or executing political or social ideas. Such a definition described the phenomenon of terrorism broadly enough, but reflected little of the essence of "state terrorism". On the one hand, if one assesses the motivation of the states participating in the Conferences, it is clear that states were not prepared to criminalize the acts of states that practiced terrorism, such as the USSR. On the other hand, states did not set out to address the elements of international crimes of states at these conferences. They were working under the conventional crimes.

The definition of "terrorism" as an international crime was worked on within the framework of the League of Nations, between 1934 and 1937. It was prompted by the need to protect the first persons of states or persons representing them. The resulting Convention on the Prevention and Punishment of Terrorism (*Convention for the Prevention and Punishment of Terrorism, 1937)*, adopted in 1937 and signed by 24-member states of the League of Nations, affirmed *"the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State"* (art. 1 (1)). Art. 1 (2) contained a provision stating that *"the expression "acts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public"* (*Convention for the Prevention and Punishment of Terrorism, 1937).* Thus, the emphasis was on the phrase "criminal acts," and the objective side covered "the creation of a state of fear, horror". The perpetrator's intent involved exposure to "particular persons, or a group of persons or the general public" (*Convention for the Prevention and Punishment of Terrorism, 1937).* At the same time, the context of Art. 2 clearly established the focus of such crimes: *"Heads of States, persons exercising the prerogatives of the head of the*

State, their hereditary or designated successors". Potential victims of terrorism were seen as an instrument of influence on the state, and the state was associated with its first persons or persons representing it in the international arena.

Over time, the understanding of the object and objective aspect of terrorism has been refined. The question of the relationship between the concepts of "terrorist" and "freedom fighter" emerged, when developing countries in the UN required "to exclude from the definition of terrorism the acts or transactions of national liberation movements…" (Cassese, 2004).

If we turn to the further history of the formation of the concept of "terrorism" in international law, it is necessary to agree with the argument of A. Cassese. He argued the position that the formed concept of terrorism exists (Cassese, 2004). And one of the most convincing arguments, in our opinion, is the fact of the existence of an international treaty, the provisions of which prohibit terrorism. What was really missing was "*agreement on the exception*" (Cassese, 2004). Speaking of the Art. 33 (1) of the Fourth Geneva Convention of 1949, Art. 4 (2) (d) of the Second Additional Protocol of 1977 to the Geneva Conventions, Art. 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), A. Cassese indicates that the draftsmen of these documents had "*a fairly clear idea of what they were prohibiting*" (Cassese, 2004). That means that the authors of these international legal documents *"deliberately or unwittingly were referring to a general notion underlying treaty law and laid down in customary rules"* (Cassese, 2004).

Later, conventions were adopted to regulate liability for aircraft hijacking, crimes against civil aviation, hostage taking, and the financial system of the state. These conventions segmented the methods used by terrorists to commit their crimes and were aimed at improving national legislation.

Even later, the idea of "terrorism" as a concept was specified and described in detail in the International Convention for the Suppression of the Financing of Terrorism 1999, where for the purpose of a comprehensive and complete description of the qualifying features, the authors of the document referred to nine conventions that affect a certain aspect and gave a voluminous description of the phenomenon of terrorism as such (Art. 2 (1) b) (Cassese, 2004).

But is there a clear vision for states regarding the concept of "state terrorism"?

State terrorism is a voluminous concept. In the author's 1998 dissertation on "Political and Legal Aspects of International Terrorism," I classified terrorism and categorized it as a type of political terrorism, such as: "1) state terrorism as an international crime affecting the interests of one or more foreign states; 2) state terrorism as an international crime against its own citizens" (Пунга, 1998).

The direct object of state terrorism as an international crime was then identified, viz: "international peace and security; international stability and legality; ensuring the right of peoples to self-determination; the foundations of international cooperation; the human person, his rights and freedoms" (Пунга, 1998).

Today, in the context of Russia's war against Ukraine, it is obvious that state terrorism is not the main goal of criminals, but is an instrument of the execution of the gravest international crime, such as genocide. And if earlier, when analysing the acts of states that patronize terrorism, I wrote about its secrecy, now the spectrum of criminal acts begins with open threats to destroy the civilian population, infrastructure facilities, the Ukrainian people as a whole. In the broadest sense, *state terrorism is a tactic of organized violence by a state represented by its organs, built on economic pressure, psychological impact, political pressure, military invasion and aimed at eliminating politicians, developing and maintaining panic among the population in order to change the existing social order, overthrow the government, and destroy the state and its people.* As in the case of terrorism, terrorist states use the technique of intimidation.

Intimidation of the victim state's population can be carried out through murder, serious bodily injury, destruction of critical infrastructure, etc. That is, intimidation itself constitutes criminal acts.

Explosions in Ukrainian residential neighbourhoods, train stations and squares, murders and serious bodily injuries, intimidation of civilians through torture and mockery, must be qualified under Art. 2 of Convention on the Prevention and Punishment of the Crime of Genocide 1948 (Convention on the Prevention and Punishment of the Crime of Genocide) and under Art. 6 of the Rome Statute of the International Criminal Court 1998 (Rome Statute of the International Criminal Court). Here the intention of the terrorist state extended to the destruction of the Ukrainian people.

However, it is not only about genocide, i.e., extermination of an entire people but of actions of the state that harm the peaceful existence of a sovereign state, its political independence, the safety of its population and intimidate it, threaten its life and well-being. Such actions are considered by socio-political sciences as terrorist, and the policy of such a state as terrorism (Тимченко, Яцишин, 2020).

Addressing terrorism as collective penalties and likewise all measures of intimidation or of terrorism are prohibited by Art. 33 (I)[1] of the Convention (IV) relative to the Protection of Civilian Persons in Time of War in 1949 (Convention (IV) relative to the Protection of Civilian Persons in Time of War), and by the Art. 4 (2)(d) of the Second Additional Protocol of 1977 (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)). This norm is one of the postulates, the very logic of international humanitarian law.

Russia's actions in the form of intimidation of the Ukrainian civilian population should also be qualified as crimes against humanity, for in the essence of Art. 7 of the Rome Statute of the International Criminal Code they refer to “a widespread or systematic attack”, causing suffering, serious injury to body or to mental or physical health of the large number of people.

The quintessence of the concept of "state terrorism" can be well seen in the International Convention for the Suppression of the Financing of Terrorism 1999, the authors of which attempted to qualify “acts of terrorism in all its forms and manifestations”:

“Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act” (Article 2 (1) b International Convention for the Suppression of the Financing of Terrorism 1999).

This definition clearly shows such qualifying features as: 1) intention to cause death or serious bodily injury; 2) civilian population (or any other person not taking an active part in the hostilities) as an object (as an instrument of influence on decision-making body – government or an international organization), or a government or an international organization (which was forced to do something); 3the situation of armed conflict; 4) the purpose to intimidate a population, or a government or an international organization; 5) acts of intimidation or compelling to do or to abstain from doing any act.

The above-mentioned arguments show that in international law there is a clear vision of the essence of "state terrorism," the commission of which is due to military action and constitutes a crime under international law. At the same time, the authors of international legal instruments did not specify the word "state" (noun or adjective) when describing or specifying terrorism. This does not prevent us from understanding the real context of the international legal provisions. Obviously, *state terrorism is indiscriminate violence, realized in the form of a*

widespread or systematic attack, causing death or serious bodily injury to large numbers of people during hostilities.

Qualification of state terrorism by national law

States' counterterrorism laws have different pasts and contexts. One of the most settled is the U.S. legislation. It combines a variety of approaches and strategies, from creating "a strong and sophisticated counterterrorism enterprise" to "diplomacy" that will "to reduce the threat of large-scale terrorist attacks on the homeland," and will contribute to overcoming the «national security challenges, including strategic competition, cybersecurity threats». [1]

French anti-terrorist legislation has a rich history, dating back to the 19th century, when the state adopted exceptional provisions under wartime regulations, and focused today on combating Islamic radicalism (How the November 2015 attacks marked a turning point in French terror laws).

Since Russia's full-scale invasion of Ukraine, the counterterrorism laws received new development and a new setting. Never before the issue of international responsibility for state terrorism has been discussed on a large scale. And if previously states created lists of terrorist states very rarely and hardly ever a list of sanctions against them was formed (for example, the United States included Sudan, Iran, Syria, North Korea and Cuba in its list of terrorist states), now the issue of Russia's responsibility for committing large-scale terrorist attacks against civilians in Ukraine is subject to general discussion.

Ukraine belongs to the category of states that have not had a long experience in combating international terrorism. For some time, its legislation followed the logic of the development of international legal norms in this direction. The same way was followed, for example, by Italy, which anti-terrorist legislation began to develop after the terrorist acts of September 11, 2001 in New York.

Art. 1 of the 2003 Law of Ukraine "On Combating Terrorism" enshrines a whole range of notions defining the essence of terrorist activity (Закон України «Про боротьбу з тероризмом», 2003). Based on the provisions of this article, "a terrorist state is a state that openly, using its own armed forces, other armed groups, or covertly, using armed groups acting on behalf of and/or in the interests of such a state, commits terrorist acts, acts of international terrorism" (Закон України «Про боротьбу з тероризмом», 2003). The term "state terrorism" is not interpreted, but it is clear from the text that "*all forms and manifestations of terrorism"* (a term used in most international legal conventions and UN resolutions) are punishable.

The same article defines "international terrorism" including such elements as:

Objective

(1) commission of a crime – on a global or regional scale; violent acts (kidnapping, seizure, murder of innocent people or threat to their life and health, destruction or threat of destruction of important national economic facilities, life support systems, communications, use or threat of use of nuclear, chemical, biological and other weapons of mass destruction).

[1] To read more: National Strategy for Countering International Terrorism. National Security Council, June 2021. [Online]. Available at: https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf; Country Reports on Terrorism 2021. US Department of State. [Online]. Available at: https://www.state.gov/reports/country-reports-on-terrorism-2021 (Accessed: 20 April 2023)

The subjective side

(2) motives and intentions – "in order to achieve certain goals" (according to the text of the Law of Ukraine); in order to create an atmosphere of fear (according to international legal documents).

Based on these provisions, as well as on the logic of international legal conventions of an anti-terrorist nature, the provisions of the European conventions, a general formulation of "state terrorism" emerges, identical to the one that we presented in the previous paragraph.

National legislation formulates the motives in different ways. Thus, according to the decision of the Constitutional Court of Spain, this may be the "feeling of insecurity within the society" (Walter, 2017).

The Italian law, on the other hand, defines the terrorist's purpose as "eliminating the democratic order" (Walter, 2017).

At the beginning of May 2022, the Seimas of the Republic of Lithuania (Resolution on the recognition of the actions of the Russian Federation in Ukraine as genocide and the establishment of a Special International Criminal Tribunal to investigate the crime of Russian aggression, 2022) recognised Russia's war against Ukraine as genocide and "advocates the establishment of a Special International Criminal Tribunal (hereinafter referred to as the Special Tribunal) to investigate and assess the crime of russian aggression against sovereign Ukraine and to bring those responsible to justice, through the united efforts of the international community and on the basis of the precedents of history (Nuremberg, Tokyo, Sierra Leone and the other special tribunals)". The Resolution Nr. XIV-1070 of the Seimas of the Republic of Lithuania of 10 May 2022 specified: *«that the Russian Federation, whose military forces deliberately and systematically target civilian targets for bombing, is a state sponsor and perpetrator of terrorism"*(Resolution on the recognition of the actions of the Russian Federation in Ukraine as genocide and the establishment of a Special International Criminal Tribunal to investigate the crime of Russian aggression, 2022).

The authors of the resolution did not use the term "state terrorism," but based on the document it is obvious that the wording *«terrorism, such as the killing and torturing of the civilian population of Ukraine, bombardment of residential buildings and other civilian objects»* refers to it. Here the word "state" indicates the affiliation of the acts, in other words.

The same document referred to the private company "Wagner", recognized as a terrorist organization by many states, which committed crimes in the form of "brutal executions in Syria", as well as the responsibility of Kadyrovites for terrorist acts (Resolution on designating the private company Wagner as a terrorist organization, 2023).

On August 11, 2022 the Saeima of the Latvian Republic adopted a statement on Russia's targeted military attacks against civilians and public areas in Ukraine, recognising Russia's violence against civilians as terrorism and Russia as a state sponsor of terrorism (Saeima adopts statement declaring Russia a state sponsor of terrorism, 2022). The Latvian parliament has described the qualifying attributes of "state terrorism" of Russia at length, also without using the term itself, but implying it: *"Russia has for many years supported and financed terrorist regimes and organisations, being the largest arms supplier to the Assad regime in Syria, and has carried out terrorist attacks in sovereign countries, including the poisoning of the Skripal family in the territory of the United Kingdom and the downing of Malaysia Airlines flight MH17, which cost the lives of 298 people...»* (Saeima adopts statement declaring Russia a state sponsor of terrorism, 2022).

In these provisions, the duration of Russia's terrorist activities, its commitment to ignoring the principles of the sovereign equality of states, non-interference in internal affairs, non-use of force, etc., is well traced.

The Saeima of the Latvian Republic emphasized in its statement that "*recognises Russia's violence against civilians committed in pursuit of political aims as terrorism, recognises Russia as a state sponsor of terrorism, and calls on other likeminded countries to express the same view…*" (Saeima adopts statement declaring Russia a state sponsor of terrorism, 2022).

What is the practical significance of recognizing a state as a terrorist state?

According to the opinion of Doug Bandow, an American political writer: "Calling a state or movement "terrorist" is primarily symbolic, a bit of name-calling to discredit the discreditable… It would be better to simply abolish the practice of naming countries state sponsors of terror than to continue diluting the label" (Bandow, 2022).

In the author's view, such recognition demonstrates the lack of tolerance of states for international crimes, and thus reaffirms their intention to fight for the principles of international law. Such recognition could be the beginning of the application of a new economic policy towards a terrorist state and its supporters.

Russia's war against Ukraine has dotted all the "i's" regarding the qualification of this criminal act. The terrorist attacks are so large-scale, so overt, and so insidious that there is not a single doubt about the need to call Russia a terrorist state and its activities state terrorism.

Previously, the states had feared a breach of idyllic relations with Russia. It took the whole year 2022 for most of the world to be finally convinced of the falsity, cavalierness and cruelty of this state, of its rejection of democratic values and its intention to destroy the established world order.

Conclusions

A brief excursion into history shows that the terrorist's main motive is the intention to intimidate the population. Terrorism cannot be considered a legitimate method of conflict resolution. An unlawful act cannot be assessed as a legal act (*Ex injuria jus non oritur*). "State terrorism" is a criminal political system that can act as a system that absorbs other peoples and then terrorism carried out by the state serves as an instrument of genocide. "State terrorism" can constitute the essence of crimes against humanity because of its mass, systemic nature, high level of cruelty and duration.

In international law there is a clear vision of the essence of "state terrorism", the commission of which is due to military action and constitutes a crime under international law. At the same time, the authors of international legal instruments did not specify the word "state" when describing or specifying terrorism. Which does not prevent us from understanding the real context of the above-mentioned articles. Obviously, *state terrorism is indiscriminate violence, realized in the form of a widespread or systematic attack, causing death or serious bodily injury to a large number of people during hostilities.* There is a notion of the essence of "terrorism," "terrorist state," and "international terrorism" in national law. In a broad sense, *state terrorism is a tactic of organized violence of the state represented by its bodies, built on economic pressure, psychological impact, political pressure, military invasion and aimed at the elimination of political figures, development and maintenance of panic among the population in order to change the existing social order, overthrow the government, destruction of the state and its people.*

What is the practical significance of the formulation of the term "state terrorism"? It is related to the understanding of the duration, multifacetedness, and scope of the crime itself. This, in turn, will make it possible to objectively and fairly qualify the acts of the offender.

The aggression of the Russian Federation against Ukraine, indiscriminate and brutal murders, rapes, psychological pressure against its civilian population should be regarded as acts of state terrorism, and Russia as a terrorist state.

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THE MEANING ROLE OF THE PACTA SUNT SERVANDA PRINCIPLE IN INTERNATIONAL LAW: IDENTIFYING CHALLENGES TO THE LEGITIMACY OF PEACE AND WAR

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Annotation. *This study examines the principle of pacta sunt servanda and its components, namely consent, continuity, and good faith. It reveals the inconsistent application and declining authority of these principles in the implementation of international obligations, particularly in the fields of human rights and humanitarian law. Despite their crucial role in promoting peace, justice, and human dignity, these principles are often disregarded, prioritizing the interests of individual state parties over their international legal obligations. This trend undermines the core purpose of the UN system and poses significant challenges in holding states accountable for breaching their commitments in the field of human rights and humanitarian law.*

In the author's opinion, the interpretative function the principle of pacta sunt servanda holds particular importance and untapped potential in the context of human rights and humanitarian law. The author hypothesizes that the international community must reaffirm its principles and apply them in a strong and accountable manner. The principle of pacta sunt servanda inherited from previous legal systems, has proven its fundamental meaning and worth. Moreover, it will enhance the realization of the axiological principles of the UN Charter, which were established to ensure peace, security, human rights, and justice, and need to be restored and observed at both the international and national levels.

The research underscores the need for the international community as a whole to reaffirm its purpose by robustly and responsibly upholding and applying the generally accepted principles across all international bodies, including judicial and quasi-judicial entities.

Keywords: *Pacta sunt servanda, Consent, Continuity, Good faith, human rights, peace, humanitarian law.*

Introduction

Recently, the Parliament of the Russian Federation (RF) announced its withdrawal from the Treaty on Conventional Armed Forces in Europe, which continued other denunciations of international agreements in the field of maintaining peace and security. In 2019, both the United States and Russia suspended their obligations under the Intermediate-Range Nuclear Forces (INF) Treaty, which had been in effect since 1987. In May 2020, Russia announced its withdrawal from the Open Skies Treaty, which permitted unarmed flights over participating countries' territories.

This negative trend of terminating international treaties aimed at preventing armed conflicts is further exacerbated by the facts of massive violations of fundamental human rights, as well as States´ obligations in humanitarian law or Jus in Bello, particularly in situations of armed conflict (UN GA Resolution 2675 (XXV) 1970).

The European region is currently experiencing a large-scale armed conflict, in spite the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1951) has been designed to serve to fundamental freedoms as the foundation of justice and peace (ECHR, Preamble). The RF withdrew from the ECHR following its engagement in a war with Ukraine, a State Party to the ECHR. The Belarusian government, against which there are serious allegations of serious abuse of jus cogence against its own population after Presidential election in 2020, has tried to get away from international judicial control, announcing its withdrawal

from the universal international mechanism for considering individual complaints of violations of human rights.

Does this occurrence happen as a consequence of the failure to uphold the fundamental values proclaimed in the post-World War II documents?

When scholars proposed the classification of peace into 'positive peace' and 'negative peace' several decades ago (Ipsen, 1984), they defined the boundary between the two categories as active efforts to address the root causes of conflicts and solve them through conventional/contractual obligations. It was unforeseen that 'positive peace' characterized by strong friendly relations between nations and a commitment to universally recognized principles and treaties´ obligations, would undergo such a notable transition into 'negative peace'.

Considering the extensive violations of fundamental human rights, as well as the breach of the prohibition on the use of force and other United Nations principles, which result in widespread and systematic infringement upon individual rights and humanitarian law obligations, a crucial legal question arises: Can the principle of *pacta sunt servanda (PSS)*, along with other generally recognized principles, still be considered a legitimate tool in regulating interstate relations within the framework of international human rights and humanitarian law?

The purpose of the study is: 1) to reveal the meaning and role of the *PSS* principle in international law in interpreting the legitimacy of peace and war; 2) to contribute to the state of knowledge and encourage application of the generally recognized principle of *PSS* and its components, including *consent, continuity, and the notion of good faith* for interpretation of legal provisions and States´ practice in the field of regulation of war and peace.

The focus of this article will primarily be on the provisions of international human rights (IHRL) and humanitarian law (IHL), referred to as "law in peace." The interdependence between peace and conflicts will also be emphasized by providing examples and analyzing the consequences of non-compliance with international treaties.

In order to address the research question, an innovative method has been developed. The principle *PSS* will be analyzed through the synthesis of three interconnected notions of international law, enhancing the possibilities for their interpretation together and separately with a synergistic effect.

The notion of legitimacy will be applied as a broad concept that characterizes not only legality (so called “legitimacy’s legal” or “procedural component”) but also the adequacy of the legal activity of the legislative body and other agencies and institutions from the perspective of reflecting public opinion, including the position of civil society, the population, and so on. This concept has been well analyzed by scholars from the East-European region (Dzehtsiarou, 2011; Zavershinskii, 2001) as well as academics from American and Western-European institutions (Clark, 2008, O’Connor, 2009, **Wiharta,** 2009).

The author posits the principle of *PSS* as a legitimate tool for assessing interstate relations within IHRL and IHL. The legitimacy of this principle is based on three interconnected elements: political consensus, legality, and moral authority. The interpretation of legal norms in accordance with fundamental principles is outlined not only in national constitutions but also in international treaties, such as the Vienna Convention on the Law of Treaties (VCLT, 1969, Art. 26). In the author's opinion, the interpretative function the principle of *PSS* holds particular importance and untapped potential in the context of IHRL and IHL. The author hypothesizes that the international community must reaffirm its principles and apply them in a strong and accountable manner. The principle of *PSS* inherited from previous legal systems, has proven its fundamental meaning and worth. Moreover, it will enhance the realization of the axiological

principles of the UN Charter, which were established to ensure peace, security, human rights, and justice, and need to be restored and observed at both the international and national levels.

Part 1. Pacta sunt servanda (PSS) principal: general and specific in international law

1.1. IL Perspectives: Key Characteristics of the principle of *PSS*. The principle of *PSS* is widely recognized as a fundamental principle of international treaty relations (Binder, 2020). Dating back to Roman times, the principle was also addressed in the Declaration of London of 1871, which stated that no contracting party could modify any provisions of a treaty without the onsent of the other contracting parties (UN Conference on the Law of Treaties, 1968). The principle is of utmost importance in general international law, where it is regarded as the "basic norm of international law" (Kelsen, 1966) and is seen as a binding principle that extends beyond treaty obligations (Lauterpacht, 1958). Lukashuk emphasized that both principles – "pacta sunt servanda" and "good faith" play an important role in preventing arbitrariness and chaos, and serve as a kind of guide in assessing the behavior of a state party in the context of its obligations under the UN Charter (Lukashuk, 1983).

The *PSS* is universally recognized and has legal authority as a source of international law, according to Article 38 of the UN Statute on the ICJ (UN Statute ICJ). It is explicitly included in the Preamble of the VCLT, as well as in Article 26 of the Convention itself (VCLT, 1969). The modern wording of the principle *PSS* states that every treaty in force is binding upon the parties and must be performed by them in good faith.

Not all agree on the universal applicability of *PSS*, however. In the context of Belarus' practice, an example illustrates the stance of the Ministry of Foreign Affairs regarding the legitimacy of the principle of *PSS* as an exception to state sovereignty when considering the state's obligations. Officials rejected the obligation to enforce decisions of human rights judicial bodies, arguing that the principle is obligatory only when a state has clearly and unambiguously consented to be bound by an international treaty that establishes the binding nature of decisions made by the international bodies. They cited the example of the Security Council of the UN as an "obligatory" entity (Ulyashyna, 2014, p. 30). Thus, the government illustrates a misperception of international treaties as being different in terms of their binding force, despite the clear meaning of the provisions of the Vienna Convention on the Law of Treaties (VCLT), which have universal coverage for all written international treaties.

Another example rejecting the general character of the principle of PSS is the conclusion drawn by a scientist from national university of Singapore Zhifeng. After analyzing legislation, verbal and behavioral communication, as well as empirical reports from numerous countries, Zhifeng argues that if a country or a jurisdiction lacks the necessary legal system and economic stability to enforce contracts, PSS lacks efficacy. He believes that *PSS* can only be respected and given effect in a system that provides for legal and economic stability (Zhifeng, 2022). The arguments address the challenges posed by objective criteria that could impede the effective fulfillment of international obligations. However, another component of the principle, namely good faith, enables us to differentiate between situations in which a State Party faces unfortunate circumstances but still acts in accordance with good faith, and cases that demonstrate a deliberate and harmful disregard for international commitments.

1.2. *PSS* in Human Rights Law. As for the human rights monitoring bodies, like the UN HR Committee, in its General Comments and Concluding Observations, they often refer to the obligations of states parties to the ICCPR under the principle of PSS: for example, the HR Committee reminded that pursuant to the principle articulated in Article 26 of the VCLT, States Parties are required to give effect to the obligations under the Covenant in "good faith" (UN

HRC GC 31, p.3). Moreover, when the HR Committee, in its General Comments devoted to the "public emergency" clause (Article 4 of the ICCPR), it called on States parties to duly consider the developments within international law as to human rights standards applicable in emergency situations. Moreover, it reminded that the State party's other obligations under international law, particularly the rules of international humanitarian law, shall be applied to ensure compliance with measures undertaken while derogating from the provisions of the ICCPR (UN HRC GC 29, pp.3, 9).

Conversely, the ICJ applies concepts that regulate the rights and obligations of individuals, particularly in the field of IHL, IHRL and international criminal law (ICL). In the report prepared by the Committee on International Human Right Law and Practice Commission in 2008, numerous facts of such adaptation have been presented. For example, in the case of the Bosnian Genocide, the ICJ applied the concept of "positive obligations of states," which is characteristic of human rights law, rather than general international law. In its reasoning, the Court states that a state is culpable not only when it commits genocide (negative obligations, which means "refraining from intervention"), but also when it fails to take actions to prevent genocide (or fulfil positive actions) and does not cooperate with the International Criminal Tribunal for the former Yugoslavia in bringing the accused Ratko Mladic to trial (Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1997).

While international IHL and IHRL have historically developed separately, some recent treaties include provisions from both bodies of law. Examples of such treaties are the 1989 Convention on the Rights of the Child, particularly its 2000 Optional Protocol on the involvement of children in armed conflict, the 1998 Rome Statute of the International Criminal Court (ICC), and the 2006 Convention on the Protection of All Persons from Enforced Disappearance.

1.3. Humanitarian Law and *PSS.* Contractual humanitarian law being a part of the general international law applies the *PSS.* For the Geneva Conventions and their Additional Protocols which form the core framework of international humanitarian law, this principle is crucial in ensuring compliance with these treaties. States are expected to uphold their obligations and commitments outlined in these humanitarian law treaties. Additionally, there are norms of customary international law which have been established before conventions were adopted. According to the International Committee of the Red Cross (ICRC)' report published the results of a comprehensive study on customary international humanitarian law, there are at list 161 norms that regulate armed conflicts. The vast majority of these norms are applicable during both international and non-international armed conflicts.

The four Geneva Conventions have been ratified by all States and the fact demonstrates the universal approval of the obligations surrounding the conduct occurring during an armed conflict. By analysing the nature of international obligations within the international humanitarian law a Belarusian scientist Kalugin has directly referred to the principle *PSS* while considering the matters and challenges of national implementation (Kalugin, 2000). Meanwhile a German scientist Bothe, avoids using the full connotation of the principle but rather describe the role of national law in the implementation of international humanitarian law perusing the idea that "the operation of international humanitarian law thus depends to a large extend on domestic action" (Bothe, 1984).

Meanwhile, the texts of all Geneva Conventions stipulate in their Article 1 that 'the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' The wording is somewhat similar, albeit with a broader scope that addresses individuals as the ultimate beneficiaries, compared to the ICCPR. Each State Party to the ICCPR 'undertakes to ensure to all individuals within its territory and subject to its jurisdiction

the rights recognized in the present Covenant and/or undertakes to take the necessary steps... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant' (ICCPR, 1966, Art. 2). So, even if not explicitly mentioned *PSS,* which existed only as a customary rule at the time when the humanitarian treaties were adopted, the spirit of the principle is present in both - human rights law treaties and in the treaties regulating relations in times of war.

Summing up each participating State in international agreements governing the State parties' human rights obligations as well as protection of war victims and the limitation of means and methods of warfare, in accordance with the principle of PSS, is obliged to faithfully fulfill the obligations it has undertaken under these agreements.

Part 2. Consent, continuity, good faith

This part explores certain concepts that are specifically related to the integral components of the PSS principle that reiterates: 'every treaty in force is binding upon the parties and must be performed by them in good faith'.

Concepts "consent", "continuity", "good faith" are specifically related to the following wordings: --"every treaty in force," which is interconnected with the concepts of consent and continuity, since each treaty is formed by states and requires careful observance for maintaining stable international relations;

--"binding upon the parties," which also involves consent and continuity, as it implies the expressed agreement of all parties to the treaty and highlights its importance for all; and

--"must be performed by them in good faith," which directly references the concept of good faith and conveys a strong sense of obligation through the use of the passive voice.

2.1. State consent: An Overview of the VCLT Provisions. Consent from a state in question is a necessary element throughout most stages of norm formation, development, and enforcement proceedings within the "treaty law" (VCLT, Articles 2, 7, 9, 11, 14, 16, 18, 19, 23, 46 etc.).

The consent means an act of expression of a State party to a treaty by constituting, acceptance approval or accession, or by any other means if so agreed by parties. Researchers highlight the following features when approaching the nature and effect of the concept of 'consent': according to Fitzmaurice, it has a legitimizing effect resulting from a state's expressed consent to be bound by a treaty (Fitzmaurice, 1956). Friedl argues that there are norms under customary international law and general principles of international law to which a state does not explicitly give its consent (Friedl, 2017). Indeed, the 'classical' view of consent requires deeper analysis when it comes to obligations that encompass components related to common values, such as faith in fundamental human rights, the dignity and worth of the human person, the equal rights of men and women, the equal rights of nations, both large and small, as well as the promotion of international peace and security through the acceptance of principles serving common interests (as stated in paragraphs 3 and 9 of the Preamble of the UN Charter).

2.1. 1. Consent of a State in light of obligations owed to the international community as a whole

Perspectives from the "international community of states as a whole" and the "obligations owned to the international community as a whole" (obligations *erga omnes*) have been applied in assessing states' obligations arising in international human rights and humanitarian law. These perspectives have been established not only in treaties but also in other sources of law.

The UDHR is of particular interest in this respect. As an instrument of "soft law", it has been recognized as applicable to all nations due to the *opinio juris* of the international

community as a whole. The significance of the recognition of the UDHR lies in the fact that it remains a single normative catalogue that includes the most of fundamental individual rights and freedoms at the global level. The acceptance of the UDHR also assumes that the international community as a whole accepts common values and objectives of human rights commitments by specific treaties and other commitments.

The relevance of such a conclusion to human rights treaties is significant because the UDHR is an example of states' deed that acted as the international community as a whole by transforming the Declaration into a "Grundnorm" of international human rights law. Another example when a State's consent might be put aside is related to a human rights treaty, when a state may find itself in a situation where its reservation is declared impermissible (HR Committee, GC 24, para 18). While consent by an individual state is no longer an absolute limit to state obligations under human rights treaties (Sheinin, 2008), it is important to note that state consent is still a key factor in treaty law. However, in certain cases where human rights obligations are considered peremptory norms, state consent would be pushed aside by an objectively binding constitution (Merrills, 2005).

Although the principle of invoking a State's responsibility for a breach of a peremptory norm of general international law (jus cogens) as one of the *erga omnes* obligations is recognized as an available mechanism, it has not been effectively utilized by any State party, particularly in reference to the ICCPR. Despite calls from UN bodies, such as the 2012 UN HR Council Resolution with respect to Belarus (UN HR Council Resolution, 2012, p. 1 and beyond), no States have expressed solidarity through this means to fight against violations related to common values and interests, as seen in the case of Belarus. This lack of action has continued in the following years. Meanwhile the HR Committee in its General Comments reminded that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that there is a UN Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest (UN HRC, 2004).

The concept of collective action is derived from the UN Charter which in Article 1 calls for states to "take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace". Moreover, with regard to international humanitarian law, the ICJ has stated in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (ICJ Reports 1996 (I).

It is worth reminding that traditional scholars of international law viewed human rights law as a special mode that emerged under international law to transition from the former "law of coexistence" to a different type of law known as the "law of cooperation" (Vasak, 1982; Friedman, 1984). Unfortunately, the legal mechanism of the responsibility of states to ensure collective human rights, namely the obligation to implement the *erga omnes* principle, does not always work. Sceptics' predictions have proved true: "Human rights law, which began its

development as a regime of a special nature, has stalled without ever challenging the state-centered structure of international law" (Christoffersen, 2009; Friedmann, 1984).

In summary, the research shows that while the concept of 'consent' is a necessary element of treaty law, states must also accept its limits in the regulation of common values, including the protection of human rights and humanitarian law obligations. Despite setbacks in the international community's intention to create a society of cooperation, there is a need for continued efforts to comprehend and accept the certain limitations of an individual state's consent in interpreting the common interest as is stipulated in the UN Charter.

2.2. The continuity or stability of international relations. *The continuity or stability of international relations* requires states to abide by their obligations under valid treaties and implement the relevant obligations. The principle continuity of international obligations is established by the UN Charter, which stipulates that the UN must establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. Additionally, the UN members must maintain international peace and security, and to that end, take collective measures in conformity with the principles of justice and international law to promote universal respect for and observance of human rights and fundamental freedoms (UN Charter, Preamble para 4, art. 1 part 1 and 3). The concept of continuity has been further elaborated in UN documents and earlier works by legal scholars such as Lauterpacht and Hahn. Lauterpacht pointed out that continuity is in itself an element of legal justice, while Hahn emphasized that continuity must be ensured beyond changes in objectives, jurisdiction, institutional structure, or even the extinction of the organization originally entrusted with those tasks. (Lauterpacht, 1958; Hahn, 1962).

The principle of the continuity of a treaty, not only in its literal sense but also in terms of the values of international obligations, forms the foundation of the entire international system established by the UN Charter. This system is designed to maintain international peace and security, and to that end, to take collective measures *"for the prevention and removal of threats to the peace"* and *"to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace"* as stated in Article 1, parts 1 and 3 of the UN Statute.

2.2.1. Continuity vs withdrawal. *Erga omnes.* IHRL has contributed to the development of the general notion of continuity in international law, as demonstrated by specific documents such as the UNHCR Sub-Commission resolution "Continuing of obligations under international human rights treaties" (UNHCR Resolution, 1999) in 1999 and the UNHCR General Comment 24 in 1997(UNHCR General Comment 24, 1997). In 1997, considering the case of the notification submitted by the Democratic People's Republic of Korea, the UN bodies stated a general prohibition of withdrawal due to the main characteristics of human rights treaties (HRTs), which …*do not establish reciprocal rights among States or protect their interests, but establish obligations toward individuals under their jurisdiction whose violations can be claimed by them or by the community of States Parties"*; "express *universal axiological principles, withdrawal from which should not be permitted"* (UN Aide Memoire, 1997, para 7).

Scholars have reflected on the application of the concept of continuity to human rights and humanitarian law, with Pocar emphasizing that a state cannot deny the protection of the rights of its population and that international institutions have enforced these obligations, leading to the continuity of international human rights and humanitarian law treaties. (Pocar, 2011).

The principle of continuity in international human rights law shall in practice mean that the rights enshrined in the Covenant belong to the people living in the territory of the State

party. Indeed, the HR Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of rights under the Covenant, such protection devolves with the territory and continues to belong to them, notwithstanding a change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the ICCPR (HR Committee, General Comment No. 26).

Despite this, there are inconsistencies in the element of continuity in the VCLT provisions. While the VCLT rules that, according to *PSS*, a State may not refer to provisions of internal law to justify its failure to perform a treaty, certain provisions of the VCLT such as those relating to the suspension and termination of treaties (articles 56-60) or invoking grounds for impossibility to perform or fundamental change of circumstances (articles 61-62) protect State interests. However, the VCLT does not provide specific provisions for non-reciprocal treaties, such as humanitarian and human rights treaties, to ensure continuity. While the principles of the UN Charter and most human rights treaties declare zero possibility for withdrawal or include termination clauses, and demonstrate the willingness to protect common values and the final beneficiaries - people - via continuity of treaties, the termination clauses and provisions of human rights treaties remain a common place.

Despite the obvious contradiction to jus cogens violations, the UN bodies approved the Belarusian government's submission by acting in compliance with formal provisions. As a result, the withdrawal of the Belarusian government from the Optional Protocol prevents Belarusians from submitting individual communications to the only available body for Belarusians capable of acting as an international tribunal in cases of torture (UN, Press-releases of treaty bodies, 2022).

The Belarusian case marks the fifth withdrawal from the OP. This case happened at a time when the Russian Federation started the war from the soil of Belarus against Ukraine, and this aggression was committed with illegal support from the Belarusian government or high officials. So far, the international community has failed to take notice of this dramatic act of withdrawal, which has devastating effects for the Belarusian people and others who might have become victims of human rights or humanitarian law violations from February 24, 2023, up to now. There is no doubt that the very fact of withdrawal undermines the values and principles of the UN. It is clear that in cases where a state seeks to evade international judicial scrutiny by exploiting gaps in the VCLT and the failures of singular human rights treaties to ensure the continuity principle, a mechanism must be established to ensure that dissenting opinions highlighting violations within that country can be heard at the international level.

Another closely related concept to the continuity of non-reciprocal treaties is "collective actions," which is derived from Article 1 of the UN Charter. This article calls for "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about, by peaceful means, and in conformity with the principles of justice and international law".

Unfortunately, nowadays we observe that legal mechanism of "collective" human rights responsibility of states, namely the obligation to implement the *erga omnes* principle does not work. Indeed, while the non-observance of obligations of State Parties towards individuals as right-holders under a human rights treaty is a matter of every State Party's legal interest in the performance of obligations by every other State Party, the States hesitate to take legal actions in that regard. The ICCPR has designed a special procedure (ICCPR, Article 41, 1966), and the HRC has explained that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations. As indicated in the fourth preambular paragraph of the ICCPR, there is a UN Charter obligation to promote universal respect for, and observance of, human rights and

fundamental freedoms. Moreover, the HR Committee has recommended that States Parties should pay attention to violations of ICCPR rights by any State Party. "*Drawing attention to possible breaches of Covenant obligations by other States Parties and calling on them to comply with their Covenant obligations should not be regarded as an unfriendly act, but rather as a reflection of legitimate community interest."* (GC 31, para 2).

On the contrary, the procedural mechanism of individual complaints to international bodies, which was and still viewed as a secondary (subsidiary) one in relation to domestic remedies, has seen rapid development. For example, since its ratification, OP to the ICCPR has resulted in more than 175 Belarusians receiving decisions from the Committee, while around 300 complaints have been pending (Institute for war and peace reporting (IWPR, 2022). Even more impressive is the statistic that characterizes the number of complaints filed annually to the European Court of Human Rights by Russian citizens. In March 2022, Russia was expelled from the Council of Europe, but the European Court of Human Rights retains jurisdiction over cases related to Russia that occurred before September 2022. According the data, on August 2022 - around 16,750 applications from Russia have been pending. It is the highest case-count country (ECHR, Annual Report, 2022).

This explains the decision by the governments of both Belarus and the Russian Federation to withdraw from human rights treaties. However, the international community as a whole must ask whether a state wishing to avoid the attention of an international body in cases where victims report torture shall have the opportunity to do so simply by formally invoking the existing clause on withdrawal from the OP (OMCT, 2020) or the CoE Statute and the ECHR (Magliveras, 2022). In author's opinion the situation and established practice are worrying and call into question the principle of continuity/stability of human rights treaties.

In summary, the continuity of treaties is highly relevant to the sense of *pacta sunt servanda* and can be broadly applied to revise human rights treaties for the benefit of their ultimate beneficiaries. Withdrawal from human rights treaties should be considered a breach of the UN's purposes.

2.3. Good Faith in International Law. *Good faith* is another crucial element of the *pacta sunt servanda*, as it implies that states should act in good faith when entering into and performing their obligations under a treaty (VCLT, Article 26). It also stands as a generally recognized principle of international law with multifaceted meanings and functions. Moreover, it is also a way of interpreting treaties regulated by the Article 31 of the VCLT. Thus, treaties provisions shall be implemented in good faith, in accordance with ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The term and the concept have been of interest to both practitioners and scholars analyzing the meaning and role of the doctrine in legal discourse in domestic and international trials. While practitioners underline that it is difficult to define "in absolute terms" (Jacobellis v State of Ohio, Tetley, 2004), scholars agree with the complexity of the definition but still believe that it is crucial to comprehend its nature since it is a fundamental principle that applies to all aspects of international law (Reinhold, 2015). It has a guiding role in the decision-making process (Dworkin R, 1977) and ensures international order while preventing arbitrary behavior and chaos (Lukashuk, 1989). Russo calls the principle *good faith* a "general interpretive parameter" that requires states to consider the interests of other contracting parties, including international cooperation and the legitimate expectations of individuals as the ultimate beneficiaries of the human rights treaty regime (Russo, 2014). Binder and Hofbauen share the opinion that *good faith* is an integral part of the *pacta sunt servanda* and conclude that while the latter contains the *formal order* to comply with treaty obligations, the principle of *good faith* determines the *specific content* of such compliance (Binder and Hofbauen, 2019).

2.4. Good Faith in Human Rights Law. The wording of the principle of *good faith* is more precise and clear within the human rights treaties framework: "The State Party is expected to collaborate *sincerely and effectively* in the realisation of the aim of the Council" (Statute of the Council of Europa, 1949, Article 3), or each State Party to the ICCPR "…*undertakes to ensure* to all individuals within its territory and subjects to its jurisdiction the rights recognized in the present Covenant and/or *undertakes to take the necessary steps* …to adopt such legislative or other measures as may be *necessary to give effect to the rights* recognized in the present Covenant" (ICCPR, 1966, Art 2).

The principle of *good faith* entails ethical dimensions and requires the exclusion of deceit, concealment, and attempts to mislead. It can be used as a benchmark to evaluate the level of compliance with the implementation of obligations assumed by the parties.

As examples of the application of the good faith principle in human rights treaties, it is worth presenting several provisions from human rights treaties that serve to prevent actions that abuse the protected rights and freedoms:

Thus, the following provisions warn that nothing may be interpreted as implying any rights for any state, group, or individual to engage in activities or perform acts aimed at destroying any of the protected rights or limiting them to a greater extent than what is provided in the treaty (e.g., Article 5 of the ICCPR, Articles 17 and 18 of the ECHR).

The next passage discusses the application of the general rule of treaty interpretation to the Optional Protocol of the ICCPR, which lacks explicit provisions or language regarding the conduct of parties during performance and withdrawal from the OP. The author argues that the good faith principle, as stated in Article 31 of the VCLT, should be followed, requiring the parties to respect and fulfill their treaty obligations in good faith and consider the goals and purposes of the treaty. The Preamble of the Optional Protocol is mentioned as a factor that should be considered when evaluating withdrawal from the treaty.

Lastly, Article 103 of the UN Charter states that in the event of a conflict between the obligations of the Members of the Organization under the Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. In conclusion of this part, it would be appropriate to draw a comparison between the withdrawal from the Optional Protocol (OP) to the ICCPR and a withdrawal from the Non-Proliferation Treaty, which has been examined by Coppen. Coppen's analysis suggests that while a unilateral withdrawal from a multilateral treaty, undertaken with the aim of avoiding supervisory or jurisdictional mechanisms, may be legally justifiable under the principle of good faith, the actual legal consequences of such a withdrawal should be evaluated in terms of its impact on international security and stability (Coppen, 2014, pp. 21-33).

Conclusions

A study of the principle of *pacta sunt servanda* and its components - consent, continuity and good faith - revealed:

The axiological principles of the UN Charter established to support peace, security, human rights and justice cannot be effectively restored and sustained at both the international and national levels without a concerted collective effort.

The inconsistent application and declining authority of the generally recognized principles of *pacta sunt servanda* and *good faith* in the implementation of international obligations in the field of human rights and humanitarian law. Despite their critical role in promoting peace, justice, and human dignity, these principles are often set aside, prioritizing the interests of individual state parties over their obligations under international law. This trend

undermines the very purpose of the UN system and poses significant challenges for holding states accountable for their breaches of commitments. To address these challenges, it is essential to uphold the relevance and authority of generally recognized principles in international law, strengthen their enforcement mechanisms, and promote greater awareness of their importance.

The *pacta sunt servanda*, inherited from previous legal systems, has proven its fundamental meaning and worth to be recalled. The principle as it is as well as its elements, including *good faith, consent,* and *continuity*, represent critically important legal and ethical commitments for human rights. These principles also have independent content that allows separate applications. They have been introduced and applied in normative provisions of general international law and human rights law, as well as in academic research and selected practice.

Neglecting the application of generally recognized principles by individual states and their role as representatives of the international community as a whole in upholding common goals leads to a weakening of the entire international humanitarian law and human rights system, ultimately affecting its beneficiaries. Overall, international bodies have faced significant challenges in holding states accountable for breaching good faith in the process of fulfilling their obligations, resulting in violations of jus cogens norms, the erosion of rights and freedoms, and even alleged international crimes.

The research also proves that the international community as a whole needs to reaffirm its purposes by strongly and accountably holding and applying the generally accepted principles in the work of all international bodies, including judicial and quasi-judicial bodies.

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INTERCULTURAL COMPETENCE AND LAW ENFORCEMENT OFFICER: STRAIGTFORWARD OR CONTRAVERSIAL?

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Abstract. *The concept of intercultural competence for every denizen of a global world, and especially, a professional, such as a pedagogue, a law enforcement officer is important, it has been discussed and has gained support for the last two decades at least. However, in the light of recent events and changing geopolitical context, the deliberations should be renewed. The aim of this paper is discussing aspects that are straightforward and aspects that may comprise controversy, regarding the intercultural competence of law enforcement officers (or any other person for that matter). The attention to revisit the concept and its contents was prompted due to the recent discussions motivated by joining the project, funded by the EC: Cooperation for developing joint curriculum on tackling hybrid threats (HYBRIDC). Participation in the project allowed collecting the part of the data for empiric study and deciding on potential benefits to proceed with the deliberations. The paper presents findings of a pilot study, which revealed the differences between interpretations among students in two countries. The limitation of the study should be taken into consideration, yet, the findings provide observations worth further examinations, especially in the light of recent geopolitical context.*

Keywords*: intercultural competence, hybrid threats, controversy.*

Introduction

While the very concept of the importance of intercultural competence for every denizen of a global world, and especially, a professional, such as a pedagogue, a law enforcement officer is discussed and gained support for the last two decades at least, however, in the light of recent events and changing geopolitical context, the deliberations should be renewed, at least from the point of view of the authors of this paper.

The **aim** of this paper is discuss aspects that are straightforward and the aspects that may comprise controversy, regarding the intercultural competence of law enforcement officers (or any other person for that matter).

The **objectives** are organized around the two RQs: What are the aspects of intercultural competence, which make discussion straightforward? What are the aspects of intercultural competence, which make discussion straightforward?

Methods of critical analyses of references, theoretical considerations, reflection on personal experience and a pilot empiric study, involving respondents – future law enforcement officers in Lithuania and Estonia were employed for the development of the paper.

Intercultural competence: straightforward of controversial

For the authors of this paper, especially, one of them, the attention and analysis, contextualization of intercultural competence and the development of intercultural competence was one of the main research interests for more than two decades (see, e.g., Zuzeviciute, 2010; Ross, Zuzeviciute, 2011; Zuzeviciute et al, 2013, etc.).

While we still believe in the importance of intercultural competence for every denizen of a global world, and especially, a professional, such as a pedagogue, a law enforcement officer, however, in the light of recent events and changing geopolitical context, we think that the deliberations should be renewed.

Our thinking and the logics of the paper are organized along the arguments about what is straightforward, and what may pose certain controversy, when intercultural competence of law –enforcement officers is analysed.

Firstly, we posit that intercultural competence is very important for every denizen of this global world, including people in professional settings, such as law enforcement. The fact that professional law-enforcement officers must be aware of cultural differences, must be ready to address them in a professional yet culturally sensitive manner seems straightforward.

Secondly, we posit that due certain innate characteristics of intercultural competence, which the very essence of the said competence, intercultural competence may be contextualized as controversial in the light of geopolitical situation.

While the former claim is based on a number of theories and studies completed during at least the last twenty years, the attention on the latter was prompted due to the recent discussions motivated by joining the project, funded by the EC: *Cooperation for developing joint curriculum on tackling hybrid threats* (HYBRIDC).

War against the Ukraine, which started on 24th February, 2022, motivated us, citizens of the countries with the external EU border to re-think certain concepts, re-visit certain understandings and re-examine certain beliefs. Intercultural competence falls into this category.

Several influential models of intercultural competence were offered, with the one offered by Deardorff almost twenty years ago having gained the place among the most frequently used (Deardorff, 2008, though the model was first introduced for academic community few years earlier).

In the model three dimensions: Knowledge and comprehension, Skills and Attitudes are identified. Knowledge and Comprehension include cultural self-awareness, deep cultural knowledge sociolinguistic awareness; Skills encompass ability to listen, observe, and evaluate, analyze, interpret, and relate; Attitudes encompass respect (valuing other cultures), openness (withholding judgment), curiosity and discovery (tolerating ambiguity).

Another influential model was offered by Bennet (2008). The model also identifies three aspects: Cognitive Dimension (here cultural self-awareness, culture-general knowledge, culture-specific knowledge and cultural adaptation process are enumerated), Behavioral Dimensions encompass ability to empathize, to listen and gather appropriate information, ability to manage relationships and to manage social interactions and anxiety, Affective Dimensions encompass curiosity, initiative, risk-taking, suspension of judgment, cognitive flexibility, tolerance of ambiguity, cultural humility.

There are evident differences, such as an emphasis on linguistic competence in Deardorff's model, while in Bennett's model emphases is on relations. However, the two models have many similarities: the knowledge about and the competence to do may clearly be identified as similar, also, for both authors withholding judgements, tolerating ambiguity are important.

It is important to note that the subsequent analysis of the models, and their translation into the professional's life in Lithuanian context (on the case of teacher's professional) revealed that the most demanding and the least automatic is the behavioural aspect of intercultural competence. That is, even if we learn about other people and their cultures, and even if we consciously understand certain characteristics of their culture that we make us wonder, but to behave in an adequate and contextual way may be most demanding (Norvilienė, Zuzevičiūtė, 2011).

While importance of linguistic competence is extensively discussed by other authors, emphasizing the crucial role of linguistic (whether it is contemporary lingua franca: English, or other language(s) used in communities) competencies for effective police work (Pielmus, 2019; Shalfrooshan et al, 2019), other authors note the importance of other factors for building authentic, genuine intercultural competence.

Longer interactions (Guillén-Yparrea, Soledad Ramírez-Montoya, 2023), also immersion into another culture (Chédru, Delhoume, 2023), attention and analyses of personal attitudes (Barrow, 2023) are identified among those factors.

The very idea of analyzing the concept, the attempts to construct and deconstruct intercultural competence is a huge social innovation. These attempts denote humanity's efforts to distance itself from colonialist ambitions and to re-orientate itself towards global denizinship and universality of human rights (Bea, 2022).

Intercultural competence, or at least admitting its place and importance among the professional's competencies (including professional law-enforcement officer) – we will argue - may serve as a strong marker regarding society's genuine maturity. While these aspects seem to illustrate straightforwardly positive and desirable role intercultural competence plays in professional law-enforcement officer's (or any other citizen's) activities, however, recent events prompt further analysis.

Hybrid threats, including propaganda, deliberately misleading or specifically designed informational attacks (Arcos et al, 2022), including breach or straightforward cyberattacks (Magonara, Malatras, 2023), mass migration (Lubinski, 2022) may be enumerated next to full fledged bloody war; these are the realities of the recent years in the world which a decade ago we thought had been taking a direction towards rules, reason based cohabitation.

The list of hybrid threats is long, and due to the limitations for the scope of this paper we will not analyse all of them. Among the most evidently linked to our theme is mass migration.

As Bachmann, Paphiti (2021) suggest:

> *'Mass migration within the context of hybrid warfare is a strategic mechanism effected where the state deploying the threat will place pressure upon the targeted government to take some course of action – or not – which is to the advantage of the state making the threat and to the disadvantage of the targeted state. The targeted state will recognize that the threat to cause a migration flow across its borders will place tensions upon the welfare, social, medical, and educational sectors of its society which, in turn, raises the specter of unrest and dissatisfaction with the government. Changing demographics, and increasing unemployment <...> In an extreme case, this could conceivably lead to the collapse of the government, especially in a country that had a volatile economy.'* (Bachmann, Paphiti, 2021, 120).

The very characteristics, which make up the essence of intercultural competence: empathy, suspension of judgment, cognitive flexibility, tolerance of ambiguity, cultural

humility may be (and was, as it was the experienced along Polish, Lithuanian, Latvian borders in 2021) corrupted for the nefarious purposes of agents acting in bad faith.

The disinformation machine, targeted hybrid aggressions under the guise of humanitarian crisis appeal to the best intentions we hold towards a brother or sister, a human being with whom we share this small planet of ours; but the machine does not have the best intentions of its own, thus a defence mechanism has to be enacted in such situation.

The problem is, we barely started learning to exercise intercultural competence as a countermeasure for the egocentric cultural instincts, which are inherent for any person; and yet, after not more than two decades we have to re-evaluate its role and potential hazards for relying on it.

Thus, while discussing the contents of professionalism with future law enforcement officers, including attention to intercultural competence as the competence that underlines the contemporary, human rights orientated cohesive society, probably, also it must be emphasised that the same society is founded on the ideas of supremacy of law.

The ideas of contemporary state as the state based on democracy, thus equality, thus universal human rights, thus supremacy of law are quite young. They were formulated appr.300 years ago and it took some time for them to be recognised and implemented; moreover, still not all countries globally implemented this social-legal innovation, which makes it so much harder to preserve the fragile progress achieved (Zuzeviciute, 2022).

Law enforcement officers (though, probably, all the professionals and citizens) must balance their activities carefully with the sensitivity to intercultural aspects of contemporary living, and upholding the supremacy of law, which comprises the core of our democracies.

Controversies, in relation to intercultural competencies are linked to situations where this balance must be maintained in order to secure the general cohesiveness of co-habitation and the implementation of law enforcement for the general state of security within a given society.

Findings from a pilot study

In order to examine whether the role of intercultural competence resonates with future law-enforcement officers, a pilot study was designed and implemented during the last quarter of 2022 and the first quarter of 2023. Totally 99 students/future law enforcement officers from Lithuania (65) and Estonia (34) shared their opinion in an anonymous questionnaire, where they were asked to choose the statement that they agreed with most.

Limitations of the study.

The limited number of respondents (less than 100), a convenience sampling comprise two major limitations in this pilot study, also, the fact that the number of respondents in each group is different should be taken into consideration; thus, we are not formulating generalisation, but merely present findings and possible interpretations. The findings also enable formulation guidelines for further, more in-depth studies in the theme.

The first observation is interesting and asks for further, probably, qualitative research methodology based study in the future; namely: the answers by respondents in Lithuania and Estonia differed significantly. Even if the number of respondents was unequal, the findings indicate situation worth further exploration, Fig.1, Fig 2.

If the majority of Estonian respondents chose '*It is moral to have and exercise it, but rule of law comes first'*, among Lithuanian respondents '*It is very important in global world*' received the most voices.

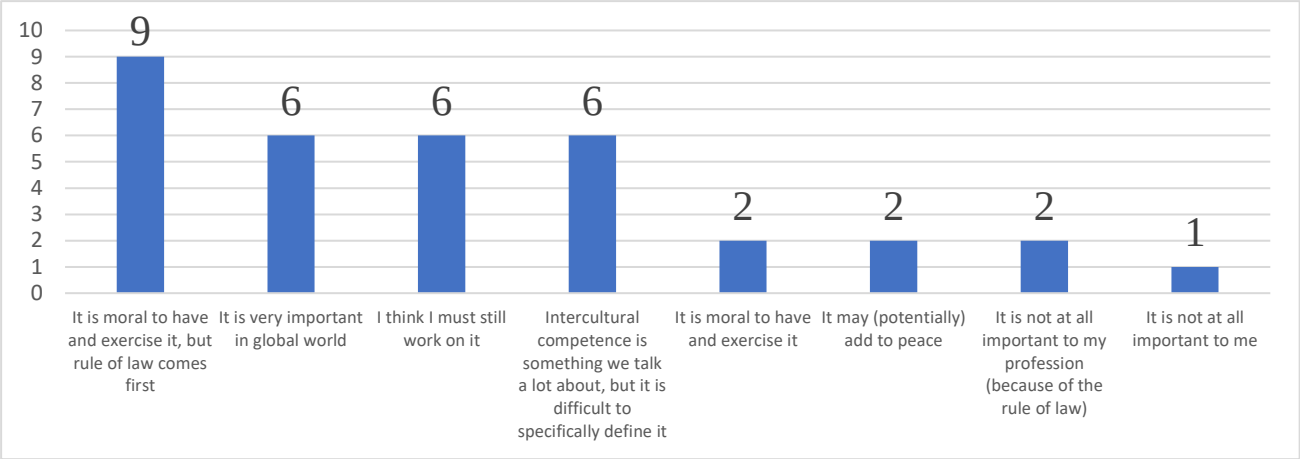

Figure1. Estonian respondents (future law-enforcement officers) on intercultural competence

Interestingly, Estonian colleagues had a much more diversified opinions, e.g., Estonian respondents 26.4% chose their first rank, while 36,9% of Lithuanian respondents chose their first rank.

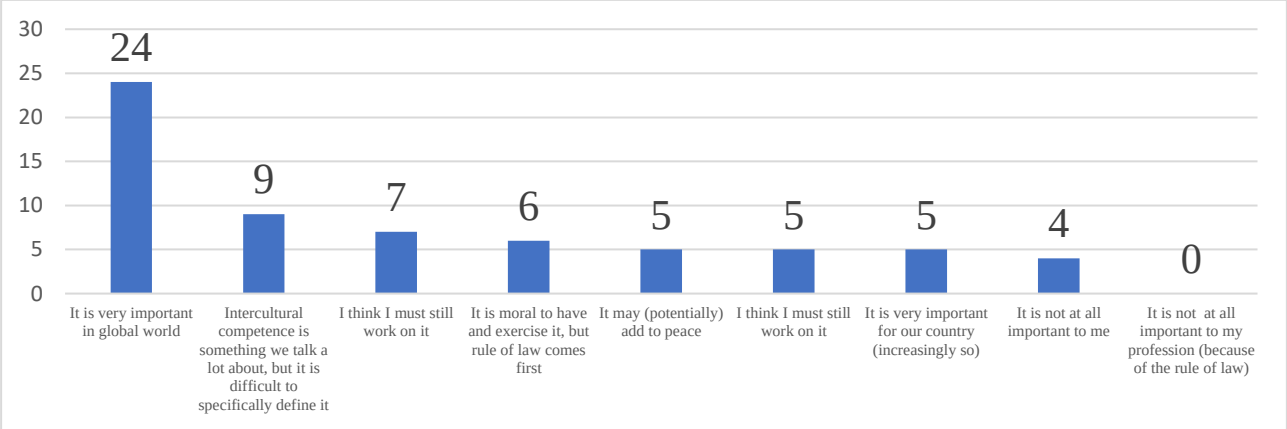

Figure 2. Lithuanian respondents (future law-enforcement officers) on intercultural competence

Even if the rank itself was different (Estonians: 'intercultural competence is important, but rule of law come first' (for Lithuanian this one was in the 4th place); Lithuanians: 'it is very important in contemporary world' (for Estonians this one was in the 2nd place)), but the general distribution of ideas was more diverse among the Estonian colleagues.

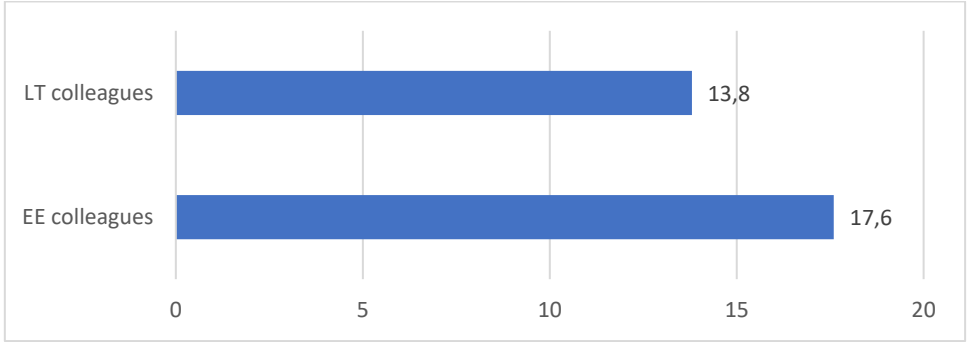

Figure 3. 'Intercultural competence is something we talk a lot about, but it is difficult to specifically define it' – choices (% of respondents)

Lithuanians were quite categorical regarding whether' intercultural competence is important for their profession' (0 respondents chose this statement), while there were 2 Estonians who chose it.

For more Estonian colleagues intercultural competence remains to be further and more precisely defined than for Lithuanian colleagues, Fig.3.

While the data is preliminary, but it shows the differences between interpretations among students in two countries. Surely, we are aware about the limitation of the study and provide these observations merely as a stepping stone for further examinations.

Conclusions

Straightforward aspects of role of intercultural competence, or at least admitting its place among the professional's competencies (including professional law-enforcement officer) may serve as a strong marker regarding society's genuine maturity, level respect for human rights. These aspects illustrate positive and desirable role intercultural competence plays in professional law-enforcement officer's (or any other citizen's) activities.

Controversies, related to intercultural competencies are linked to situations where the balance between sensitivity to intercultural aspects of contemporary living, and upholding the supremacy of law must be maintained in order to secure the general cohesiveness of co-habitation and the implementation of law enforcement for the general state of security within a given society.

Pilot empiric study findings, though preliminary, show that respondents in Estonia and Lithuania attributed different ranks for intercultural competence. For Estonian students intercultural competence is important, but rule of law comes first, for Lithuanian students intercultural competence is important in global world.

Findings show the differences between interpretations among students in two countries, while the limitation of the study should be taken into consideration, yet, the findings provide observations worth further examinations, especially in the light of recent context and also in the light of the curriculum that the professionals (future law enforcement officers) are covering, facing the recent changed geopolitical situation.

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THE PROTECTION OF ENVIRONMENT OF BALTIC SEA IN LITHUANIAN LEGISLATION

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Abstract *The Baltic Sea is named as one of the most polluted seas in the world and is of increasing public and state concern. The pollution of the Baltic Sea is determined by the hydrographic, ecological and geographical characteristics of the sea. However, pollution of the Baltic Sea is determined not only by the geographical, ecological and hydrographic characteristics of the Baltic Sea. Active human activity in the Baltic Sea region also contributes to the large scale of pollution. The regulation of the Baltic Sea environmental protection consists of a wide-scale legal regulatory mechanism for the protection of the Baltic Sea environment. Lithuanian legal regulation includes aspects of maritime flora and fauna protection, the evaluation of the impact of planned economic activities, the regime for the protection of marine environment, the measures of protection of coastal zone in the seashore of the Baltic Sea. Furthermore, the article discusses the implementation of the Marine Strategy Framework Directive in Lithuanian legal regulation.*

Keywords: *Baltic Sea; marine environment protection; Marine Strategy Framework Directive; environmental impact assessment*

Introduction

The Baltic Sea is named as one of the most polluted seas in the world and is of increasing public and state concern (Grybauskienė, 2008, p. 38). The pollution of the Baltic Sea is determined by the hydrographic, ecological and geographical characteristics of the sea. First of all, the Baltic Sea is a semi-enclosed sea connected to the North Sea by very small, narrow straits: the Lesser Belt, the Greater Belt and the Sound (Fitzmaurice, 1992, p. 1). The narrowness of the straits connecting the Baltic Sea and the North Sea means that the water in the Baltic Sea is renewed only every 30 years (Baltic Marine Environment Protection Commission, 2018). Second, the Baltic Sea is a shallow sea. The small volume of water in the Baltic Sea and limited water change means that the pollution entering the Baltic Sea is not dispersed in the global ocean, but accumulates in the Baltic Sea and causes long-term damage to the marine environment. Third, the Baltic Sea is the largest body of desalinated water in the world. Baltic Sea water is a mixture of salty water from the North Sea and fresh salty water entering the Baltic Sea. Because seawater is too salty for freshwater plant and animal species, and too fresh for marine species, only a few species have been able to adapt to such special environmental conditions of the Baltic Sea. However, the limited number of such species also means that each species has a special importance in maintaining the life and dynamics of the entire ecosystem (Baltic Marine Environment Protection Commission, 2003, p. 7). It is necessary to pay attention to the fact that a special, unique and highly pollution-sensitive

ecosystem and environment of the Baltic Sea has been formed due to the geographical, ecological and hydrographic characteristics of the Baltic Sea. This factor determines the need for special environmental protection of the Baltic Sea.

However, pollution of the Baltic Sea is determined not only by the geographical, ecological and hydrographic characteristics of the Baltic Sea. Active human activity in the Baltic Sea region also contributes to the large scale of pollution. The water of the Baltic Sea washes the shores of 9 countries - Denmark, Sweden, Finland, Russia, Estonia, Latvia, Lithuania, Poland and Germany. About 85 million people live in the Baltic Sea basin, about 15 million on the coast (Baltic Marine Environment Protection Commission, 2003, p. 22). The Baltic Sea region has well-developed industry, agriculture, shipping and other activities. It should be noted that the inland waters of all the states of the Baltic region, i.e. about 250 rivers, with urban and industrial wastewater and other pollutants flow into the Baltic Sea. Thus, the agriculture, industry, shipping, depletion of biological resources, pollution from different sources of pollution and the resulting eutrophication contribute to the deterioration of the environment of the Baltic Sea.

The regulation of the Baltic Sea environmental protection consists of a wide-scale legal regulatory mechanism for the protection of the Baltic Sea environment. Environmental protection of the Baltic Sea is regulated by various legal regimes. First of all, the environmental protection of the Baltic Sea is regulated by various international agreements: the general guidelines for the protection of the marine environment and the obligations of states are provided by the Convention on the Law of the Sea, the Helsinki Convention is dedicated specifically to the environmental protection of the Baltic Sea basin, and individual aspects such as pollution from ships or the protection of biological diversity are regulated by other international agreements. Secondly, the protection of the Baltic Sea application is regulated at the level of EU law. The main document dedicated to the protection of the marine environment is the Marine Strategy Framework Directive, which is implemented by the EU Baltic Sea Region Strategy. EU law also contains other EU directives related to the protection of the marine environment. Thirdly, the environmental protection of the Baltic Sea is implemented by transposing the general obligations and standards stipulated in international and EU law into national law, in our case, Lithuanian law, which will be the object of the analysis of this particular paper.

It is clear that the main threats to the environment of the Baltic Sea, such as non-native species, fishing, human-caused eutrophication, irreversible changes in hydrographic conditions, pollutants, marine litter and underwater noise are caused by human activities. Although the protection of the environment of the Baltic Sea is implemented by the ecosystem-based method of human activities, thereby creating conditions for the sustainable use of marine goods and services, in order to achieve a good state of the marine environment, human activities still undoubtedly influence the environment of the Baltic Sea. It should be noted that with the growth of energy and industry in the Baltic Sea region, the environmental protection of the Baltic Sea faces new challenges: microplastic pollution, underwater noise and rapidly growing infrastructure, such as the environmental aspects of installing a wind farm.

The legal regulation of the Baltic Sea environmental protection in Lithuania: parliamentary level

International and regional agreements are very important and significant legal regulatory measures for the protection of the Baltic Sea environment, which encourage the adoption of relevant national legislation into the national legal base. The legal regulation of environmental

protection of the Baltic Sea at the national level is determined by various laws and governmental decrees. These legal acts aim to harmonize the environmental protection policy of the Baltic Sea not only with the guidelines for the protection of the sea and its environment established by the EU, but also with other international obligations.

First of all, the duty of the state and man to protect the environment, and at the same time the environment of the Baltic Sea from harmful effects, is enshrined in the Constitution of the Republic of Lithuania (1992, Art. 53). The state is committed to taking care of "the protection of the natural natural environment, fauna and flora, individual natural objects and particularly valuable areas, ensures that natural resources are used in moderation, as well as restored and enriched. It is prohibited by law to devastate the earth, its depths, waters, pollute waters and air, have a radiation effect on the environment, and impoverish flora and fauna." (The Constitution of the Republic of Lithuania, 1992, Art. 54).

In 1992 the Law on Environmental Protection of the Republic of Lithuania was also adopted. This law establishes the basic rights and obligations of natural and legal persons, ensuring the rights of the people of the Republic of Lithuania to a healthy and safe environment, the harmonious development of interaction between society and nature; preservation of the diversity of organisms and the living environment necessary for them. Other laws and normative acts regulating the use of natural resources and environmental protection are adopted on the basis of this law.

After the restoration of independence in 1990, a lot of attention was paid in Lithuania to the development of the system of protected areas. The Seimas of the Republic of Lithuania in 1993 adopted the Law on Protected Areas of the Republic of Lithuania, the purpose of which is to regulate the system of protected areas and social relations related to it, the legal bases for determining and establishing protected areas, changing their boundaries, changing their status, protection, management and control, regulating activities in them, as well as areas of international importance, among them the regulation of the territories of the European ecological network "Natura 2000" and the creation of the natural framework and activities in them. Protected areas are established in order to preserve territorial complexes and objects (values) of natural and cultural heritage, landscape and biological diversity, to ensure the ecological balance of the landscape, the balanced use and restoration of natural resources, to create conditions for cognitive tourism, scientific research and monitoring of the state of the environment, to promote natural and cultural heritage territorial complexes and objects (values) (The Law on Protected Areas, Art. 3). In the Republic of Lithuania, there are more than 15 protected areas covering part of the Baltic Sea or closely related to the environment of the Baltic Sea - Curonian Spit National Park, Pajūris Regional Park, Baltic Sea Thalasological Reserve, Karklė Thalasological Reserve, Neringa Thalasological Reserve, etc. It should be noted that the Curonian Spit is recognized as having exceptional global value and is included in the list of World Cultural and Natural Heritage.

In order to implement the requirements of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, a network of NATURA 2000 territories is being developed in Lithuania. NATURA 2000 areas are integrated into the current national system of protected areas. During the implementation of the network of NATURA 2000 territories in Lithuania, 85 territories (4 of them marine) important for the protection of birds, according to the EU Birds Directive and 579 territories (4 of them marine) important for the protection of habitats, according to the EU Habitats Directive, have already been established. The development of this network does not aim to create such nature reserves where all human activities are prohibited. It is even necessary to support or encourage such human

activities in the areas established to protect biological diversity, which would be compatible with the objectives of environmental protection.

The legal regulation of environmental protection of the Baltic Sea is also implemented by the Law on Wildlife Fauna of the Republic of Lithuania, adopted in 1997, which regulates public relations in the territory of the Republic of Lithuania and its airspace, in the territorial sea of the Republic of Lithuania, on the continental shelf and in the economic zone in the Baltic Sea, related to the natural environment of or in the use, protection and protection regulation of temporarily present, migratory or otherwise visible or detectable wild animals, habitats and nests of their species, keeping wild animals from other natural areas in captivity and their other use. This law aims to ensure compliance with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species.

Another law, very closely related to biological diversity and its protection, is the Law on Protected Animals, Plants, Fungal Species and Communities of the Republic of Lithuania (1997), which establishes and regulates the relations of legal and natural persons related to the protection of protected animal, plant and fungal species and communities and their habitats and vegetation (habitat) protection, the main requirements for the preservation and propagation of these species and communities. The law establishes the basic principles of organizing the protection of protected species and communities. This law implements Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

It is necessary to mention the Law on Environmental Monitoring (1997), which determines the content, structure, implementation of environmental monitoring, the rights and duties and responsibilities of the entities participating in the environmental monitoring process. The main tasks of environmental monitoring:

1. constantly and systematically monitor the state of the natural environment and its elements in the territory of the Republic of Lithuania;
2. to systematize, evaluate and forecast spontaneous and anthropogenic changes occurring in the natural environment, trends and possible consequences of natural environment change;
3. to collect, analyze and provide state institutions, the public with information about the state of the natural environment, necessary to ensure sustainable development, territorial planning, social development decisions, scientific and other purposes;
4. to analyze and evaluate the effectiveness of implemented environmental protection measures;
5. to ensure international exchange of environmental monitoring information.

It should be noted that state monitoring of the Baltic Sea and the Curonian Lagoon is carried out in Lithuania. A state monitoring network operates in the Baltic Sea and the Curonian Lagoon, where macrophytes, bottom habitats, ichthyofauna, birds, garbage, noise, coastal dynamics, coastal hydrological and meteorological measurements and observations are carried out.

One of the main legal acts regulating the environmental protection of the Baltic Sea is the Law on the Protection of the Marine Environment of the Republic of Lithuania, adopted in 1997, the purpose of which is to determine the basic principles and measures of the protection of the marine environment, the rights and obligations of persons engaged in economic activities

that have or may have a direct or indirect impact for the marine environment, as well as the competence and main functions of state and municipal institutions in the field of marine environment protection management. This law applies to ships flying the flag of the Republic of Lithuania, foreign ships located in the sea area of the Republic of Lithuania, persons engaged in economic activities in the land and sea area of the Republic of Lithuania that have or may have an impact on the marine environment, and state and municipal institutions whose competence or main functions are related to the marine environment. environmental protection.

The Law on the Protection of the Marine Environment (1997) lays down the foundations for the formation and implementation of the environmental protection policy of the Baltic Sea. Furthermore, this legal act implements the Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (hereinafter - Marine Strategy Framework Directive), as the obligation to implement the Baltic Sea Region Strategy is transferred to national law. National legislator and other institutions are obliged to plan measures for the protection of the environment of the Baltic Sea: to carry out the evaluation of the condition of the marine environment, to establish the criteria for the good state of the marine environment of the Baltic Sea, to foresee the objectives for the protection of the marine environment, to prepare and implement the program for monitoring the state of the marine environment. As in the Marine Strategy Framework Directive, the The Law on the Protection of the Marine Environment (1997) also stipulates that an action plan for the implementation of Baltic Sea environmental protection measures is prepared, detailing these measures and determining actions to achieve or maintain a good state of the marine environment.

It should be noted that the Ministry of the Environment prepares, organises, coordinates and controls the national development programs in which measures to protect the environment of the Baltic Sea are planned. The criteria for the good state of the marine environment in the Baltic Sea region, the assessment of the state of the marine environment, the characteristics of the good state of the marine environment in the Baltic Sea region the environment minister approves the requirements for establishing marine environment protection goals and measures to achieve or maintain a good environmental condition in the Baltic Sea region.

The Law on the Protection of the Marine Environment (1997) establishes environmental impact assessment, establishment of protected areas, pollution prevention requirements, ship waste management, liquidation of pollution incidents and management of other activities in the sea area of the Republic of Lithuania. For example, the Law provides that the protection, use and other activities of natural resources in the maritime area of the Republic of Lithuania are determined by this Law, the Law on Environmental Protection, The Law on Environmental Impact Assessment of Planned Economic Activities, other laws and legal acts. The construction and reconstruction of hydrotechnical structures, wind power plants, fish farms, ports or other infrastructure structures, as well as excavation, drilling, blasting works, seismic surveys, military exercises and other planned activities that may have a negative impact on the marine environment are carried out only according to the requirements set out in the Law on Environmental Protection, The Law on the Environmental Impact Assessment of Planned Economic Activity and other laws.

Institutions and officials carrying out state control of environmental protection, in accordance with the procedure established by the Law on State Control of Environmental Protection (2002), control whether persons comply with the prevention of pollution from ships and other requirements for the protection of the marine environment and the use of natural resources set out in this law and other legal acts.

Another law closely related to the regulation of environmental protection of the Baltic Sea is the Law on the Coastal Zone of the Republic of Lithuania (2002). This law describes the objectives of determining the coastal zone, its components, determines the protection and use of coastal landscape land and sea water area. The objectives of establishing a coastal zone are:

1. using rationally to preserve the landscape of the Curonian Spit, which is included in the UNESCO World Heritage List, the continental coastal landscape, the habitats of rare and endangered plant and animal species, and other natural resources;
2. to ensure the balanced use of the coastal belt for the needs of the state and society;
3. ensure the implementation of measures for the protection of natural and cultural values of the landscape;
4. to enable the public to use the recreational resources of the coastal strip. (The Law on the Coastal Zone, Art. 3).

According to the Law on the Coastal Zone (2002, Art. 4), the coastal zone is a land territory no narrower than 100 m from the sea shore line, which includes a dune ridge, foothill, cliff and beach, stretching from the state border of the Republic of Latvia to the northern breakwater of Klaipėda port, the Curonian Spit to the state border of the Russian Federation, territorial waters of the Baltic Sea up to 20 m isobath. This law regulates the activities in the coastal zone - land management and use, issuance of documents allowing construction in the coastal zone, coastal management, monitoring of the condition of the coasts and control of the use of the coastal zone and responsibility for violations.

It is necessary to note that shoreline management measures to preserve or restore important or characteristic features of the shores are provided for in the Coastal Zone Management Programme (Ministry of the Environment, 2014). The Ministry of the Environment has prepared a draft of the Coastal Zone Management Programme for 2023-2032 (Ministry of the Environment, 2023). This program foresees that in the next decade, priority will be given to the following priority directions of coastal management: protection of natural processes, regeneration and protection of the ridge and dunes, deflationary forms and slopes are covered with branch formwork, the dune ridge is reinforced with fences, paths and stairs are installed, coastal zone is reset (Ministry of the Environment, 2023).

Environmental Impact Assessment of the activities carried out in the Baltic Sea

The legal regulation of the environmental protection of the Baltic Sea is closely related to the Law on Environmental Impact Assessment of Planned Economic Activities of the Republic of Lithuania (1996) (hereinafter - EIA Law). This law regulates the processes of selection of planned economic activities for environmental impact assessment and environmental impact assessment of planned economic activities, and mutual relations between the participants of these processes. Many national laws, such as the marine environment protection, protected areas law and EU directives, oblige countries to carry out an environmental impact assessment. According to the EIA Law, an environmental impact assessment is carried out when:

1) the planned economic activity is listed among the types of planned economic activity whose impact on the environment must be assessed (Appendix 1 of the EIA law);
2) during the selection of the planned economic activity for the environmental impact assessment it is determined that it is necessary to carry out an environmental impact assessment for this particular planned economic activity;
3) the implementation of the planned economic activity may have an impact on the territories of the European ecological network "Natura 2000" and when the institution of

protected areas determines, in accordance with the procedure established by the Minister of the Environment, that this impact may be significant. (EIA Law, 1996).

Annex 1 of the EIA Law (1996) stipulates that the impact on the environment must be assessed when:

- the economic activity is related to the extraction of traditional hydrocarbons (oil or gas) in the sea area;
- the installation of seaports or wharves is carried out, including installation of loading and/or unloading terminals, facilities for ships with a carrying capacity of 1,350 tons and more, excluding ferry piers, construction of gas, oil or chemical supply pipelines (when the diameter of the pipe is 800 mm and more, and the length is 40 km and more) etc. (EIA Law, 1996, Annex 1).

Annex 2 of the EIA Law (1996) provides a list of types of planned economic activities that must be selected for environmental impact assessment. This list includes types of economic activities related to the impact on the environment of the Baltic Sea: fish farming or breeding in the sea, reclamation of land areas from the sea, extraction of mineral or organic substances from the seabed, installation of wind farms, installation of seaports or inland ports (including fishing ports, loading or unloading terminals), for ships with a carrying capacity of less than 1,350 tons, or when an area of 0.5 ha or more is installed in the water area and on land), dredging of the water areas of seaports; for gas supply pipelines, construction or installation of anti-erosion seashore structures or facilities that can change the seashore, etc. (EIA Law, Annex 2).

The Law on territorial planning of the Republic of Lithuania (1995) is also related to the legal regulation of the environmental protection of the Baltic Sea, which regulates the territorial planning of the territory of the Republic of Lithuania, the continental shelf and the exclusive economic zone in the Baltic Sea, and determines the rights and responsibilities of the persons participating in this process. The purpose of this law is to ensure the harmonious development of territories and rational urbanization, by establishing the requirements for the systematicity of territorial planning process decisions, the compatibility and mutual impact of documents at different levels, to create conditions for the harmony of the natural and anthropogenic environment, urban quality, while preserving the valuable landscape, biological diversity, natural and cultural heritage values.

The implementation of the EU Baltic Sea region strategy in Lithuania

Marine Strategy Framework Directive (2008) sets out a common European Union (EU) approach and objectives for the prevention, protection and conservation of the marine environment in view of the pressures and impacts of damaging human activities, while allowing for its sustainable use, by means of an ecosystem-based approach (Strategy for the marine environment, 2023).

The Marine Strategy Framework Directive is implemented by the EU Strategy for the Baltic Sea Region. In Lithuania, the Environmental Protection Agency was appointed the responsible institution for the implementation of the Marine Strategy Framework Directive by the Ministry of the Environment. By Resolution No. 1264 of August 25, 2010 (updated 29 August 2012), the Lithuanian government approved the Baltic Sea environmental protection strategy, the goal of which was to achieve and/or maintain a good state of the Baltic Sea environment until 2020: to protect and preserve the marine environment, to prevent its deterioration and, if possible, to restore it marine ecosystems in water areas where this environment is negatively affected and to prevent or reduce pollution entering the marine

environment to ensure that marine biodiversity, marine ecosystems, human health or legitimate use of the marine environment are not affected or at significant risk.

The strategy for the protection of the Baltic Sea contained 5 defined goals, tasks and evaluation criteria for the implementation of the goals:

· to strive for an ecosystem-based approach to the management of marine environmental protection, ensuring that the impact of human activities does not prevent the achievement or maintenance of good environmental status of the Baltic Sea and that the capacity of marine ecosystems to respond to human-induced changes is not undermined, while creating the conditions for the current and future generations could use marine resources and marine services sustainably;

· to reduce the entry of nutrients into the marine environment by 2016, so that human-caused eutrophication is reduced in the marine area and does not have a negative impact on the environment;

· strive to ensure that the concentration of dangerous chemicals in the Baltic Sea does not cause pollution and negative changes in ecosystems;

· to achieve an adequate level of preservation of the biodiversity of the Baltic Sea;

· strive for shipping and other economic activities in the Baltic Sea to be carried out in an environmentally friendly manner (Ministry of the Environment, 2010).

Presently, this document is regulating the mentioned strategy and there is no new strategy adopted in Lithuania for the direction of this field, and there is no information on the website of the Environmental Protection Agency about any preparation of a new strategy for the protection of the environment of the Baltic Sea.

In order to implement the goals of the Strategy, the 2010-2015 plan of measures for the implementation of the Baltic Sea Environmental Protection Strategy was approved by order of the Minister of the Environment of the Republic of Lithuania (2010). For example, in order to improve the management of marine environmental protection, applying an ecosystem-based approach, the measures for the implementation of this goal were foreseen:

- a description of the procedure for determining the state of the marine environment,
- the characteristics of the good environmental condition of the Baltic Sea,
- the goals of marine environmental protection,
- the approval of monitoring programs and measures,
- approval of the state environmental monitoring program,
- assessment of the state of the marine environment and the impact of human activities on the marine environment,
- determination of the characteristics of a good environmental condition of the Baltic Sea,
- preparation of a program for monitoring the state of the marine environment,
- preparation of a draft amendment to the Baltic Sea Environmental Protection Strategy and its implementation measures plan,
- closer cooperation with other countries located in the Baltic Sea area and basin on issues of environmental protection of the Baltic Sea, etc.

The legal act mentioned is the last (most recent) legal act listing detailed measures to be taken in the Baltic Sea for the implementation of the Baltic Sea Environmental Protection Strategy, there were no more documents adopted on this question.

The Environmental Protection Agency (2020) reviewed and submitted to the European Commission an updated environmental monitoring program of the Baltic Sea prepared in accordance with the requirements of the EU Marine Strategy Framework Directive. This update of the monitoring program aims to implement the main objective of the directive - to improve

the state of the sea. The Environmental Protection Agency (2020) stresses that the monitoring of the Baltic Sea, which has been carried out for more than one decade, allows to assess the trends and changes of eutrophication, pollution by chemical substances, some biological components (for example, fish, birds). The implementation of the Marine Directive has increased the need for data, as well as the scope of monitoring, including monitoring of marine litter, underwater noise, seabed habitats, seabirds wintering in the open sea, and non-native species.

The assessment of the condition of the Baltic Sea carried out by the Environmental Protection Agency (2020) showed that the improvement of the condition of the sea is observed only according to a few indicators (e.g. pollution by oil products, pesticides, etc.), but there are no fundamental changes, problems remain relevant in the areas of biodiversity, eutrophication caused by human economic activity, fish stocks and other areas. The main impacts include pollution from the sea basin, shipping, port activities, fishing, tourism, coastal industry. Sea monitoring is an important source of data for setting water protection goals, selecting measures to improve the condition and evaluating the effectiveness of measures. By the end of 2022, in accordance with the Marine Directive, all EU countries must update programs of measures to achieve a good state of the marine environment. As mentioned, for the moment there is no public information about such actions.

The Marine Strategy Framework Directive (2008) establishes an obligation to report to the European Commission every six years. The most recent evaluation has been carried out in 2018. The experts of the European Commission have evaluated Lithuanian progress since 2012 evaluation. The evaluation includes different categories (or descriptors), such as ‘Non-indigenous species’, ‘Euthrophication’, ‘Hydrographical changes’, ‘Contaminants’, ‘Contaminants in seafood’, ‘Marine litter’, ‘Energy, incl. underwater noise’, ‘Biodiversity’, ‘Commercial fish and shellfish’ etc. Lithuania has increased its scores in most of the categories, in comparison with the 2012 evaluation. (Marine Strategy Framework Directive, technical assessment, 2021).

CONCLUSIONS

Summarizing the legal regulation of the Baltic Sea environmental protection at the national level, it can be stated that the Baltic Sea environmental protection is regulated by various national laws related to environmental protection, preservation of protected areas, protection of wildlife and wild fauna, protection of marine environment etc. It should be noted that Lithuania implements the EU Strategy for the Baltic Sea region according to the Marine Strategy Framework Directive. The Environmental Protection Agency is assigned to the implementation of this directive. The Lithuanian strategy for the protection of the Baltic Sea contains the objectives, tasks and evaluation criteria for the implementation of the objectives for the protection of the environment of the Baltic Sea. The 2010-2015 plan of measures for the implementation of the Baltic Sea Environmental Protection Strategy was used to implement the strategy's goals. Presently the updated monitoring plan for the Baltic Sea was submitted to the European Commission, and the preparation of the new strategy for the Baltic Sea will be underway in the near future.

It can be seen that the Law of the Sea Convention, the Helsinki Convention, the Marine Strategy Framework Directive, the EU Strategy for the Baltic Sea region and other international agreements and EU directives are implemented through national legal acts, which form a comprehensive legal regulatory mechanism for the environmental protection of the Baltic Sea.

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