



INSIGHT

INSTRUMENTALIZATION OF MIGRANTS, SANCTIONS
TACKLING HYBRID ATTACKS AND SCHENGEN REFORM
IN THE SHADOWS OF THE PACT

edited by Daniela Vitiello and Stefano Montaldo

BELARUS-SPONSORED MIGRATION MOVEMENTS
AND THE RESPONSE BY LITHUANIA, LATVIA, AND POLAND:
A CRITICAL APPRAISAL

MIRKO FORTI*

ABSTRACT: Lithuania, Latvia, and Poland have amended their legislation to respond to the increased migration flows caused by the policies of instrumentalisation of migrants implemented by the Belarusian government. This *Insight* illustrates these responses and shows how these EU Member States instrumentalised border tensions with Belarus to adopt restrictive migration policies impacting the rights of people on the move. Such legislative changes follow a paradigm shift at the EU level, in light of which third country nationals who are subject to instrumentalisation are qualified as hybrid threats. As a consequence, EU migration management policies legitimise national restrictive border control measures into the EU legal framework, to prevent the entry of foreign persons into the EU territory. Such a policy approach confirms a chronic inability of the EU to respond effectively and uniformly to mass migration movements, thus driving hostile third States to perpetrate hybrid attacks, such as instrumentalisation of migration practices, to gain political or economic advantages over the EU and its Member States. This *Insight* argues that EU migration and asylum policies must conform to the highest standards of fundamental rights protection to avert future hybrid attacks in the form of migration instrumentalisation practices. Furthermore, the EU should abandon a securitization rationale that equates people on the move as security threats, thus legitimizing their dehumanisation and disregarding their rights.

KEYWORDS: borders – fundamental rights – migration – asylum – instrumentalization – hybrid attacks.

* Postdoctoral fellow in EU Law, University of Tuscia, mirko.forti@unitus.it.

This *Insight* builds upon the research work carried on under the auspices of the European Center of Excellence for Countering Hybrid Threats.

EUROPEAN PAPERS

VOL. 8, 2023, NO 1, PP. 227-238

(EUROPEAN FORUM, 11 JULY 2023), PP. 227-238

www.europeanpapers.eu

ISSN 2499-8249

doi: 10.15166/2499-8249/648

(CC BY-NC-ND 4.0)



I. INTRODUCTION

This *Insight* addresses the legislative responses adopted by Lithuania, Latvia and Poland to Belarus-sponsored migration movements doubting compliance with the fundamental rights framework of people on the move. The *Insight* then illustrates the EU regulatory initiatives to respond to the hybrid attack perpetrated by Belarus explaining their criticalities and flaws. More specifically, it questions the vagueness and legal uncertainty of the legislative definition of migration instrumentalisation. Such a lack of clarity contributes to a blurring framework bringing into discussion the limits of discretionality of EU Member States when responding to migration instrumentalisation episodes. The *Insight* addresses the above-mentioned points moving from the analysis of the migration crisis occurred at the EU-Belarus border between the 2021 and 2022.

The 2020 Belarusian presidential election saw Alexander Lukashenko re-elected. The Organization for Security and Cooperation in Europe (OSCE) reported systematic and massive human rights violations after the vote, calling for the annulment of the official election results due to irregularities at all stages of the voting process.¹ In response to this dramatic escalation, the EU imposed a package of restrictive measures on the Belarusian government.² More specifically, sanctions hit a list of Belarusian officers with a visa ban and the freezing of all their assets in Europe.³

A few months later, Lithuania reported an increase in incoming migration flows from Belarus and accused Lukashenko's government of encouraging the opening of new migration routes as a means of destabilization.⁴ Lukashenko responded to these allegations declaring that Belarus did not prevent anyone from reaching the EU external frontiers.⁵

Belarus responded to European sanctions by implementing practices to artificially increase migration flows and destabilize the EU and its Member States. Various newspaper articles and reports explained how the Belarusian government had been luring third-country nationals, especially from Middle Eastern countries, to its territory with false hopes of crossing EU borders.⁶ According to these sources, a network of travel agencies, airlines and smugglers had been cooperating, with the help of the Belarusian authorities, to enable migrants to obtain visas, travel to Belarus and, from there, reach EU borders.

¹ OSCE, OSCE Rapporteur's report under the Moscow Mechanism on alleged Human Rights violations related to the Presidential Elections of 9 August 2020 in Belarus, 5 November 2020, www.osce.org.

² BBC, *EU slaps sanctions on Belarus leader Lukashenko for crackdown* www.bbc.com.

³ Council Implementing Regulation (EU) 2020/1648 of 6 November 2020 implementing Article 8a (1) of Regulation (EC) n. 765/2006 concerning restrictive measures in respect of Belarus.

⁴ L Dapkus, 'Lithuania says Belarus could be behind recent migrant influx' (7 June 2021) U.S. News www.usnews.com.

⁵ Belta, *Lukashenko comments on measures to fight illegal migration on border* www.eng.belta.by.

⁶ T Kulakevich, 'Trouble on the Belarus-Poland border: what you need to know about the migrant crisis manufactured by Belarus' leader' (18 November 2021) *The Conversation* www.theconversation.com; BBC, *Belarus border crisis: How are migrants getting there?* www.bbc.com.

Migrants also reported how Belarusian border guards repeatedly pushed them to cross the borders into EU countries.

European Commissioner for Home Affairs Ylva Johansson accused Lukashenko and the Belarusian government of using migrants as a weapon against the EU.⁷ The High Representative of the Union for Foreign Affairs and Security Policy, Josep Borrell, observed how the distinction between war and peace is gradually fading, leaving room for hybrid forms of warfare, such as those at the EU-Belarus border.⁸ Also the President of the EU Commission, Ursula von der Leyen, accused Belarus of launching a hybrid attack against the EU and its member states with hostile policies of instrumentalized migration.⁹

Lithuania, Latvia and Poland reacted to increased migration movements towards their borders with radical modifications to their migration and asylum legal framework. Under such legislation, people on the move are considered as a security threat and, thus, dehumanised. This *Insight* shows how the measures taken by Lithuania, Latvia and Poland are an expression of the inability of the EU and its member states to respond to sudden migration influxes that drives hostile third States to adopt instrumentalization of migration practices to destabilize the EU.

II. DEFINING MIGRATION INSTRUMENTALIZATION

Practices concerning the instrumentalization of migratory fluxes are not a new phenomenon.¹⁰ States have used mass movements of people for various purposes, including colonization, territorial expansion, or the conquest of new economic markets. Thus, migration instrumentalization can assume a variety of features according to the existing circumstances and aims pursued. As far as the EU-Belarus border scenario is concerned, the instrumentalization of migration indicates the capability of a state to direct migratory movements towards a target country with the intent to destabilize such a target, duly influence its actions, and gain economic or political concessions from it.¹¹

The EU Commission, in its proposal to reform the Schengen Border Code, defined the instrumentalization of migration as a situation in which a third state actively encour-

⁷ J Parrock, 'Lukashenko is "using human beings" in an "extreme act of aggression towards the EU", says Johansson' (25 August 2021) Euronews www.euronews.com.

⁸ B Hall, S Fleming and J Shotter, 'How migration became a weapon in a 'hybrid war' (5 December 2021) Financial Times www.ft.com.

⁹ 2021 State of The Union Address by Commission President von der Leyen (15 September 2021) ec.europa.eu; Statement by President von der Leyen at the joint press conference with NATO Secretary-General Stoltenberg and Latvian Prime Minister Kariņš in relation to the situation in Belarus and at its border with the EU (28 November 2021) ec.europa.eu.

¹⁰ A Fakhry, R Parkes and A Racz, 'Migration Instrumentalization: A Taxonomy for an Efficient Response' (Hybrid CoE Working Paper 14-2022) www.hybridcoe.fi.

¹¹ *Ibid.*

ages or facilitates irregular migratory movements towards EU external borders to destabilize the EU and its Member States where such actions are capable of endangering essential state functions, such as territorial integrity or law enforcement mechanisms.¹² This definition contains various unclear terms that may cause problems of regulatory uncertainty and, therefore, discrepancies in the implementation phase.¹³ More specifically, there are no valid instruments to assess the hostile intentions of a third country to destabilize the EU and its Member States. It is likewise not possible to unambiguously determine when a specific action could undermine vital state activities. Such a lack of legal clarity leaves room for political disputes over the opportunity to frame a specific situation at the borders within the migration instrumentalization context.¹⁴ Thus, differentiation on a national basis of the treatment of incoming third-country migrants could be one of the consequences of this broad and unclear definition.

III. AMENDMENTS TO NATIONAL LEGISLATION AGAINST INSTRUMENTALIZATION OF MIGRATION EPISODES: THE CASES OF LITHUANIA, LATVIA, AND POLAND

Lithuania, Latvia and Poland recorded a growing border pressure during the second half of 2021. Polish border authorities registered about 9400 attempts to pass national frontiers irregularly in just one month (August-September 2021),¹⁵ while Latvia received about 582 asylum applications in the same year.¹⁶ These three countries addressed the steady increase in incoming migration fluxes as a security concern. Polish authorities reacted to the increased border pressure by deploying about 4,000 border guards and 25,000 soldiers¹⁷ and building a security barrier along the Belarus frontier.¹⁸ The progressive militarisation of national borders and migration management contradicts EU migration policies. Recital 26 of the Schengen Borders Code (SBC)¹⁹ explained how the migration of

¹² Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final, 14 December 2021, art. 2 (27).

¹³ ECRE, *A step too far: introducing "instrumentalisation" in EU Law* ecre.org.

¹⁴ S Heinikoski, 'Schengen Reform and the instrumentalisation of asylum-seekers' (FIIA Briefing Paper 333-2022) www.fiaa.fi.

¹⁵ B Bathke, 'Poland seeks extension of state of emergency on Belarus' (28 September 2021) Info Migrants www.infomigrants.net.

¹⁶ Office of Citizenship and Migration Affairs Republic of Latvia, *Statistics on asylum seekers until 2023* www.pmlp.gov.lv.

¹⁷ ECRE News, *EU Eastern borders: Poland ignores Commission pressure for Frontex deployment, Eastern States moves to "legalise" pushbacks, Belarus suspends return agreement* ecre.org.

¹⁸ M Cholodowski, "'We're gonna build a wall and it will be impenetrable'". Kaczyński pledges to seal the Polish-Belarus border' (14 October 2021) Wyborcza wyborcza.pl.

¹⁹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

several third-country nationals should not represent a security threat *per se*. The securitisation of migration issues dehumanises people on the move, thus legitimising the disregard for their rights, as occurred in the village of Usnarz Górny, located between Poland and Belarus.²⁰ A small group of Afghani migrants were stranded in this place during August 2021 due to Polish border guards preventing them from entering the EU territory while Belarus agents blocked them from going back on their way. According to the reports, Polish authorities repeatedly violated the fundamental and procedural rights of these people.²¹ More specifically, border guards allegedly failed to initiate the necessary procedures despite the repeated asylum claims made by the stranded migrants. Polish border guards allegedly abandoned irregular migrants caught trying to cross the border in the middle of the surrounding forests. Foreigners should acquire asylum-seeker status and related rights at the time of applying for protection and regardless of the way such an application is made (art. 3 (1) APD). Severe surrounding circumstances exacerbated the already dramatic conditions of concerned individuals.²² Stranded migrants could not access legal and medical assistance and faced severe challenges in obtaining food, water, and shelter. Such a situation may infringe on the prohibition of inhuman and degrading treatment (art. 3 ECHR). The ECtHR issued a series of interim measures to prevent irreversible harm to the affected people and thus ordered the Polish authorities to provide them with food, water, clothing, shelter, and access to medical care.²³ Poland decided not to comply with ECtHR orders as it emphasized that the migrants were in the territory of Belarus and hence under the consideration of Lukashenko's government.²⁴ Despite such claims of lack of jurisdiction, Polish border guards performed border control activities towards the migrants. According to the ECtHR relevant case law,²⁵ Poland thus stated its jurisdiction over third-country nationals on the Polish-Belarus border.

Lithuania, Latvia and Poland declared a state of emergency²⁶ and adopted various legislative changes to their legal framework to address the consequences of massive incoming migration fluxes and prevent irregular entries. The sequent sections of the *Insight* illustrate how such regulatory modifications could prevent weaponised third-country nationals from applying for international protection and infringe on their fundamental rights.

²⁰ M Górczyńska, 'On the side of the law. An analysis of the situation on the Polish-Belarusian border' (9 September 2021) Helsinki Foundation for Human Rights www.hfhr.pl.

²¹ *Ibid.*

²² C Ciobanu, 'Poland delivers another blow to international rights of refugees' (30 August 2021) Balkan Insight www.balkaninsight.com.

²³ ECtHR, Press Release, 'Court gives notice of "R.A. v. Poland" case and applies interim measures', ECHR 283 (2021), 28 September 2021.

²⁴ Polish Ministry of the Interior and Administration, *Poland provided the ECHR with its position on the order for interim measures* www.gov.pl.

²⁵ ECtHR *Hirsi Jamaa and others v Italy* App n. 27765/09 [23 February 2012] paras 81-82.

²⁶ Government of the Republic of Lithuania, *On the declaration of the extraordinary situation and the appointment of the State Commander of National Emergency Operations* e-seimas.lrs.lt.

IV. NATIONAL EMERGENCY MEASURES AND THEIR COMPLIANCE WITH THE FUNDAMENTAL RIGHTS FRAMEWORK

The Lithuanian Parliament approved several amendments²⁷ to the Law on the Legal Status of Aliens, radically limiting access to asylum procedures on the national territory.²⁸ The Latvian government declared a state of emergency in four frontier areas (the municipalities of Ludza, Krāslava, and Augšdaugava, and the city of Daugavpils) for three months starting on 10 August 2021, thus introducing new rules about migration management.²⁹ Polish authorities issued as well a declaration of emergency in concerned border areas and prohibited media operators and NGO agents to come in the interested zones.³⁰ Polish authorities passed several amendments to an executive Regulation,³¹ adopted in 2020 as part of the national framework addressing the Covid-19 pandemic. This act restricted entries of third-country nationals at selected border points with Russia, Ukraine, and Belarus, thus preventing specific categories of individuals, including asylum-seekers, from entering the Polish territory. In addition to that, the Polish Parliament approved a series of amendments to the Act on Foreigners of the Republic of Poland (Act on Foreigners)³² and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland (Act on Granting Protection)³³ introducing a new kind of administrative decision regarding foreign individuals on Polish territory, namely an order of unauthorised crossing of borders.³⁴ Such a provision prescribes the immediate removal from Poland of individuals who irregularly crossed the borders, prohibiting them from returning to all Schengen area countries for a period of six months to three years.

Legislative changes introduced in all three countries prioritise the defence of national borders even at the expense of the legitimate prerogatives of people on the move. Ac-

²⁷ Seimas of the Republic of Lithuania, 'On the Law of the Republic of Lithuania amending Articles 5, 71, 76, 77, 79, 113, 131, 136, 138, 139, 140 on the Law on the Legal Status of Aliens No IX-2206 and Supplement of the Law with Chapter IX', XIV-506 (13 July 2021); Seimas of the Republic of Lithuania, 'On the Law of the Republic of Lithuania on the Legal Status of Aliens No IX-2206 Amendment to Article 67', XIV-515 (10 August 2021).

²⁸ ECRE, *Extraordinary responses: legislative changes in Lithuania, 2021* ecre.org.

²⁹ Cabinet of the Ministers of the Republic of Latvia, Order n. 518 of 10 August 2021 regarding the declaration of emergency situation, www.likumi.lv.

³⁰ G Baranowska, 'The deadly woods. Legalizing pushbacks at the Polish-Belarusian border' (29 October 2021) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de).

³¹ Dz.U.2020.435 z 2020.03.13, the Decree is based on the State Border Protection Act of 12 October 1990 (Dz.U 2019 item 1776).

³² Act on Foreigners of the Republic of Poland of 12 December, 2013, as amended, Dz. U. 2013 poz. 1650.

³³ Act on Granting Protection to Foreigners on the Territory of the Republic of Poland, 13 June 2003, Dz. U. 2003 Nr 128 poz. 1176.

³⁴ Euractiv, *Poland passes law allowing migrants to be pushed back at the border* www.euractiv.com.

ording to amended art. 67 Aliens Law, Lithuanian authorities may decide to receive asylum applications only in specific places: a) at border-crossing points and specific transit zones, b) in the national territory when the foreigner has entered Lithuania legally, and c) at Lithuanian embassies, consulates, and diplomatic missions in a foreign state. National border guards could also refuse to evaluate the asylum applications of those who entered Lithuanian territory irregularly. The amended Polish regulatory framework limits as well the access to asylum procedures for third-country nationals. According to art. 33, par. 1a of the Act on Granting Protection, the Head of the Office for Foreigners may not consider an asylum application from individuals who irregularly crossed the Polish border unless a) they arrived directly from a territory where their lives were endangered, b) presented valid reasons for having crossed the borders illegally, and c) submitted an asylum application immediately upon entering Polish territory. Insofar as Latvia is concerned, the state of emergency declaration allowed Latvian authorities to receive no asylum applications in the affected areas.

The EU Asylum Procedures Directive³⁵ does allow the Member States to establish specific places to receive applications for protection, but without impairing the right to asylum.³⁶ A small number of widely scattered border crossing points can render the possibility of applying for asylum ineffective for many people. Limited access to transit zones and lack of procedural safeguards to ensure individual admission to asylum procedures indicate that there are no effective possibilities for legal entry.³⁷ The ECtHR stated that preventing applicants from making their asylum claims, and proceeding with their expulsion to Belarus without a proper assessment of their conditions (also known as pushback operations), is against the prohibition of torture or inhuman and degrading treatment (art. 3 ECHR).³⁸ Such practices may as well violate the prohibition of collective expulsion (art. 4 Protocol 4 ECHR).³⁹ Pushback practices could infringe on the principle of non-refoulement (art. 33 of the 1951 Refugee Convention), thus exposing affected individuals to risks to their integrity if turned back to their countries of origin or transit.

The legislative changes create two categories of asylum seekers and penalise those who cross the border irregularly. However, the right to asylum does not depend on the manner of arrival in a particular country, as adverse circumstances often push migrants to come to national borders without prior authorisation.⁴⁰ Lithuania, Latvia, and Poland

³⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

³⁶ ECRE, *Extraordinary responses* cit.

³⁷ ECtHR *Shahzad v Hungary* App n.12625/17 [8 July 2021] para. 65.

³⁸ ECtHR *M.A. and others v Lithuania*, App n. 59793/17 [11 December 2018] para. 115.

³⁹ ECtHR *D.A. and others v Poland* App n. 51246/17 [8 July 2021] paras 78-80.

⁴⁰ UNHCR, *UNCHR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland*, www.refworld.org.

can legitimately control its border, but international law obligations, including the principle of non-refoulement, the right to seek asylum and the prohibition of collective expulsions, should be respected.

Introduced amendments have detrimental consequences as well on the procedural rights of asylum seekers. Legislative changes to Lithuanian Aliens Law established an extra-judicial complaint mechanism against adverse asylum decisions according to which interested individuals could ask for redress before the Migration Department. Such an appeal procedure did not grant applicants any suspensive effect of the debated measure, thus rendering futile the right to an effective legal remedy (art. 19 ECHR).⁴¹ Applicant expulsion during the complaint procedure would make it pointless. The Polish legal framework provides as well interested individuals with the right to fill a complaint to the High Commander of the Border Guard, but the appeal mechanism does not suspend the enforcement of expulsion orders.

According to the ECtHR, access to legal remedies should not be a mere formal option but a real possibility.⁴² Notwithstanding these considerations, Lithuanian authorities allegedly did not respect the procedural rights of concerned migrants.⁴³ More specifically, decisions on asylum claims were written in Lithuanian, thus complicating their understandability and appealability. Migrants were also allegedly unaware of their right to have professional legal assistance during the assessment procedure of their asylum requests. The ECtHR requires a different judicial body from the one that issued the debated measure ruling on the complaint to ensure the respect of the right to an effective remedy.⁴⁴ In spite of such a prescription, Polish and Lithuanian norms state that the national Migration Departments could decide on the complaints regarding its own decisions.

The CJEU defines detention status as the deprivation of freedom of movement and the isolation from the remaining population through permanent confinement in a closed and restricted space.⁴⁵ Detention should be an *extrema ratio* choice to be pursued when other options are not available.⁴⁶ According to amended art. 5(6) Aliens Law, Lithuanian border guards, during an emergency situation, can *accommodate* asylum seekers in designated

⁴¹ ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] para. 293; ECtHR *Kebe and others v Ukraine* App n. 12552/12 [12 January 2017] para. 101.

⁴² ECtHR *Abdolkhani and Karimnia v Turkey* App 30471/08 [22 September 2009] para. 115.

⁴³ G Blažytė and others, 'Comparative report on the influx of irregular migrants across the border of Belarus: the response by the governments of Lithuania and Latvia' (NIEM Report - 2022) www.forintegration.eu.

⁴⁴ ECtHR *Khan v United Kingdom* App n. 35394/97 [12 May 2000] para. 47.

⁴⁵ Joined Cases C-924/19 PPU and C-925/PPU *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367 para. 223; Case C-72/22 PPU *M.A. v Valstybės sienos apsaugos tarnyba*, ECLI:EU:C:2022:505 para. 39.

⁴⁶ Case C-18/16 K. v *Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2017:680 para. 48.

places while pending their protection claims without allowing them to move within the national territory. Thus, despite the use of the term accommodation, the Lithuanian legal framework established a regime of *de facto* detention for asylum applicants.⁴⁷ Thus, normative provisions allowed Lithuanian authorities to hold foreigners on the sole ground of irregular entry. Arbitrary detention determined by a non-judicial authority (Lithuanian border guards) with no means of challenging such a decision may infringe on the right to liberty and security (art. 5 ECHR). Such a detention regime did not consider the needs and necessities of vulnerable persons when accommodating incoming migrants in reception centres. The Lithuanian Ombudsman assessed that the conditions applied to migrants detained in the reception centres were contrary to the prohibition of inhuman and degrading treatment. More specifically, reports⁴⁸ certified the poor hygienic conditions of such centres and their premises, the impossibility of accessing adequate health care services for the concerned individuals, and the lack of daily warm food.

V. EU LEGISLATIVE CHANGES TO ADDRESS THE INSTRUMENTALISATION OF MIGRATION PHENOMENA

In early December 2021, the European Commission introduced its proposal on provisional emergency measures for the benefit of Lithuania, Latvia, and Poland,⁴⁹ which was meant to provide the three countries with a variety of measures to address migration instrumentalisation phenomena. The proposal extended for the above-mentioned EU States to 4 weeks the time limit to register asylum applications, thus derogating the previous deadline of 10 days (art. 6 (1) APD). In addition to that, the border authorities of Lithuania, Latvia and Poland could assess asylum claims at the border, thus not allowing applicants into the national territory. Moreover, these Member States could provide migrants with reception conditions different from those foreseen in the Reception Conditions Directive, respecting the fundamental rights and basic needs of interested individuals. Later in December 2021, the Commission published its Proposal for a Regulation addressing situations of migration instrumentalisation,⁵⁰ which provides EU states facing the consequences of state-sponsored migration movements with various derogatory

⁴⁷ ECRE, *Extraordinary responses: legislative changes in Lithuania, 2021* cit.

⁴⁸ Seimas Ombudsmen's Office of the Republic of Lithuania, *Report on ensuring human rights and freedom in places of temporary accommodation of foreigners having crossed the border of the Republic of Lithuania with the Republic of Belarus*, NKP-2021/1-3 www.lrski.lt; Seimas Ombudsmen's Office of the Republic of Lithuania, *Report on ensuring Human Rights and freedoms of foreign nationals in the Kybartai Aliens Registration Centre under the Ministry of the Interior of the Republic of Lithuania*, NKP-2021/1-4 www.lrski.lt.

⁴⁹ Commission Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final, 1 December 2021.

⁵⁰ Commission Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890 final, 14 December 2021.

measures from the EU legal framework of migration and asylum. According to the draft, states may limit border crossing to specific transit zones and have four weeks to register asylum applications and sixteen weeks to decide upon their approval.

The legislative proposals from the European Commission raise many concerns⁵¹ about their normative consistency with the already existing EU's regulatory framework on migration and asylum. The willingness to adopt a new legislative instrument addressing migration instrumentalisation phenomena when the European Parliament is already discussing a Regulation proposal⁵² on the situation of crisis and force majeure in the migration context is debatable. Such an approach delegitimises the work of the European Parliament and shows how the EU does not have uniform and coherent plans on how to address emergencies in the field of migration and asylum. This lack of a regulatory structure and policy uniformity may expose inherent vulnerabilities of the EU in managing incoming migratory fluxes and thus lead hostile third countries to adopt migration instrumentalisation initiatives to gain concessions from the EU and its member states. The European Commission legitimises wide derogations from the EU migration and asylum framework with the two proposals addressing state-sponsored migration fluxes. As a consequence of such fragmentation, targeted countries would have political discretion to disregard their migration management obligations, thus leaving more responsibilities to other EU countries and undermining the Common European Asylum System. The two proposals then seem to fit into a broader policy discourse that approaches migration from a predominantly security perspective.⁵³ The legislative initiatives give the interested states instruments to "close" their borders to incoming menaces, although this approach means disregarding the fundamental rights of migrants. In other words, the proposals from the European Commission place the burden of instrumentalisation on the migrants themselves and not on the hostile third countries.⁵⁴ The implementation of the regulatory proposals would not cause any consequences for the hostile States responsible for

⁵¹ M Forti, 'Questioni giuridiche e problemi di tutela dei diritti fondamentali nella risposta dell'Unione europea alle pratiche di strumentalizzazione dei flussi migratori' (2022) *Freedom, Security & Justice: European Legal Studies* 245.

⁵² Commission Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020)613 final, 23 September 2020.

⁵³ J Huysmans, 'The European Union and the securitization of migration' (2000) *JComMarSt* 751; S Léonard, 'EU border security and migration into the European Union: Frontex and securitization through practices' (2010) *European Security* 231; I Atak and F Crépeau, 'National security, terrorism and the securitization of migration', in V Chetail and C Bauloz (eds) *Research handbook on International Law and migration* (Edward Elgar 2014) 93; T Fakhoury, 'Securitising migration: the European Union in the context of the post-2011 Arab upheavals' (2016) *The International Spectator* 67; A Demirkol, 'An empirical analysis of securitization discourse in the European Union' (2022) *Migration Letters* 273.

⁵⁴ C Scissa, 'Misure emergenziali al confine tra UE e Bielorussia: uno scontro tra "titani" con gravi ripercussioni per i migranti' (European Forum Insight of 7 April 2022) www.europeanpapers.eu 43.

hybrid attacks toward the EU through the weaponisation of people on the move. However, the above-discussed legislative proposals would make it more difficult accessing the right to asylum for the instrumentalised migrants themselves. It is questionable, at least, how the EU legislative drafts to address practices of instrumentalisation of migration allow EU member states to derogate from the current EU migration and asylum legal framework instead of implementing already existing tools, such as complementary pathways and relocation programmes, to alleviate migratory pressure at their national borders.

Notwithstanding the EU Council did not approve the Instrumentalisation Regulation,⁵⁵ the EU Commission argued⁵⁶ for its exam alongside the Crisis and Force Majeure (CFM) Regulation Proposal⁵⁷ to adopt a holistic and uniform approach to emergencies in the field of migration management (including the ones caused by migration instrumentalization practices). According to the CFM, EU Member States could derogate from EU asylum legal standards to respond to migration crisis. The recently released Asylum and Migration Management Regulation (AMMR) Proposal⁵⁸ would provide EU Member States with a Permanent EU Migration Support Toolbox to deal with a mass influx of irregular entries at their national borders. According to art. 6a (1) (c) of the AMMR, EU Member States addressing specific migratory challenges could derogate from the EU legal framework to deal with increased border pressures. The concept of adaptive responsibility illustrates the increasing tendency of the EU to allow Member States to derogate from their legal obligations in terms of migration management to address migration emergencies.⁵⁹ The lack of a clear definition of migration crisis could leave a wide margin of discretion to EU Member States when applying legal derogations, thus undermining the coherence and uniformity of the EU migration and asylum legal framework.

VI. CONCLUDING REMARKS

Belarus artificially increased pressure on EU borders by creating new migration routes to Lithuania, Latvia and Poland to respond to a growing political escalation with the EU. Such a hybrid attack exploited the chronic inability of the EU to manage incoming migratory fluxes due to the divergent interests of the EU Member States. The legislative measures adopted by Lithuania, Latvia and Poland derogated from the EU migration and asylum legal

⁵⁵ ECRE, *ECRE Reaction: No Majority for Instrumentalisation Regulation* ecre.org.

⁵⁶ Communication COM(2022) 740 final/2 of 12 January 2023 from the Commission on the Report on Migration and Asylum.

⁵⁷ Commission Proposal COM(2020) 613 final cit.

⁵⁸ Commission Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23 September 2020.

⁵⁹ F Peerboom, 'Flexible responsibility or the end of asylum law as we know it?' (26 April 2023) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de).

framework prioritising the inviolability of national frontiers at the expense of an EU holistic response to the increased border pressure. These three countries dealt with Belarus-sponsored migration movements from an emergency perspective that addressed people on the move as potential security threats. Polish Prime Minister Mateusz Morawiecki feared how the migrant crisis on the Belarus border might rapidly escalate, while Lithuanian Prime Minister Ingrida Šimonytė called for the support of European partners to address the crisis.⁶⁰ The weaponisation of migration contributes to the progressive dehumanisation of people on the move, thus legitimising national repressive measures disregarding the rights and prerogatives of instrumentalised third-country nationals.⁶¹ The primary focus of such an approach is protecting the integrity of State borders and preventing irregular entries within the national territory, although this could imply infringing on the fundamental rights of weaponised migrants. As shown by this *Insight*, the legislative measures from Lithuania, Latvia and Poland did not comply with the necessity and proportionality requirements and unreasonably limited the rights of third-country nationals from Belarus. The EU legislative response to the Belarusian hybrid attack legitimised such national measures allowing affected Member States to derogate from the EU migration and asylum framework to manage the consequences of migration instrumentalisation practices. This *Insight* illustrates the flaws and shortcomings of the EU regulatory initiative and how they could impact the rights of people on the move. The lack of a clear and uniform definition of instrumentalisation of migration leaves a wide margin of discretion to the EU Member States on how to deal with state-sponsored migration fluxes. As a consequence, instrumentalised migrants may undergo discretionary treatments accordingly to the different national measures. The *Insight* explains how legitimising derogations on a national basis from the EU migration and asylum legal framework could undermine the fundamental rights safeguards of weaponised third-country nationals. Moreover, it argues for abandoning a securitisation perspective when dealing with migration movements, thus suggesting EU migration policies should comply with the highest fundamental rights standards to discourage future hybrid attacks. The ongoing discussions around the New Pact on Migration and Asylum may be the occasion for a paradigm shift in EU migration policies towards a holistic and uniform approach that does not consider third-country nationals as security threats, thus disarming the weaponisation of migration menace. Political divisions between Member States could, however, prevent such uniformity of intent, weakening the EU's role on the international stage and making it vulnerable to hybrid attacks in the form of state-sponsored migration fluxes. Introducing the concept of adaptive responsibility within the New Pact would certify the EU's difficulty in responding as one to the challenges posed by today's migratory dynamics.

⁶⁰ A Włodarczak-semczuk, A Sytas, 'Poland says Belarus border crisis may be prelude to something worse' (22 November 2021) Reuters www.reuters.com.

⁶¹ F Bender, 'Against "weaponized migration"' (10 November 2021) Social Europe socialeurope.eu.