



INSIGHT

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

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PROTECTING BORDERS OR INDIVIDUAL RIGHTS? A COMPARATIVE DUE PROCESS RIGHTS ANALYSIS OF EU AND MEMBER STATE RESPONSES TO 'WEAPONISED' MIGRATION

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ABSTRACT: In recent years the EU and its Member States have claimed to be increasingly targeted by “weaponised” migration. Due to the contemporary sensitivity of migration-related issues in the EU, neighbouring states are supposedly using the threat of increased migration to force the Union’s hand in other policy areas. Below, several recent examples of this supposedly happening will be discussed, with an emphasis on: (i) the 2021 crisis along the Lithuania-Belarus external border; and (ii) the Turkish decision to briefly open its borders with Greece in February 2020. While the phenomenon of “weaponised” migration raises numerous legal questions, this Insight focusses only on the responses of self-proclaimed “targets” within a European context: the EU and its Member States. With the aim of understanding the impact of Lithuanian, Greek, and EU reforms on due process rights of the migrants supposedly being “weaponised”, the most prominent reforms will be critically scrutinised from the perspective of EU asylum and fundamental rights law. In this Insight, it will be argued that the EU and its Member States strongly favour border security over the due process rights of the migrants involved, reflecting a wider trend of a normalisation of illegal practices at both domestic and EU level.

KEYWORDS: “weaponisation” of migration – Member States and EU reforms – EU asylum law – EU fundamental rights law – Lithuania – Greece.

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I. INTRODUCTION

Since mid-2021, numerous EU Member States – including Lithuania, Poland, and Latvia – have been confronted with increases in asylum applications.¹ According to the EU and the most affected Member States, this is partly caused by the actions of neighbouring Belarus. The Lukashenko regime has supposedly purposefully organised travel to its territory for thousands of individuals and subsequently facilitated their transit towards the EU. This is apparently done with the aim of pressuring the Union into dropping the sanctions it has imposed and renewed against Belarus since October 2020.² The Belarussian “use” of migrants for political purposes amounts, in the eyes of the Union and the Member States, to a “weaponisation” of migration.³ This is, however, not the first time that the EU has considered one of its neighbours to be acting in this manner. Similar practices have supposedly been implemented by Russia,⁴ Morocco,⁵ Turkey,⁶ and others.

While the phenomenon of “weaponised” migration raises various unanswered legal questions, this *Insight* will specifically focus on the responses of self-proclaimed “targets” within a European context: the EU and its Member States. Section II begins with the background of the “weaponisation” of migration. It will explain what the phenomenon entails and compare recent examples of its claimed use against the EU and its Member States. Next, in Section III, this *Insight* will dive deeper into two of those examples and provide an overview of the most important reforms adopted by two of the Member States significantly affected – Lithuania and Greece – as well as those adopted by the EU in parallel. The aim is to clarify to what extent these reforms comply with asylum seeker due process rights as protected under EU asylum and fundamental rights law. In the fourth and final section, parallels between the situations in Lithuania and Greece will be drawn. It will be argued that the proposal and/or adoption of problematic “emergency” reforms – at both domestic and EU level – reflect a broader trend of a normalisation of illegal pushback strategies throughout the Union. This results in a situation where the EU and its Member

¹ European Council on Refugees and Exiles (ECRE), Legal Note n. 11, ‘Extraordinary Responses: Legislative Changes in Lithuania – ECRE’s Assessment of Recent Changes to Asylum Legislation in Lithuania and their Impact, with Reference to Compliance with EU and International Law’ (2021) 2; See also: BBC News, ‘Poland Blocks Hundreds of Migrants at Belarus Border’ (8 November 2021) BBC News www.bbc.com.

² European Council, *EU Relations with Belarus* www.consilium.europa.eu.

³ Council of the EU, *Press release 638/21- Belarus: Declaration by the High Representative on behalf of the European Union on the Instrumentalization of Migrations and Refugees by the Regime* (30 August 2021) www.consilium.europa.eu.

⁴ See A Fakhry, R Parkes and A Rácz, ‘Migration Instrumentalization: A Taxonomy for an Efficient Response’ (Hybrid CoE Working Paper 14 March 2022) 11-12.

⁵ *Ibid.* See also T Nogueira Pinto, ‘European Migration as a Political Tool’ (9 September 2021) Geopolitical Intelligence www.gisreportsonline.com.

⁶ *Ibid.* See also R Cortinovis, ‘Pushbacks and Lack of Accountability at the Greek Turkish Borders’ (CEPS Paper in Liberty and Security in Europe 2021-01) 2.

States seemingly treat those seeking protection as dangerous “weapons” rather than human beings entitled to individual protections.

II. THE “WEAPONISATION” OF MIGRATION IN AN EU CONTEXT

Ever since the 2015 migration “crisis”, there have been relatively high numbers of migrant arrivals at the EU’s external borders.⁷ While the causes for this can sometimes be obvious – e.g. people trying to find safety as a consequence of Russia’s invasion of Ukraine in February 2022 –,⁸ what is less well known is that the increased numbers of arrivals can also be partly caused by the deliberate actions of a number of the EU’s neighbours. Over the last decade, the EU and its Member States have claimed to be increasingly targeted by “weaponised” migration, i.e., “those cross-border population movements that are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or states”.⁹ A recent study of the phenomenon claims that between 2014 and 2020 the EU was targeted by “weaponisation” practices at least 40 times.¹⁰ A number of third countries – including Belarus,¹¹ Turkey,¹² Morocco,¹³ and Russia¹⁴ – have allegedly adopted such practices as a way to exploit current political disagreement and public fears concerning migration within the Union. To obtain a better understanding of this phenomenon in an EU context, three recent and prominent examples of claimed “weaponisation” practices against the Union and its Member States will be discussed and compared below.

Most recently, it has been claimed that Belarus has “weaponised” migration against the Union and its Member States. The Lukashenko regime has reportedly resorted to such practices in response to the EU openly condemning “the Belarusian authorities for their violent repression of peaceful protests for justice, freedom and democracy in the wake of the fraudulent 9 August 2020 presidential elections”,¹⁵ and increasing and

⁷ See e.g. Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

⁸ United Nations High Commissioner for Refugees, *Operational Data Portal: Ukraine Refugee Situation* data.unhcr.org.

⁹ K Greenhill, *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy* (Cornell University Press 2010) 13.

¹⁰ A Fakhry, R Parkes and A Rácz, ‘Migration Instrumentalization: A Taxonomy for an Efficient Response’ cit. 9.

¹¹ Council of the EU, *Belarus: Declaration* cit.

¹² See e.g. Cortinovis, ‘Pushbacks and Lack of Accountability at the Greek Turkish Borders’ cit.

¹³ See e.g. B Garcés Mascareñas, ‘CEUTA: The Weaponisation of Migration’ (May 2021) Barcelona Centre for International Affairs Opinion 669 www.cidob.org.

¹⁴ See e.g. H Schoenmaker, ‘Allegations of Russian Weaponized Migration against the EU - with the Blackest Intention?’ (2019) *Militaire Spectator* www.militairespectator.nl.

¹⁵ European Parliament Resolution of 17 September 2020 on the situation in Belarus 2020/2779(RSP) paras 1-3.

renewing its sanctions from October 2020 onwards.¹⁶ According to the EU and its Member States,¹⁷ from June 2021 onwards Belarus has purposefully organised travel to its territory for thousands of individuals,¹⁸ with the aim of subsequently facilitating their transit towards Lithuania, Latvia, and Poland.¹⁹ Realising the contemporary political sensitivity surrounding increased arrivals of irregular migrants in the EU,²⁰ the Lukashenko regime supposedly believes this to be a tool through which it can force the Union into withdrawing its sanctions.²¹

Roughly one year earlier, the EU claimed that Turkey also used “weaponisation” practices. After having threatened to do so earlier,²² in February 2020 President Erdoğan announced that his country would open its borders with Greece and would no longer stop migrants from gaining access to EU territory.²³ This announcement came as a clear contradiction to the country’s commitments under the 2016 EU-Turkey Statement,²⁴ under which Turkey is to prevent any new migrants from gaining access to the EU.²⁵ Unlike the situation in Belarus, the Turkish government was not actively organising travel to its territory for those it intended to push towards the Union. Instead, it “used” the millions of migrants already present in Turkey in early 2020.²⁶ Similar to the above-described Belarusian practices however, the Turkish government used the threat of new arrivals of migrants as a way to force the EU’s hand in other policy areas.²⁷ Concretely, it linked its compliance with the EU-Turkey Statement with Turkey’s involvement in the Syrian conflict.²⁸ President Erdoğan openly stated in October 2019 that “if you [the EU] try to present our operation as an invasion, we will open the gates and send 3.6 million migrants your way”.²⁹

A third prominent example of claimed “weaponised” migration against the EU concerns the behaviour of Morocco. This situation relates to its heavily disputed annexation

¹⁶ European Council, *EU Relations with Belarus* cit.

¹⁷ Council of the EU, *Belarus: Declaration* cit.

¹⁸ ECRE, Legal Note n. 11 (2021) cit.

¹⁹ European Council, *EU Relations with Belarus* cit.; BBC News, ‘Poland Blocks Hundreds of Migrants at Belarus Border’ cit.

²⁰ European Commission, Public Opinion in the European Union – Standard Eurobarometer 89 (March 2018) 4 webgate.ec.europa.eu.

²¹ Council of the EU, *Belarus: Declaration* cit.

²² A Jennequin, ‘Turkey and the Weaponization of Syrian Refugees’ (January 2020) Brussels International Center Policy Brief 1-2 www.bic-rhr.com.

²³ R Cortinovis, ‘Pushbacks and Lack of Accountability at the Greek Turkish Borders’ cit. 2.

²⁴ EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016

²⁵ *Ibid.* paras 1-3.

²⁶ United Nations High Commissioner for Refugees, *Refugee Data Finder – Key Indicators* www.unhcr.org.

²⁷ R Cortinovis, ‘Pushbacks and Lack of Accountability at the Greek Turkish Borders’ cit. 5.

²⁸ S Adar and others, ‘The Refugee Drama in Syria, Turkey, and Greece’ (German Institute for International and Security Affairs SWP Comment 16-2020) 3.

²⁹ Reuters, ‘Turkey’s Erdogan Threatens to Send Syrian Refugees to Europe’ (10 October 2019) www.reuters.com.

of the Western Sahara.³⁰ According to the EU, Morocco frequently reduces the surveillance of its borders with Spain, to force the EU and its Member States into supporting the country's claims over this region.³¹ Most recently, on May 17th and 18th 2021, Moroccan border officials briefly opened the borders with the Spanish enclave of Ceuta.³² This was supposedly done as a punishment for allowing Brahim Ghali – a Sahrawi leader fighting for the independence the Western Sahara – to obtain Covid-19 treatment in Spain. The opening of the borders resulted in approximately 10.000 people gaining access to Ceuta and applying for international protection there.³³ While these apparent Moroccan “weaponisation” practices show similarities with the Belarussian and Turkish examples – once again a neighbour is using the threat of arrivals to coerce the EU and/or its Member States –, there are also clear differences. Firstly, the Moroccan government partly “uses” its own population as “weapons” of migration.³⁴ Secondly, and perhaps more interestingly, the views of the “weaponising” state and those of its European target appear to be converging; the Spanish government recently announced a U-turn regarding its position on the Western Sahara. In March 2022 it was reported that Spain now supports Morocco's plans for the region, under which the Sahrawis would gain some autonomy but would remain under Moroccan sovereignty.³⁵ This change suggests that Morocco and its European neighbour are starting to see eye-to-eye on the original cause of their disagreement – something which is true to a much lesser extent with regards to Belarus and Turkey. At this point it is too early to tell what the Spanish change of mind will mean for the Western Sahara and what effects it will have on Moroccan “weaponisation” practices. Due to this unclarity, the rest of this *Insight* will focus on the reforms adopted by the EU and two of the most affected Member States in the Belarussian and Turkish contexts, where the risk of continued/renewed disagreements and use of “weaponisation” practices is more prominent.

III. EU AND MEMBER STATE REFORMS AND THE IMPACT ON DUE PROCESS RIGHTS

In reaction to claimed Belarussian and Turkish “weaponisation” practices, two of the predominantly affected Member States – Lithuania and Greece – and the EU have adopted several policy and legislative reforms. Before providing an overview of these measures, and analysing their impact on asylum seeker due process rights, it is important to keep in mind that the domestic reforms were not directly responding to claimed “weaponisation” practices, but to their factual consequences: dealing with a sudden influx of persons

³⁰ BBC News, 'Western Sahara Profile' (7 September 2010) BBC News www.bbc.com.

³¹ KM Greenhill, 'Morocco 'Weaponized' Migration to Punish Spain. That's More Common than You Think' (1 June 2021) Washington Post www.washingtonpost.com.

³² *Ibid.*

³³ T Nogueira Pinto, 'European Migration as a Political Tool' cit.

³⁴ *Ibid.*

³⁵ R Minder, 'Spain, Seeking Better Ties with Morocco, Shifts Stance on Western Sahara' (19 March 2022) New York Times www.nytimes.com.

attempting to gain access to Member State territories.³⁶ The prime responses – if there were any – to the “weaponisation” practices themselves were adopted at EU level. Despite this difference, from a legal perspective the domestic and Union reforms also share an essential feature. Due to their EU asylum and fundamental rights law obligations, both the Member States and the Union must make sure that all adopted measures guarantee full compliance with the fundamental rights of the migrants being “weaponised”,³⁷ including their due process rights. The extent to which this happens will be discussed below.

III.1. LITHUANIAN REFORMS

After having declared an “emergency situation”,³⁸ the Lithuanian government announced its responses to what it considers a “hybrid aggression” by Belarus.³⁹ Firstly, on July 13th 2021 immediate policy responses were announced: military presence along the border was increased and these forces were tasked with building a “physical defence barrier”.⁴⁰ At the same time, the Lithuanian government responded at the legislative level by making two modifications to the country’s Law on Legal Status of Aliens (LLSA): the July and August amendments.⁴¹ The purpose of these amendments is that in an extraordinary situation due to a mass influx of aliens – as was the case here – the Lithuanian asylum procedure can be accelerated and asylum seeker rights can be temporarily limited.⁴² The amendments achieve these aims in a number of ways.

Firstly, the amendments limit access to, and accelerate, the Lithuanian asylum procedure. Access to the asylum procedure is restricted through the August Amendment, which alters art. 67 LLSA. Under para. 1⁽¹⁾ of the new provision, applications for asylum may only be made at specific locations: (i) at border crossing points or transit zones; (ii) in the territory of Lithuania when the asylum seekers concerned entered the Republic legally; and (iii) in a foreign state, when submitted to Lithuanian diplomatic missions or consulates

³⁶ International Organization for Migration, *More than 13,000 Migrants Reported along the Turkish-Greek Border* www.iom.int.

³⁷ See art. 78(1) TFEU; arts 18 and 19 Charter of Fundamental Rights of the European Union [2012]; European Commission, *Common European Asylum System* ec.europa.eu.

³⁸ ECRE, Legal Note n. 11 (2021) cit.

³⁹ Seimas of the Republic of Lithuania, Resolution No XIV-505 of 13 July 2021 on Countering Hybrid Aggression (Seimas Resolution No XIV-505).

⁴⁰ *Ibid.* para. 3.

⁴¹ Law of the Republic of Lithuania No. XIV-605 “On the Law of the Republic of Lithuania Amending arts 5, 71, 76, 77, 113, 131, 136, 138, 139, 140 of the Law on Legal Status of Aliens No IX-2206 and the Supplement of the Law with Chapter IX” of 13 July 2021 (hereinafter: “July Amendment”); and Law of the Republic of Lithuania No. XIV-515 “On the Law of the Republic of Lithuania on the Legal Status of Aliens No. IX-2206 Amendment of Article 67” of 10 August 2021 (hereinafter: “August Amendment”).

⁴² Seimas Ombudsmen’s Office of the Republic of Lithuania, Regarding the Draft Law Amending and Supplementing the Law of the Republic of Lithuania on the Legal Status of Aliens of 12 July 2021 No. 1/3D-1711 2.

assigned by the Minister of Foreign Affairs.⁴³ Para. 1⁽²⁾ adds that an application submitted by someone arrested at the border which has not followed the procedure specified in para. 1⁽¹⁾ shall not be accepted.⁴⁴ In this way, the new rules create an incentive for Lithuanian border authorities to prevent migrants from ever reaching the prescribed locations in art. 67 para. 1⁽¹⁾. Simply put: if access to these locations is made impossible, Lithuania avoids responsibility for the migrants concerned. As such, the changes to art. 67 lay the foundation for the implementation of illegal “pushbacks”, *i.e.* “measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of *non-refoulement*”.⁴⁵ After the entry into force of the amendments to the LLSA, reports by news outlets, civil society groups and Frontex show that Lithuanian authorities have indeed resorted to violent pushback practices,⁴⁶ resulting in the death of at least 21 migrants.⁴⁷ This implementation of pushbacks is very problematic when viewed from the perspective of EU asylum seeker due process rights. By stopping those who have crossed from Belarus from ever reaching the locations of art. 67 para. 1⁽¹⁾, migrants are prevented from applying for asylum and from having their individual cases assessed before being returned to e.g. Belarus or their country of origin. As such, these policies amount to a breach of the right to apply for asylum,⁴⁸ and risk the occurrence of *refoulement*.⁴⁹ Even though the EU Asylum Procedures Directive (APD) allows Member States to require that “applications for international protection be lodged in person and/or at a designated place”,⁵⁰ this is only possible if such a requirement respects the ability for applicants to access asylum procedures.⁵¹ The changes to art. 67 LLSA can, however, not be justified by relying on the APD, as the provision and the resulting use of pushback strategies prevent access to the Lithuanian asylum procedure. Apart from limiting access to the Lithuanian asylum procedure,

⁴³ Art. 1(1) August Amendment amending art. 67 cit. Note: in the text, parts of the relevant article numbers of the July and August Amendments are presented in superscript. This is done for the sake of authenticity and reflects the practice of the Lithuanian legislator in those Amendments.

⁴⁴ Art. 1(2) August Amendment amending art. 67 cit.

⁴⁵ General Assembly, Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and Sea of 12 May 2021, UN Doc A/HRC/47/30.

⁴⁶ See e.g. A Fakhry, R Parkes and A Rác, ‘Migration Instrumentalization: A Taxonomy for an Efficient Response’ cit. 20-22; See S Jakucionis and A Stankevicius, ‘Frontex Says Lithuania Should Scrap Pushback Policy, as it Violates Migrants’ Rights’ (28 December 2021) Lithuanian Radio and Television (LRT) www.lrt.lt.

⁴⁷ United Nations Office for the Coordination of Humanitarian Assistance, *8 Things to Know about the EU/Belarus Border Crisis* reliefweb.int.

⁴⁸ Art. 18 of the Charter.

⁴⁹ Art. 19(2) of the Charter.

⁵⁰ 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, art. 6(3).

⁵¹ ECRE, Legal Note n. 11 (2021) cit.

amendments to arts 76 and 77 LLSA additionally allow for the application of an accelerated procedure to those who do manage to file for protection.⁵² Whereas under the old rules such a procedure could only be applied in limited situations, and exemptions existed for “vulnerable” applicants, changes to arts 76(6) and 77(3) LLSA mean that the accelerated procedure is now applied to all asylum seekers who have entered Lithuania from Belarus.⁵³ This is problematic for two reasons: firstly, subjecting all applications to an accelerated procedure risks that Lithuanian authorities will not be able to conduct a proper vulnerability assessment,⁵⁴ and to subsequently provide vulnerable applicants with specific support and procedural guarantees required by EU law;⁵⁵ and, secondly, in a reaction to the Lithuanian amendments, the United Nations High Commissioner for Refugees (UNHCR) has stated that in this accelerated procedure, those allegedly “weaponised” by Belarus – whether vulnerable or not – are not given sufficient time to substantiate their claims, risking the occurrence of “serious administrative errors resulting in a violation of the principle of non-refoulement”.⁵⁶

The amendments to the LLSA additionally facilitate the automatic detention of all those arriving from Belarus. Changes made to art. 5 allow for all applicants who are subject to the accelerated procedure – which, as mentioned, are all asylum seekers who have arrived from Belarus⁵⁷ – to be temporarily accommodated at border control points, the State Border Guard Service, or other places adapted for that purpose, without granting them the right to move freely.⁵⁸ Additionally, the duration of such accommodation has been prolonged – from 28 days to six months.⁵⁹ While the Lithuanian legislator may speak about “temporary accommodation”⁶⁰ for the purposes of EU law this amounts to detention as defined in art. 2(h) of the Reception Conditions Directive (RCD) as: “[...] confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement”.⁶¹ Art. 8(2) of that same directive clarifies that detention of asylum applicants is only permissible “When it proves necessary and on the basis of an individual assessment of each case [...] if other less coercive alternative measures cannot be applied effectively”.⁶² The new Lithuanian rules clearly do not

⁵² Art. 3 July Amendment amending art. 76 cit.

⁵³ ECRE, Legal Note n. 11 (2021) cit. 5.

⁵⁴ Art. 24(1)-(2) Directive 2013/32 cit.; and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, art. 22.

⁵⁵ Art. 24(3)-(4) Directive 2013/32 cit.; and Chapter IV Directive 2013/33 cit.

⁵⁶ United Nations High Commissioner for Refugees, Legal Observations on the Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No XIV-506) 28 July 2021 para. 25.

⁵⁷ ECRE, Legal Note n. 11 (2021) cit. 5.

⁵⁸ Art. 1 July Amendment amending art. 5(6) cit.

⁵⁹ *Ibid.* art. 5(8).

⁶⁰ *Ibid.* art. 5(6).

⁶¹ Art. 2(h) Directive 2013/33 cit.

⁶² Art. 8(2) Directive 2013/33 cit.

comply with these requirements, as detention of asylum seekers is not based on an individual assessment and is not applied as a last resort measure. The prolongation of the duration of detention is also problematic when viewed from the perspective of EU asylum law. The Court of Justice of the European Union (CJEU) has namely clarified that the maximum duration of four weeks, mentioned in art. 43(2) APD, continues to apply even when Member States are confronted with “arrivals of a large number of applicants”.⁶³

Thirdly, changes to art. 71(1) LLSA allow for the temporary limitation of asylum seeker rights. This provision provides an overview of the rights of applicants in the asylum process – including rights to information, interpretation, access to medical and psychological services, access to UNHCR and other organisations offering legal aid, etc.⁶⁴ The newly-formulated art. 71(1)⁽¹⁾ says that these rights may be temporarily and proportionately restricted in case of an extraordinary situation due to a mass influx of aliens, if they cannot be guaranteed for objective reasons other than material reception conditions.⁶⁵ This feature of the July Amendment undermines the effectiveness of the affected migrants’ right to asylum, which must be guaranteed under art. 18 of the Charter of Fundamental Rights of the European Union (Charter),⁶⁶ and art. 6(2) APD.⁶⁷ When an applicant is not properly informed about procedural requirements and/or developments of their application and is additionally prevented from obtaining legal aid in this process, then this seriously diminishes their ability to properly prepare an application and the chances of its success. In this way, the change to art. 71(1) results in a situation where Lithuanian authorities have to base their decisions on applications that are not as well prepared as they could otherwise have been. This increases the risk of incorrectly rejecting asylum applications and could result in cases of *refoulement*.⁶⁸ Additionally, it could be argued that the temporary limitation of asylum seeker rights amounts to further breaches of EU secondary law. Both the APD and RCD contain provisions providing rights of all applicants for international protection, including: rights to information,⁶⁹ access to an interpreter,⁷⁰ and to converse with UNHCR and other bodies offering legal aid.⁷¹ UNHCR has commented that these rights “may not be subject to any restrictions, even where a large number of asylum

⁶³ Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367 para. 246.

⁶⁴ Law of the Republic of Lithuania on the Legal Status of Aliens of 29 April 2004 No. IX-2206, art. 71(1).

⁶⁵ Art. 2 July Amendment amending art. 71 cit.

⁶⁶ Art. 18 of the Charter; See also European Parliament, *Guaranteeing the Right to Asylum* www.europarl.europa.eu.

⁶⁷ Art. 6(2) Directive 2013/32 cit.

⁶⁸ Art. 19(2) of the Charter.

⁶⁹ Art. 12(1)(a) Directive 2013/32 cit.; and art. 5(1) Directive 2013/33 cit.

⁷⁰ Art. 12(1)(b) Directive 2013/32 cit.; and art. 5(2) Directive 2013/33 cit.

⁷¹ Art. 12(1)(c) and 29 Directive 2013/32 cit.

applications makes it objectively difficult to comply with the applicable standards".⁷² While it fails to give a source for this statement and while UNHCR is not formally empowered to interpret provisions of EU law, an analysis of the relevant pieces of EU secondary law and related CJEU jurisprudence suggests that the High Commissioner may be correct. When looking at the directives themselves, there is nothing in them that suggests that the above-mentioned rights and reception conditions can be temporarily limited in the way done by art. 71(1)⁽¹⁾ LSSA. For example, the preamble to the RCD says that the directive "should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants".⁷³ The CJEU has furthermore clarified that the general purpose of Directive 2003/9 – the RCD's predecessor – and the compliance of fundamental rights "preclude the asylum seeker from being deprived – even for a temporary period [...] – of the protection of the minimum standards laid down by that directive".⁷⁴ Additionally, while art. 20 RCD says that the Member States may limit material reception conditions in "exceptional and duly justified cases",⁷⁵ para. 5 of that same provision clearly states that decisions to reduce reception conditions "shall be taken individually".⁷⁶ Temporarily limiting asylum seeker rights in the way done by the newly formulated art. 71(1)⁽¹⁾ clearly does not comply with these requirements, as the decision to limit rights is not based on an individual decision but suspends the rights of all applicants.

Lastly, the July Amendment constrains the ability for applicants to appeal any decision taken during the asylum procedure before a judicial authority. The revised text of arts 135⁽¹⁾, 135⁽²⁾, and 136 LLSA namely states that, before a refusal to process an asylum application or to grant asylum can be challenged in court, an administrative appeal must first be lodged with Lithuania's Migration Department.⁷⁷ Problematically, art. 135⁽²⁾ provides that such an administrative appeal will not suspend the enforcement of the original decision of the Migration Department.⁷⁸ This lack of suspensive effect results in a breach of the right to an effective legal remedy, protected by EU primary and secondary law.⁷⁹ The CJEU has clarified that within the context of return and removal decisions "the protection inherent in the right to an effective remedy and in the principle of *non-refoulement* must be guaranteed by affording the applicant for international protection the right to

⁷² United Nations High Commissioner for Refugees, Legal Observations on the Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens cit. para. 19.

⁷³ Preamble recital 8 Directive 2013/33 cit.

⁷⁴ Case C-79/13 *Saciri and Others* ECLI:EU:C:2014:103 para. 35.

⁷⁵ Art. 20(1) Directive 2013/33 cit.

⁷⁶ *Ibid.* art. 20(5).

⁷⁷ Arts 8 and 9 July Amendment on art. 135 and amending art. 136 cit.

⁷⁸ *Ibid.*

⁷⁹ Art. 47 of the Charter; and art. 46 Directive 2013/32 cit.

an effective remedy enabling automatic suspensory effect, before at least one judicial body".⁸⁰ By not giving suspensive effect to the Migration Department's original decisions, the newly created pre-trial administrative procedure risks scenarios where applicants are removed from Lithuanian territory without the possibility of having this decision reviewed by a judicial authority even once. In addition to this, a change made to art. 138(2) LLSA shortens the time available for lodging the discussed administrative appeal from 14 to just seven days. This change in and of itself could be problematic under the right to an effective remedy. Limiting the time to lodge an appeal, combined with the lack of suspensive effect of administrative decisions and the discussed possibility to limit applicants' rights to information and an interpreter, result in a situation where the newly created pre-trial procedure cannot be considered as compliant with asylum applicants' right to an effective legal remedy as protected under arts 47 of the Charter and 46 APD.

III.2. GREEK REFORMS

Similar to Lithuania in 2021, one year earlier Greece was confronted with a sudden increase in asylum applications - a consequence of the above-discussed claimed Turkish "weaponisation" practices.⁸¹ Only a few days after the Greek-Turkish border was opened on February 28th 2020, the International Organisation for Migration estimated that at least 13.000 migrants had assembled at the border with the aim of crossing into Greece.⁸² As an immediate response, the Greek government enlarged its military and police presence along the border.⁸³ Regrettably, similar to the events along the Lithuania-Belarus border, humanitarian organisations and NGOs - including the UN Special Rapporteur on the human rights of migrants - have reported many instances of maltreatment of migrants by Greek authorities, including: the arbitrary detention of migrants;⁸⁴ beatings; the use of tear gas; theft of personal belongings; the use of rubber bullets; and even the use of live ammunition resulting in the death of a number of migrants.⁸⁵ Like their Lithuanian counterparts in 2021, as an immediate response to a sudden influx of migrants, Greek border authorities resorted to violent pushback strategies.⁸⁶ These policies aimed at

⁸⁰ Case C-181/16 *Sadikou Gnadi v. État belge* ECLI:EU:C:2018:465 para. 58.

⁸¹ A Skordas, 'The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law (Part I)' (5 May 2020) EU Migration Law Blog eumigrationlawblog.eu.

⁸² International Organization for Migration, *More than 13,000 Migrants Reported along the Turkish-Greek Border* www.iom.int.

⁸³ R Cortinovis, 'Pushbacks and Lack of Accountability at the Greek Turkish Borders' cit. 5.

⁸⁴ United Nations High Commissioner for Refugees, *Greece: Rights Violations against Asylum Seekers at Turkey-Greece Border Must Stop - UN Special Rapporteur* www.ohchr.org.

⁸⁵ See e.g. Amnesty International, 'Caught in a Political Game - Asylum-Seekers and Migrants on the Greece/Turkey Border Pay the Price for Europe's Failures' (3 April 2020) www.amnesty.org. See also Edirne Governor's Office, Press release 2020-1 of 4 March 2020 www.edirne.gov.tr.

⁸⁶ See e.g. Istanbul Bar Association Human Rights Center, 'Report on Istanbul Bar Association Human Rights Center's Visit to Pazarkule Checkpoint on 4-5 March 2020' (2020) www.istanbulbarosu.org.tr.

preventing those seeking protection from entering into Greece and pushing them back into Turkey.⁸⁷ As such their use amounts to clear violations of the right to apply for asylum and risks the occurrence of *refoulement*.⁸⁸ Additionally, it has been argued that the maltreatment of migrants by Greek border authorities has resulted in breaches of the affected migrants' right to life, the prohibition of torture, right to an effective remedy, right to liberty and security, the prohibition of collective expulsion and the prohibition of discrimination.⁸⁹ The Greek government has attempted to justify its operations at the border by arguing that the Turkish "weaponisation" of migration amounted to a threat to the national security, warranting an effective response.⁹⁰

Apart from immediate policy responses, reforms were also adopted at the legislative level. In March 2020, the Greek government adopted an emergency decree on asylum at the Turkish border (Emergency Decree). Art. 1(1) of the Emergency Decree states that "the submission of asylum applications by individuals who enter the country illegally from the time the current Act takes effect is suspended. These individuals will be returned, without registration, to the country of departure or to the country of origin".⁹¹ The second para. adds that this suspension of asylum applications would remain in force for one month.⁹² The government argues that the suspension of the right to apply for asylum is justified because of a "necessity to confront an asymmetrical threat to the national security, which prevails over the reasoning for applying the rules of EU law and international law on asylum procedures".⁹³ The Emergency Decree is highly problematic when viewed from the perspective of asylum seeker due process rights. The suspension of the ability to apply for asylum and the automatic return to the country of departure or country of origin is clearly at odds with the right to seek and enjoy asylum and the prohibition of *refoulement*.⁹⁴ It should be pointed out that EU law does not allow for a suspension of asylum applications.⁹⁵ The Greek government has attempted to use art. 78(3) TFEU to justify the Emergency Decree. This provision makes it possible for the Council – acting on a Commission proposal and in consultation with the European Parliament – to support a

⁸⁷ *Ibid.*

⁸⁸ Arts 18 and 19(2) of the Charter.

⁸⁹ Istanbul Bar Association Human Rights Center, 'Report on Istanbul Bar Association Human Rights Center's Visit to Pazarkule Checkpoint on 4-5 March 2020' cit. See also A D Ergin, 'What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis' (30 September 2020) [Verfassungsblog verfassungsblog.de](http://Verfassungsblog.verfassungsblog.de); and Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border* www.hrw.org.

⁹⁰ President of the Hellenic Republic, Act of Legislative Content - Suspension of the Submission of Asylum Applications (Greek Emergency Decree) preamble para. 2, English version odysseus-network.eu. Note: the official Greek version of the Emergency Decree can be found in Government Gazette A'45 2020 lawnet.gr.

⁹¹ *Ibid.* art. 1.

⁹² *Ibid.*

⁹³ *Ibid.* preamble para. 2.

⁹⁴ Arts 18-19 of the Charter.

⁹⁵ A D Ergin, 'What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis' cit.

Member State suddenly confronted with an influx of arrivals through the adoption of provisional measures.⁹⁶ In this scenario art. 78(3) can however not be used to justify the described Greek reforms. This is because the appeal to the provision by the Greek government does not comply with the mentioned procedural requirements. Additionally, the provision cannot be used to limit the right to apply for asylum and/or lead to a violation of the prohibition of *non-refoulement*.⁹⁷ Finally, the claim made in the Greek Emergency Decree that the protection of national security “prevails over the reasoning for applying the rules of EU law and international law on asylum procedures”⁹⁸, finds no basis in either EU asylum or fundamental rights law.⁹⁹

The Greece-Turkey border-crisis only lasted about 20 days. After meeting with European leaders in early March 2020, and in an effort to stop the spread of Covid-19, Turkey announced the closure of the border on March 18th.¹⁰⁰ Despite the claimed Turkish “weaponisation” practices coming to an end in this manner, civil society groups and observers have reported continued cases of maltreatment of migrants, including the use of violence and pushing migrants towards the open sea in unseaworthy vessels.¹⁰¹ This shows that Greece’s keenness for the implementation of pushback strategies applies regardless of whether irregular migrants crossing from Turkey have been supposedly “weaponised” or not.

III.3. EU REFORMS

As mentioned, apart from the Lithuanian and Greek reforms, the EU has also played a role in responding to claimed Belarussian and Turkish “weaponisation” practices. While the discussed domestic measures mainly reacted to the factual consequences of suddenly having to process an influx of arrivals, some Union policies additionally aim to respond to the claimed “weaponisation” of migration itself. Below, an overview of the most important Union reforms will be provided. Like the domestic analysis, these too will be assessed from the perspectives of EU asylum and fundamental rights law.

When reports of Belarussian “weaponisation” practices started to emerge, the EU was quick to respond. The Union clearly condemned the Lukashenko regime, stating that its “instrumentalisation of migrants and refugees is utterly unacceptable”¹⁰² and classified its

⁹⁶ Art. 78(3) TFEU.

⁹⁷ United Nations High Commissioner for Refugees, *UNHCR Statement on the Situation at the Turkey-EU Border* www.unhcr.org.

⁹⁸ Preamble para. 2 Greek Emergency Decree cit.

⁹⁹ See also Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland, Hungary and the Czech Republic* ECLI:EU:C:2020:257 paras 144-147 and 180.

¹⁰⁰ Infomigrants, *Turkey Closes its Borders to the EU Once Again* www.infomigrants.net.

¹⁰¹ WeMove Europe and Oxfam International, ‘Complaint to the European Commission Concerning Infringements of EU Law by Greece’ (22 September 2020) De Brauw Blackstone Westbroek debrauw.com 3-4 and 40-41.

¹⁰² Council of the EU, *Belarus: Declaration* cit.

actions as a “hybrid-attack”.¹⁰³ Subsequently, several policy changes were announced. Apart from renewing and increasing the already functioning sanctions against Belarus – including travel bans and the freezing of assets of individuals and entities who are considered responsible for the repression and intimidation of those protesting for democracy in Belarus –¹⁰⁴ in July 2021 Frontex officers were deployed to the Lithuania-Belarus border to initiate a rapid intervention there.¹⁰⁵ Furthermore, during that same month Lithuania requested the use of the EU Civil Protection Mechanism, in the context of which 19 Member States have offered their help by sending resources to be used for the reception of those entering the country.¹⁰⁶ At the legislative level the Commission submitted a proposal for temporary legal and practical measures to address the emergency situation at the EU's external border with Belarus.¹⁰⁷ In its proposal the Commission classified the state of affairs as an “emergency situation” within the meaning of art. 78(3) TFEU, thus justifying the proposal for provisional measures.¹⁰⁸ If adopted, the proposal would have allowed Poland, Lithuania, and Latvia to depart from normally applicable rules and apply a so-called “emergency asylum and migration management procedure”.¹⁰⁹ This procedure allows for: extensions in registration deadlines (from 10 working days to four weeks)¹¹⁰ and in the time to decide on applications filed at a border or transit zone (from four to 16 weeks);¹¹¹ deviations from arts 17 and 18 RCD describing the generally applicable material reception conditions;¹¹² and limitations on the automatic suspensive effect of an appeal in border procedures.¹¹³ Clearly, these provisional measures have the potential to negatively impact asylum seeker due process rights. Extending time available to decide on applications creates an increased risk for those entering the EU irregularly from Belarus to be placed in longer periods of arbitrary detention,¹¹⁴ whilst simultaneously not being guaranteed normally

¹⁰³ Communication COM(2021) 752 final from the Commission of 1 December 2021 on a Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland.

¹⁰⁴ European Council, *Restrictive Measures Following the 2020 Belarus Presidential Elections* www.consilium.europa.eu.

¹⁰⁵ Frontex, *Frontex Launches Rapid Intervention in Lithuania* frontex.europa.eu.

¹⁰⁶ United Nations Office for the Coordination of Humanitarian Assistance, *Lithuania – Migrant Influx EU Civil Protection Mechanism Response – DG ECHO Daily Map* reliefweb.int.

¹⁰⁷ European Commission, *Press release IP/21/6447- Asylum and Return: Commission Proposes Temporary Legal and Practical Measures to Address the Emergency Situation at the EU's External Border with Belarus* (1 December 2021) ec.europa.eu.

¹⁰⁸ Explanatory Memorandum Communication COM(2021) 752 final cit.

¹⁰⁹ Chapter II Communication COM(2021) 752 final cit.

¹¹⁰ Art. 2(1) Communication COM(2021) 752 final cit.

¹¹¹ *Ibid.* art. 2(5).

¹¹² *Ibid.* art. 3.

¹¹³ *Ibid.* Explanatory Memorandum.

¹¹⁴ Danish Refugee Council, ‘Human Dignity Lost at the EU's Borders – Thousands of Men, Women and Children Await Winter at EU Borders without Access to Rights, Justice or Basic Assistance to Survive’, (December 2021) 13-14 drc.ngo; See also Platform for International Cooperation on Undocumented Migrants, ‘PICUM

applicable reception conditions – including access to legal aid.¹¹⁵ These aspects of the proposed provisional measures are problematic. Limiting access to legal aid, for example, creates a situation where – similar to the above-discussed Lithuanian amendments – applicants are not able to properly prepare their applications for international protection. This, in turn, increases the chances of administrative errors and risks occurrences of *refoulement*.¹¹⁶ The European Council for Refugees and Exiles has additionally argued that the other proposed deviations result in a situation where “the right to an effective remedy [...] is weakened; and material conditions are reduced to the point that they may fall below the requirements of human dignity”.¹¹⁷ While the discussed provisional measures only formed part of a legislative proposal – that has in the meantime been abandoned – it is worrying to see that the Union never clearly condemned Lithuania for adopting its problematic reforms. Instead, it appears that the Union increasingly shares the domestic impulse to classify a situation like this one as an “emergency” situation and the idea that this somehow justifies the adoption of provisional measures which restrict the fundamental rights of those attempting to find protection in the EU.

Union responses to the Greek-Turkish border crisis were less confrontational, than those adopted in the Belarussian context. Similar to that situation, Frontex initiated a rapid intervention.¹¹⁸ Besides this, the occasional condemnation of Turkish policies,¹¹⁹ and coming out in clear support of the Greek border authorities,¹²⁰ no EU measure of a punitive nature – e.g. sanctions – or concrete legislative action was taken against Turkey. This can partly be explained by the fact that the crisis only lasted about 20 days.¹²¹ Additionally, in an effort to stop the influx of arrivals and being aware of the number of migrants present in Turkey at the time, it is also clear that the EU had a vested interest in not stepping up confrontation even further. The lack of EU legislative action also means that its reforms did not have such a direct impact on asylum seeker rights. Yet, this does not mean that the EU bears no responsibility for the human rights breaches that continue to occur at its borders with Turkey,¹²² nor that the mentioned responses do not at least indirectly contribute to

Input to the UN Special Rapporteur on the Human Rights of Migrants Report on Human Rights Violations at International Borders: Trends, Prevention and Accountability (February 2022) 3-4 www.ohchr.org.

¹¹⁵ Amnesty International, Letter to European Council President Michel (7 December 2021) Reference n. TIGI IOR 10/2021/2469.

¹¹⁶ Art. 19(2) of the Charter.

¹¹⁷ ECRE, *Asylum Mini-Package: Derogations through the Backdoor* ecre.org.

¹¹⁸ Frontex, News Release- Frontex to Launch Rapid Border Intervention at Greece's External Borders (2 March 2020) frontex.europa.eu.

¹¹⁹ D Boffey, ‘EU and Turkey Hold ‘Frank’ Talks over Border Opening for Refugees’ (9 March 2020) The Guardian www.theguardian.com.

¹²⁰ President von der Leyen, Remarks at the Joint Press Conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel, 3 March 2020 ec.europa.eu.

¹²¹ R Cortinovis, ‘Pushbacks and Lack of Accountability at the Greek Turkish Borders’ cit. 5.

¹²² A D Ergin, ‘What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis’ cit.

these. This is especially true when the 2020 Greece-Turkey border crisis is considered in the broader context of EU migration cooperation with Turkey. While a detailed human rights scrutiny of e.g. the 2016 EU-Turkey Statement goes beyond the purposes of this *Insight*, there appears to be consensus amongst human rights scholars that numerous aspects of this arrangement result in consistent human rights violations of migrants returned to Turkey under it.¹²³ Though this is problematic in and of itself, the attitudes reflected in the EU responses to the Greece-Turkey border crisis show further tolerance for policies which violate the rights of the migrants affected. Similar to the responses adopted in the Belarussian context, the EU's clear support for domestic border authorities –¹²⁴ despite credible reports of human rights violations caused by them –¹²⁵ combined with a failure to condemn the Greek government for the ill-treatment of migrants and the adoption of its problematic Emergency Decree, can be seen as additional examples of this.

IV. COMMON TRENDS AND CONCLUDING THOUGHTS

In section III it has been shown that numerous aspects of the Lithuanian, Greek, and EU reforms, directly or indirectly, have had a detrimental effect on due process rights of the migrants supposedly being “weaponised” by Belarus and Turkey. While a detailed scrutiny of the problematic parts of these measures can be found above, several commonalities between the reforms can be established.

Other than the EU-wide sanctions, mentioned in sections II and III of this *Insight*, it appears that neither the Member States nor the EU have yet been able to develop any effective responses to situations where neighbouring states supposedly “weaponise” migration against them. In absence of alternatives, it has been shown that both Lithuania and Greece – often with Union support – have resorted to the adoption of “emergency” legislative measures in conjunction with the imposition of a violent crackdown against the migrants being “weaponised”. The discussed reforms show similarities in the sense that they share the common goals of: (i) making it extremely difficult, if not impossible, for any arriving migrants to apply for asylum; and (ii) making their forced return to the country of departure/origin easier. By preventing individuals from even applying for asylum and by not allowing judicial appeals against rejections of submitted applications, they amount to illegal “pushbacks” and risk the return of individuals to places where their lives or freedoms may be in danger. As such, the reforms result in clear breaches of the most

¹²³ See e.g. O Ulusoy and H Battjes, ‘Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement’ (2017) VU Migration Law Series 15.

¹²⁴ President von der Leyen, Remarks at the Joint Press Conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel cit.

¹²⁵ See e.g. United Nations High Commissioner for Refugees, *Greece: Rights Violations Against Asylum Seekers at Turkey-Greece Border Must Stop*, cit.

important asylum seeker due process rights protected under EU asylum and fundamental rights law: the right to apply for asylum and the prohibition of *non-refoulement*.¹²⁶

Aside from breaching these, and other rights, the implementation of the problematic reforms reflects a wider trend of a worrying normalisation of the adoption of such illegal practices across the EU. Research conducted by the Danish Refugee Council shows that in 2021 11.901 pushbacks occurred on EU territory,¹²⁷ with the organisation's secretary-general stating that this number represents just the "tip of the iceberg".¹²⁸ Due to the sensitivity of the topic of irregular migration and continuous disagreements about how to address existing problems, there appears to exist an increased willingness to disregard EU asylum and fundamental rights law obligations and adopt illegal "emergency" responses. The discussed Lithuanian and Greek reforms being prominent examples of this. UNHCR already expressed its concern about this trend in August 2020, stating that while it "fully respects the legitimate right of States to control their borders [...] States must guarantee and safeguard the rights of those seeking international protection in accordance with national, European and international law. Every individual has the right for their case to be heard and their protection needs assessed."¹²⁹

Worryingly, the national impulse to resort to "emergency" reforms and pushback strategies, appears to be increasingly supported and furthered by the Union itself when its claiming to be targeted by "weaponisation" practices. The overview of EU reforms above shows that, instead of clearly condemning the Lithuanian and Greek governments for adopting problematic reforms, the Union has come out in clear support of these Member States.¹³⁰ Even more alarmingly, in the more recent Belarussian situation, the Union was not only unwilling to condemn a Member State, but is prepared to take things one step further by proposing its own "emergency" legislative responses – even when they come at the detriment of asylum seeker due process rights.¹³¹ This suggests that the tendency to disregard EU asylum and fundamental rights law is no longer just a trend at national level but is seeping into the EU itself. Further evidence of this is the language used in the discussed Commission proposal for provisional measures. By describing the caused influx of arrivals as "a real threat and present danger to the Union's security",¹³²

¹²⁶ Arts 18 and 19(2) of the Charter.

¹²⁷ Danish Refugee Council, 'Human Dignity Lost at the EU's Borders – Thousands of Men, Women and Children Await Winter at EU Borders without Access to Rights, Justice or Basic Assistance to Survive', cit. 4.

¹²⁸ N Nielsen, '12,000 Illegal Pushbacks this Year 'Tip of Iceberg' Says NGO' (17 December 2021) EU-observer euobserver.com.

¹²⁹ United Nations High Commissioner for Refugees, *UNHCR Concerned by Pushback Reports, Calls for the Protection of Refugees and Asylum-Seekers* www.unhcr.org.

¹³⁰ See Council of the EU, *Belarus: Declaration* cit.; and President von der Leyen, Remarks at the Joint Press Conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel cit.

¹³¹ Explanatory Memorandum Communication COM(2021) 752 final cit.

¹³² *Ibid.*

the Commission suggests that the individuals supposedly being “weaponised” are indeed dangerous weapons which the Union and its citizens need to be protected from. Particularly at a time where some of the Union’s founding values, including “respect for human dignity [...], the rule of law and respect for human rights, including the rights of persons belonging to minorities”,¹³³ are being attacked both externally and from within, it is vital that the EU and its Member States show a strong willingness to protect them. To do so they must make sure that any existing and/or future asylum policies treat those arriving in the EU as human beings entitled to individual protections, rather than dangerous “weapons”. Regrettably it appears that, for now, the Union and its Member States will continue to prioritise the protection of their external borders over migrants’ individual rights, thereby further normalising and tolerating policies in clear violation of EU asylum and fundamental rights law.

¹³³ Art. 2 TEU.