



INSIGHT

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

edited by Daniela Vitiello and Stefano Montaldo

LET'S CALL IT WHAT IT IS:
HYBRID THREATS AND INSTRUMENTALISATION
AS THE EVOLUTION OF SECURITISATION
IN MIGRATION MANAGEMENT

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ABSTRACT: This *Insight* examines the discourse surrounding the instrumentalisation of migration and its impact on monitoring the EU's external borders. It analyses the regulatory response, focusing on the Instrumentalisation Regulation, to determine if an exceptional emergency response is justified. The article explores recent arguments regarding changes in factual circumstances, such as pushbacks and their human rights implications. It also investigates the invocation of hybrid threats and instrumentalisation of migrants in national legal contexts (Greece, Spain, Poland, Lithuania and Latvia) to justify systematic pushback practices. The *Insight* discusses EU institutions' adoption of these arguments and their inclusion in legislative proposals. The article critically examines the regulatory proposals from a fundamental rights perspective, questioning the extent to which the existing protection framework can be derogated. The *Insight* assesses whether a fundamental shift has occurred and if it warrants an exceptional response to safeguard the Area of Freedom Security and Justice, Schengen, and the Common European Asylum System. It offers an "insight" contributing to the ongoing scholarly conversation by providing a timely analysis of the legal implications of the instrumentalisation of migration, considering it as a continuation of the securitisation paradigm rather than a paradigm shift requiring an exceptional emergency response, as exemplified by the proposed Instrumentalisation Regulation.

KEYWORDS: instrumentalisation – hybrid threats – external borders – fundamental rights – pushbacks – securitisation.

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I. INTRODUCTION

In June 2022, representatives of six Greek civil society organisations, members of the Informal Forced Returns Recording Mechanism, aiming to address the rising allegations of systematic pushbacks in the country, addressed the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE). The briefing dealt with breaches of the Rule of Law and the EU *acquis* concerning grave human rights violations, lack of answerability, and the discrediting of EU and international monitoring bodies that criticise the systemic practice of pushbacks in the country.¹ A few days later, the then Greek Minister of Migration and Asylum, Notis Mitarachi, appeared before the LIBE Committee, flatly rejecting the claims of the national monitoring mechanism and the allegations made in a letter by the LIBE Committee to the European Commission. The Greek Minister repeated often-heard accusations against Turkey regarding the “instrumentalisation of migrants” and accused the EU of a lack of solidarity for not allowing further movement to other EU countries for refugees whose asylum application has been approved.² Despite the rising amount of evidence, the Greek authorities have chosen to respond by rejecting allegations of unlawfulness and bringing forward arguments suggesting a *sui generis* situation at the borders, which can only be addressed by “a maximum level of security”.

Such arguments, however, including “hybrid threats” and the “instrumentalisation of migrants” by third countries, are not uniquely used by the Greek authorities. They are gaining traction amongst EU countries, most prominently Poland, Spain and Lithuania, while they have also been repeated by the resigned Frontex Executive Director, Fabrice Leggeri. This dynamic has also infiltrated the vocabulary and lawmaking of the European Commission in the 2020 Pact on Migration and Asylum.³

These arguments combined with a denialism strategy and refuting the facts⁴ and claims that the legal framework is not adequately clear⁵ threaten to change the landscape of the surveillance of the EU’s external borders creating a new normal of extreme border violence and jeopardising respect for human and refugee rights and the Rule of Law as a whole.⁶

The instrumentalisation of migration raises several legal questions that other authors have dealt with, especially regarding the compliance of the reactions of Member States with

¹ Refugee Support Aegean, *Briefing, Systemic Breaches of the Rule of Law and of the EU Asylum Acquis at Greece’s Land and Sea Borders* www.gcr.gr.

² Multimedia Centre of the European Parliament, *Committee on Civil Liberties, Justice and Home Affairs* www.multimedia.europarl.europa.eu.

³ Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

⁴ E Kuskonmaz, ‘Deniability? Frontex and Border Violence in the EU’ (19 January 2022) Refugee Law Initiative www.rli.blogs.sas.ac.uk.

⁵ See the Twitter post of 8 April 2022 by Giorgios Christides at twitter.com.

⁶ L Marin, M Gkliati and S Tas, ‘An “Impossible Trinity”? Frontex, EU External Borders and the Rule of Law’ (5 September 2022) *Verfassungsblog* www.verfassungsblog.de.

fundamental rights.⁷ Without repeating these arguments, this *Insight* focuses on the regulatory response of the EU, which is based on an argument of an unprecedented emergency situation on the ground. Accepting the alleged emergency circumstances can mean the creation of a new normal of extreme border violence. This can have legal implications that can substantially reshape the Area of Freedom, Security and Justice, including the internal and external dimensions of Schengen and the Common European Asylum System (CEAS).

I give an overview of the recent arguments claiming changes in factual circumstances and examine the foundational elements of this alleged paradigm shift that could legitimise exceptional regulatory action. The aim is to answer whether there is indeed a paradigm shift. Is something different in the circumstances at the borders that demands an organised legal, political and operational exceptional emergency response in the shape of the Instrumentalisation Regulation? For this reason, section II examines the definition of pushbacks and their human rights implications, while section III shows how arguments regarding hybrid threats and the instrumentalisation of migrants are used in different national legal contexts to justify systematic pushback practices. Sections IV and V show that instrumentalisation-related arguments have been adopted by EU institutions and have found their way into legislative proposals. Section VI addresses the fundamental-rights-related criticisms of the regulatory proposals, while section VII questions that we are confronted with a fundamentally different situation on the ground, a paradigm shift that justifies radical derogations from the existing protection framework that threatens the Rule of Law as a whole.

II. PUSHBACKS AND THEIR HUMAN RIGHTS IMPLICATIONS

In recent years, pushbacks have become a common tool of the border management toolbox in several European states, such as Greece, Poland, Croatia, Hungary and Italy.⁸ States conduct pushback operations unilaterally, in coordination with third states, or through non-state actors. The operations can take several forms, such as pushbacks at land borders, at sea borders, pushbacks involving non-state actors and pushbacks by proxy.⁹ Land border pushbacks can take the form of “hot returns” and direct deportations

⁷ M Gkliati, ‘The Next Phase of The European Border and Coast Guard: Responsibility for Returns and Pushbacks in Hungary and Greece’ (2022) *European Papers* www.europeanpapers.eu 171; F Peerboom, ‘Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to “Weaponised” Migration’ *European Papers* (European Forum Insight of 17 September 2022) www.europeanpapers.eu 583; SF Nicolosi, ‘Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum’ (2021) *Utrecht Law Review* 19.

⁸ Commissioner for Human Rights of the Council of Europe, Recommendation “Pushed Beyond the Limits: Four Areas for Urgent Action to End Human Rights Violations at Europe’s Borders” of 7 April 2022 rm.coe.int; Parliamentary Assembly of the Council of Europe, Resolution 2462 (2022) of 12 October 2022 “Pushbacks on Land and Sea: Illegal Measures of Migration Management”.

⁹ D Cantor and others, ‘Externalisation, Access to Territorial Asylum, and International Law’ (2022) *IJRL* 120, 132.

without a direct individual examination at the borders.¹⁰ Sea border pushbacks, widely observed in the Mediterranean, involve the interception of a vessel and its immediate return onto international waters or the territorial waters of a neighbouring state. They may also take the form of pullbacks, conducted in cooperation with the third state, which acts as a proxy state returning persons attempting to leave its territory before they arrive at their European destination.¹¹

Given that the legal international community lacks a commonly agreed definition for “pushbacks”, the Special Rapporteur on the Human Rights of Migrants gives a working definition that defines pushbacks as measures that result in migrants “being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border”.¹² In short, this characterises blanket practices that forcibly prevent access to the state’s territory without exempting beneficiaries of international protection.

Given the complex mixed population of migratory flows, including refugees and other persons requiring international protection, and the violence often required to conduct pushbacks, human rights risks are unavoidable. First of all, pushbacks take the form of prohibited collective expulsions.¹³ This established principle of international law constitutes an essential procedural right for the access of individuals to a fair administrative and judicial review. It applies to all third-country nationals, regardless of their legal status and protection needs. Such collective returns without an individual assessment of protection needs, depending on the circumstances of the persons on board, also violate the prohibition of *refoulement*, which is central in human rights and refugee law.¹⁴

The violation of search and rescue obligations in maritime law and the right to life is also of key importance, especially regarding the duty for disembarkation of rescued persons at a place of safety¹⁵ and the duty of coastal states to maintain effective search and rescue services within their Search and Rescue zones.¹⁶ Closely related and often violated

¹⁰ Ibid. 133.

¹¹ Ibid. 134.

¹² General Assembly, United Nations Report of the Special Rapporteur on the human rights of migrants on means to address the human rights impact of pushbacks of migrants on land and at sea of 12 May 2021, UN Doc A/HRC/47/30.

¹³ Art. 4 of Protocol n. 4 of the European Convention on the Human Rights of Migrants [1968]; art. 19 of the Charter of Fundamental Rights of the European Union [2012], regarding protection in the event of removal, expulsion or extradition.

¹⁴ Art. 3 of the European Convention on Human Rights (ECHR) [1950]; art. 19(2) of the Charter; art. 33 of the Convention on the Status of Refugees and Exiles (Refugee Convention) [1951].

¹⁵ I Papanicolopulu, ‘The Duty to Rescue at Sea, in Peacetime and in War: A General Overview’ (2016) IRRC 491, 494.

¹⁶ See art. 98(1) and (2) of the United Nations Convention on the Law of the Sea [1982]; International Convention for the Safety of Life at Sea [1980] in particular Chapter V, Regulation 33(1); International

in the context of pushbacks are also the prohibition of torture and inhuman and degrading treatment, the right to an effective remedy, the right to asylum, and the rights of children.¹⁷

III. INSTRUMENTALISATION AS JUSTIFICATION FOR PUSHBACKS IN NATIONAL RHETORIC AND LAW

Despite these practices' serious human rights implications, political arguments that attempt to justify and legitimise these practices as a necessary reaction to a disproportionate threat to national security are becoming increasingly widespread. EU Member States are required to prevent unauthorised crossings into the Schengen area in accordance with the Schengen Borders Code (SBC),¹⁸ and the European Court of Human Rights (ECtHR) recognises a sovereign prerogative of states to control access to their territory.¹⁹ Their human rights and asylum law obligations limit these state prerogatives and obligations. To this traditional interpretation, states now add new elements, arguing that the general background, state actors' motivations, and the specific circumstances of given incidents need to be considered. Such circumstances would justify urgent, exceptional, and even unprecedented action.

III.1. GREECE

In its response to a letter to the Frontex Executive Director inquiring into pushback allegations, the Greek government argued that its *non-refoulement* obligations need to be assessed "against the general background of the situation at the eastern Aegean as well as the specific conditions of the event".²⁰ Central amongst the mitigating parameters mentioned (including the Covid-19 pandemic) was the "organised and massive character of the migration flows at the eastern Aegean", which relates to the unilateral decision of the Turkish President to suspend the EU-Turkey deal.

According to Greece: "This instrumentalisation of migrants escalated the phenomenon to a hybrid nature threat, directly affecting the EU internal stability. Moreover, it climaxed the situation to the dimension of an offence against Greece's national security, which necessitated to be counter addressed as such".

Convention on Maritime Search and Rescue [1985] in particular Chapter 2(II), and International Convention on Salvage [1996].

¹⁷ D Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' cit. 136.

¹⁸ 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).

¹⁹ ECtHR *Amuur v France* App n. 19776/92 [25 June 1996].

²⁰ Letter from I Plakiotakis (Hellenic Republic Ministry of Maritime Affairs and Insular Policy) to F Leggeri (Frontex Executive Director) Ref: ORD/FDU/TUH0/3115/2020 available at www.statewatch.org.

Greek authorities often rely on this type of aggressive rhetoric, suggesting a dangerous escalation that threatens “destabilisation in the Mediterranean”.²¹ The most striking concrete outcome of this argumentation was the response to the March 2020 incident at the northern land borders of Evros, when the Turkish government opened its side of the border, allowing large numbers of people to cross simultaneously. The Greek government responded with mass pushbacks, unlawful detention, and the use of excessive widespread violence, including blank bullets and live ammunition.²² Moreover, Greece immediately proceeded to suspend the right to asylum by suspending the registration of claims. The legislative amendment also introduced pushbacks into national legislation, stating that unauthorised persons crossing the Greek border were to be immediately returned.²³ A year later, Greece took further action designating Turkey as a safe third country for persons seeking international protection in Greece belonging to five nationalities,²⁴ including nationalities with high recognition rates for international protection, such as Somalia (94.1%), Syria (91.6%) and Afghanistan (66.2%).²⁵ The inclusion of Turkey in the national list of safe third countries²⁶ has been criticised as resulting in pushbacks, which precludes the individual examination of the protection claims. The applications would be deemed inadmissible if Turkey is considered a safe third country.²⁷ Acknowledgement of these risks becomes unavoidable after the European Commission 2022 country report in Turkey, which identifies serious obstacles refugees face while trying to address international protection, including violations of the principle of *non-refoulement*, degrading detention conditions and a broader Rule of Law backsliding in the country.²⁸

²¹ See, for instance, Keep Talking Greece, *Defense Ministry Sources Warn of “Hybrid-Type Threats” this Summer* www.keeptalkinggreece.com; S Michalopoulos, ‘Rumours about Turkey’s “Hybrid war” during Summer Sparks Controversy in Athens’ (31 May 2022) Euractiv www.euractiv.com.

²² Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border. Detained, Assaulted, Stripped, Summarily Deported* www.hrw.org; M Stevis-Gridneff and others, “‘We Are Like Animals’: Inside Greece’s Secret Site for Migrants’ (10 March 2020) New York Times www.nytimes.com; J Fisher, ‘Migrants Clash with Greek Police at the Turkish Border’ (2 March 2020) BBC News www.bbc.com; N Keady-Tabbal and I Mann, ‘Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations’ (22 May 2020) Just Security www.justsecurity.org.

²³ For more information, see M Gkliati, ‘The Next Phase of The European Border and Coast Guard’ cit.

²⁴ Joint Ministerial Decision (JMD) 42799/2021 of the Government Gazette 2425/B/7-6-2021.

²⁵ Refugee Support Aegean, *Asylum Statistics for 2020 A need for Regular and Transparent Official Information* www.rsaegean.org.

²⁶ Joint Ministerial Decision 42799/2021, as amended by Joint Ministerial Decision 458568/2021, B’5949.

²⁷ Greek Council for Refugees, NGO Letter to Greek Ministry of Migration and Asylum, European Commission Dispels Greece’s Designation of Türkiye as a “Safe Third Country” for Refugees – Repeal the National List of Safe Third Countries www.gcr.gr; see for background, M Gkliati, ‘The Application of the EU-Turkey Deal: A Critical Analysis of the Decisions of the Greek Appeals Committees’ (2017) European Journal of Legal Studies 81.

²⁸ Staff Working Document SWD(2022) 333 final of the Commission of 12 October 2022, Türkiye 2022 Report.

III.2. POLAND, LITHUANIA AND LATVIA

Hybrid threat arguments have also been utilised by Poland, Lithuania and Latvia when, in retaliation against EU sanctions,²⁹ Belarus facilitated the crossing of a large number of migrants present in its territory in the three neighbouring countries. The Prime Minister of Lithuania, in a letter to the EU Commissioner for Human Rights of 23 August 2021, stated that “[t]he recent migration influx is a hybrid attack launched by the Belarusian regime”.³⁰

Poland argued that Belarus instrumentalised migrants to destabilise the country and shake down the EU. War rhetoric was deployed, and migrants were regarded as weapons,³¹ the Belarusian President, Alexander Lukashenko, was accused of launching an “attack” and “hybrid war”,³² and Poland’s efforts to “defend its borders” were backed by other Member States, such as Germany and the Netherlands.³³ The incidents took national security and defence dimensions. The Polish Minister of the Interior and Administration, Mariusz Kamiński, stated: “Many Border Guard officers, Police officers and soldiers of the Polish Armed Forces guarded the security of our state border day and night. Some suffered physical injuries and were wounded. They did it for Poland, and Poland thanks them for that”.³⁴

All three countries declared a state of emergency to legitimise derogations from their fundamental rights obligations “by conceptualising the facilitation of migration movements by a state as a hybrid warfare”.³⁵ A state of emergency suggests that there is a “threat to the life of the nation”.³⁶

The Polish government adopted a widespread, systematic practice of violent pushbacks. Many were seriously injured or died when faced with adverse conditions on both sides of the border and minus temperatures.³⁷ The Polish authorities also took formal measures declaring a state of emergency that prevented lawyers, journalists, and NGO aid workers from approaching the border area. Poland furthermore passed legislation, which legalises

²⁹ Council of the European Union, *Belarus: Fourth Package of EU Sanctions over Enduring Repression and the Forced Landing of a Ryanair Flight* www.consilium.europa.eu.

³⁰ Letter from I Šimonytė (Prime Minister of the Republic of Lithuania) to D Mijatović (Commissioner for Human Rights of the Council of Europe) of 23 August 2021 rm.coe.int.

³¹ A Vallianatou, ‘The Poland-Belarus Border Crisis Is What Happens When Humans Are Treated as Weapons’ (16 November 2021) *The Guardian* www.theguardian.com.

³² Ministry of the Interior and Administration of the Republic of Poland, *Completion of the Physical Part of the Barrier on the Polish-Belarusian Border – An Event with the Participation of the Leadership of the Ministry of the Interior and Administration* www.gov.pl.

³³ J Cienski, ‘The Politics behind Poland’s Border Crisis’ (9 November 2021) *Politico* www.politico.eu.

³⁴ M Galeotti, ‘How Migrants Got Weaponized. The EU Set the Stage for Belarus’s Cynical Ploy’ (2 December 2021) *Foreign Affairs* www.foreignaffairs.com; Ministry of the Interior and Administration of the Republic of Poland, *Completion of the Physical Part of the Barrier on the Polish-Belarusian Border* *cit.*

³⁵ Amnesty International, *Latvia: Return Home Or Never Leave The Woods* www.amnesty.org.

³⁶ Art. 4 of the UN International Covenant on Civil and Political Rights [1966]; art. 15 ECHR.

³⁷ A Valcárcel, ‘Out of Sight – Refugees and Migrants at the Belarus-Poland Border’ (2 June 2022) *Reliefweb* www.reliefweb.int; Amnesty International, *Belarus/EU: New Evidence of Brutal Violence from Belarusian Forces against Asylum-Seekers and Migrants Facing Pushbacks from the EU* www.amnesty.org.

pushbacks,³⁸ clearly violating its international obligations.³⁹ Finally, Poland constructed a wall in the summer of 2022 covering approximately 187 kilometres along the border with Belarus.⁴⁰ Constructing border fences can constitute a pushback independently of other border control activities if it lacks *de facto* accessible border crossing points.⁴¹

Latvia was severely criticised by Amnesty International for its violent and widespread pushbacks in its report “Return home or never leave the woods”.⁴² Its state of emergency allowed the national authorities to prevent people from crossing irregularly and summarily return them without considering their protection claims, thus effectively suspending the right to asylum, using “the necessary measures” including “physical force and special means”.⁴³

The Lithuanian asylum law, resulting from the state of emergency, which limited peoples’ ability to make asylum applications and systematised the automatic detention of asylum seekers, was rejected by the Court of Justice of the European Union (CJEU) in June 2022, finding it incompatible with EU law. The CJEU further noted that ordinary tools are available under EU law, which “allow the Member States to exercise, at the Union’s external borders, their responsibilities for maintaining public order and safeguarding internal security, without it being necessary to resort to a derogation under of Article 78 TFEU”.⁴⁴ Despite the ruling, Lithuania adopted in April 2023 amendments to the State Border and Protection law legalising pushbacks “under a state-level extreme situation regime or a state of emergency, consolidating, thus, the existing administrative practice”.⁴⁵ The Lithuanian Minister of the Interior states: “EU law follows events and is very late. Therefore, we must have national measures to help defend against hybrid attacks and instrumentalisation of migration – and they must be enshrined in law”.⁴⁶

³⁸ G. Baranowska ‘The Deadly Woods: Legalizing Pushbacks at the Polish-Belarusian Border’ (29 October 2021) *Verfassungsblog* www.verfassungsblog.de.

³⁹ UN High Commissioner for Refugees, 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 (UD265) of 16 September 2021.

⁴⁰ M Galeotti, ‘How Migrants Got Weaponized’ *cit.*; Ministry of the Interior and Administration of the Republic of Poland, *Completion of the physical part of the barrier on the Polish-Belarusian border* *cit.*

⁴¹ D Cantor and others, ‘Externalisation, Access to Territorial Asylum, and International Law’ *cit.*

⁴² Amnesty International, *Latvia: Return Home or Never Leave The Woods* *cit.*

⁴³ Ombudsman of the Republic of Latvia, *Regarding Emergency Situation on the Border of Latvia and Belarus* www.tiesibsargs.lv.

⁴⁴ Case C-72/22 PPU *M.A. v Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:50 paras 64-65 and 74.

⁴⁵ Euractiv, *Lithuania Legalises Migrant Pushbacks* www.euractiv.com.

⁴⁶ Schengenvisa, *Lithuanian Government Approves Amendments to Law on State Border, Protection & Legal Status of Foreigners* www.schengenvisa.info.com. For a more in-depth analysis on how the regulatory modifications resulting from the state of emergency in the three countries could prevent third-country nationals from applying for international protection and infringe on their fundamental rights, see M Forti, ‘Belarus-sponsored Migration Movements and the Response by Lithuania, Latvia, and Poland: A Critical Appraisal’ *European Papers* (European Forum Insight of 11 July 2023) www.europeanpapers.eu 227.

III.3. SPAIN

An increasing number of examples of instrumentalisation arguments in EU Member States include, for instance, the May 2021 incident, where 8,000 migrants attempted to enter the Spanish enclave of Ceuta from Morocco. In line with instrumentalisation arguments, Morocco's stance was interpreted as an attempt to exert pressure on Spain following a diplomatic dispute regarding the medical treatment of a Western Saharan rebel leader in a Spanish hospital.⁴⁷ In response, Spain deployed its earlier practice of "hot returns", "involving direct deportations without individual examination directly at the border".⁴⁸ Most recently, concerns have been expressed that Russia would instrumentalise Ukrainian migration to undermine the EU's support for Ukraine.⁴⁹

IV. INSTRUMENTALISATION ARGUMENTS INFILTRATING THE EU

Such rhetoric is not confined to national media but is reproduced and enhanced by EU officials. During the March 2020 incident at the Turkish-Greek border, EU leaders rushed to the side of the Greek government in a striking display of support and power. The European Commission President, Ursula von der Leyen, thanked Greece for being the "shield" of Europe.⁵⁰ She later referred to the instrumentalisation of migrants by Belarus as "a cruel form of hybrid threat".⁵¹ During her annual State of the Union Address, the Commission President stated: "Let's call it what it is: this is a hybrid attack to destabilise Europe".⁵²

Ylva Johansson, the European Union Commissioner for Home Affairs, has also spoken of "using human beings" in an "act of aggression".⁵³ The Slovenian EU Council Presidency stated that "[t]his aggressive behaviour [...] is unacceptable and amounts to a direct attack aimed at destabilising and pressurising the EU" and asserted that EU states are "determined to take all necessary measures to effectively protect all the EU external borders, by counteracting Belarus' aggression".⁵⁴ The EU's Strategic Compass of March

⁴⁷ Reuters, *Spain Vows to Restore Order after Thousands Swim into Ceuta from Morocco* www.reuters.com.

⁴⁸ C Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT before the ECHR' (28 February 2020) EU Immigration and Asylum Law and Policy www.eumigrationlawblog.eu; L Rasche, 'The Instrumentalisation of Migration – How Should the EU Respond?' (16 December 2022) Jacques Delors Centre www.delorscentre.eu; J Cassarino 'An Unsettling Déjà-vu: The May 2021 Ceuta Events' European Papers (European Forum Insight of 11 May 2022) www.europeanpapers.eu 79.

⁴⁹ L Rasche, 'The Instrumentalisation of Migration' cit.

⁵⁰ J Rankin, 'Migration: EU Praises Greece as "Shield" after Turkey Opens Border' (3 March 2020) The Guardian www.theguardian.com.

⁵¹ European Commission, *Von der Leyen on Belarus: The EU Has the Will, the Unity and the Resolve to Face this Crisis* ec.europa.eu.

⁵² European Commission, *2021 State of the Union Address by President von der Leyen* www.ec.europa.eu.

⁵³ 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.

⁵⁴ L Cook and L Dapkus, 'EU Condemns Belarus for "Direct Attack" Using Migrants' (18 August 2021) APnews apnews.com.

2022 features the instrumentalisation of migrants next to the “privatisation of armies and the politicisation of the control of sensitive technologies” as part of a “new world of threats” necessitating the “defence of Europe”.⁵⁵ The EU Commission formalised these interventions by offering a definition of “instrumentalisation”.⁵⁶

V. EU REGULATORY RESPONSES TO “HYBRID THREATS”

In October 2021, 12 Member States addressed a letter to the European Commission asking for the adaptation of the legal framework “to the new realities”, requesting the legalisation of pushbacks, EU funding for border walls and measures to respond to “a hybrid attack characterised by an artificially created large scale inflow of irregular migrants”.⁵⁷ One month later, the rhetoric started taking more official form in a Communication of the European Commission of November 2021, opening with the following sentence: “A particularly cruel form of hybrid threat has emerged with the state-sponsored instrumentalisation of people for political ends”.⁵⁸ The Commission there announced a series of measures aiming to address the crisis, including sanctions against Belarus and financial support to Poland. The Commission also took an active role in facilitating the return of those who managed to cross to Poland without an assessment of their protection claims, possibly resulting in *refoulement*.

Before the end of the year, in December 2021, the European Commission announced a package of legislative proposals and other measures addressing the issue of instrumentalisation. This includes amendments to the SBC, including a broad definition of the instrumentalisation of migrants,⁵⁹ the adoption of further sanctions against Belarus,⁶⁰ and

⁵⁵ European External Action Service (EEAS), *A Strategic Compass for Security and Defence* www.eeas.europa.eu 5-6.

⁵⁶ Joint Communication JOIN(2021) 32 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 November 2021 responding to state-sponsored instrumentalisation of migrants at the EU external border. See also the definition of instrumentalisation in the proposed revision of the Schengen Border Code: Proposal COM(2021) 891 final from the Commission of 14 December 2021 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.

⁵⁷ Letter to M Schinas (European Commission Vice-President) and Y Johansson (Commissioner for Home Affairs) of 7 October 2021 Re: Adaptation of the EU Legal Framework to New Realities www.statewatch.org.

⁵⁸ Joint Communication JOIN(2021) 32 final cit.

⁵⁹ Arts 2, 5, 13 and 28 Proposal COM(2021) 891 final cit. The text defines the instrumentalisation of migrants as a situation in which a third country or non-state actor encourages or facilitates the movement of third-country nationals towards the EU's external borders or to a Member State to destabilise the EU or a Member State.

⁶⁰ Implementing Regulation (EU) 2021/2124 of the Council of 2 December 2021 implementing art. 8a(1) of Regulation (EC) 765/2006 concerning restrictive measures in respect of Belarus; Implementing Decision (CFSP) 2021/2125 of the Council of 2 December 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus.

discussions on developing a toolbox of measures for responding to state-sponsored migration.⁶¹ Most notably, the Commission has proposed a reform in the emergency mechanism of Regulation (EU) 2016/399 to address the situation of instrumentalisation of migrants by third countries (Instrumentalisation Regulation).⁶²

The Instrumentalisation Regulation aims to set up an emergency procedure for migration and asylum management in case of instrumentalisation of migrants by a third country.⁶³ The proposal allows wide derogation from the protection standards of the Common European Asylum System (CEAS), including the proposed Return Directive of 2018,⁶⁴ the proposed recast Reception Conditions Directive of 2016⁶⁵ and the proposed Asylum Procedures Regulation of 2016.⁶⁶ It will further act in practice as a derogation to the EU Charter on Fundamental Rights, especially concerning the right to asylum and the prohibition of *non-refoulement* and collective expulsion (arts 18 and 19). The range of derogations would also cover protection guarantees included in the SBC, the Frontex Sea Operations Regulation⁶⁷ and the European Border and Coast Guard Regulation.⁶⁸

Upon an implementing decision of the Council, Member States faced with a situation of state-sponsored migratory flows will be allowed to adopt emergency measures. Key amongst these measures is the possibility to register asylum applications only at specific border crossing points, limiting thus the flow of applicants and extending the registration

⁶¹ L Rasche, 'The Instrumentalisation of Migration' cit.; Amnesty International, *EU: 'Exceptional Measures' Normalise Dehumanisation of Asylum Seekers* www.amnesty.org; Proposal COM(2021) 752 final from the Commission of 1 December 2021 for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland.

⁶² Proposal COM(2021) 890 final from the Commission of 14 December 2021 for a Regulation of the European Parliament and of the Council addressing situations of instrumentalization in the field of migration and asylum.

⁶³ European Parliamentary Research Service, *Instrumentalisation in the Field of Migration and Asylum [EU Legislation in Progress]* www.eprthinktank.eu; Legislative Train Schedule, *Proposal for a Regulation on Situations of Instrumentalisation in the Field of Migration and Asylum* www.europarl.europa.eu.

⁶⁴ Proposal COM(2018) 634 final from the Commission of 12 September 2018 for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast).

⁶⁵ Proposal COM(2016) 0465 final from the Commission of 13 July 2016 for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast).

⁶⁶ Proposal COM(2016) 0467 final from the Commission of 13 July 2016 for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

⁶⁷ Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

⁶⁸ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624.

period. Furthermore, the deadline for application registration at the borders can be extended for up to four weeks, while the border procedure, which allows not authorising entry to the territory to all asylum claims, is extended. Moreover, they may limit the minimum reception standards to only meet basic needs and expedite return procedures.⁶⁹

While the Council and the Commission have been particularly eager to expedite the adoption of the Instrumentalisation Regulation, making it “one of the fastest moving legislative files related to asylum”.⁷⁰ The “legislative train” is running across substantial obstacles. While there is a common position on the SBC within the Council, the compromise proposal by the Czech Presidency, presented in December 2022, failed to secure a majority in the Council.⁷¹ The compromise proposal went even further than the Commission’s proposal, facilitating, for instance, the activation of the derogation mechanism.

The fate of the Instrumentalisation Regulation remains uncertain for the time being. Member States remain divided over the proposal, while the majority of the political groups in the European Parliament are opposed to it. The time for amendments and trilateral negotiations is particularly short, as the mandates of both the Commission and the European Parliament end in 2024. Next to that, the stated intentions of the upcoming Council Presidencies to prioritise other files may see the Instrumentalisation Regulation fade away.⁷²

Still, this proposal is paving the way towards wide-ranging derogations from protection standards and the legalisation of pushbacks. The European Council of Refugees and Exiles (ECRE) expects it “might return by the backdoor – through integration into other reform proposals”.⁷³ Indeed, the freezing of the Instrumentalisation Regulation has given rise to suggestions to use the proposed Regulation for addressing situations of crisis and force majeure (Crisis Regulation) to introduce derogations as legitimate self-defence against a hybrid attack.⁷⁴ Moreover, the definition of instrumentalisation, and thus, its legitimation in the EU legal framework, remains in the SBC. Finally, the Asylum and Migration Management Regulation (AMMR) Proposal, currently undergoing trilateral negotiations,⁷⁵ includes

⁶⁹ See also M Forti, ‘Weaponisation of Migrants? Migrants as a (Political) Weapon and the EU Regulatory Response: What to Expect Now’ (10 March 2022) EJIL:Talk www.ejiltalk.org.

⁷⁰ European Council of Refugees and Exiles, *Joint Statement: NGOs Call on Member States: Agreeing on the Instrumentalisation Regulation Will Be the Final Blow to a COMMON European Asylum System (CEAS) in Europe* www.ecre.org.

⁷¹ L Rasche, ‘The Instrumentalisation of Migration’ cit.; European Council of Refugees and Exiles, *ECRE Reaction: No Majority for Instrumentalisation Regulation* www.ecre.org.

⁷² European Council of Refugees and Exiles, *ECRE Reaction* cit.

⁷³ Ibid.

⁷⁴ Proposal COM(2020) 613 final from the Commission of 23 September 2020 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. See JA Uriarte, ‘The European Pact on Migration and Asylum: Border Containment and Frontline States’ (2022) *European Journal of Migration and Law* 463.

⁷⁵ Proposal COM (2020) 610 final from the Commission of 23 September 2020 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].

a “Permanent EU Migration Support Toolbox”, from which Member States may draw to deal with a mass influx of irregular entries. This would also allow for derogations from the EU legal framework (art. 6a (1)(c) AMMR). In absence of a clear definition of “instrumentalisation”, “crisis” or “influx”, a wide margin of appreciation is left for Member States, which can undermine minimum rights and protection guarantees, but also the uniform application of EU law and the Rule of Law as a hole.

VI. THE WORST OF A SERIES OF BAD LEGISLATIVE PROPOSALS

The opposition to the Instrumentalisation Regulation was fierce and came from different fronts. In a rare alignment, United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM) and ECRE, took a strong and explicit stance against the Instrumentalisation Regulation.⁷⁶ The Regulation has also been criticised by the European Economic and Social Committee, which focuses on fundamental rights-compliant alternatives.⁷⁷ Its rejection was considered an advocacy success. In a joint statement, more than 80 NGOs from 22 European countries state, “[t]he derogations are substantial and substantive, significantly affecting the rights of people seeking protection”. They strongly oppose the inclusion of the concept of instrumentalisation in EU law and the widespread derogation this would lead to.⁷⁸ ECRE stated, “[t]he Instrumentalisation Regulation is the worst of a series of bad legislative proposals on asylum issued by the European Commission”.⁷⁹

The proposed Regulation has received widespread criticism as ineffective in addressing attempts of third countries to coerce the EU and its Member States while disregarding the structural factors that contribute to using such coercive diplomatic tools and the EU’s own role in it. Moreover, it can be used to strengthen third countries’ arguments on the EU’s “hypocrisy” and “double standards” on refugee and human rights.⁸⁰ Legal experts have criticised it for having the potential to become a tool that Member States can exploit to circumvent their obligations under refugee, EU asylum, and EU and international human rights law and deter access to their territory, leading to all the possible violations mentioned in section II.

The room it offers for derogations is widespread and disproportionate, while it lacks adequate legal safeguards for asylum seekers, undermining thus the protection regime as a whole. The definition of instrumentalisation in the SBC needs to be narrower and contain several terms that open it to interpretation and exploitation for political aims. It

⁷⁶ C Woollard (ECRE), K Stefaniaki (UNHCR) and K Dimopoulos (IOM) at ECRE/Greek Refugee Council conference on ‘The Concept of “Instrumentalisation” in Migration Management and Derogations from Asylum Rules and Standards: Fundamental Rights and Rule of Law Considerations’, Athens, 3 February 2023.

⁷⁷ European Economic and Social Committee, *Instrumentalisation of Migrants* www.eesc.europa.eu.

⁷⁸ European Council of Refugees and Exiles, *Joint Statement* cit.

⁷⁹ European Council of Refugees and Exiles, *ECRE Reaction* cit.

⁸⁰ L Rasche, ‘The Instrumentalisation of Migration’ cit.

leads to the normalisation of a constant state of emergency that can justify derogations from minimum standards and the Rule of Law itself.⁸¹

The Regulation allows for adopting emergency measures that allow for a violent crack-down against the migrants being “weaponised”.⁸² These measures close the borders for asylum applicants and make accessing the territory and asylum procedures exceedingly difficult. It prevents registrations of asylum claims and judicial appeals against rejected applications. It expedites the return of those who managed to cross the border without properly examining their protection needs. In this sense, it essentially codifies and legitimises the systematic pushbacks that have already been taking place in practice and creates the circumstances for violating the non-derogable rights to asylum and *non-refoulement*.

Moreover, delaying the registration of asylum claims via the prolongation of registration deadlines and extension of the asylum border procedure to the maximum duration risks substantial violations of procedural and reception rights and can lead to prolonged *de facto* detention.⁸³ Procedural and substantive safeguards are also at stake in relation to the legal fiction of non-entry, according to which third-country nationals are considered to have arrived at the territory only once their entry has been legally approved, regardless of their actual physical presence.⁸⁴ The fiction on non-entry, even though present in the national legislation of Member States, in relation, for instance, to transit zones of airports,⁸⁵ appeared for the first time in an expanded form in the proposal for a Screening Regulation⁸⁶ and the Instrumentalisation Regulation. This fiction temporarily excludes migrants from accessing legal rights and procedures in the host Member State and can facilitate systematic and extended detention.⁸⁷

VII. FUNDAMENTALLY DIFFERENT SITUATION ON THE GROUND?

The Commission justifies this unprecedented legislative activity as a necessary means to address the extraordinary situation of instrumentalisation, a novel threat against EU stability. However, studies show that the phenomenon of instrumentalisation of migration for foreign policy and diplomatic objectives has been around for a while.⁸⁸

⁸¹ M Forti, ‘Weaponisation of Migrants?’ cit.

⁸² F Peerboom, ‘Protecting Borders or Individual Rights?’ cit.

⁸³ L Rasche, ‘The Instrumentalisation of Migration’ cit.

⁸⁴ European Council of Refugees and Exiles, *ECRE Commentary: An Analysis of the Fiction of Non-entry as Appears in the Screening Regulation* www.ecre.org.

⁸⁵ For instance, “Fiktion der Nichteinreise” in Germany, see K Soderstrom, ‘Flexible Borders: The Fiction of Non-entry and Asylum Seekers in Germany’ (17 July 2019) CONREP Blog www.arts.unimelb.edu.au.

⁸⁶ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, art. 4(1).

⁸⁷ European Council on Refugees and Exiles, ‘Reception, Detention and Restriction of Movement at EU External Borders’ (E-paper published by the Heinrich-Böll-Stiftung European Union 2021) www.eu.boell.org.

⁸⁸ KM Greenhill, *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy* (Cornell University Press 2016).

In her seminal work on the issue, Kely Greenhill first defined instrumentalisation already in 2008 as “coercive engineered migration” or “strategic engineered migration” and developed her analysis on the “instrumentalisation of population movements for political and military means” in 2008.⁸⁹ The history of international relations counts numerous such examples,⁹⁰ while the EU itself and its Member States have been the target of such practices at least 40 times in the period between 2014 and 2020,⁹¹ *i.e.*, before the Turkish, Moroccan and Belarusian examples triggered the instrumentalisation response.

Moreover, these diplomatic coercion practices have proven far from a disproportionate threat to the stability of the EU and the countries in question. In the cases of Greece, Spain, Poland, Lithuania and Latvia cases, an initial peak of attempted border crossings occurred within a short period. However, it did not result in a large-scale increase in arrivals.⁹² Moreover, the circumstances fundamentally changed in practice, especially for Poland, when the Ukrainian war broke out shortly after the Belarusian crisis. Poland opened its borders, and the threat of the “weaponised” refugees from Belarus was soon set aside. Poland has taken a leading role in responding to the Ukrainian crisis, taking progressive legislative and administrative measures to implement the Temporary Protection Directive successfully.⁹³ Poland hosts more than 1.5 million Ukrainian refugees⁹⁴ proves that with the practical solidarity of the EU, it has a significant reception capacity.

VIII. CONCLUSION AND DISCUSSION

According to the Commission, the existing CEAS was not equipped to address such unique and extreme threats as those presented by instrumentalisation, and a more flexible framework was necessary to allow States to address them without having to resort to art. 78(3) TFEU. The framework provided by the Treaties allows a Member State confronted with an emergency situation characterised by a sudden inflow of third-country nationals to take provisional measures concerning the common asylum policy. These measures, however, cannot be taken autonomously but may be adopted by the Council upon a proposal of the Commission and after consulting the European Parliament.

⁸⁹ KM Greenhill, ‘Strategic Engineered Migration as a Weapon of War’ (2008) *Civil Wars* 6. See further: KM Greenhill, ‘When Virtues Become Vices: The Achilles’ Heel of Migration Social Policy’ in GP Freeman and N Mirilovic (eds), *Handbook on Migration and Social Policy* (Edward Elgar Publishing 2016).

⁹⁰ J Cassarino, ‘An Unsettling Déjà-vu’ *cit.*; F Peerboom, ‘Protecting Borders or Individual Rights?’ *cit.*

⁹¹ A Fakhry, R Parkes and A Rácz, ‘Migration Instrumentalisation: A Taxonomy for an Efficient Response’ (Hybrid CoE Working Paper 14-2022) 9.

⁹² L Rasche, ‘The Instrumentalisation of Migration’ *cit.*

⁹³ Reliefweb, *UNHCR Regional Bureau for Europe: The Implementation of the Temporary Protection Directive – Six Months On (October 2022)* www.reliefweb.int; European Union Agency for Fundamental Rights, *National Legislation Implementing the EU Temporary Protection Directive in Selected EU Member States (October 2022 update)* fra.europa.eu.

⁹⁴ UNHCR Operational Data Portal, *Ukraine Refugee Situation* www.data.unhcr.org.

As it has been shown, however, the phenomenon of instrumentalisation and specifically the targeting of the EU, has been around for a while. At the same time, recent incidents have not produced the feared effects. The proposed response itself is disproportionate and broadly affects the fundamental rights of migrants. What is more, the overall EU migration policy is counterproductive to instrumentalisation. While the EU sees instrumentalisation as an existential threat that should allow for the derogation of even the most basic rights, it continues to feed the phenomenon by strengthening the role of third States and increasing its dependence on neighbouring and other third countries and its own vulnerability towards such measures of coercion.⁹⁵

We can observe a sharp change in rhetoric rather than a substantial change in factual circumstances warranting such an emergency response. The political and legislative attention devoted to the phenomenon of instrumentalisation is yet another example of the “multi-crisis” analytical framework.⁹⁶

In fact, it is highly questionable whether the response constitutes a paradigm shift. The measures included in the instrumentalisation regulation were already introduced after the “refugee crisis” of 2015 with the hotspot approach in Italy and Greece. They largely resembled the border procedure proposed in the New Migration Pact. In fact, the Commission is continuing an already existing trend attempting to expedite and broaden exceptional elements of the Pact.⁹⁷

Beyond the mere continuation of legislative agendas, while the Commission is attempting to regulate and add safeguards to what has already been happening in practice, it essentially normalises and legitimises the illegal practice of pushbacks at the EU level. This results in the deterioration of fundamental rights safeguards and adds to the Rule of Law crisis at its external borders.⁹⁸ When the European Commission, in its attempt to protect the right to asylum, normalises derogations from it, it becomes essential to reflect upon what really drives lawmaking.

The Instrumentalisation Regulation reflects the natural continuation and intensification of a securitisation trend that characterises the EU migration policy of the last four

⁹⁵ IG Lang, ‘The New Pact on Migration and Asylum: A Strong External and a Weak Internal Dimension?’ (2022) *European Foreign Affairs Review* 1.

⁹⁶ Z Sahin-Mencutek and others, ‘A Crisis Mode in Migration Governance: Comparative and Analytical Insights’ (2022) *Comparative Migration Studies* 1, 12; M Gkliati and J Kilpatrick, ‘Crying Wolf too Many Times: The Impact of the Emergency Narrative on Transparency in Frontex Joint Operations’ (2022) *Utrecht Law Review* 57.

⁹⁷ Communication COM(2020) 609 final cit.; L Rasche and M Walter-Franke, ‘Clear, Fair and Fast? Border Procedures in the Pact on Asylum and Migration’ (1 December 2020) Jacques Delors Centre www.delorscentre.eu; M Gerbaudo, ‘The European Commission’s Instrumentalization Strategy: Normalising Border Procedures and De Facto Detention’ *European Papers* (European Forum Insight of 3 October 2022) www.europeanpapers.eu 615.

⁹⁸ L Marin, M Gkliati and S Tas, ‘An “Impossible Trinity”?’ cit.; DV Kochenov and B Grabowska-Moroz, ‘The EU’s Face in Łukašienka’s Mirror’ (26 August 2021) *Verfassungsblog* www.verfassungsblog.de.

decades.⁹⁹ Instrumentalisation is the evolution of securitisation, according to which exceptional and extraordinary situations, described as crises, require new security measures. Migration is one of the primary issues that is seen in the EU as a security threat,¹⁰⁰ thus justifying “emergency measures” that would otherwise not have been acceptable.¹⁰¹ Migration governance in Europe has become synonymous with managing a security crisis, manifested as “processes of bordering”¹⁰² and deterrence,¹⁰³ with a detrimental impact on the fundamental rights of migrants.

According to the developing narrative, the threat goes beyond regular security and becomes a national security and defence matter. While securitisation has resulted in the related trend of crimmigration,¹⁰⁴ instrumentalisation does not only see a criminal or even terrorist threat but a threat to the territorial integrity and political stability of Member States and the EU as a whole. While the crimmigration narrative deploys the language of Criminal Law, instrumentalisation deploys the language of the Law of War to justify even more extreme responses to an even more acute and existential threat.

The EU’s response to the phenomenon of instrumentalisation of migrants should be one that focuses on addressing the related structural issues of migration diplomacy,¹⁰⁵ taking into account the interdependence of the EU and third countries in relation to migration management and the increased reliance of the EU on the cooperation of neighbouring countries¹⁰⁶ in the context of externalisation.¹⁰⁷

With respect to the migrants themselves, any response should be in accordance with fundamental rights rather than escalating an instrumentalisation incident into a humanitarian emergency. Moreover, as noted by the European Economic and Social Committee, any attempt to combat the instrumentalisation of migrants should provide for solidarity and responsibility sharing among Member States, including swift relocation

⁹⁹ J Jeandesboz and P Pallister-Wilkins, ‘Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis’ (2016) *Mediterranean Politics* 316.

¹⁰⁰ O Waever, B Buzan and J De Wilde, *Security: A New Framework for Analysis* (1st ed, Boulder: Lynne Rienner Publishers 1998); S Léonard, ‘EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices’ (2010) *European Security* 235.

¹⁰¹ P Pallister-Wilkins and J Jeandesboz, *Crisis, Enforcement and Control at the EU Borders* (1st ed, Routledge 2014) 115.

¹⁰² P Pallister-Wilkins, ‘Interrogating the Mediterranean “Migration Crisis”’ (2016) *Mediterranean Politics* 311.

¹⁰³ T Gammeltoft-Hansen and J Hathaway, ‘Non-refoulement in a World of Cooperative Deterrence’ (2015) *ColumJTransnatlL* 235; T Gammeltoft-Hansen and NF Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ (2017) *Journal of Migration and Human Security* 30.

¹⁰⁴ JP Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) *AmULRev* 1689.

¹⁰⁵ L Rasche, ‘The Instrumentalisation of Migration’ cit.

¹⁰⁶ J Cassarino, ‘The Instrumentalization of Migration in the Euro-Mediterranean Area: Between Past and Present’ (2021) *IEMed Mediterranean Yearbook 2021* www.iemed.org; J Cassarino, ‘An Unsettling Déjà-vu’ cit.; L Rasche, ‘The Instrumentalisation of Migration’ cit.

¹⁰⁷ D Cantor and others, ‘Externalisation, Access to Territorial Asylum, and International Law’ cit.

procedures.¹⁰⁸ Finally, one cannot fail to note that the EU has successfully addressed the potential instrumentalisation of Ukrainian refugees by Russia with the activation and successful implementation of the Temporary Protection Directive.

¹⁰⁸ European Economic and Social Committee, *Instrumentalisation of Migrants* cit.