

ESTUDIOS

Los intensos flujos migratorios, que desde 2015 han afectado a la UE, han puesto de relieve los problemas estructurales de la política de inmigración y asilo, desarrollando un interesante debate sobre la necesidad de reformar este sistema y provocando la adopción de propuestas para abordar de forma transversal sus principales ámbitos. Si bien hay que reconocer que la UE se ha puesto en marcha, hasta el momento no ha tenido mucho éxito. Y es precisamente por ello que es necesario mirar también más allá del Océano Atlántico para analizar si los Estados del continente americano están viviendo una crisis migratoria parecida a la de Europa, qué tipo de crisis, su intensidad y en especial las respuestas que se están dando en estos países extracomunitarios. En este sentido, el carácter global y estructural del fenómeno migratorio requiere un estudio más amplio, considerando, por un lado, de los países de origen y tránsito para comprender las causas e intentar ayudar a estos países; y por otro las políticas implementadas por los países terceros que también son importantes receptores de migrantes, como algunos del continente americano, *in primis* Estados Unidos y México. En definitiva, el objetivo es averiguar si existen tendencias comunes en las respuestas e intercambiar experiencias para ver si algunas de las medidas adoptadas en otros lugares son exportables también a la UE y así mismo, por el contrario, detectar y concretar las prácticas que no se deberían importar porque representarían un retroceso, al ser contrarias a los estándares mínimos de protección. Esto es fundamental en el proceso de reforma de la política de inmigración y asilo de la Unión.

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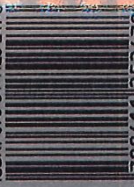
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DESAFÍOS Y LÍMITES DE LA POLÍTICA MIGRATORIA EN EUROPA Y AMÉRICA
PERSPECTIVAS DE DERECHO COMPARADO

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PERSPECTIVAS DE DERECHO COMPARADO

VALENTINA FAGGIANI

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Junta de Andalucía
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DESAFÍOS Y LÍMITES DE LA POLÍTICA MIGRATORIA EN EUROPA Y AMÉRICA

Perspectivas de derecho comparado

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The migration crisis goes East: the EU's Eastern borders under strain, between hybrid attacks, threats to human rights and the Ukrainian exodus

Francesco Luigi Gatta

1. Introduction

The European Union (henceforth: “EU”) has been recently faced with significant migratory challenges. After the problematic 2015 refugee crisis, which put a considerable pressure on the Southern Mediterranean external borders of the Union, the most recent issues in terms of asylum and migration governance and border controls have come from the East: from Belarus in 2021, following the “hybrid attack” carried out by the Lukashenko’s regime with migrants and refugees being used as “weapons” to destabilize Europe; and from Ukraine in 2022, following the Russian military invasion and the subsequent displacement of millions of people, who have started to head towards the EU in search of safety.

Against this background, the aim of this chapter is to provide an overview and an assessment of the two humanitarian-migratory crises that have recently affected the EU and its Member States geographically located in the Eastern portion of the European external borders. To this end, the chapter is ideally divided into two parts, relating to the above-mentioned sources of the respective migration crises.

The first one is devoted to Belarus, being structured in a preliminary analysis of the legal-political background of the tensions between the EU and Belarus (paragraph 2), followed by a description of the strategy of “weaponizing” refugees put in place by the government of Minsk in order to hit its neighboring Countries, Poland, Lithuania and Latvia, as well as, more broadly, to destabilize the EU and its institutions in Brussels (paragraphs 3 – 4). The analysis of the Belarusian border crisis is then completed with an examination of the various reactions put in place by those directly affected by the migratory pressure, namely, Poland, Lithuania and Latvia (paragraph 5.1 – 5.3.), as well as of the different responses of the EU (paragraph 5.4.).

In the second part of the text the attention is put on Ukraine, first by setting the scene of the increasing migratory movements relating to the exodus of the Ukrainian population fleeing the Country after the Russian aggression (paragraph 6). Then, the focus is put on the 2001 Directive for temporary protection, i.e., the legal instrument that the EU has chosen to activate (for the first time in the history) in order to cope with the incoming inflow of people from Ukraine. The main features and contents of the Directive are analyzed in general (paragraph 6.1), as well as

in their concrete implementation in respect of the Ukrainian situation and according to the decision taken by the EU (paragraph 6.2). A reflection will also be provided on the question as to whether and to what extent the activation of the 2001 Temporary Protection Directive may entail an added value for the EU and its Member States (paragraph 7). Finally, by way of conclusion, an overall assessment of the two crises will be provided, highlighting the main challenges related to the recent and ongoing migratory pressure over the Eastern European borders, including, in particular, in terms of compliance with relevant human rights obligations (paragraph 8).

2. Setting the scene: the Eastern European borders and their recent crises

It is a fact that the 2015 European migration crisis had its core in the Mediterranean Sea, which has been the theater of a significant influx of migrants mainly coming from Syria¹. The so-called refugee crisis attracted a lot of attention, including by the media, which contributed to the worldwide dissemination of images of the migrants' human tragedy². The arrival of a considerable number of migrants provoked significant challenges especially for Greece and Italy, which, being the most geographically exposed to the migratory flows, invoked the support of the EU and its Member States in the name of the principle of solidarity, enshrined in EU primary law and identified as a governing value in the field of migration governance³. The EU, for its part, tried to react to the crisis by putting in place a variety of measures⁴, including seeking the collaboration of strategically-located Third Countries (i.e. Turkey, Libya) in order to prevent or, at least, contain the migratory flows.

¹ In recent years the EU and its Member States have been confronted with an increasing migratory pressure. From 2011 onwards, in particular, migratory flows towards Europe have been intensifying, being fueled especially by relevant international events such as the so-called Arab Spring and the outbreak of the war in Syria. The "refugees crisis" reached its peak in 2015, when an estimated one million migrants irregularly entered the territory of the EU across the Mediterranean. For detailed data and statistics on migratory flows and irregular arrivals in the EU during 2015, see FRONTEX, *Annual Risk Analysis for 2016*, Frontex 2499/2016 (2016).

² One of the most iconic and tragically famous images of the 2015 refugee crisis is a photograph of a two-year-old Syrian boy, Alan Kurdi, laying, dead, on a beach, after he drowned on 2 September 2015 in the Mediterranean Sea along with his mother and brother. The photograph of his body was taken by Turkish journalist Nilüfer Demir and quickly made global headlines, going "viral", and prompting international responses.

³ See Article 67(2) and Article 80 of Treaty on the Functioning of the European Union.

⁴ For an analysis of the reasons and the features of the European migration crisis, among others, see CARLIER J.-Y., CRÉPEAU F., *De la "Crise" Migratoire Européenne au Pacte Mondial sur les Migrations: Exemple d'un Mouvement sans Droit?*, *Annuaire Français de Droit International*, Vol. 1, 2017, p. 461 ff; ATAK I., CRÉPEAU F., *Managing Migration at the External Borders of the European Union: Meeting the Human Rights Challenges*, *Journal Européen des Droits de l'Homme - European Journal of Human Rights (JEDH)*, 5/2014, p. 601 ff; BOSSUYT M., *The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Issues*, *Journal Européen des Droits de l'Homme - European Journal of Human Rights (JEDH)*, 5/2015, p. 598 ff.

Numerically, the countermeasures adopted by the EU and some of its Member States had the effect of reducing the pressure over European borders in the short- and medium-term. In the post-2015 period, however, migratory flows towards the EU have kept evolving, by developing themselves in different directions and settings. In this respect, the Eastern European borders have recently witnessed a progressive increase in the arrivals and attempts of irregular crossings, especially in their Northern segment, involving EU Member States, like Poland or the Baltic Countries, which were not so much used to migration-related challenges.

Such a portion of the European external perimeter is classified as “Eastern Borders Route” according to the EU Agency Frontex⁵. Typically, as data and evidence collected by the Agency show, this route has not been that problematic in terms of migration management. Meaning, the overall scale of irregular migratory movements along these borders is much smaller than on any other migratory route into the EU, and amounts to a fraction of a percent of the total. The Eastern Borders Route, indeed, has been traditionally subject to other kind of security threats, mostly relating to illicit activities such as smuggling of illegal products, like cigarettes, stolen cars, drugs, as reported by Frontex⁶.

When it comes to human mobility, this route has mostly involved nationals from neighbouring Countries, like Ukrainians, Russians and, to a lesser extent, people from Belarus and Moldova. In any case, though, until recently, the Eastern portion of the EU’s external borders was mainly affected by challenges for border control associated either with smuggling or other reasons, not related to migration. This scenario changed drastically in 2021, when migratory flows became on the rise. Migrants and asylum seekers appeared in more significant numbers, bringing the number of overall detected illegal borders crossings to over 8,000 (as compared to a less than 700 in 2020)⁷. Such an inflow of people, thus, contributed to suddenly weaking up this “dormient” part of the European external borders. How come that this has happened?

The main answer to this question is: Belarus.

⁵ According to Frontex, the so-called Eastern Borders Route is 6,000-km-long, being composed of land border between a number of non-EU and EU Countries, namely Belarus, Moldova, Ukraine, Russia on the one hand, and Estonia, Finland, Hungary, Latvia, Lithuania, Norway, Poland, Slovakia, Bulgaria and Romania on the other. Migration-wise, the Warsaw-based Agency also classified the EU’s external borders in other main routes, namely the Western Mediterranean Route (i.e. mainly involving Spain and Morocco); the Central Mediterranean Route (i.e. the maritime channel between North Africa and Italy and Malta); the Eastern Mediterranean Route (i.e. mainly involving Turkey and Greece and Cyprus); the Western Balkan Route (i.e. involving the EU and non-EU Countries in the Western Balkan region).

⁶ For more information on the Eastern Borders Route see the official website of the Frontex Agency, www.frontex.europa.eu, namely the dedicated page to the different migratory routes towards the EU.

⁷ See data and statistics available on the dedicated page of the Eastern Borders Route on the Frontex official website. For additional information, see also, FRONTEX, *Strategic Risk Analysis 2022*, 17 July 2022.

3. “Weaponizing refugees”: dragging migrants into the political game

At the end of August 2021, while the Taliban were entering Kabul almost undisturbed, the world (re)discovered the problem of Afghanistan. Two decades of NATO military garrison were wiped out, with the situation becoming all of the sudden very chaotic. The Afghan crisis made the news, shocked the public opinion around the world, and immediately triggered discussions within the international community, as it was the case of the extraordinary G7 on the situation in Afghanistan convened on 24 August 2021.

In this framework, it soon became pretty clear that one of the main implications of the Afghan crisis was the subsequent, numerically considerable exodus of people fleeing the Country in search of safety and protection. Such a prospect, consequently, nurtured the fears and concerns of a number of potential receiving States, especially within the EU. Very soon the nightmare of “another 2015” resurfaced among governments, reawakening the ghost of the big refugee crisis Europe had been facing in the previous years.

In particular, the EU Member States geographically located on the Eastern part of the European external borders were particularly aware of the challenges they were about to face. Significantly, thus, they immediately expressed their views on the need to effectively tackle the incoming migratory flows. For example, in a joint declaration released on 23 August by the Prime Ministers of Poland, Estonia, Lithuania and Latvia, one can read that *“It is equally important to jointly use all available diplomatic and practical means to cut the new irregular migration routes at its inception, as soon as possible. In the EU we need to use this momentum to rethink our approach towards the protection of our borders”*⁸.

Similarly, a few days later, in the framework of an extraordinary meeting organized by the Council of the EU to discuss the situation in Afghanistan, the ministers of the Interior of the EU Member States affirmed to be *“determined to act jointly to prevent the recurrence of uncontrolled large-scale illegal migration movements faced in the past, by preparing a coordinated and orderly response”*⁹.

⁸ Statement of the Prime Ministers Ingrida Šimonytė (Lithuania), Arturs Krišjānis Kariņš (Latvia), Kaja Kallas (Estonia) and Mateusz Morawiecki (Poland) on the hybrid attack on our borders by Belarus, 23 August 2021. The statement was echoed in the declarations by the EU institutions, which showed solidarity towards the affected EU countries on the one hand, and expressed severe criticism towards Belarus on the other. See, for example, the statement by the Commission President Ursula Von der Leyen released in November 2021: EUROPEAN COMMISSION, *Statement by President von der Leyen on the situation at the border between Poland and Belarus*, Statement by the President, Washington D.C., 8 November 2021.

⁹ COUNCIL OF THE EU, *Statement on the situation in Afghanistan*, Statements and remarks, 31 August 2021, §6.

Against this background, in such an alarming and emergency-driven atmosphere, the intensification of migratory flows from Afghanistan represented a golden opportunity for Belarus: an opportunity to influence and instrumentalize those flows, first, by attracting migrants within its territory, and then, to push and re-direct them towards the EU. Such a strategy of exploiting migrants as a means of destabilization was meant as a response to the sanctions imposed on Belarus by the EU. More generally, it brought (again) to light the issue of the role played by Third Countries adjacent to the EU in managing migration, especially showing all the risks connected to volatile and unpredictable interlocutors when it comes to border controls and containment of migratory flows.

Truthfully, it had already happened with Turkey, in March 2020, in the framework of the tensions at the land border with Greece and Bulgaria and the threat of President Erdoğan to relax border controls and let migrants flow into the EU. In that case, EU institutions' leaders rushed at Ankara to heal the disagreement and plug the cracks in the 2016 EU-Turkey Declaration¹⁰. Then, it was Morocco's turn, in spring 2021, with the Ceuta crisis and the influx of thousands of migrants across a border that has suddenly become porous¹¹. Despite causing big sensation and alarmism, these incidents are actually not surprising: they do not represent anything new, rather, they constitute recurring dynamics in the bilateral management of migratory flows¹². These events, ultimately, reveal and confirm all the risks of betting on "gate keepers" whose level of reliability is completely uncertain.

In summer and autumn 2021 it was the turn of Belarus, whose leader Lukaschenko was perfectly aware of having the trump card of migrants, to be played in response to the sanctions approved by the EU against his own regime¹³. In the above-mentioned joint declaration, Poland

¹⁰ The EU-Turkey statement was negotiated and concluded mainly in order to manage the migratory movements towards the EU and, most notably, Greece. The Statement has been widely commented (and criticized), among others, see SPIJKERBOER T., Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice, *Journal of Refugee Studies*, 31/2018, pp. 216–239; FERNÁNDEZ ARRIBAS G., The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem', *European Papers*, Vol. 1, no. 3, 2016, pp. 1097-1104; CORTEN O., DONY M., Accord politique ou juridique: Quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?, *Eumigrationlawblog*, 10 June 2016; CARRERA S., GUILD E., EU-Turkey plan for handling refugees is fraught with legal and procedural challenges, *CEPS Commentary*, 10 March 2016; PEERS S., The final EU/Turkey refugee deal: a legal assessment, *EU Law Analysis*, 18 March 2016; GATTI M., The EU-Turkey Statement: A Treaty That Violates Democracy', *EJIL:Talk!*, 18 April 2016; LABAYLE H., DE BRUYCKER P., The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain?, *Eumigrationlawblog*, 1 April 2016.

¹¹ On such a matter see BELLOSO M.L., ROJO D.F., Morocco uses migratory pressure to force Spain and the EU to give in to the Sahara, *ADiM Blog*, Editorial, May 2021.

¹² Like a *déjà-vu*, as explained in CASSARINO J.-P., An unsettling sense of déjà-vu: The May 2021 Ceuta events and their precedents, *ADiM Blog*, Analyses & Opinions, July 2021.

¹³ On this point, see the analysis of KOCHENOV D., GRABOWSKA-MOROZ B., The EU's Face in Łukašenka's Mirror: Inhuman Treatment of Afghan Hostages at the Polish-Belarusian Border and the Promise of EU Values, *VerfassungsBlog*, 26 August 2021.

and the three Baltic republics do not hesitate to state that “*the ongoing crisis has been planned and systemically organized by the regime of Alexander Lukashenka*”¹⁴. Such a strategy of coercive migration was not totally new, as the Belarusian government had already threatened the EU with migrants in the past¹⁵. The 2021 “hybrid attacks” launched by Belarus, though, have been particularly successful in the destabilization of its neighboring countries.

4. Belarus and the 2021 artificially-induced migration crisis

The 2021 Belarus-EU Crisis refers to the significant and rapid increase of migratory flows against the EU and Schengen borders as a result of Belarus’ “hybrid attacks” carried out with a view to destabilize the EU’s Eastern external borders¹⁶. It may be contextualized within the already delicate state of relations between the EU and Belarus, which had been cooling and deteriorating for a while prior to border crisis. Especially following the 2020 controversial and heavily contested Belarusian elections, as well as other incidents and provocations (such as, emblematically, the forced landing in Minsk of the Ryanair Flight carrying onboard a Belarusian journalist and opposition activist)¹⁷, the situation has overheated, leading to the President Lukashenko’s instrumentalization and weaponization of migrants and use of hybrid warfare, understood as a strategy whose “*key objective appears to have been to discomfit, humiliate, and sow division within the EU for failing to recognize him as the legitimate winner of the flawed 2020 Belarusian presidential election and for imposing sanctions on his country after he brutally suppressed the pro-democracy protests that followed*”¹⁸.

Against this background, and by way of synthesis, the Belarusian tactic of weaponizing migrants against the EU may be described as follows. Starting from the summer of 2021, an increasing influx of migrants – mainly from Iraq, Afghanistan, Syria, and Yemen – reached Belarus, mainly via flights to Minsk. The “attraction” of these individuals to Belarus has

¹⁴ See above, footnote no. 8.

¹⁵ See GREENHILL K. M., *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy*, Ithaca and London, Cornell University Press, pp. 5-6.

¹⁶ For an analysis of the Belarus’ strategy, see BARANOVSKA G., The Deadly Woods. Legalizing Pushbacks at the Polish-Belarusian Border, *Verfassungsblog*, 29 October 2021; KOCHENOV D., GRABOWSKA-MOROZ B., The EU’s Face in Łukašenka’s Mirror: Inhuman Treatment of Afghan Hostages at the Polish-Belarusian Border and the Promise of EU Values, *Verfassungsblog*, 26 August 2021.

¹⁷ The Ryanair Flight 4978, flying from Athens to Vilnius in May 2021, was carrying onboard the Belarusian journalist and opposition activist Roman Protasevich, who was arrested shortly after the forced landing in the Belarusian capital. This resulted in the implementation of sanctions and severed diplomatic relations between EU Member States and Belarus even further. In this respect, the 2021 Belarus-EU border crisis is often seen as a continuation of this conflict.

¹⁸ GREENHILL, K.M., When Migrants Become Weapons, *Foreign Affairs*, March/April 2022.

reportedly been pursued via a combination of means, such as a tailor-made social media campaign and dissemination of “fake news” regarding the (false) promise of easily getting access to Europe; a policy of facilitation of travels to Belarus due to the issuance of visas by the Belarusian diplomatic and consular authorities, coupled with the offer of many cheap flights organized by the Belarusian air company, Belavia¹⁹. Once in Belarus, migrants have initially received accommodation in State-owned hotels, and have then been induced to travel (or even transported by Belarussian authorities) to the State border zones with Latvia, Lithuania and Poland, in the attempt to enter the EU²⁰. At the borders, migrants have been directed towards the weakest and less controlled access points, allegedly receiving specific instructions by the Belarusian authorities and being also provided with tools to cut the barbed-wire fences and break in the territory of one of the concerned EU Member States.

The Belarusian strategic instrumentalization of migrants prompted a robust approach of securitization, heavy border controls and increased surveillance on the part of the Latvian, Lithuanian and Polish authorities, which, in turn, resulted in serious concerns for the respect of human rights of the people involved in the political game. International and authoritative human rights observers, indeed, reported a number of problematic issues on both sides of the borders, including, denial of access to asylum procedures, collective expulsions, as well as violence and ill-treatment by border authorities²¹. The situation was particularly aggravated by the fact that, being rejected and unwanted from both sides of the Belarus-EU borders, migrants remained “stranded” in a sort of no man’s land, in severe conditions and with no access to shelter and assistance. It is not a surprise, thus, that some individuals have died, thereby triggering additional criticism by human rights associations and by relevant international institutional bodies²².

¹⁹ On this point see ADAMS P., How Belarus is helping “tourists” break into the EU, *BBC News*, 22 October 2021.

²⁰ For more details about the Belarusian strategy, see DEL MONTE M. AND LUYTEN K., Emergency measures on migration Article 78(3) TFEU, *EPRS | European Parliamentary Research Service*, European Parliament, 698.851, December 2021. For data and statistics regarding the attempts to cross into the EU, see KOROUTCHEV R., PEEV K., The Current Migrant and Refugee Crisis in Europe: Refugee Reception Centers in South-East Bulgaria, *Journal of Liberty and International Affairs (JLIA)*, no. 1, 2022, pp. 67-80.

²¹ Among various others, see, by way of example, AMNESTY INTERNATIONAL, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU*, 20 December 2021.

²² See for example the following communications and statements by the UNHCR, UNHCR, UNHCR and IOM shocked and dismayed by deaths near Belarus-Poland border, Press release, 21 September 2021; UNHCR, UNHCR urges States to end stalemate at Belarus-EU border and avoid further loss of life, Press release, 22 October 2021. On the tragic conditions faced by the migrants “stranded” in between Belarusian and European borders, see also DEL MONTE M. AND LUYTEN K., Emergency measures on migration Article 78(3) TFEU, cit. ; MILLS C., FELLA S., LOFT P., BUTCHARD P., *Belarus/EU Migrant Crisis*, UK Parliament, House of Commons, Commons Library Research Briefing, 26 November 2021; SARI A., HUDSON B., *Stirring Trouble at the Border: Is Belarus in Violation of International Law? – Part 2*, *Just Security*, 19 November 2021.

5. The reactions by the affected EU Member States: militarization, border closures and pushbacks

Faced with the “blackmail” of Belarus, the affected Member States of the Eastern European borders reacted with a combination of both regulatory and operational measures. On the one hand, they almost immediately declared the state of emergency, introducing special legal regimes for the concerned border areas, thereby allowing for derogations and/or restrictions to the ordinary management of migration flows and asylum applications. On the other, operationally, they reinforced border surveillance and controls, deploying the army and/or special forces and commandos, as well as erecting or strengthening barbed-wire fences with a view to “securitize” the concerned portion of the border with Belarus.

Such measures resulted in a *de facto* systematic practice of non-admission in the national territory, coupled with the refusal to register asylum applications and the collective pushback of those migrants who were pushed against the borders by the Belarusian authorities. As a consequence, this set of measures appear to be in direct contrast with EU law, as well as contrary to international law and, in particular, to the European Convention on Human Rights (henceforth: “ECHR”), as the Strasbourg Court itself has certified. Not surprisingly, thus, the legal and operational responses put in place by the concerned EU Member States have attracted sharp criticism by a number of international institutional bodies, which have pointed to a number of very problematic issues in terms of human rights compliance, as the examples provided below show.

5.1. Poland

Poland declared a state of exception on 2 September 2021, which formally remained in force until 2 December of the same year, and covered over 180 different towns and localities²³. The area was securitized and turned into a closed space where anyone who was not a permanent resident within it was prohibited from entering, as well as from taking photographs, or making videos, and documenting the situation²⁴. Additionally, the relevant portion of the Polish border with Belarus was subject to a robust process of militarization, with the deployment of a

²³ See DEL MONTE M. AND LUYTEN K., Emergency measures on migration Article 78(3) TFEU, *EPRS | European Parliamentary Research Service*, European Parliament, 698.851, December 2021, notably p.3

²⁴ *Ibid.*

considerable amount of soldiers and military equipment. Finally, Poland also adopted legislation facilitating the return of those that crossed the border back to Belarus without any assessment of their claims for international protection²⁵.

Poland has been especially criticized for the restrictive measures implemented at its borders in reaction to the increasing migratory pressure catalyzed by Belarus. Such a conduct, first of all, has generated litigation before the European Court of Human Rights (henceforth: “ECtHR”) with a number of applications being lodged against the Polish State. The Strasbourg Court intervened by issuing interim measures according to Rule 39 of its Rules of Procedure. In particular, Poland was ordered, on the one hand, to allow assistance to be provided in favor of the applicants, especially in terms of granting access to the concerned area to NGOs, humanitarian associations and lawyers; and on the other hand, to refrain from pushing migrants back to Belarus²⁶. The Court did not, however, order Poland to let the applicants enter its national territory.

While at the time of writing this group of applications brought against Poland is pending, it is worth recalling that, actually, the same Polish State already had a history of violation of migrants’ rights at its borders with Belarus, even before the “hybrid” migration-related attacks of summer 2021 took place. Indeed, practices such as pushbacks, systematic non-admission and denial of registration of asylum applications had been addressed by the ECtHR, which certified their incompatibility with the ECHR with a “package” of judgments delivered between 2020 and 2022²⁷. What is more, the Strasbourg judges acknowledged that such practices were not

²⁵ Initially, an Executive Order of March 2020 had been enacted for the purpose of combatting COVID-19, and prohibiting border crossings in a generalized manner at the borders with Russia, Belarus and Ukraine. Such an interim measure was then amended in August 2021, to facilitate the automated return of all individuals found to be in violation thereof, at either the border crossing points and/or anywhere else within Polish territory, regardless of requests for international protection. Later on, a Parliamentary Act entered into force on 25 October 2021 established, *inter alia*, the immediate and automatic return of third country nationals apprehended at the border, coupled with an entry ban of a duration ranging between 6 months and 3 years. For a more detailed analysis of these regulatory measures, see BARANOWSKA G, The Deadly Woods: Legalizing pushbacks at the Polish-Belarusian border, *Verfassungsblog*, 29 October 2021; DE CONINCK J., (II-)Legal Gymnastics by Poland and Hungary in EU Border Procedures, *Verfassungsblog*, 11 November 2021.

²⁶ See the Court’s press releases, ECtHR, Interim measures Poland-Latvia-Belarus border, Press Release – Interim Measures, 25 August 2021; ECtHR, Notification and application of interim measures in the case R.A. and Others v. Poland lodged by 32 Afghans, Press Release – Communicated Cases, 28 September 2021. The applicants in these applications – which, at the time of writing, are pending – have relied on a number of provisions of the ECHR, including Articles 2, 3, and 4 of Protocol No. 4, as well as Articles 5, 6, 8, and 13.

²⁷ See notably ECtHR, judgment of 23 July 2020, *M.K. and Others v. Poland*, Appl. nos. 40503/17, 42902/17 and 43643/17. This judgment was the forerunner of the case-law concerning pushbacks at the Polish-Belarusian border. Among other relevant findings, the Court acknowledged the existence of a systemic practice of non-admission at borders, refuse to receive and register asylum applications and collective expulsions. For an analysis of the decision, see BRANDL U., A human right to seek refuge at Europe’s external borders: The ECtHR adjusts its case law in *M.K. vs Poland*, *Eumigrationlawblog*, 11 September 2020; GATTA F.L., Systematic Push Back of ‘Well Behaving’ Asylum Seekers at the Polish Border: *M.K. and Others v. Poland*, *Strasbourgobservers*, 7 October 2020. The judgment was then followed by a series of other decisions in which the Court confirmed and reiterated

purely episodic. Rather, they represent a widespread strategy of deterrence, pointing to the “existence of a systemic practice” aimed at denying entry in the national territory as well as the possibility of lodging an asylum application.

Further reactions have come from the Council of Europe Commissioner for Human Rights (henceforth: “Coe Commissioner HR”), Dunja Mijatović, who has sharply criticized the conduct of the Polish (and Belarusian) border authorities leading to the abandonment of the migrants in critical conditions²⁸. Following an urgent and specific visit *in situ*, the Commissioner called on the Polish authorities to intervene in order to satisfy the very basic needs of the people stranded at borders, whose conditions had possibly even worsened due to the winter season²⁹. Reactions, finally, have also come from the United Nations (henceforth: “UN”), within which a number of institutional bodies expressed their concern and criticism, including the UNHCR³⁰ and the Special Rapporteur on the human rights of migrants³¹.

5.2. Lithuania

Lithuania was the first State that declared a state of emergency on the border with Belarus on 2 July 2021, which was extended on 10 November of the same year, until 15 January 2022³². A restrictive securitization approach to border control was equally enacted, leading to highly problematic issues in terms of compliance with human rights obligations, especially with regard to access to asylum procedures, unlawful forms of deprivation of liberty, and collective

its findings in terms of various violations of the ECHR. See, notably, ECtHR, judgment of 8 July 2021, *D.A. and Others v. Poland*, Appl. no. 51246/17; and, more recently, in the same sense, see ECtHR, judgment of 30 June 2022, *A.B. and Others v. Poland*, Appl. no. 42907/17; ECtHR, judgment of 30 June 2022, *A.I. and Others v. Poland*, Appl. no. 39028/17.

²⁸ See, for example, COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *Poland should take immediate action to protect the human rights of people stranded at its border with Belarus*, Statement, Strasbourg, 25 August 2021.

²⁹ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights*, Country Visit, Strasbourg, 19 November 2021. The Commissioner recalled that “although the situation is the result of the reprehensible actions by Belarus, this does not absolve Poland from its human rights obligations”. She further criticized the ban on access to areas adjacent to the border, covered by Poland’s state of emergency, which prevented international organisations and civil society from providing vital humanitarian assistance and carrying out crucial monitoring and human rights work.

³⁰ UNHCR, *UNHCR and IOM shocked and dismayed by deaths near Belarus-Poland border*, Press Releases, 21 September 2021

³¹ See UNITED NATIONS, *Belarus and Poland: Stop sacrificing migrant lives to political dispute—UN Special Rapporteurs*, Press Releases, Special Procedures, 6 October 2021. With regard to the situation at the Polish borders, the UN Special Rapporteur on the human rights of migrants, Felipe González Morales, clearly affirmed that “freedom from torture, refoulement and collective expulsions are non-derogable rights. This means they can never be suspended, not even in a state of emergency.”

³² DEL MONTE, M. AND LUYTEN, K., Emergency measures on migration Article 78(3) TFEU, cit., p. 3.

expulsions. Such a border and migration policy, backed with a number of disputable legislative measures, has been challenged by the Court of Justice of the EU, which, with a judgment delivered on 30 June 2022, ruled that an EU Member State that has declared a state of emergency due to a mass influx of migrants can neither refuse a migrant the right to lodge an application for asylum, nor detain them solely on the grounds that they are staying in the country unlawfully³³. The decision, which has been welcomed as a “milestone judgement”³⁴, is relevant insofar as it certifies the incompatibility with EU law of forms of automatic detention and systematic denial of asylum, including in the framework of “extraordinary situations” or during the “mass influx of foreigners”, which had been invoked by the Lithuanian government.

In parallel to the case before the Court Luxembourg, litigation was also triggered before the ECtHR, with interim measures being indicated to the Lithuanian government³⁵. Here as well, practices of pushback and denial of access to asylum procedures at the Lithuania-Belarus borders were not unknown in Strasbourg: the ECtHR had already found a number of violations of the ECHR in respect of Lithuania’s border controls in the judgment *M.A. and Others v. Lithuania*, delivered in 2018³⁶.

Moreover, within the Council of Europe, the Commissioner HR Mijatović, has expressed her criticism towards the indiscriminate and collective pushbacks of migrants by the Lithuanian border authorities. In August 2021, in particular, she sent a letter to the government in Vilnius calling for the response to migration-related challenges to be fully compliant with the Country’s human rights obligations, especially by ensuring fair asylum procedures and preventing summary returns without adequate safeguards³⁷.

Similarly, other manifestations of concern for the protection of migrants’ rights by Lithuania have come from other international organizations. Within the UN, for example, the Committee

³³ Court of Justice of the EU, judgment of 20 June 2022, *M.A. v Valstybės sienos apsaugos tarnyba*, case C-72/22 PPU, ECLI:EU:C:2022:505.

³⁴ AMNESTY INTERNATIONAL, *EU/Lithuania: In milestone judgement, EU Court slams automatic detention and denial of asylum*, 30 June 2022. Amnesty International had already pointed out various violations of EU law, international human rights and refugee law relating to the measures enacted by the Lithuanian government at the borders with Belarus. See, in particular, AMNESTY INTERNATIONAL, *Lithuania: Pushbacks, illegal detention, deception and abuses against refugees and migrants*, 27 June 2022.

³⁵ See the Court’s press releases mentioned above in the footnote 26. It can be noted that, in the case of Lithuania, and contrary to Poland, some applicants had actually managed to enter the Lithuanian territory. The Court, thus, in respect of these applicants indicated the interim measures not to expel them to Belarus and to keep them within the national territory with a view to assessing their asylum applications. See, in particular, the statement of facts in the case of *A.S. and Others v. Lithuania* (application no. 44205/21).

³⁶ ECtHR, judgment of 11 December 2018, *M.A. and Others v. Lithuania*, Appl. no. 59793/17.

³⁷ See COE COMMISSIONER FOR HUMAN RIGHTS, *Letter to the Prime Minister of Lithuania*, Ref: CommHR/DM/sf 030-2021, Strasbourg, 10 August 2021. See also the press release, COE COMMISSIONER FOR HUMAN RIGHTS, *Lithuania: safeguards in asylum procedures and preventing pushbacks should be central to response to migration challenges*, Press Release, Strasbourg, 24 August 2021.

against Torture (henceforth: “CAT”) in the concluding remarks made the end of 2021 on the report presented by Lithuania, highlighted a series of problems related to the expulsions of asylum seekers³⁸. The document refers to a particular situation of crisis and migratory pressure, at the same time, however, it identifies a number of significant shortcomings in terms of compliance with human rights obligations, including, among the major critical issues, the practice of systematic push-back at borders, associated with a potential breach of Article 3 of the 1984 UN Convention against torture. On the one hand, indeed, the CAT clarifies that it is aware of the “*serious and unprecedented challenges ... in the context of the ongoing refugee and migrant crisis*”³⁹. On the other, however, it expresses deep concern about the deterrence practices implemented by the Lithuanian border authorities, including “*the collective expulsion of asylum seekers... without reviewing their individual situations, including the practice of pushback operations*”⁴⁰. The CAT reiterates that collective expulsions prevent the assessment as to the presence of any relevant elements for the purposes of international protection and the principle of *non-refoulement*⁴¹.

5.3. Latvia

The Latvian government declared a state of emergency at its borders in August 2021, which was initially extended until February 2022⁴². It covered specific cities and municipalities in the South-eastern area of the Country, where police and armed forces were deployed and settled. The measure introduced a number of highly controversial provisions, including the authorization given to military and border guards to “*use physical force and special means in order to return the person immediately*”, given that the same authorities “*shall not accept the applications of persons regarding the granting of a refugee or alternative status*”⁴³.

³⁸ COMMITTEE AGAINST TORTURE (CAT), *Concluding observations on the fourth periodic report of Lithuania*, 21 December 2021, UN Doc. CAT/C/LTU/CO/4.

³⁹ *Ibid.*, §11.

⁴⁰ *Ibid.*, §11, lett. f).

⁴¹ *Ibid.*, §11, lett. g). The Committee equally expresses critical considerations towards the Lithuanian authorities’ approach to asylum seekers who, having not been immediately rejected or expelled, have had access to an interview and an individual examination of their situation. It highlights, in fact, the need for the procedural guarantee of an individualized assessment not to be reduced to a mere formality, carried out as a “facade” guarantee, especially if in the context of accelerated and de-formalized border procedures. Instead, the Committee emphasizes the need to ensure “*the quality and fairness of factual and legal assessments*” of the interview and individualized assessment of the situation of each migrant.

⁴² See the Statement released on 12 August 2021 by the Latvian government, Republic of Latvia, Cabinet of Ministers, Regarding the Declaration of Emergency Situation, Republic of Latvia, Cabinet Order No. 518, adopted 10 August 2021, available online on the official website of the Latvian government.

⁴³ See the communication by the Latvian government, Republic of Latvia, Cabinet of Ministers, Government declares the state of emergency in Latvia's border area, 11 August 2021.

The order declaring the state of emergency, thus, *inter alia* provides that applications for international protection shall not be received and processed in the concerned territories. Moreover, it enables the responsible authorities to stop attempts to illegally cross the State border and to immediately return migrants to Belarus. With a number of amendments introduced in April 2022, the (theoretical) possibility to apply for asylum was introduced with regard to specific border-crossing points and in the migrants' detention centre located in the city of Daugavpils.

The situation in Latvia, however, is not immune from criticism. Litigation was triggered in Strasbourg, which led to the Court issuing interim measures with regard to a number of applications, which are currently pending⁴⁴. Additionally, as in the case of Lithuania, the Coe Commissioner HR Mijatović expressed concern about the situation through a letter sent to the Latvian government and addressing a number of issues as regards asylum-seekers having been violently prevented from entering Latvia from Belarus, being held in inhumane conditions in the forest, being denied access to the asylum procedure, and being forced into signing voluntary return declarations⁴⁵.

5.4. The response of the EU: money, operational support and some (attempted) legislative measures

Following the “hybrid attacks” of the Belarusian government, the EU has put in place a number of countermeasures. The responses coming from Brussels have mainly taken four different forms: diplomatic, financial, operational, and legislative measures, as summarized below.

First of all, diplomatically, the EU has clearly taken its position, on the one hand, by manifesting solidarity towards the affected Member States, and, on the other, by condemning Belarus' action as a neatly unlawful conduct. EU institutions and bodies, indeed, have unequivocally raised their voice in this sense. For example, one may recall the declaration by the EU High Representative, Joseph Borrell, who did not hesitate to refer to “*the orchestrated*

⁴⁴ See in particular the case *H.M.M. and Others v. Latvia* (Appl. no. 42165/21) which was communicated to the government on 3 May 2022. The case concerns 26 applicants, Iraqi nationals of Kurdish origin, who tried to enter the Latvian territory. 16 of them were removed to Iraq by the Latvian authorities, whereas 7 are in the Accommodation centre of Detained Foreigners “Daugavpils”. The applicants claim that they crossed Latvia's border and entered its territory, but were pushed back to Belarus without their requests for asylum being registered or assessed.

⁴⁵ COE COMMISSIONER FOR HUMAN RIGHTS, *Letter to the Minister of the Interior of Latvia*, Ref:CommHR/DM/sf023-2022, Strasbourg, 29 July 2022. See also the press release, COE COMMISSIONER FOR HUMAN RIGHTS, *Latvian authorities should investigate human rights abuses at border with Belarus*, Letter, Strasbourg, 9 August 2022.

*instrumentalisation of human beings by the Belarus regime for political purposes*⁴⁶. Similarly, the President of the European Commission, Ursula von Der Leyen, while delivering a speech before the European Parliament sitting in its plenary configuration, besides expressing her support for Poland, Latvia and Lithuania, manifestly condemned the “*the outrageous behaviour of the Belarusian regime*”⁴⁷. The European Parliament, for its part, besides holding specific debates and discussions on the matter⁴⁸, in its Resolution of 7 October 2021 on the situation of Belarus strongly condemned “*the Lukashenka regime’s instrumentalisation of human beings for political purposes*”, further highlighting that “*Belarus’s state-sponsoring of illegal crossings at the EU’s external border, coupled with a disinformation campaign, is a form of hybrid warfare aimed at intimidating and destabilising the EU*”⁴⁹. Moving from words to facts, the EU has also implemented a package of sanctions against Belarus. The EU sanctions regime in this respect, which had been already triggered vis-à-vis the Lukashenko’s regime, has been strengthened and extended, targeting a specific list of people and entities in Belarus⁵⁰.

In terms of solidarity measures in favor of the affected Member States, the EU has responded in terms of both economic and operational support. From the first point of view, the EU unlocked special resources in order to provide immediate financial support for the management of the external borders confronted by the migratory flows coming from Belarus (e.g. an emergency aid of EUR 36.7 million to Lithuania via the Asylum, Migration and Integration Fund – AMIF). As for the operational support, on the one hand, various materials and humanitarian equipment were made available to the affected Member States (e.g. tents, beds,

⁴⁶ COUNCIL OF THE EU, *Belarus: Declaration by the High Representative on behalf of the European Union on the situation at the European Union border*, Press release, 10 November 2021. The declaration further adds and clarifies that “*the Candidate Countries, The Republic of North Macedonia, Montenegro, Serbia and Albania and the EFTA countries Iceland, Liechtenstein and Norway, members of the European Economic Area, as well as Ukraine align themselves with this declaration*”. See also the speech pronounced on the same day and available on the website of the European Union External Action Service (EEAS), *Belarus: Speech by High Representative/Vice-President Joseph Borrell at the EP on the situation on the border*, 10 November 2021.

⁴⁷ See EUROPEAN COMMISSION, *Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the October European Council and the situation in Belarus and at its border with the EU*, SPEECH/21/6249, Strasbourg, 23 November 2021. See also the press release, EUROPEAN COMMISSION, *Von der Leyen on Belarus: The EU has the will, the unity and the resolve to face this crisis*, News, AC/21/6254, Strasbourg, 23 November 2021.

⁴⁸ See, for example, the press release EUROPEAN PARLIAMENT, *Poland-Belarus border: MEPs alarmed by humanitarian and political crisis*, Press Releases, European Parliament, 10 November 2021.

⁴⁹ EUROPEAN PARLIAMENT, *resolution of 7 October 2021 on the situation in Belarus after one year of protests and their violent repression (2021/2881(RSP))*, §16.

⁵⁰ The EU had already imposed sanctions on Belarus following the fraudulent presidential elections in August 2020. It has then progressively expanded the restrictive measures against specific individuals and entities in Belarus. Sanctions include asset freeze and travel bans. Most recently, in June 2022, a new package of sanctions has been adopted in respect of the Belarusian government: on this point, see COUNCIL OF THE EU, *Belarus: EU adopts new round of restrictive measures over internal repression*, Press Release, 3 June 2022. For more detailed information regarding the sanctions imposed by the EU, see the “EU sanction map”, available at www.sanctionsmap.eu.

heating systems, food-rations and other in-kind assistance via the EU Civil Protection Mechanism)⁵¹; on the other, operational and logistic support was offered through EU's specialized agencies, such as Frontex, the EU Asylum agency and Europol⁵².

Finally, the EU's response to the crisis has also tried to take the form of legislative measures. On 1 December 2021 the European Commission proposed to activate provisional emergency measures for the benefit of Latvia, Lithuania, and Poland using Article 78(3) TFEU as legal basis⁵³. Such a provision is designed to introduce temporary, exceptional solidarity measures in support of those Member States affected by "an emergency situation characterised by a sudden inflow of nationals of third countries". It was activated, under the previous Commission guided by President Juncker, and for the first (and, so far, only) time in the history, on the occasion of the 2015 refugee crisis, leading to the creation of the controversial relocation mechanism in favor of Greece and Italy⁵⁴.

The 2021 Commission's proposal was conceived as a mean to complement diplomatic efforts and other measures adopted by the Union to respond to Belarus' hybrid attacks. According to the explanatory memorandum of the proposal, indeed, it was aimed at providing operational

⁵¹ See EUROPEAN COMMISSION AND HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Responding, Responding to State-Sponsored Instrumentalisation of Migrants at the EU External Border, JOIN(2021)32 final, 23 November 2021, notably p. 3.

⁵² *Ibid.* The Agencies provided support through the deployment of both personnel (e.g. officers, experts, border guards) and technical equipment (e.g. patrol cars, helicopters).

⁵³ EUROPEAN COMMISSION, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final, 1 December 2021. For a synthesis of the proposal, see the press communication by the Commission, EUROPEAN COMMISSION, *Asylum and return: Commission proposes temporary legal and practical measures to address the emergency situation at the EU's external border with Belarus*, Press Release, IP/21/6447, 1 December 2021. The proposal was based on Art. 78(3) TFEU, which reads: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

⁵⁴ See Council Decision (EU) 2015/1523 of 14 September 2015 and (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The decisions introduced, on the basis of Article 78(3) TFEU, a two-year emergency relocation mechanism, aimed at redistributing a total amount of 160,000 asylum seekers from Italy and Greece to other Member States as a means to implement the principle of solidarity as applied to migration-related policies. The relocation mechanism, however, has proven to be not only legally and politically controversial, but also unsatisfactory in terms of its practical implementation. It has, thus, provoked quite a few thoughts among the EU migration law scholars: among the various comments and analyses of the relocation mechanism, see BORNEMANN J., Coming to terms with the refugee relocation mechanism, *European Law Blog*, 14 April 2020; CARRERA S., GUILD E., Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU, CEPS Policy Brief No. 334, October 2015; FRASCA E., GATTA F.L., Rebel rebel, how could they know? The boundless imagination of Poland, Hungary and the Czech Republic in opposing the relocation mechanism, *Cahiers de l'EDEM*, June 2020; MAIANI F., Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?, *Eumigrationlawblog*, 3 February 2016; SAVINO M., *On failed relocation and would-be Leviathans: Towards the New Pact on Migration and Asylum*, *ADiM Blog*, Case Law Commentary, July 2020; THYM D., Legal Framework for Entry and Border Controls, in HAILBRONNER K., THYM D. (eds.), *EU Immigration and Asylum Law. Commentary*, Beck/Hart/Nomos, 2016.

support “*necessary to manage in a humane, orderly and dignified manner, fully respectful of fundamental rights, the arrival of persons being instrumentalised by Belarus*”⁵⁵. The main provisional measures envisaged in support of Latvia, Lithuania, and Poland essentially consisted in some procedural derogations to the ordinary functioning of the EU asylum law regime; and particularly, for instance, in the possibility to: i) register asylum applications only at specific registration points; ii) extend the registration deadline for asylum applications up to four weeks⁵⁶; iii) apply an accelerated procedure for all applications. At the time of writing, however, the proposal has not been adopted.

6. Ukraine: the massive exodus towards the EU in search of safety

The Russian invasion of Ukraine, initiated on 24 February 2022, has destabilized the entire world. It has generated a complex array of repercussions in diplomatic, political, military, and economic terms, which will be probably felt for years to come. It has also determined major humanitarian-migratory implications, especially with regard to the EU. The Ukrainian conflict, indeed, is capable of potentially triggering an even worse refugee crisis than that of 2015, for at least four reasons.

First: geography. Ukraine, unlike Syria (the main country of origin of the 2015 migratory flows), directly borders with four EU Member States: Poland, Slovakia, Hungary and Romania. Unlike the 2015 refugee crisis, moreover, there is no buffer zone, like in the case of Turkey, acting as a “gate keeper” at Europe’s door. Additionally, in the case of Ukraine, migratory movements and routes do not need to go through complex trajectories as the Anatolian desert or the Aegean sea. Put it simply, to give an emblematic example, from Lviv, the largest city in western Ukraine, it takes roughly ten hours by car to reach Berlin.

Second: numbers. At the dawn of the European refugee crisis, in 2014, Syria had 19 million inhabitants. According to the UNHCR, after a decade of war, out of the 6,6 million Syrian refugees, today only 1 million is hosted in the EU. Ukraine, conversely, has 44 million inhabitants (more than twice as much the Syrian population), and 7 million of them have already been displaced by the war in a window of time of just a few months⁵⁷.

⁵⁵ COM/2021/752 final, p. 1.

⁵⁶ By way of derogation to the Asylum Procedures Directive which sets a deadline for registration of 3 or 6 days, and in case of mass influx up to 10 days. See 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, notable Article 6.

⁵⁷ According to UNHCR, as of September 2022, over 7 million refugees from Ukraine have been recorded across Europe. For more detailed and updated data relating to the situation of Ukraine, see the information on the website of the UNHCR, at <https://data.unhcr.org/en/situations/ukraine>.

Third: Mobility. Ukraine is a visa-exempt Third Country, unlike all other Countries where refugees come from. This means Ukrainian citizens enjoy visa-free travels to the Schengen Area, where they could stay up to 90 days. Ukrainians, moreover, are generally quite mobile people, used to go West, as the Ukrainian diasporas in various EU countries (especially Poland) clearly show. While the war in Syria induced EU Member States to tighten the visa requirements to restrict access to their territory, the war in Ukraine led EU neighboring countries to relax border checks: an option under the Schengen Border Code (Article 9)⁵⁸, also recommended by the Commission⁵⁹. This may be also seen a “surprising” manifestation of solidarity towards (these Ukrainian) refugees by Countries that are typically and generally hostile towards (all other) refugees.

Fourth: Asylum. Frontline EU Countries of the so-called Visegrad group have very weak – if not, almost non-existent – asylum systems, which is the result of years of legislative and administrative restrictions aimed at pretty much dismantling any form of reception of asylum-seekers. In Hungary, emblematically, recent legislative reforms led to “*the virtual impossibility of making an application for international protection*” (in the EU Court of Justice’s own words)⁶⁰.

In this scenario, and in the light of the above-mentioned factors, the Schengen Area may be seriously affected by the Ukrainian exodus, with the risk of the main cornerstones of the system being compromised in the medium- or long-term. On the one hand, indeed, relaxation of external border controls undermines the accuracy of identity, security and health checks (let’s not forget about Covid-19: vaccination rate is very low among Ukrainians). On the other hand, the disproportion between the arrivals and the reception capacity in the EU Member States bordering with Ukraine makes mass secondary movements towards the “heart” of Europe (i.e. especially Germany) very likely, if not, essentially, inevitable.

Against this background, the EU, confronted with a new, serious migratory challenge, has acted quickly and – surprisingly – quite in a solid manner, managing to gather and catalyze consensus among the governments in order to adopt countermeasures in the face of a common emergency.

6.1. A new (old) solution: the 2001 temporary protection Directive

⁵⁸ See 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).

⁵⁹ See EUROPEAN COMMISSION, Commission Communication, Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders, 2022/C 104 I/01

⁶⁰ Court of Justice of the EU (Grand Chamber), judgment of 17 December 2020, *European Commission v. Hungary*, Case C-808/18, ECLI:EU:C:2020:1029, §118.

The conflict in Ukraine has reawakened ancient and sharp dichotomies: democracy vs autocracy; freedom vs censorship; national self-determination vs imperialist annexation; and of course, peace vs war. These are the lenses through which the vast majority of Europeans look at the Ukrainian conflict, (re)discovering their values and basic principles, such as solidarity. This also contributes to explain the consensus that EU Member States soon and broadly achieved as regards the management of the incoming flows of displaced Ukrainians: unanimously, for the first time, EU Member States decided to activate the Directive 2001/55/CE on temporary protection⁶¹. The directive represents an *ad hoc* tool to manage mass influx of displaced person, which was designed more than two decades ago, but was never used before, not even in the 2015 “Mediterranean” refugee crisis⁶².

As to its contents, in short, the directive envisages a 1-year temporary protection regime in the event of a mass influx of displaced persons from third countries, whose duration is extendable to a maximum of 3 years (Article 4). The *rationale* lies essentially in a two-fold objective: strengthening solidarity both externally, vis-à-vis the beneficiaries of the temporary protection, and internally, among the EU Member States (Article 1).

As to the external solidarity, and in terms of obligations vis-à-vis the beneficiaries of the temporary protection, a wide range of rights are guaranteed by the Directive. Member States shall, *inter alia*, provide access to: procedures for obtaining residence permits (Article 8); suitable accommodation, social and medical assistance, employment and educational services (Articles 12-14); family reunification (Article 15); asylum procedures (Articles 17-19).

As to the internal solidarity, a fair redistribution of the beneficiaries among Member States is envisaged on the basis of the national reception capacity, as indicated by governments. Intra-State transfers of the beneficiaries are possible, based on the consent of the person concerned (Article 26): this is a significant difference with the so-called Dublin regime, where asylum seekers are not cable of expressing any choice as to their destination, with the consequence of being (theoretically) “locked” in a given Country⁶³.

⁶¹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁶² On the differences between the 2015 “Mediterranean” migration crisis and that of 2022 related to Ukraine, see SAVINO M., GATTA F.L., On the Brink of a New Refugee Crisis: Temporary protection as a paradigm shift?, *VerfassungsBlog*, 3 October 2022. For an analysis of the Directive as applied to the Ukrainian situation, see S. PEERS S., Temporary Protection for Ukrainians in the EU? Q and A, *EU Law Analysis*, 27 February 2022.

⁶³ On such an important aspect of the Temporary Protection Directive as opposed to the ordinary functioning of the Dublin asylum procedures, see THYM D., Temporary Protection for Ukrainians: The Unexpected Renaissance of ‘Free Choice’, *VerfassungsBlog*, 5 March 2022.

In procedural terms, in order to trigger the Directive, its basic factual-legal requirement (i.e. the existence of a mass influx of displaced persons) needs to be established: this is for the Council to decide, based on a previous proposal by the Commission (while the European parliament is merely informed: see Article 5). The Commission shall also examine any request by a Member State in that respect (which is what happened in the past with Italy and Malta, whose requests, however, were ignored). The Commission proposal shall frame the scope of application of the temporary protection measure, specifying at least the following elements: to whom it will apply, when and to how many people, based on an estimation of the scale of the movements of displaced persons (Article 5, para. 3).

6.2. The activation of the temporary protection in respect of Ukrainians

The migratory pressure generated by the conflict in Ukraine pushed EU Member States to react in a surprisingly coordinated way. At the Extraordinary Justice and Home Affairs Council on 27 February 2022, that is, just a few days after the Russian military invasion, a “broad support” emerged for the first-ever activation of the Directive 2001/55/EC on temporary protection⁶⁴. Shortly after, on 3 March, the Commission’s proposal was adopted, entering into force the following day as Council Implementing Decision (EU) 2022/382⁶⁵.

The Council implementing decision identifies three categories of beneficiaries of the protection: a) Ukrainians residing in Ukraine before 24 February 2022 (date of the Russian military invasion); b) other third-country nationals who benefited from international protection in Ukraine; c) family members of the persons under a) and b). The Commission’s original proposal was more inclusive, but the final decision of the Council embodied a more restrictive approach, including in the temporary protection scheme or in other forms of “adequate protection” only those who can prove that they were legally residing in Ukraine⁶⁶.

As regards inter-State collaboration and solidarity, the Council implementing decision identifies the tools to facilitate such an administrative cooperation mainly in the Migration Preparedness and Crisis Management Network, established in accordance with Recommendation (EU) 2020/1366⁶⁷. The Network, which includes both the EU Member

⁶⁴ See Council, Extraordinary Justice and Home Affairs Council, 27 February 2022.

⁶⁵ Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

⁶⁶ *Ibid.*, Article 2.

⁶⁷ See Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint).

States and the relevant EU Agencies, is meant to help the Commission monitor the reception capacities and coordinate the information exchange among national administrations.

When it comes to the “redistribution” of the beneficiaries of the temporary protection, it has to be mentioned that EU Member States, while in the process of designing the new mechanism in favor of the Ukrainians, adopted an *ad hoc* statement on the non-application of Article 11 of the 2001 Directive⁶⁸. This provision would impose on the Member State granting temporary protection to a person a “take back” obligation in case of his/her unauthorized movement to another Member State. This “gentlemen agreement”, as it has been called⁶⁹, seems to have a two-fold purpose: showing solidarity towards the EU Member States bordering with Ukraine, but also (and especially) avoiding the administrative and burdensome complexity of those “take back” procedures, which, as the “Dublin transfer” procedures show, are very often hard to implement⁷⁰.

The activation of the temporary protection regime, without the first-country-of-entry rule and the “take back” procedures typically embedded in the Dublin rules, reveals that so-called secondary movements may facilitate a spontaneous redistribution of the beneficiaries and promote a sort of “horizontal” solidarity among EU Member States. At the same time, the mechanism may foster the valorization of private reception resources, made available in the framework the existing Ukrainian diasporas in several EU countries, thereby alleviating the pressure – at least partially and in an initial phase – on national public reception systems.

Finally, the Directive provides that EU Member States “shall receive persons... in a spirit of Community solidarity” and “shall indicate – in figures or in general terms – their capacity to receive such persons” (Article 25, para. 1). This means, essentially, that solidarity has a voluntary nature and contributions in this respect are made on the basis of each government’s indication of availability. Once a given quota has been indicated, however, it will be included in the decision by the Council. On such a matter, ultimately, taking also in consideration that the 2001 Directive itself contains very scant provisions on the delicate point of solidarity and

⁶⁸ See Council of the EU, Statement of the Member States, 2022/0069(NLE), 4 March 2022. The statement reads as follows: “With a view to supporting Member States who are the main entry points of the mass influx of displaced persons fleeing war from Ukraine covered by Council Implementing Decision of 4 March 2022 and to promoting a balance of efforts between all Member States, Member States agree not to apply Article 11 of Directive 2001/55/EC in relation to persons enjoying temporary protection in a given Member State in accordance with that Council Implementing Decision and moving to another Member State without authorisation unless on a bilateral basis Member States agree otherwise”.

⁶⁹ Peer S., Temporary Protection for Ukrainians in the EU?, cit.

⁷⁰ Admittedly, this would not imply the recognition of a right to free movement to the persons enjoying temporary protection, who, according to the Council Implementing Decision, “should be able to avail of the rights derived from temporary protection only in the Member State that issued the residence permit” (Recital no. 16).

responsibility-sharing, there will be the need for intense political negotiation and inter-administrative collaboration.

7. Activation of the 2001 Temporary Protection Directive: added value and potential advantages

As said above, it took twenty years to use the Directive on temporary protection, which, nevertheless, was created precisely to deal with situations of migration-related emergencies. So, why triggering this legal instrument now? The answer lies in a number of factors.

First, the Directive is – as the EU legislation currently stands⁷¹ – the only *ad hoc* normative tool designed for humanitarian-migratory crises: it was already there, in force and ready to be used. Adopted in the aftermath of the war in Yugoslavia and Kosovo, it provides for the temporary protection of a large number of displaced persons in a flexible and coordinated manner: flexible, because it avoids the lengthy and burdensome asylum-related administrative proceedings; coordinated, because it includes solidarity-driven mechanisms for sharing the burdens relating to the reception of displaced people.

Second, in general, in an emergency situation characterized by a heavy migratory pressure the orderly and effective implementation of the procedurally complex EU rules on asylum may turn out to be very hard (if not impossible: as the cases of Greece and Italy in 2015 show). Now, unlike the previous “Mediterranean” migratory crises, in the case of the Ukrainian exodus the frontline Countries are those of the Visegrad bloc, that is, States whose asylum and reception systems basically exist only on paper. Consequently, the 2001 Directive probably represents the only way to cope with the incoming migratory flows, ensuring a significant administrative simplification on the one hand, and the recognition of a number of rights to the Ukrainians irrespective of an asylum application on the other⁷².

Third, not triggering the directive would have meant repeating the mistakes made in 2015 and ignoring that the “Mediterranean” crisis was also, and especially, an administrative one.

⁷¹ The European Commission in 2020 tabled a proposal for a Regulation addressing “situations of crisis and force majeure in the field of migration and asylum”, but negotiations are still ongoing and, in the case of the military aggression to Ukraine, there was clearly no time to waste. See European Commission, proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020)613 final, 23 September 2020.

⁷² According to Article 17 of the Temporary Protection Directive, though, the access to the asylum procedure and the possibility to lodge an asylum application must be ensured at any time.

Learning the lesson, thus, would mean a more pragmatic approach in order to prevent the national asylum and reception systems from being overwhelmed.

Finally and more in general, the decision to use the temporary protection scheme not only conveys a political message of solidarity to the Ukrainian people, but it also tells EU Member States to promote solidarity among themselves.

8. Concluding remarks

After the 2015 refugee crisis, which generated significant issues for the EU and its Member States geographically located in the Mediterranean area, the 2021 and 2022 migration crises now represent the new challenges Europe will have to face. Both crises, somehow, have been provoked by an act of aggression: in an unconventional and atypical manner, in the case of Belarus and its “hybrid” attacks, which instrumentalized migrants; in the more “classic” form of the military aggression in the case of Russia, thereby causing a massive exodus of Ukrainian people fleeing the region in search of safety.

The 2021 Belarus border crisis is surely of a modest character, when it comes to numbers and entity of the migratory flows. Yet, it should not be underestimated: it might well happen again in the future, and has nevertheless posed significant challenges and difficulties for the receiving Countries, which, like in the case of Latvia and Lithuania, are not used nor well-prepared to deal with such a sudden inflow of persons. Last but not least, the Belarus migratory crisis has highlighted extremely serious violations of migrants’ basic human rights, with people being stranded between borders, unwanted and abandoned, right before the Europe’s doors, in a situation that is unacceptable.

The 2022 Ukrainian migratory crisis is undoubtedly more significant in numerical terms. Also, it concerns individuals that, unlike those trying to enter the EU from Belarus, are considered as “Europeans”. Contrary to the approach displayed towards the migrants coming from Belarus, who faced expulsion, deterrence and border closures, the Ukrainians can count on a new (old) system of management of displaced persons in a situation of emergency. The freshly-activated 2001 temporary protection Directive is a tool that has the potential to help Member States cope with the Ukrainian exodus in an effective, solidarity-based and possibly human rights-compliant manner. The activation of the 2001 Directive, thus, reveals an approach that is more welcoming towards the Ukrainians, but also more pragmatic, as it unties the protection from the lengthy and burdensome asylum proceedings. EU Member States seem to have realized that

in a situation of crisis rules can be applied on large scale only if they are simple and prevent litigation: possibly an important lesson learnt from the 2015 refugee crisis.

At the same time, such a temporary protection scheme is not a silver bullet for what is a complicated and long-lasting challenge that will be faced for years to come. In the short- and medium-terms it remains hard for the frontline EU Member States to organize the first reception of millions of Ukrainians, and to manage the issuance (and renewal) of residence permits in their favor. In general, it is equally complex to promote and coordinate a fair redistribution of Ukrainians in a spirit of true solidarity, mutual trust and cooperation.

To conclude, the recent crises at the European Eastern external borders pose significant challenges for the EU. Much remains to be done and EU Member States will need to stick together and effectively cooperate to overcome future problems. The EU, in particular, will have to provide a response that has to be both effective and functioning in practical terms, but also, and especially, in accordance with its founding values and basic principles, such as, above all, the protection of everybody's dignity and fundamental human rights.

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