



EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by ‘Instrumentalisation’

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Abstract

This paper engages with the routine normalisation of mass violations of human rights at the EU–Belarusian border. The direct and indirect victimisation of the racialised ‘other’ on the Eastern border of the Union is a direct extension of the EU-sponsored war on the racialised passport-poor in the Mediterranean. Together, the two form one clear and coherent picture of flagrant mass rights abuse. This EU law approach has claimed more than 27,000 lives over the last eight years and left more than 120,000 innocent people captured and imprisoned, or enslaved and sold for ransom by the criminal proxies enlisted by the EU and its Member States. This dramatic situation has not arisen by chance. An array of legal techniques is deployed by the EU, specifically by FRONTEX, the European Commission and, albeit incidentally and to a lesser extent, the European Court of Justice—to make sure that the full brunt of the denial of the right to life and other vital rights of non-citizens is never presented as a violation of EU law. We call these legal techniques ‘EU lawlessness law’. Focusing on the situation at the EU–Belarusian border allows us to zoom in on the bespoke lawlessness solutions crafted and deployed there by the EU and its Member States. The gross violations of the law are rhetorically justified by the alleged instrumentalisation of migrants by the dictatorial Belarusian regime. Paradoxically, the latter emerges as a de facto partner of the EU and its Member States, in torturing numerous people in complete disregard of any of the legal guarantees that the Union professes to provide.

Keywords EU-Belarusian border · Lawlessness Law · Responsibility · FRONTEX · Instrumentalisation · Race

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“Where are you from? Wherever you are from, you didn’t know that if you come here, we would kill you?”

Mohamed, a man from Iraq, recounting commandos addressing his group while questioning them inside a van in the Latvian forest.¹

“The Lithuanian army came, and they had an electric stick that they used against us. They put us in a white van, six Syrian men. It was very small so there was no space. One of the guys had a blood sugar issue and his situation was very bad. He told us and one of the guys spoke a bit of English and he asked for help from the Lithuanian army. They stopped the car and got out, they asked who had the blood sugar issue. The soldier then put the stick in his mouth and used the electricity in his mouth and he [the man] lost consciousness. He was shaking so much and we thought he was dead. They drove us to the border and beat us more and pushed us across the border. He couldn’t even walk when they pushed us across, and we had to carry him.”

“Adil”, a Syrian man pushed back to Belarus, interviewed in March 2022²

“On 2 March, in the morning, the police entered my room. They handcuffed us, they hit us. I was without clothes—I still have bruises on my body. They took me to the forest [outside], all naked. I spent five hours locked up, handcuffed and without clothes.”

“Elise”, a young woman from Sub-Saharan Africa, interviewed in March 2022.³

1 Introduction

The pushbacks and pullbacks of the racialised passport poor at sea and on land—resulting in the deaths of thousands—have become business-as-usual at the EU’s borders: Europe kills. The violation of the most basic human rights including the right to life, the prohibition of torture, the right to *non-refoulement* and the right to asylum⁴ have become systematic⁵ in the liminal spaces of the EU’s borders.⁶ These practices have been documented not only in the Mediterranean,⁷ but also on

¹ Amnesty International (2022a), p. 32.

² Amnesty International (2022b), p. 18.

³ Ibid, p. 38.

⁴ The right to asylum enshrined in the EU Charter of Fundamental Rights (CFR) (Article 18 CFR) implies, among others, the right to seek asylum. See den Heijer (2022), p. 554.

⁵ Shatz (2023); Ganty and Kochenov (2024) and the references therein; Cf Mungianu (2016), p. 89; Papastavridis (2016); Goodwin-Gill (2011); Baumgärtel (2019); See also, Case C-556/17 *Torubarov* ECLI:EU:C:2019:62; Case C-808/18 *Commission v. Hungary* ECLI:EU:C:2020:1029; *Hirsi Jamaa and others v. Italy* (Application no. 27765/09) (2012); *Safi and others v. Greece* (Application no. 5418/15) (2022).

⁶ Macklin (2023).

⁷ See eg CNN (2017), MSF (2022), Oxfam (2017), OLAF (2021), for a summary of this Report, see: Izuzquiza et al. (2022), Urbina (2021).

land—first at the Serbian border with Hungary⁸ and more recently at the Belarusian border with Poland, Latvia and Lithuania,⁹ as well as the Bulgarian¹⁰ and Greek¹¹ borders with Turkey. This is what the rightless arbitrariness of immigration control in the EU is about, creating a looming rule of law deficit.¹² We approach this deficit with a particular focus on the situation at the EU–Belarusian border, where race is frequently the ticket to entry into the EU. Non-white migrants are systematically subjected to inhuman treatment, torture, and denied all rights by the authorities. This is a direct extension, we demonstrate, of the EU-sponsored deterrence through killing anti-migration policy in the South where in concert with the Member States, the EU has turned the Mediterranean into a mass grave of epic proportions.¹³ These abusive practices against non-white migrants have evolved significantly after the so-called refugee crisis in 2015–2016: most of the Member States, including those which appeared at first sight welcoming, ended up following suit some Eastern European Member States’ approach, including Hungary, Poland, and Slovakia, consisting in opposing migration from the Middle East and Africa since the outset.¹⁴ Today, the position against the ‘racialised others’ is mainstream in the EU, shared and condoned among the EU Commission, the Council and most of the Member States.¹⁵

The European strategy now includes, but is not limited to, arming thugs and funding prisons for the passport poor in the lawless spaces, such as post-conflict Libya and weak former colonies further afield,¹⁶ in the hopes that harsh treatment at the hands of the criminals that Europeans equip would discourage migration. Inhuman treatment, torture and killings are the consequence of this bespoke criminal enterprise which has become business-as-usual for the EU, claiming more than 27,000 lives in the Mediterranean over the last nine years,¹⁷ tens of thousands of people dumped in the desert in remote areas in North Africa,¹⁸ and more than 120,000 innocent people captured and imprisoned, or enslaved and sold for ransom by the proxies enlisted by the EU and its Member States.¹⁹ The EU is involved in one way or another in all these operations, supporting and financing the perpetrators when it is not directly engaged in committing those crimes.²⁰

⁸ FRO (2016).

⁹ Amnesty International (2022a), p. 18; Amnesty International (2022b); Ancite-Jepifánova (2022a, 2022b, 2022c); Baranowska (2022a).

¹⁰ Human Rights Watch (2022a).

¹¹ Human Rights Watch (2022b).

¹² Mitsilegas (2022), Grabowska-Moroz and Kochenov (2022), p. 187.

¹³ For the data, see, Missing Migrants Project: <https://missingmigrants.iom.int/>.

¹⁴ For a timeline regarding the 2015 crisis see: ICMPD (2015).

¹⁵ Basheska and Kochenov (2024).

¹⁶ OLAF (2021), Urbina (2021).

¹⁷ UNHCR, Operational Data Portal. Available at: <https://data.unhcr.org/en/situations/mediterranean>

¹⁸ Lighthouse Reports (2022).

¹⁹ Urbina (2021); Shatz (2023).

²⁰ Shatz (2023).

Mass crimes do not occur by chance. A whole array of legal techniques is deployed by the EU—and specifically the European Commission, FRONTEX and to some extent the European Court of Justice (ECJ)—to make sure that the full spectrum of denying non-citizens’ rights—from dignity to the right to life—is virtually never presented as a violation of EU law: a fundamental breakdown of EU rule of law is the result of orderly operation of the EU legal system, functioning as designed.²¹ The legal techniques are nothing other than the EU’s ‘lawlessness law’.²² Taking this well-designed and lavishly funded EU-manufactured lawlessness as our starting point, we focus on its application at the EU–Belarusian border. We start out by introducing the basics of EU lawlessness law to show that it is based on Europe’s passport apartheid:²³ one among the constituent features of the EU legal order first diagnosed by Étienne Balibar as ‘apartheid européen’,²⁴ which has since grown significantly in proportions²⁵ emerging as the militant arm of the continent-wide ethno-nationalist ‘eurowhiteness’ project.²⁶ We then zoom in on the situation at the EU–Belarus border to show how the EU’s lawlessness law works in the East of the European continent, making rights unavailable and values and principles vacant. The main actors of the EU lawlessness law at the Union’s border with Belarus are then dealt with one-by-one: FRONTEX, the European Commission and, to a lesser extent, the ECJ. The three are there to ensure that responsibility and accountability for grave violations of the law on the books remains indeterminate, thus enabling the harnessing of mass human rights violations to the service of the EU’s passport apartheid in collaboration with the Member States *de facto* using the EU as an accountability and responsibility shield.

2 EU Lawlessness Law: Turning to Law to Whitewash Rights Abuse

A specific legal framework is deployed in the EU to ignore non-citizens, by making the core rights, principles and the very territory of the EU as a constitutional system unavailable to them,²⁷ or to otherwise humiliate, torture them, and sometimes kill them, either directly or indirectly, as a result of concerted EU and Member State efforts.²⁸ This legal framework is marked by nationality-based segregation and aims

²¹ Kochenov and Ganty (2024).

²² *Ibid.* Kochenov and Ganty (2023). See also the revised and deeply updated version of this paper forthcoming in *Columbia Journal of European Law* (2024); Ganty and Kochenov (2024).

²³ Dimitry Kochenov defines passport apartheid as ‘the central feature of the world’s population management, mobilizing law, politics and international relations at the service of the blood-based aristocracy principle underpinning the distribution of resources and opportunities in the world today’. Kochenov (2025). Cf Kochenov (2020).

²⁴ Balibar (2001), p. 192.

²⁵ Kochenov and Ganty (2023).

²⁶ Kundnani (2023).

²⁷ Kochenov and van den Brink (2015), p. 66; Kochenov and Ganty (2023), pp. 16–33.

²⁸ See, *inter alia*, Urbina (2021); Spijkerboer (2018), p. 232; Concord Europe (2018); Costello and Mann (2020); See also Melzer (2017); Callamard (2017); OHCHR and UNSMIL (2018), pp. 58–59.

at the exclusion of non-citizens through the execution of a conscious policy of keeping out the unwanted racialised passport poor *at any cost*.

We argue that EU lawlessness law consists in a legal construction of bespoke lawlessness and arbitrariness, making sure that any rights owed to the ‘other’—including dignity and not infrequently the life itself—are rendered entirely indeterminate and unusable in practice. This implies absolute legal marginalisation which at times results in the physical annihilation of racialised non-citizens in the border spaces. Through the concerted efforts of the EU and its Member States at the Belarusian border and the Mediterranean, aided in the latter region by the EU and Member States’ proxies, these liminal areas have been transformed into a mass grave of colossal proportions. *All* the rights in the books are denied on the basis of citizenship and race.²⁹ The main tool here is what Kochenov and Ganty defined elsewhere as the ‘EU lawlessness law’. The lawlessness law is a steadily evolving system of intentional legal arrangements crafted to remove any accountability or enforceable claims to rights from the racialised ‘others’ when they are attempting to reach European soil,³⁰ or to claim EU law rights once settled in the Union. It *is* the law of the Union functioning as designed, intentionally breaking core principles of EU and international law and creating, precisely, an exclusion from the most important elements of the law for non-citizens inside the Union, as well as turning the boundaries of the Union—from the Mediterranean³¹ to Belarus³²—into lawless places of death, inhuman treatment and hopelessness for the citizens of a *particular set* of the former colonies and a handful of other most impoverished spaces.

This complex legal framework, which aims at the exclusion of non-citizens through the execution of an intentional policy, can be presented as a spectrum. This spectrum starts at one of its extremes with appeals to the original constitutional design³³ and scope of Union law³⁴ as a core element of the federalist bargain at the heart of the EU,³⁵ in order to make the core elements of the EU legal system unavailable to non-citizens.³⁶ Although the lawlessness law goes to the foundational heart of the internal market and the original four freedoms, it is infinitely more complex than stating that a stateless worker in Latvia should not be entitled to freedom

²⁹ Achiume (2021a); Achiume (2021b); Munshi (2015).

³⁰ Reports of EU and US citizens and the nationals of other ‘Western’ countries being pushed back at sea or being imprisoned by the EU-sponsored Libyan thugs using FRONTEX intelligence are very limited. The system is clearly designed to make EU law inapplicable to Africans and Asians from the ‘global south’ and works as such. For an exceptionally rare report of a French national being pushed back, see Brito (2022). The Turkish ethnicity of the victim is an important part of the story showcasing the racialised nature of her treatment.

³¹ Already 14 years ago: Human Rights Watch (2008); And more recently: Lighthouse Reports (2022); Human Rights Watch (2020, 2021); Amnesty International (2021b); Border Violence Monitoring Network (2020).

³² Amnesty International (2022a), p. 18. Amnesty International (2022b); Ancite-Jepifánova (2022c, a, b). Kochenov and Grabowska-Moroz (2021); Baranowska (2022a).

³³ Hansen and Jonsson (2014).

³⁴ Caro de Sousa (2014); Tryfonidou (2008); Kochenov and Plender (2012).

³⁵ Nic Shuibhne (2017); Spaventa (2017); Kochenov (2017).

³⁶ Kochenov and van den Brink (2015); Kochenov and Ganty (2023), pp. 16–33.

of movement³⁷ and that a Nigerian in Brussels has to be discriminated against on the ground of nationality thus going to jail, where any EU citizen would remain free, as explained elsewhere.³⁸ At the other end of the spectrum we find a proactive legal construction of bespoke lawlessness and arbitrariness, making sure that any rights owed to the ‘other’ are rendered entirely indeterminable and unusable in practice.

The lawlessness law is very complex in its operation and is marked by a radical departure from the core values on which the Union and the Member States are said to be built, in particular the rule of law and the protection of human rights.³⁹ At EU’s borders, it operates through a set of different tools. First, it moves the EU’s agreements with principled human rights implications outside the scope of EU law and international law.⁴⁰ Second, it sets up enormously intrusive and unaccountable funding schemes to establish, preserve and sponsor the export of rights violations outside the EU’s borders.⁴¹ Third, it ignores the European Commission’s role of guardian of the Treaties through security and instrumentalisation narratives as justification of the most obvious violations at the EU borders by Member States. Fourth, it deploys FRONTEX, an EU agency,⁴² to abet and cover up crimes, break the law and share vital intelligence with EU-sponsored thugs deployed by the Union and the Member States to hunt the racialised passport poor on the Union’s behalf, with the ECJ continuously refusing to examine FRONTEX accountability.⁴³ The two last tools which concern the EU Commission, FRONTEX and, to some extent, the ECJ constitute a special focus of the last three sections of this paper, where we describe the lawlessness law techniques which contribute to delivering rightlessness at the EU–Belarusian border.

3 EU–Belarusian Border: An Ongoing Well-Known Mass Rights Violation

Rightlessness, abuse and impunity are business-as-usual at the EU–Belarusian border since 2021. Latvia, Lithuania and Poland openly deprived migrants of all basic human rights with the active support from the European Union through the EU lawlessness law techniques discussed in the sections that follow. This section describes the mass violations of humans rights of the racialised others at the EU–Belarusian

³⁷ Ziemele (2005); Kochenov and Dimitrovs (2016).

³⁸ Kochenov and Ganty (2023), pp. 28–33.

³⁹ Grabowska-Moroz and Kochenov (2022).

⁴⁰ Eg Arribas (2016); Lehner (2019); Kassoti and Carrozzini (2022).

⁴¹ Castillejo (2017); Oxfam (2020); Molinari (2021); See also Urbina (2021).

⁴² Fink (2019), pp. 3, 4 (Fink discusses at length the question of responsibility of multi-actor situation involving FRONTEX (the joint operations more specifically)). See also: Mungianu (2016); Kalkman (2021); See also the contributions in the *Verfassungsblog*’s debate on FRONTEX and the Rule of Law, available at <https://verfassungsblog.de/category/debates/FRONTEX-and-the-rule-of-law-debates/>; Gkliati and Kilpatrick (2022).

⁴³ Joint investigation conducted by Bellingcat, Lighthouse Reports, *Der Spiegel*, ARD, and TV Asahi: Bellingcat (2020). Lüdke (2022); Stawatch (2021a); Sunderland and Pezzani (2022); Rijpmans and Vermeulen (2015); See also, crucially, OLAF (2021).

border. This is done with the objective to offer a clear understanding of the extent of the lawlessness law system developed by the EU: not only is there an obvious deprivation of the right to asylum under the cover of the ‘instrumentalisation’ of migrants by the Belarusian dictatorship, but also, and importantly, migrants at the EU–Belarusian border are being continuously exposed to various types of inhuman and degrading treatment, by the Latvian, Lithuanian and Polish authorities supported by the EU, as investigated and described in detail, *inter alia*, by the Amnesty International and also by Ancite-Jepifánova, one of the authors of this article.

1. Rightlessness behind the smokescreen of ‘instrumentalisation’

Latvia, Lithuania and Poland, all of which have a land border with Belarus, have traditionally been among the EU Member States receiving the lowest number of asylum-seekers—both in absolute numbers and per capita.⁴⁴ For example, from 2018 to 2020 there were fewer than 200 people seeking asylum in Latvia per year, with fewer than a third of applications being approved.⁴⁵ In 2020, Lithuania registered 315 asylum applications, while neighboring Poland, a country with a population of 37 million, registered fewer than 3,000 such claims.⁴⁶ Things changed in the summer of 2021, when Belarus started actively issuing visas to the nationals of Middle Eastern and African countries, allowing them safe passage through its territory and no longer preventing irregular border crossings into the EU.⁴⁷

This led to rising numbers of asylum seekers—predominantly from the Middle East and African countries—trying to cross into Poland, Latvia or Lithuania from Belarus. In 2021, Poland registered 7699 asylum applications in total (in comparison to 2803 in 2020). 4052 of the applicants (including 567 children) were placed in guarded centres for foreigners.⁴⁸ In August 2021 there were 386 asylum applications registered by the Latvian authorities, compared to 147 registered during the entire year in 2020.⁴⁹ By mid-August 2021, Lithuania had registered (and subsequently detained) over 4000 people who had irregularly crossed into the country from Belarus (2882 persons were detained in July alone), compared to the 81 apprehended at that border during the entire COVID pandemic year of 2020.⁵⁰

⁴⁴ European Parliament (2022).

⁴⁵ Latvian Office of Citizenship and Migration Affairs, Statistics on Asylum Seekers until 2023. Available at: <https://www.pmlp.gov.lv/en/statistics-asylum-seekers-until-2023>.

⁴⁶ European Parliament (2022). The lower number of applications in 2020 in Poland was caused by the closure of the Terespol border checkpoint during the pandemic. Since asylum seekers were not mentioned in the list of people allowed to cross the border during the pandemic, it was very difficult for them to apply for asylum at the Polish borders. In comparison, the figure was over 4000 (yearly) in 2019 and 2018 and over 5000 in 2017. Cf. the Polish Office for Foreigners data: Zestawienia roczne - Urząd do Spraw Cudzoziemców - Portal Gov.pl (www.gov.pl)).

⁴⁷ See eg Bruneau et al. (2021).

⁴⁸ SIP (2021).

⁴⁹ Unpublished statistics of the Latvian Office of Citizenship and Migration Affairs (on file with the authors).

⁵⁰ ECRE (2021).

In all the three Member States involved, this situation has widely been labelled as the ‘instrumentalisation’ or ‘weaponisation’ of migrants by the Belarusian regime that ‘artificially’ creates migratory flows to ‘destabilise’ the EU, in response to the 2021 imposition by the Union of sanctions on Minsk. Persons crossing from Belarus are framed as a security threat and presented as an element of ‘hybrid warfare’ against the EU—a narrative that has intensified following Russia’s invasion of Ukraine. All those crossing are described as ‘illegal’ or ‘economic’ migrants, as opposed to the only ‘genuine’ refugees—those fleeing Ukraine (yet Russian citizens attempting to flee are presented as staunch supporters of the Putin regime⁵¹); or portrayed as ‘pawns’ used by Łukašenka in a political game.⁵² Such wording not only implies that there is a distinction between ‘artificially created’ and ‘natural’ migratory flows, but also dehumanises the persons affected and deprives them of agency.

Although the concept of the ‘instrumentalisation of migration’ has currently no basis in EU and international refugee law, it is used by Polish, Latvian and Lithuanian governments to arbitrarily deny a group of racialized individuals fundamental rights protection, thereby setting aside Primary EU law, human rights instruments, and the letter and the spirit of the national constitutions of the countries involved. This is despite the fact that the increase in irregular arrivals from Belarus has still been truly minor in absolute numbers: the ultimate sacrifice of the rule of law and basic legality is thus made absolutely for nothing.

On 2 July 2021 the Lithuanian government declared an ‘extraordinary situation’ due to a ‘mass influx’ of third-country nationals.⁵³ On 13 July 2021 the Lithuanian parliament passed a resolution which stated that ‘the states hostile towards Lithuania are waging hybrid aggression against the Republic of Lithuania, during which flows of third-country nationals illegally crossing the state border of the Republic of Lithuania are organised [...] with the purpose to destabilise the situation in Lithuania and cause damage to the State of Lithuania [...]’.⁵⁴ In this context, Lithuania adopted amendments to its Aliens Law. The latter provided that following the declaration of an extraordinary situation due to a mass influx of foreigners, asylum applications could only be submitted at Lithuanian embassies abroad and at official border crossing points.⁵⁵

⁵¹ Ganty et al. (2022).

⁵² For examples, see TVNET/LETA (2021); Eng.LSM.lv (2021a); Eng.LSM.lv (2021b); ieviņa (2023); see also Hargrave et al. (2022).

⁵³ Government of the Republic of Lithuania, Resolution No 517 of the of 2 July 2021, Dėl valstybės lygio ekstremaliosios situacijos paskelbimo ir valstybės lygio ekstremaliosios situacijos operacijų vadovo paskyrimo (On the Declaration of the Extraordinary situation and the Appointment of the State Commander of National Emergency Operations), TAR, 30/07/2021, No. 15235. Available at: e-seimas.lrs.lt/portal/legalAct/lt/TAD/ad73a4c1dc0011eb866fe2e083228059?jfwid=-1cefbqu9c8.

⁵⁴ 8 Seimas of the Republic of Lithuania, Resolution XIV-505 2021–07-13, Resolution on Countering Hybrid Aggression. Available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/1a84e440e49c11eb866fe2e083228059?jfwid=tcgd2hdge>.

⁵⁵ Law No. XIV-515 ‘On the Law of the Republic of Lithuania on the Legal Status of Aliens No. IX-2206 Amendment to Article 67’. Available at: <https://www.e-tar.lt/portal/legalAct.html?documentId=1e963ae0faa211eb9f09e7df20500045>.

Neighbouring Latvia went even further and imposed a blanket prohibition on the right to (seek) asylum, including at official border crossing points. On 10 August 2021, Latvia declared a state of emergency in all administrative territories along the country's approximately 173 km long border with Belarus. Under the relevant Cabinet of Ministers Order, the Latvian State Border Guard, the National Armed Forces and the State Police were given broad powers to order persons who irregularly crossed the Latvian border from Belarus or attempted to do so, to immediately return to Belarus without formal return procedures. The Latvian authorities were allowed to use physical force and special means, such as electric shock devices, to ensure compliance. The Order expressly provided that the structural units of the Latvian Border Guard and other authorities located in the territory where the state of emergency was declared should no longer register asylum claims—including at official border crossing points.⁵⁶ It was only following a domestic court decision of March 2022⁵⁷ that asylum claims started being accepted at official border crossing points and at the detention center for foreigners in the Latvian city of Daugavpils close to the Belarusian border.

In Poland the pushback practices were grounded in domestic law within two frameworks that operated in parallel. In August 2021, the Polish Minister of the Interior and Administration passed an amendment to the 2020 executive regulation, adopted within the COVID-19 response framework, which suspended and/or restricted border traffic at selected border crossing points to Russia, Belarus and Ukraine and listed the categories of persons exceptionally allowed to cross the border (such as Polish nationals, their family members or foreigners with a Polish residence permit). According to the amendment, persons who crossed the border but were not included in the list, such as asylum-seekers, were to be returned to the Polish border.⁵⁸ This amendment which seemingly 'legalized' pushbacks is still in force at the time of writing and has not been abolished by the new government notwithstanding its constant pledges to restore the rule of law in Poland. The Parliamentary Act which entered into force in October 2021 allows border guards to immediately expel people apprehended upon crossing the external border 'irregularly'. Although border guards are in principle still obliged to receive claims for international protection, they disregard such claims in practice.⁵⁹ Moreover, in the few cases where such claims go through, the Act allows the head of the office of foreigners to simply refuse to consider the merits of asylum claims made by persons who crossed the

⁵⁶ Ministru kabineta rīkojums Nr. 518 'Par ārkārtējās situācijas izsludināšanu'. Available at: <https://likumi.lv/ta/id/325266-par-arkartejas-situacijas-izsludinasanu>.

⁵⁷ On file with the authors. See also ReTV (2022).

⁵⁸ *Rozporządzenie Ministra Spraw Wewnętrznych i Administracji zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych* [Regulation of the Minister of the Interior and Administration amending the ordinance on the temporary suspension or limitation of border traffic at certain border crossing points], Journal of Laws 2021, item 1536.

⁵⁹ This was already a problem in 2016 and 2017, as testified by ECtHR case of *M.K and Others v. Poland* (App Nos. 40503/17, 42902/17 and 43643/17), 23 July 2020. Cf. Association for Legal Intervention and the Rule of Law Institute (2023).

border irregularly. The only exception are persons coming directly from the territory of a country where their life or freedom is threatened with persecution or the risk of serious harm. For their application to be registered, the latter need to present credible reasons for their irregular entry and submit their asylum claim immediately after crossing the border.⁶⁰

Such measures openly breach EU and international human rights law, particularly where it concerns access to the asylum procedure, the prohibition of collective expulsion and compliance with the central cornerstone of international refugee law—the *non-refoulement* principle, which prohibits returning foreign nationals to a state where they may be exposed to persecution and/or inhuman or degrading treatment.⁶¹ This principle is non-derogable and should be respected even in situations of declared emergency. Accordingly, a person who crosses the border, either regularly or irregularly, and expresses a wish to apply for international protection, should be at least temporarily admitted to have their circumstances individually assessed on the merits.

The right to asylum is laid down in Article 18 CFR. The Asylum Procedures Directive⁶² further specifies that every person has a right to apply for international protection in the territory of a Member State, including at the border, and obliges Member States to register and process such applications, regardless of how the applicant has entered the country. In other words, persons must also be able to submit claims for international protection outside official border crossing points, unless such points are easily accessible.⁶³ Although the legislation of the relevant Member States foresees the opportunity to apply for asylum at official border crossing points, intermediaries typically bring people to places far from such points and Belarusian border guards prevent foreign nationals from accessing them. Therefore, the relevant domestic rules do not offer a genuine and effective possibility to submit a claim for international protection and to receive an individualised assessment of this claim. With regard to the Polish Act of Parliament, the ECJ earlier clarified that EU law precludes national legislation allowing an asylum application to be disregarded on the basis that the person has arrived in the EU via a third state in which they were not exposed to persecution or a risk of serious harm.⁶⁴ Moreover, it is plainly evident that Belarus cannot be considered a safe third country.⁶⁵

⁶⁰ *Ustawa o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw* [Law amending the Law on foreigners and other laws], Journal of Laws 2021, item 1918. For a discussion see eg Baranowska (2021) and Grześkowiak (2023).

⁶¹ Protected under Article 33(1) of the 1951 Refugee Convention, Article 3 of the Convention against Torture, Article 3 of the European Convention on Human Rights (ECHR) and Article 19(2) of the EU Charter of Fundamental Rights (CFR).

⁶² 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 (recast), OJ L 180, 29.6.2013, 60.

⁶³ See also *N.D. and N.T. v Spain* (App. Nos. 8675/15 and 8697/15), 13 February 2020; *M.K. and Others v. Poland* (App. Nos. 40503/17, 42,902/17 and 43,643/17), 23 July 2020; *Shahzad v. Hungary* (App. No. 12625/17), 8 July 2021. For an analysis see, eg De Coninck (2021).

⁶⁴ Case C-564/18 *L.H. v Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2020:218.

⁶⁵ See eg *M.A. and Others v. Lithuania* (App. No. 59793/17), 11 December 2018, paras 64–65.

2. Rightlessness, inhuman treatment and deaths

The adoption of the domestic legislation described above has led to violations of human rights that go beyond the mere deprivation of the right to asylum. At the Belarusian border with Poland, Latvia and Lithuania, racialised non-EU nationals are being continuously exposed to various types of inhuman and degrading treatment and even torture which, among other things, regularly result in deaths at the border.⁶⁶ From a legal perspective, one can distinguish two separate types of situations when the individuals concerned are exposed to inhuman and degrading treatment within the meaning of Article 3 ECHR and Article 4 CFR. First, the Polish, Latvian and Lithuanian authorities violate the *non-refoulement* principle by pushing them back to Belarus. There have been numerous reports of Belarusian forces regularly beating people, forcing them to re-attempt crossing the border and not allowing them to return to Minsk, effectively forcing protection seekers to live in the forest for prolonged periods in dire conditions.⁶⁷

Second, the actions of the Polish, Latvian and Lithuanian authorities on their own can equally be classified as inhuman and degrading treatment, if not torture in some cases. In June 2022 Amnesty International released a detailed report on Lithuania's ill-treatment of non-EU nationals crossing into the country from Belarus. Informed by in-depth interviews with the persons affected and other sources, Amnesty International accused Lithuanian authorities of using violent methods to carry out pushbacks, such as baton beatings and using tasers and stun guns on people at the border.⁶⁸

The pushbacks in Latvia, by contrast, targeted a very small group of largely the same people who had been forced to remain in the forest for up to seven months. In a similar report on Latvia, Amnesty International described how those asylum-seekers—predominantly from the Middle East—were forced to remain in the forest for months in freezing temperatures and were subjected to constant pushbacks. It is established that between pushbacks, Latvian special forces deployed at the border accommodated people in heavily guarded tents in undisclosed locations, exposed them to intimidation, verbal abuse and physical violence (including beatings and electric shocks), and confiscated their phones. Latvia is also accused of abusing the International Organization for Migration (IOM)-assisted voluntary return procedure by coercing people into signing voluntary return declarations as the only way to be allowed out of the forest.⁶⁹

Amnesty International's findings are consistent with a socio-legal analysis of the situation at the Latvia–Belarus border, carried out by one of the authors of this article. Aleksandra Ancite-Jepifánova conducted in-depth interviews with nearly 40 non-EU nationals who had attempted to cross into Latvia from Belarus

⁶⁶ See eg MacGregor (2023).

⁶⁷ See eg Amnesty International (2022c); Amnesty International (2021a).

⁶⁸ Amnesty International (2022b), pp. 5, 18–19.

⁶⁹ Amnesty International (2022a). Similarly, for Poland, see Grupa Granica (2022); PRAB initiative (2024).

during the autumn and winter of 2021–22. The people interviewed claim to have spent significant periods of time in the forest at the Latvia–Belarus border (typically 75–105 days), with several having remained there for seven months.⁷⁰ Their testimonies reveal that once on the Latvian side of the border, they were guarded by armed masked men in dark uniforms (referred to as ‘commandos’) who subjected those apprehended at the border to daily pushbacks, physical violence and other abuses—beating them up, including with electric shock devices, threatening them and demanding absolute obedience. The people stranded in the forest were forced to live in the open air in very low temperatures (up to -20C), suffered from severe malnutrition (the Latvian authorities only gave them a pack of biscuits and a bottle of water per day), as well as burns, frostbites and other skin conditions, caused by the inability to maintain hygiene.

After having spent prolonged periods in the forest, the people interviewed were gradually transferred to the Daugavpils detention centre on so-called ‘humanitarian grounds’. From there, they were typically returned to their countries of origin (predominantly Iraq, which Latvia, Lithuania and Poland had unlawfully invaded earlier as members of the so-called ‘coalition of the willing’) via the IOM assisted voluntary return programme, without their asylum applications being registered. According to their testimonies, the Latvian authorities informed them that there was no possibility to apply for international protection and threatened to take them back to the forest or keep them in detention indefinitely, if they did not agree to a ‘voluntary’ return.

Against this backdrop, the IOM involvement in the returns procedure is highly problematic, not to say unlawful. In a situation where individuals, despite their wish to claim asylum, were not offered the opportunity to do so, in direct breach of the law, and were denied an individual assessment of their need for protection, their participation in the IOM assisted voluntary return programme cannot be considered voluntary. Moreover, this might have led to situations where an individual was returned to a state where they could face persecution and inhuman or degrading treatment. The IOM decision to continue operating the programme under these circumstances thus raises serious concerns about the organisation’s potential engagement in and facilitation of the outright unlawful *refoulement* practices in breach of national, EU and international law.

More than two years since the beginning of this escalation, the situation at the EU–Belarus border remains largely unchanged. All three EU Member States continue their systematic pushbacks—irrespective of the seminal ruling, delivered by the ECJ in June 2022. The Court explicitly stated that Lithuanian domestic legislation effectively depriving a non-EU national of an opportunity to apply for asylum solely because they had crossed the border irregularly is incompatible with the Asylum Procedures Directive—even in the event of a declaration of an emergency due to a ‘mass influx of aliens’.⁷¹ Nevertheless, in May 2023, Lithuania further cemented

⁷⁰ For the preliminary findings, see Ancite-Jepifánova (2022a, 2022b, 2022c).

⁷¹ Case C-72/22 PPU M.A. v Valstybės sienos apsaugos tarnyba ECLI:EU:C:2022:505.

the ongoing practice of pushbacks in domestic law,⁷² a move that was followed by neighbouring Latvia a few months later.⁷³ The Tusk government in Poland remains strongly committed to the PiS policy that has effectively annihilated the rule of law and human rights at the Belarus border. EU law and international law as well as the rulings of the ECJ is thus openly and systematically ignored in all three Member States in question. The European Commission has taken no steps to stop the ongoing severe breach of the law.

Based on the facts outlined above, it is clear that the Member States' responses to the issue are disproportionate not only from a legal, but also from a public policy perspective. The number of individuals attempting to enter the EU through Belarus is generally very low and nowhere near the number of arrivals via the Mediterranean,⁷⁴ let alone the figures of 2015–16 when the EU received over 2.5 million asylum applications,⁷⁵ or the millions of Ukrainian nationals welcomed by the EU since the start of the Russian aggression. In 2021, at the peak of the crisis, Polish border guards recorded fewer than 40,000 'attempts of illegal border crossings' from Belarus,⁷⁶ with the numbers dropping to 15,000 in 2022, still representing an obviously inflated number.⁷⁷ The decrease can be largely explained by travel restrictions on nationals of certain Middle Eastern countries, introduced by foreign airline companies or governments, including Belarus, following the pressure of the EU. In November 2021, Turkey banned Syrian, Yemeni and Iraqi nationals from flying to Minsk.⁷⁸ The Belarusian state airline Belavia equally announced it would no longer carry nationals of these countries to Belarus,⁷⁹ whereby hundreds of Iraqi nationals were returned from Minsk to Iraq via so-called repatriation flights.⁸⁰ Indeed, empirical evidence suggests that individuals crossing from Belarus currently make up a highly heterogeneous group, are brought to the EU-Belarus border by intermediaries that are non-state actors and most frequently possess Russian visas, issued for various purposes. The persons arriving at the border also include those who had never acquired Belarusian or Russian visas or had previously resided in Russia or Belarus long-term, all of which does not sit particularly well with the migrants' instrumentalisation excuse deployed by the EU and the Member States in question in order to whitewash mass human rights violations.⁸¹

⁷² LRT and Euractiv.com (2023).

⁷³ LSM.lv (2023). For critique, see PACE (2023); UNHCR (2023).

⁷⁴ Buchholz (2023).

⁷⁵ Eurostat (2017).

⁷⁶ https://twitter.com/Straz_Graniczna/status/1478327785903038469?t=k2VdF_GmykZQBUnvENA9g&s=19

⁷⁷ See Sas (2023) for the 15,000 figure calculated based on the Border Guards' social media data, which is not always reliable. According to official statistics, there were 10,458 illegal border crossings/attempts in 2021 and 5,471 in 2022 (Statystyki SG Komenda Główna Straży Granicznej, available at: <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> (Accessed on 17 July 2024)).

⁷⁸ Roth and O'Carroll (2021).

⁷⁹ Ibid.

⁸⁰ Wallis (2021).

⁸¹ For a discussion see Ancite-Jepifánova (2023).

Moreover, it is crucial to keep in mind that the number of recorded border crossing attempts does not represent the actual number of people crossing the border, as many attempt to do so multiple times, inviting statistics inflation. Likewise, in the period from August 2021 to April 2022, the Latvian authorities claimed to have registered over 6,600 such attempts.⁸² Yet, according to the estimates by one of the authors of this article, based on her analysis of daily border guard statistics and interviews with the non-EU nationals involved, the actual number of people behind these figures was as low as around 250.⁸³ It is difficult to argue that such low numbers of protection seekers may represent a serious threat to national security or put at risk the essential functions of the state—particularly in light of the fact that the same Member States have together welcomed over a million people fleeing Ukraine.⁸⁴

4 FRONTEX: The Dilution of Responsibility to Zero

FRONTEX is a key actor of EU-backed lawlessness, including at the EU–Belarusian border. On the books, FRONTEX shares responsibility for border management with the Member States, although Member States retain primary responsibility for the management of their sections of the external borders.⁸⁵ However, this system of shared responsibility is based on the absence of an effective accountability mechanism for FRONTEX, resulting in the Agency’s absolute impunity.⁸⁶ The fact that FRONTEX is accountable to the European Parliament and to the Council does not help much to improve the situation.⁸⁷ That the accountability system is fundamentally flawed, given the number of grave violations known to have been committed, is not surprising. It is an example of the EU’s lawlessness law operating *as designed*, which is conceived to humiliate, strip of rights and even kill by proxy or directly through action (actively pushing people back) or inaction (non-rescuing people), as showcased on many occasions in the South.⁸⁸ This is happening in an atmosphere of absolute impunity, to achieve the goal of harsh daily enforcement of the EU’s passport apartheid at the borders of the Union. There is also evidence of indirect involvement of FRONTEX at the EU–Belarus border although its role is blurrier because of even greater lack of transparency.

⁸² Valsts robežsardze (2022).

⁸³ See Ancite-Jepifánova (2022c); Ancite-Jepifánova (2022a); Ancite-Jepifánova (2022b).

⁸⁴ UNHCR, *Ukraine Refugee Situation*. Available at: <https://data.unhcr.org/en/situations/ukraine>.

⁸⁵ Article 7, 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) No 1052/2013 and (EU) 2016/1624. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1896> (‘The EBCG Regulation’).

⁸⁶ See again recently, the dismissal of the action in damages against FRONTEX: Case T-600/22, *WS v. Frontex*. See: Fink and Rijpma (2023) and Davies (2023); See also the recent General Court judgment declaring inadmissible an action for failure to act against FRONTEX: Case T-600/22, *ST v. FRONTEX* and another action for damages: Case T-136/22, *Amoudi v. Frontex* commented by De Coninck (2024).

⁸⁷ Article 6, EBCG Regulation.

⁸⁸ Shatz (2023); Ganty and Kochenov (2024); Kochenov and Ganty (2023) and the literature cited therein.

Starting with the history and core tasks of FRONTEX as well as the Agency's impunity (1), we will proceed to analyse the lawlessness law underpinning it, including at the EU–Belarus border, looking at the lack of transparency (2) which is intrinsically linked to the absence of accountability safeguards (3) and the multiplicity of actors involved (4).

1. The Agency No. 1 of the EU's Lawlessness Law

The FRONTEX story has been told numerous times.⁸⁹ Created in 2004 to facilitate and render more effective the application of EU measures relating to the management of external borders, it has seen its mandate, funding and staff exponentially extended over the years through four major amendments to the FRONTEX founding Regulation.⁹⁰ Today it is entrusted with ensuring European integrated border management at the external borders with a view to managing those borders efficiently and addressing migratory challenges and threats at the external borders.⁹¹ Its tasks include supporting Member States in the management of external borders and participating in joint operations at the borders,⁹² cooperating with third countries by providing them with technical and operational assistance within the framework of the external action policy of the Union,⁹³ and it can develop joint operations with third countries upon the request of one or several Member States and deploy staff outside the EU, even beyond the countries neighbouring the EU,⁹⁴ to provide support for border management. It also assists Member States at all stages of the return process,⁹⁵ monitors migration flows and carries out risk analysis at the external borders for irregular migration and cross-border criminal activity,⁹⁶ trains border guards

⁸⁹ Fink (2019), pp. 3–4; Mugianu (2016).

⁹⁰ Article 1(1) and (2), Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, pp. 1–11 modified by Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 304, 22.11.2011, pp. 1–17; and then repealed by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251, 16.9.2016, pp. 1–76); Regulation (EU) 2016/1624 was itself repealed by The EBCG Regulation. The EBCG Regulation is currently 131 pages long (it was 11 pages in 2004).

⁹¹ Articles 1 and 2 EBCG Regulation. For the evolution of the mandate between 2016 and 2019, see European Court of Auditors (2021), p. 46.

⁹² Article 7(1), (3), (4) and Article 10(1)(d), (h), (i) EBCG Regulation; also Article 36 *et seq.* (Sect. 7) EBCG Regulation.

⁹³ See Articles 10(1)(k), 71 and 73 EBCG Regulation.

⁹⁴ Article 37 EBCG Regulation.

⁹⁵ Articles 7(2), (3), (4) and (10)(1), (n), (o), (p) EBCG Regulation; see also Articles 48 *et seq.* (Sect. 8) EBCG Regulation.

⁹⁶ Articles 10(1)(a) and 29 *et seq.* EBCG Regulation.

across Europe, and evaluates the capacity⁹⁷ and readiness of Member States to meet the challenges at external borders (the so-called vulnerability assessments).⁹⁸

FRONTEX is endowed with important tools to perform its tasks. The 2019 Regulation provides that the Agency shall include the European Border and Coast Guard, to number up to 10 000 operational staff by 2027.⁹⁹ It means that FRONTEX now has its own standing corps with executive powers, composed of FRONTEX and EU Member States officers authorised to carry and use weapons, as well as other lethal and non-lethal equipment.¹⁰⁰ Its budget has grown steadily since its creation, starting at EUR 6 million,¹⁰¹ reaching EUR 754 million in 2022, and to reach an average of EUR 900 million per year for the 2021–2027 period.¹⁰²

With the 2019 reform of FRONTEX, its responsibility shifted from complicity to direct responsibility. This is due, as Mariana Gkliati observes, precisely to the expansion of the powers and competences of the agency, through its standing corps of 10 000 border guards (including FRONTEX statutory staff), the increased use of its own equipment and its increased role in return operations, not to mention the joint operations in third countries.¹⁰³ Finally, FRONTEX's intelligence tasks have also grown tremendously, to the point where it is becoming 'an intelligence actor'.¹⁰⁴

Scholars,¹⁰⁵ NGOs,¹⁰⁶ journalists¹⁰⁷ and the European Parliament¹⁰⁸ have vehemently criticised the way in which the Agency uses its powers and carries out its activities. More specifically, despite the denunciation of its participation in serious and systemic violations of human rights at the borders—and notwithstanding that being bound by fundamental rights even constitutes one of its tasks in border management¹⁰⁹—its responsibility has never been legally recognised, so far. In fact, the Agency is failing even to achieve the main purposes for which has been established: in 2021, the European Court of Auditors found that 'FRONTEX's support for Member States/Schengen associated countries in fighting against illegal immigration and cross-border crime is not sufficiently effective'.¹¹⁰ The figures tell us that irregular crossings of the EU borders (along the Central and Western Mediterranean

⁹⁷ Article 10(1)(w) EBCG Regulation.

⁹⁸ Article 10(1)(c) EBCG Regulation.

⁹⁹ See Article 5(2) and Annex I EBCG Regulation. It is constituted by the national authorities of Member States responsible for border management, including coast guard services to the extent that they carry out border control tasks, the national authorities responsible for return and the European Border and Coast Guard Agency. See also Articles 54 et seq. (Sect. 9) EBCG Regulation.

¹⁰⁰ See Articles 55(5) and 82 and Annex V EBCG Regulation.

¹⁰¹ For an overview of the FRONTEX Budget over the years see Statista (2021).

¹⁰² European Court of Auditors (2021).

¹⁰³ Gkliati (2022a).

¹⁰⁴ Rijpma and Vermeulen (2015).

¹⁰⁵ For a recent criticism, see the contributions in the *Verfassungsblog's* debate on FRONTEX and the Rule of Law, *op cit*. See also Mungianu (2016).

¹⁰⁶ Lüdke (2022); Statewatch (2021a); Sunderland and Pezzani (2022).

¹⁰⁷ Bellingcat (2020).

¹⁰⁸ See European Parliament (2021).

¹⁰⁹ Article 10(1) (e), (ad) EBCG Regulation.

¹¹⁰ European Court of Auditors (2021).

Route) have increased ‘despite the mobility restrictions and enhanced border controls adopted to contain COVID-19’,¹¹¹ leaving the migration industry growing in the face of the Agency’s failure and feeding the appetite for anti-migrant politics.¹¹² The EU’s lawlessness law has not failed at all, however, as no one has been held responsible for the thousands of deaths and gruesome human rights abuses which have occurred and continue to occur. Meanwhile, the budget has only grown, a 100-fold in recent years if we consider FRONTEX on its own. The orgy of the EU law-backed violence and crime only intensifies.

The Agency is constantly on the spot at least following the leak in July 2022 of some parts of an OLAF report¹¹³ showing that the Agency had knowledge of pushback operations by Greece and other Member States, had experienced fraud in public procurement, and had tolerated serious internal malfeasance, including harassment. The scandal caused FRONTEX’s controversial former Executive Director, Fabrice Leggeri, who now represents the French extreme right in the European Parliament, to resign.¹¹⁴ However, little has changed on the part of the Council and the Commission since then: the system built to achieve human rights abuses keeps on functioning as designed.

It is an established fact that FRONTEX has been present at the EU–Belarusian border, especially at the high point of the so-called ‘crisis’ in 2021. FRONTEX sent European border guard teams to Lithuania ‘to support border controls with Belarus’¹¹⁵ and launched a Rapid Border Intervention there in 2021, which included by the end of July 2022, 100 officers, 30 patrol cars and two helicopters deployed at the border.¹¹⁶ After Greece, Lithuania has become the second EU Member State to benefit from an intervention of this kind, ‘to assist with the growing migration pressure’.¹¹⁷ FRONTEX also sent ‘patrol cars and specialised officers for conducting interviews with migrants to gather information on criminal networks involved and support the exchange of operational information’.¹¹⁸ Moreover, FRONTEX has developed additional activities in Lithuania within the framework of the Joint Operation Terra, which includes twelve Member States and the development of more than 450 FRONTEX officers by March 2022.¹¹⁹

Similarly, FRONTEX has intervened in Latvia, deploying officers to patrol the border whose role included the ‘detection and apprehension of persons having

¹¹¹ EU emergency trust fund for Africa (2021), p. 11.

¹¹² Gammeltoft-Hansen (2013).

¹¹³ Lüdke (2022); FRONTEX refused to disclose it: see <https://FRONTEX.europa.eu/media-centre/management-board-updates/management-board-conclusions-from-the-extraordinary-mb-meeting-of-28-29-april-2022-nr08YV>

¹¹⁴ Statewatch (2021b); Lighthouse Reports (2022).

¹¹⁵ FRONTEX (2021b); European Commission (2021).

¹¹⁶ FRONTEX (2021a); Amnesty International (2022b).

¹¹⁷ Amnesty International (2022b), p. 56.

¹¹⁸ European Commission (2021).

¹¹⁹ Amnesty International (2022b), p. 56; FRONTEX (2022).

crossed or having attempted to cross the border illegally; documenting relevant actions'.¹²⁰ FRONTEX has also deployed a return counselling expert.¹²¹

According to Amnesty International, FRONTEX is involved in one way or another, either actively or passively, in the human rights violations at the Belarusian border with Latvia and Lithuania, operating under lawlessness law not only because of the lack of transparency under which it operates, but also because—and this point is crucial—there is simply no appropriate legal framework to hold FRONTEX accountable for the human rights violations happening at the Belarusian border. Specifically, Amnesty International explained in the Latvian context: 'Human rights violations documented in this report appear to have taken place in areas where FRONTEX is operational, including at border locations where FRONTEX patrolling officers were deployed, and in detention facilities where the agency has access, including through its return expert. While it was not possible to ascertain whether FRONTEX was involved in any of the human rights violations documented in this report, at very least FRONTEX must comply with its obligations under Article 46 of Regulation 2019/1896 and assess its ongoing activities in Latvia given the serious and persistent violations of international and EU law perpetrated by the Latvian authorities'.¹²²

The situation is no different in Lithuania: 'the Lithuanian authorities have in the meantime continued to employ a systematic pushback policy, raising concerns that Frontex officers are likely to have been involved in sightings of people attempting to cross borders into Lithuania and who would have been subsequently detained and/or returned to Belarus by Lithuanian border guards in patent breach of international and EU law. Frontex officers themselves have shared numerous internal "Serious Incident Reports" with FRONTEX Headquarters and have flagged cases where they had witnessed potential violations of human rights'.¹²³

Finally, although FRONTEX has not carried out operations in Poland, the visit to the Poland–Belarus border by the FRONTEX Executive Director Fabrice Leggeri praising the way Poland had handled the borders was a quite worrying sign,¹²⁴ as Poland was simply pushing people back (based on its push-back provision)¹²⁵ against basic principles of international law and in direct violation of human rights law and EU law.¹²⁶

2. Lack of Transparency and Accountability Safeguards

The lack of transparency and accountability regarding FRONTEX activities is an important element underpinning the success of the EU's lawlessness law system.

¹²⁰ Amnesty International (2022a), p. 26; FRONTEX (2021b).

¹²¹ Amnesty International (2022a).

¹²² Amnesty International (2022a), p. 26.

¹²³ Amnesty international (2022b), p. 56.

¹²⁴ FRONTEX (2021a).

¹²⁵ Baranowska (2022a, 2021).

¹²⁶ Baranowska (2022b).

The situation at the EU–Belarusian border, especially at the borders of Latvia and Lithuania, is a case in point: although FRONTEX is present in Latvia and Lithuania, there is no information available about its role and activities and how these are shared with EU Member States, and especially about its involvement—whether active or passive—in the mass human rights violations well documented at that border. The Latvian government offers assurance that the collaboration ‘with other Member States, EUAA and FRONTEX was very good’.¹²⁷ The fact that the collaboration has been so good raises concerns in itself, given how many human rights violations occurred at the border. However, no clear clues of the nature of the collaboration are revealed, especially in light of the persecution of migrants and inhuman treatments at the border. There is a glaring lack of transparency, which is particularly problematic when courts fail to shift the burden of proof in pushback cases, as Baranowska shows.¹²⁸

Public accountability implies that a public official or agent has to provide information about his or her conduct, including the performance of tasks, the procedures applied and outcomes achieved, and when necessary, the agent or official should be in a position to explain its conduct.¹²⁹ In other words, accountability requires transparency. However, FRONTEX appears to be reluctant to provide any information about its role and collaboration with national authorities at the Belarusian border: it gave some conventional and general answers on Latvia and never replied to the requests for information relating to the Agency’s operations in Lithuania.¹³⁰

Without transparency, it is difficult or even impossible to provide accountability safeguards, as in the case of FRONTEX. Transparency is an essential element of EU fundamental rights¹³¹ and FRONTEX, as an EU Agency, is subjected to it—including Regulation (EC)1049/2001 on access to documents—and should provide reliable and easily accessible information with regard to its activities.¹³² In fact, transparency is also one of the tasks of the Agency.¹³³ However, its lack of transparency constitutes a structural problem for FRONTEX: without crucial information on its internal functioning and activities—which the Agency is solely able to provide—it is simply impossible to assess the Agency’s respect of its performance of its mandate in terms of fundamental rights. Only through whistleblowers, leaked reports and individual testimonies have NGOs been able to unveil its abuses and impunity in that regard.¹³⁴ Even the OLAF report, made available to MEPs months after it

¹²⁷ See the minutes of the European Parliament’s LIBE committee meeting with the Ministry of Interior and the State Border Guard including regional FRONTEX Liaison officer based in Riga. European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs (2022), p. 9.

¹²⁸ Baranowska (2023).

¹²⁹ Bovens et al. (2014), pp. 1, 9, 95; Tsourdi et al. (2022).

¹³⁰ Amnesty International (2022), p. 8.

¹³¹ Article 42 CFR enshrines the right of access to documents.

¹³² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43–48, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32001R1049>

¹³³ Article 10(1) (ad) EBCG Regulation.

¹³⁴ Gkliati (2022b).

was written, has still not been officially disclosed, which does not appear to be justified in light of the ECJ's case law, as explained by Laura Salzano.¹³⁵ The broad acceptance of the emergency ('crisis') and securitisation narratives—which have become constant—is key to justifying the absence of transparency and thus accountability.¹³⁶ The lack of transparency has important consequences for FRONTEX's accountability, especially when it comes to its operational role in joint operations, where accountability is already very hard to identify due to the accountability dilution mechanisms explained above.

Transparency is also linked to accountability safeguards which ensure that agencies operate according to the paradigm of limited government, to prevent discretion devolving into arbitrariness. There is a problem with the legal design of FRONTEX in that regard.¹³⁷ Indeed, from an internal perspective, the FRONTEX Management Board has not been able to ensure that the Agency, and especially its Executive Director, do not abuse their powers, especially when it comes to accountability regarding human rights, as documented by the relevant OLAF report.¹³⁸ This is not surprising if we consider that the Management Board is composed solely of the Commission and the Member States, represented by the heads of the border authorities,¹³⁹ without any other representation to indicate a sensitivity to the need for respect for human rights.¹⁴⁰ In fact, the growth of FRONTEX's powers and budget was not accompanied by adequate accountability mechanisms.¹⁴¹ Even the European Parliament is excluded from the Management Board. If the role of the European Parliament in the discharge of the FRONTEX budget has been very important democratically speaking,¹⁴² and the European Parliament has recently used this power to its full potential,¹⁴³ the Parliament's discharge has no cardinal legal impact for FRONTEX and its activities: it still benefits from its budget and mandate.¹⁴⁴ More importantly, there is no external control or supervision of FRONTEX's activities in terms of human rights performance (as opposed to its financial performance, for instance).¹⁴⁵ The Management Board is mainly in charge of these aspects of its

¹³⁵ Salzano (2022).

¹³⁶ Gkliati and Kilpatrick (2022). See also Davitti (2018).

¹³⁷ Marin (2022).

¹³⁸ OLAF (2021).

¹³⁹ See the composition of the Board on FRONTEX website: <https://FRONTEX.europa.eu/about-FRONTEX/who-we-are/management-board/>

¹⁴⁰ Marin (2022).

¹⁴¹ Gkliati (2022a).

¹⁴² Strik (2022). See Articles 6 and 106(2) EBCG Regulation (among others). See also Articles 260 *et seq.* of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

¹⁴³ In 2021 the European Parliament gave the discharge but asked for part of 2022 budget to be frozen: European Parliament resolution of 21 October 2021 on the Council position on the draft general budget of the European Union for the financial year 2022 (11,352/2021 – C9-0353/2021 – 2021/0227(BUD)). In May 2022, the European Parliament withheld FRONTEX discharge until full OLAF investigation report becomes available: <https://www.europarl.europa.eu/news/en/press-room/20220429IPR28235/discharge-meets-delay-signing-off-on-accounts-of-FRONTEX>.

¹⁴⁴ Gigli (2022).

¹⁴⁵ Marin (2022).

activities and it has been rather silent and quite reluctant to commission any kind of independent investigation into the matter. Even the function of the Fundamental Rights Officer (FRO) introduced in 2011 and mandated with monitoring FRONTEX's implementation of its fundamental rights obligations is internal to FRONTEX and thus dependent on the Executive Director.¹⁴⁶ In fact, it was shown that the 'Executive Director completely disregarded all opinions and recommendations from the FRO, including seven expressions of concern about fundamental rights related situations, inter alia related to Frontex's operations in Hungary and Evros',¹⁴⁷ even though the protection of fundamental rights is one of FRONTEX's missions.¹⁴⁸ Similarly, no concrete steps were taken regarding Lithuania by the Agency, although all the red flags had been raised by the FRONTEX FRO, among others.¹⁴⁹ Of course, in addition to the European Parliament, some accountability 'sticking plasters' such as the European Ombudsman, the Fundamental Rights Agency and the agencies' internal monitoring mechanisms could always be explored. However, as Sarah Tas explains in the context of the hotspots where FRONTEX plays a key role, these mechanisms are simply insufficient to monitor activities in the complex environment of these hotspots, and this also concerns Latvia, Lithuania and Poland.¹⁵⁰

3. The Multiplicity of Actors

The lack of accountability and transparency is reinforced by the fact that FRONTEX always acts together with other actors, be they national authorities or private actors. In other words, one of the major elements which help dilute FRONTEX's responsibility to nothing is the involvement of many state and non-state actors in border management, aptly characterised by André Nollkaemper as the 'problem of many hands'¹⁵¹: accountability and responsibility enter a grey zone when it comes to concerted and complex actions, where it becomes very difficult for individuals and professional lawyers to practically and legally identify the accountable actors.

¹⁴⁶ Gkliati (2022a, b). Though external control for financial and certain administrative matters does exist, as explained by Gkliati: OLAF investigates illegal reception, funding allocation, corruption and serious misconduct (Article 117 EBCG Regulation), the European Court of Auditors exercises control over the budgetary and financial management of the agency (Article 116 EBCG Regulation) and the European Ombudsman can also receive complaints regarding denied requests for access to documents or other types of maladministration against the agency (Article 228 TFEU, Article 43 Charter, Article 114(5) EBCG Regulation).

¹⁴⁷ Strik (2022). See the report of the European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs (2021).

¹⁴⁸ Articles 1 and 10(1) (e), (ad) EBCG Regulation (the expression "fundamental rights" appears 231 in the EBCG). Interestingly, Elspeth Guild points out that the Surveillance Regulation of the external sea borders fails to impose the legal requirement in terms of fundamental rights required by the Schengen Border Code. More importantly, 'although the Regulation requires observance of the international law non-refoulement requirement, there are no apparent procedural duties on border police, which an individual can rely upon to claim said rights': Guild (2022).

¹⁴⁹ Amnesty International (2022b), p. 56.

¹⁵⁰ See Horii (2018); Tas (2022).

¹⁵¹ Nollkaemper (2015); See also Gkliati and Kilpatrick (2022). This expression was coined by Thompson, (1980).

Events at the Belarusian border are paradigmatic: FRONTEX has deployed ‘return specialists’ in Latvia who, according to the Agency, are ‘in principle employees of the national authorities of the Member States and FRONTEX does not have authorisation to organise interviews with them’.¹⁵² Moreover, FRONTEX’s border guards and officers from the Member States were deployed together at the Belarusian border as part of the European Border and Coast Guard Standing Corps.¹⁵³ FRONTEX and the Lithuanian authorities collaborate on operational plans.¹⁵⁴ FRONTEX also helped Poland to return Iraqi nationals who entered the country via Belarus—at least 213 Iraqi nationals on 66 flights between July 2011 and May 2022,¹⁵⁵ but likely more.¹⁵⁶ The only guarantee that FRONTEX offered that these were not forced and illegal returns, is that the Agency received ‘a disclaimer’ from Polish authorities, which means that FRONTEX acted merely as a rubberstamp of national decisions, thus helping the country to breach EU law.

In other words, FRONTEX does not act alone, it can ‘only assist Member States on request’,¹⁵⁷ which makes it difficult if not impossible to determine its exact involvement in any given activity and to hold it and its agents responsible for human rights violations either because of their active involvement or their passive complicity. Even in the event where FRONTEX does not itself perpetrate the human rights violations, the Executive Director of FRONTEX is supposed to immediately suspend all operational activities in a Member State ‘if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist’.¹⁵⁸ Such violations of human rights have been proven in Latvia and Lithuania.

FRONTEX provided ‘assistance’ to Lithuania and Latvia when they were caught red-handed breaching a whole palette of rules of EU and international law. FRONTEX saw no need to terminate its operations in Lithuania despite obvious practices in breach of EU law and the fundamental principle of *non refoulement*.¹⁵⁹ Even if FRONTEX stopped its activities in Lithuania after the ECJ judgment of June 2022,¹⁶⁰ it was only upon request of the Lithuanian authorities.¹⁶¹ In any case, even

¹⁵² Amnesty International (2022a).

¹⁵³ European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs (2022).

¹⁵⁴ FRONTEX deployed 50 officers among the more than 100 involved in the RABIT operation. See the minutes of the LIBE’s meeting with the Ministry of Interior and the State Border Guard including regional Frontex Liaison officer based in Riga. European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs (2022), p. 10.

¹⁵⁵ See the letter that Uku Sarekanno addressed to Mr Shotter on behalf of FRONTEX Director General for Migration and Home Affairs, available at: https://www.europarl.europa.eu/doceo/document/E-9-2022-001410-ASW-ANN02_EN.pdf. This letter follows the Parliamentary questions by Erik Marquardt of 8 April 2022 on FRONTEX involvement in forced returns – Poland and Belarus. Available at: https://www.europarl.europa.eu/doceo/document/E-9-2022-001410_EN.html

¹⁵⁶ Yeni Safak (2021).

¹⁵⁷ Ibid, p. 9.

¹⁵⁸ Article 46(4) of Regulation (EU) 2019/1896.

¹⁵⁹ BNS (2021).

¹⁶⁰ Case C-72/22 PPU, *Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:505.

¹⁶¹ Nielsen (2022).

when obvious violations of EU law are ongoing at a border it is actively engaged with, FRONTEX does not consider them until an ECJ judgment obliges it to. It is clear that FRONTEX's involvement in this acted ab initio against compliance with EU law and may have facilitated the commission of human rights violations, 'as FRONTEX has not conditioned its support upon respect for human rights', as explained by Amnesty international.¹⁶²

In fact, several elements contribute to the diffusion of responsibility in such human rights violations cases, making it very difficult to reach any accountability for FRONTEX. The first element is the hybrid nature of EU agencies in general—coming between EU institutions and Member States—which has been widely commented on and researched.¹⁶³ FRONTEX is one such agency and serves both the EU, especially the Commission, and the Member States.¹⁶⁴ In addition, the joint operations between FRONTEX and the Member States—part of what is called 'Joint implementation patterns'¹⁶⁵—are also paradigmatic of the superposition and complexity of multi-actor actions.¹⁶⁶ This multiplicity of actors in the EU's border management is reinforced by the fact that operations increasingly involve private actors, directly or indirectly,¹⁶⁷ such as private military and security companies¹⁶⁸ or carriers,¹⁶⁹ to perform many activities related to border controls, including those which entail a high risk of gross human rights abuses.¹⁷⁰ Against this background, the use of new technology e.g. drones—allowing 'touchless' and remote management—has made it increasingly difficult to engage the responsibility of state and non-states actors in pushing and pulling back migrants. On top of the imbrication between the Member States, FRONTEX and private partners, FRONTEX's operational role abroad has increased in the field of cooperation between the Agency and third countries,¹⁷¹ and assistance to third countries.¹⁷² In short, the multiplicity of actors involved in these complex collective activities—also implying many layers of legal authority—between FRONTEX and the Member States, and with the implication of private actors, makes it extremely laborious to resolve the legal problem of individual, collective and shared responsibility, and establish the allocation of specific responsibility for unlawful conduct.

The lack of accountability is an important element in the success of the EU lawlessness law system as the situation at the EU–Belarusian border demonstrates: although there are clues that FRONTEX is present, we do not know its exact involvement in human rights violations with no perspective of accountability.

¹⁶² Amnesty International (2022b), pp. 6 and 56.

¹⁶³ Chamon (2016); Coman-Kund (2018).

¹⁶⁴ Chamon (2016).

¹⁶⁵ Tsourdi (2021), p.184 *et seq.*

¹⁶⁶ For an overview of these joint operations, see Fink (2019); See also Mungianu (2016), p. 37 *et seq.*

¹⁶⁷ Eg Gammeltoft-Hansen (2013).

¹⁶⁸ *Ibid.*, p. 152. Davitti (2020).

¹⁶⁹ Bloom (2015).

¹⁷⁰ Statewatch (2022).

¹⁷¹ Article 73 EBCG Regulation.

¹⁷² Article 74 EBCG Regulation.

5 ECJ: Consequential Remedies Do Not Exist

Pushbacks and pullbacks are extremely difficult to challenge because of their informal character: even if the victims survive and are not imprisoned by EU's criminal proxies in Libya or stuck between two rows of soldiers in Belarus, they have precious little resources to challenge their treatment in courts. Moreover, the jurisdictional limitations and uncertainties when it comes to the application of the CFR (especially the obligation of *non-refoulement*) make it even more difficult to challenge pushbacks and pullbacks under EU law, when they purportedly occur outside the EU territory.¹⁷³

While the ECJ is an important actor of lawlessness law in the Mediterranean,¹⁷⁴ this role should be nuanced when it comes to the Belarus border because only very few cases reached the Court and, in one case, it expressly found that pushbacks at the Belarus Border against EU law, in the context of the Lithuanian legislation previously detailed.¹⁷⁵ In that case, the Court made clear that EU law precludes any Member State from effectively depriving asylum seekers of the opportunity of access, in the territory of that Member State, to the procedure through which applications for international protection are examined, even in the event of a declaration of martial law or of a state of emergency, or in the event of a declaration of an emergency due to a mass influx of aliens.¹⁷⁶

However, such condemnations do not lead to any changes on the ground from the victims' perspective, especially in the absolute absence of any efforts by the Commission to enforce the judgments and reinstate respect for EU law. For the authorities, quite the opposite is true: the EU and its Member States have developed and are constantly perfecting the strategies of detachment and externalisation, with less direct involvement and control by Member States and EU agencies, raising further issues in terms of accountability before courts.¹⁷⁷ Instead of seeking to improve compliance with court decisions, many powers behind the atrocities at the border are perfecting the daily business of avoiding any responsibility, rendering moot, if not futile, not only the rule of law but also the most basic concepts of legality and the core idea of compliance with court decisions.

The situation is even more complicated when it comes to FRONTEX. The multiplicity of actors involved on top of the lack of transparency and the absence of external human rights monitoring makes it extremely difficult for individuals, NGOs and lawyers to challenge FRONTEX's responsibility, as in the case of the refugees at the Belarusian borders. Even when these challenges can be overcome, judicial remedies for individuals before the ECJ are scarce and inadequate, contributing to the dilution of the Agency's responsibility. It should be recalled that the ECJ has exclusive competence over the liability of EU agencies and as a result, its responsibility cannot be

¹⁷³ De Coninck (2024); Moreno-Lax and Costello (2014).

¹⁷⁴ Kochenov and Ganty (2023); Ganty and Kochenov (2024).

¹⁷⁵ C-72/22 PPU, *Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:505.

¹⁷⁶ Ibid, para. 94.

¹⁷⁷ See Amnesty international (2022a, b); Pijneburg (2018); Baumgärtel (2018a, b).

challenged before national courts,¹⁷⁸ greatly limiting the available judicial remedies for applicants; though international courts do remain available.¹⁷⁹ Four main avenues have been explored by lawyers so far: the action for failure to act,¹⁸⁰ the action for annulment,¹⁸¹ the transparency procedure¹⁸² and the action for damages.¹⁸³ All have been unsuccessful. As put by Gkliati, ‘the ECJ alone cannot provide stable and authoritative answers to questions of attribution and the liability of agencies, especially in regard to multiple actors (joint liability)’.¹⁸⁴

This absence of relevant and effective remedies has greatly limited the ability of individuals to challenge wrongful FRONTEX conduct because of the way the whole system is organised, based on the EU lawlessness law. In this context, pretending that FRONTEX involvement does not reach the lines to trigger responsibility appears at best deeply deficient and at worst complicit or even malfeasant. The Court is sending the message that it is shielding FRONTEX and high-ranked EU officials. This is the (lawlessness) law.

In fact, EU institutions are complicit and act in concert: none of them would dare remind the other of the basics of Article 2 TEU. In *Access Info Europe* the General Court even exempted the Commission from complying with basic transparency rules concerning access to documents requests indispensable to challenging EU’s behaviour.¹⁸⁵ The General Court ruled in favour of the Commission, which refused to give the applicant access to all the documents ‘containing the legal advice and/or analysis of the legality’ concerning the EU–Turkey Statement and the implementing actions,¹⁸⁶ under the pretext that it was allegedly covered by the exception relating ‘to the protection of the public interest as regards international relations’.¹⁸⁷ The General Court dealt with this case as if no mass injustice or violation of rights being perpetrated by the EU was at stake, and thus barred the route for any check. Here too was the lawlessness law in operation, preventing responsibility and setting aside pleas for the actual application of the law with a shrug. Although such actions of transparency have not come (yet) before the Court concerning the situation at the Belarus border regarding the role of FRONTEX in particular, it should be noted that

¹⁷⁸ Gkliati (2022a), p. 184. See also Joined Cases C-106/87 and C-120/87 *Asteris and Others v. Greece and EEC* ECLI:EU:C:1988:457.

¹⁷⁹ See eg Shatz and Branco (2019).

¹⁸⁰ Article 265 TFEU. See also Article 98 EBCG Regulation. Cf Case T-282/21 *SS, ST v. European Border and Coast Guard Agency (FRONTEX)*; Case T-600/22, *ST v. European Border and Coast Guard Agency (FRONTEX)*.

¹⁸¹ Case T-675/20 *Leonardo SpA v. European Border and Coast Guard Agency (FRONTEX)*.

¹⁸² Case T-851/16 *Access Info Europe* EU:T:2018:69. Cf: Case T-31/18 *Luisa Izuzquiza and Arne Semssrott v. European Border and Coast Guard Agency (FRONTEX)* EU:T:2019:815.

¹⁸³ Article 340(2) TFEU, which stipulates that an EU institution or agency shall make good any damage caused by its servants in the performance of their duties. See also Article 98 EBCG Regulation. Case T-600/21 *WS v. European Border and Coast Guard Agency (FRONTEX)* EU:T:2023:492.

¹⁸⁴ Gkliati (2022a), p. 183.

¹⁸⁵ Case T-851/16 *Access Info Europe* EU:T:2018:69. See also Case T-31/18, *Luisa Izuzquiza and Arne Semssrott v. European Border and Coast Guard Agency (FRONTEX)* EU:T:2019:815.

¹⁸⁶ *Access Info Europe*, para. 6.

¹⁸⁷ *Ibid.*, para. 122.

the refusal of the Court to grant such vital legal request participates in a wider anti-rule of law turn by the Court as some of us have argued elsewhere.¹⁸⁸

6 European Commission: The Guardian of Lawlessness

The EU Commission is an active co-creator of the EU lawlessness law system. In the words of Amnesty International, describing the situation at the Lithuanian border with Belarus: ‘The European Union has provided Lithuania with various forms of assistance, including through the deployment of EU agencies on the ground and financial support from EU funds. By perpetrating systematic human rights violations through “push-back or lock up” legislation, policies and practices, Lithuania has breached EU laws, but has been lauded by EU actors for holding the line on migration. This calls into question the responsibility of EU bodies, in particular the European Border and Coast Guard (Frontex) and the European Commission’.¹⁸⁹ In the context of the pushbacks by Poland in 2021, Maciej Grześkowiak is obviously right that ‘the Guardians of the Treaty is no more’, showing that the EU Commission, largely acquiesced to the Polish unlawful practices and more generally turns a blind eye to pushbacks at the EU borders.¹⁹⁰

The EU Commission and the Member States increasingly use the instrumentalisation of migrants by other third States as an excuse to adopt restrictive and exclusionary measures towards migrants, ‘framing migration flow as a weapon of war’ in the words of Valsamis Mitsilegas,¹⁹¹ although the Court has made clear that pushbacks are illegal and that a declaration of martial law or of a state of emergency cannot deprive refugees of access to the international protection procedure.¹⁹² In fact, the Commission embraces Member States’ ‘instrumentalisation’ narrative by taking an active role in the building of the EU lawlessness law regime. For instance, it has launched a proposal on ‘Regulation on situation of instrumentalisation in the field of migration and asylum’ codifying the ‘instrumentalisation’ concept into EU asylum law, implying that under the ‘instrumentalisation justification’ push-back and pull-back would now become black letter law.¹⁹³ This proposal builds on the securitisation narrative of ‘highly worrying phenomenon’ implying the ‘increasing role of State actors in artificially creating and facilitating irregular migration, using migratory flows as a tool for political purposes, to destabilise the European Union and its Member States’ and targets more specifically the instrumentalisation of people by the Belarusian regime.¹⁹⁴ This instrumentalisation rationale has now been fully

¹⁸⁸ Kochenov and Ganty (2024).

¹⁸⁹ Amnesty International (2022b).

¹⁹⁰ Grześkowiak (2023).

¹⁹¹ Mitsilegas (2022), p. 271.

¹⁹² Case C-72/22 PPU *Valstybės sienos apsaugos tarnyba* EU:C:2022:505.

¹⁹³ European Commission, ‘Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum’ COM(2021) 890 final, 14 December 2021.

¹⁹⁴ See legislative schedule available at <https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-instrumentalisation-in-the-field-of-migration-and-asylum#:~:text=>

included in the New Pact on Migration and Asylum for which a political agreement was reached in December 2023.¹⁹⁵ In other words, racialised migrants are punished twice for having the wrong passport: once by the authoritarian regime allegedly using human beings to destabilise the European Union and a second time by the European Union which, in turns, plays the same game by endorsing blatant violation of human rights through keeping migrants out in a lawless zone as its best response to their instrumentalisation.

The Commission's *laissez-faire* approach towards Member State practices at the EU borders is an important piece of the EU Lawlessness law puzzle. It has sometimes even openly praised Latvia and Lithuania for their obviously unlawful practices.¹⁹⁶ More specifically, when assessing the EU-level response to the events at the Belarus border, the Commission appears willing to sacrifice its role as guardian of the Treaties by failing to initiate any infringement procedure against the Member States involved, despite their obvious breach of the migrants' most fundamental rights: it has chosen 'political expediency over the duty to ensure compliance with EU legislation'.¹⁹⁷ If the term 'solidarity' is deployed, it is only to support the interest of the EU and individual Member States by preventing migrants to enter the EU territory *at all cost*. As Maciej Grześkowiak notes: 'none of the Commission's representatives (speaking on behalf of the organ) expressed solidarity with migrants finding themselves in a potentially deadly trap between Belarus and the EU'.¹⁹⁸

Indifference and inaction prevail, and the absence of responsibility is assured while people are subjected to torture, inhuman treatments and deprived of rights. The EU Commission actively participates in this general complicit apathy, backed-up and organised by EU's lawlessness law. Bas Schotel explains that the fact that the EU lacks organisation and significant capacity makes it even less accountable than the Member States for what is happening on the ground, and offers leeway for acting even more irresponsibly.¹⁹⁹ This is exacerbated by the simple fact that it is not Greece or Lithuania, but the Union as such, which is the desired destination. Unaware of the technicalities of the operation of the passport apartheid inside the Union, hopefuls travel to the continent of opportunity, while the Union, which is a single working-living space by law only for its own citizens, construes arrivals at its borders as being located between Belarus and Lithuania or Turkey and Greece, rather than between the EU and the rest of the world.

Footnote 194 (continued)

[The%20objective%20of%20this%20proposal, humane%20and%20dignified%20manner%20the.](#)

For criticism of the 'instrumentalisation' narrative, see Ancite-Jepifánova (2023); Gerbaudo (2022).

¹⁹⁵ See: European Commission (2024).

¹⁹⁶ TPV World (2023).

¹⁹⁷ Amnesty international (2022), p 6.

¹⁹⁸ Grześkowiak (2023), p 91.

¹⁹⁹ Schotel (2022), at p 87.

7 Conclusion

The EU–Belarus border is paradigmatic of the EU’s lawlessness law in action, where the Member States act in close cooperation with the EU institutions and agencies to achieve the destruction of rights and basic legal principles in an atmosphere of absolute impunity and lack of transparency and accountability. As a result, mass violations of non-citizen’s rights at the EU–Belarusian border are normalised and have become routine. Thanks to the combined efforts of the EU and the Member States to switch off the rule of law, the liminal border space is outwith the law. The direct and indirect victimisation of the racialised ‘other’ at the Union’s eastern border is a direct extension of the EU-sponsored war on the former colonials in the Mediterranean. This dramatic situation did not come about by chance. The EU together with the Member States have built a well-organised system to make sure that the whole spectrum of denying non-citizens’ rights—from dignity to the right to life—is never presented as a violation of EU law. The instrumentalisation of migrants and gross violations of the law are rhetorically justified by the actions of the dictatorial Belarusian regime emerging as a de facto partner of the EU and its Member States in torturing numerous people in complete disregard of any legal guarantees, solidifying the EU’s system of lawlessness law.

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