



WALLING OFF RESPONSIBILITY?

The Pushbacks at the EU's External Borders with Belarus



Sergio Carrera

CEPS Policy Insights

No 2021-18 / November 2021



Walling off Responsibility?

The Pushbacks at the EU's External Borders with Belarus

Sergio Carrera

Abstract

This paper examines the EU and international responses to the situation on the EU's external borders between Poland, Lithuania and Latvia with Belarus. It studies the scope and human rights impacts of current EU and national discourses framing the controversy as a 'hybrid war' and the set of restrictive national measures implemented on the EU-Belarusian frontier since July 2021. The Paper argues that border fencing and containment policies do not 'wall off' or exempt EU Member States from their own responsibility and liability for illegal pushbacks – summary expulsions without individual circumstances assessments, access to asylum procedures and due process or effective remedies – of third country nationals.

Pushbacks run contrary to the universal value of human dignity and the rule of law, and national policies putting them into effect must be read as examples of rule of law backsliding. They violate non-derogable or absolute human rights, including the non-refoulement principle and the prohibition against collective expulsions, and are incompatible with EU Schengen, asylum and returns law, as well as recent judgements by the European Court of Human Rights and the Court of Justice of the EU. Border fences are disproportionate by design and act as magnifying glasses of rule of law and human rights violations inherent to these malpractices.

The paper calls on EU Member States and the European institutions not to play by the same illiberal rulebook and pursue the same inhumane tactics as those practiced by the Belarusian regime. It recommends that the existing EU Schengen acquis is not amended to reflect the wrongdoings documented at the EU border with Belarus. European institutions and agencies, and all EU Member States involved should faithfully and effectively implement existing international and EU legal standards. They must unequivocally live up to their rule of law and human rights commitments as these are preconditions to the overall legitimacy of their own policies and the fundamental foundations and working principles of European integration.



ASILE
Global Asylum
Governance and
the European
Union's Role

This paper falls within the scope of the ASILE H2020 Project (*Global Asylum Governance and the EU's Role in Implementing the UN Global Compact on Refugees*). For more information please visit: www.asileproject.eu The ASILE project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement n° 870787. This document reflects only the author's view and the Commission

is not responsible for any use that may be made of the information it contains.

Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs Unit at CEPS. Sergio is also Visiting Fellow at the Migration Policy Centre (MPC) at the European University Institute (EUI) in Florence (Italy), Visiting Professor at the Paris School of International Affairs (PSIA) at Sciences Po (France), and Honorary Professor at the School of Law at Queen Mary, University of London (UK).

CEPS Policy Insights offer analyses of a wide range of key policy questions facing Europe. As an institution, CEPS takes no position on questions of European policy. Unless otherwise indicated, the views expressed are attributable only to the author in a personal capacity and not to any institution with which he is associated. Image credit: suriyawut, www.vecteezy.com/

Available for free downloading from the CEPS website (www.ceps.eu) © CEPS 2021

Contents

| | |
|--|----|
| 1. Introduction..... | 1 |
| 2. 'Hybrid war' or rule of law backsliding? | 2 |
| 3. National responses and their inhumane effects | 3 |
| 4. The ambivalence of EU responses | 5 |
| 5. Violating absolute rights in international law | 9 |
| 6. Incompatibility with the European Convention of Human Rights and EU law: What have the Strasbourg and Luxembourg Courts said thus far? | 11 |
| 6.1 Ensuring effective access to asylum procedures..... | 11 |
| 6.2 The irrelevance of the legal fiction of non-entry and irregularity | 12 |
| 6.3 The lack of genuine and effective legal means of admission..... | 15 |
| 7. Conclusions: Time to uphold human dignity and the rule of law in EU migration policies | 16 |

1. Introduction

Since summer 2021, the Polish, Lithuanian, Latvian and Estonian governments have voiced joint concerns¹ about an increase in the total number of irregular entry attempts by third country nationals at their external borders from the direction of Belarus. They accused the Belarusian regime of Alexander Lukashenko of orchestrating and systematically organising the travel arrangements of these third country nationals towards the EU's external borders in an attempt to put political pressure on them and destabilise the entire European Union (EU), following the imposition of a new set of EU sanctions that began on 24 May 2021². These same governments framed the events as a 'hybrid attack or threats' from the Belarusian regime, and as an attempt at 'weaponising refugees and immigrants'³.

This paper argues that there can be no border fences 'walling off' national and EU authorities' responsibilities towards the universal value of human dignity and the rule of law in the scope of migration and asylum policies. The EU's responses to the situation at the Schengen external borders with Belarus have given little to no consideration to the fact that the national measures which have been adopted and implemented at EU external borders by EU Member States include 'pushbacks'⁴ – summary expulsions without individual circumstances assessments and access to asylum procedures. Such measures violate crucial rule of law principles and non-derogable fundamental rights anchored in international law, the EU Treaties and EU secondary legislation, including the *non-refoulement* principle, the right to seek and obtain asylum and the prohibition against collective expulsions.

The primary aim of these rule of law principles and rights is preventing arbitrariness and abuse of power⁵ by ensuring the accountability of states and national authorities when implementing border and migration management policies. They seek to guarantee legal certainty, due process and effective access to justice for *every* person – irrespective of migration status – because of their *human dignity*, when their rights are violated by public authorities. And while the many undemocratic actions and human rights violations by the authoritarian Belarusian regime are indeed reprehensible, the EU and its Member States simply cannot play by the same illiberal rulebook and inhumane tactics. They must live up to their rule of law and human rights commitments, as they are preconditions to the legitimacy of their own policies and the very foundations of European integration.

¹ Joint Statement of the Prime Ministers of Poland, Lithuania, Latvia and Estonia (2021), on the hybrid attack on the borders by Belarus, 23 August 2021, retrievable from <https://www.gov.pl/web/nato-en/statement-of-the-prime-ministers-of-poland-lithuania-latvia-and-estonia-on-the-hybrid-attack-on-our-borders-by-belarus>

² European Council (2021a), Conclusions on Belarus, Special meeting of the European Council, EUCO 5/21, 24 and 25 May 2021, Brussels.

³ Joint Statement by the Assembly of the Seimas of the Republic of Lithuania and the Sejm and Senate of the Republic of Poland (2021), on irregular migration at the EU's external border, 20 October 2021, retrievable from https://www.lrs.lt/sip/portal.show?p_r=35403&p_k=2&p_t=278631

⁴ European Union Agency for Fundamental Rights (FRA) (2020), Migration: Fundamental Rights Issues at External Borders, Report, Vienna.

⁵ Council of Europe, European Commission for Democracy through Law (Venice Commission) (2016), Rule of Law Checklist, CDL-AD(2016)007rev, Strasbourg.

2. 'Hybrid war' or rule of law backsliding?

The official framing of the situation at the EU's external borders with Belarus by some national and EU officials as a 'hybrid war or threat', and the labelling of third country nationals as 'weapons' or even as 'human shields'⁶, along with the presentation of the situation as 'unmanageable'⁷ despite the relatively low numbers of reported irregular entries by national authorities⁸, have achieved precisely the opposite results. It has dehumanised the conversation and disregarded that people summarily expelled or stranded between the EU and Belarusian borders are in fact human beings who must be treated with equal dignity and be granted the right to seek and obtain asylum in the EU.

Some EU governments, interior ministers and representatives of the European institutions are behaving *as if* migration policies are something 'exceptional' when compared to other policy areas, especially when it comes to upholding the rule of law and human rights commitments. This is fundamentally flawed. National constitutions, the EU Treaties and EU Schengen, migration and asylum law say it loud and clear: Member States are indeed responsible for the management of the common EU external borders. But they *must* do so in full compliance with international refugee protection and human rights standards, and in a fashion where the rule of law and constitutional check and balances prevail.

True, liberal states and EU institutions and agencies have often 'ruled by law' exclusionary actions or restrictive policies that negatively impact the fundamental rights and access to justice by third country nationals. Yet, as argued by Habermas (2001)⁹, the rule of law - and its intersection with human rights and democracy¹⁰ - functions at the same time as 'sensors' for exclusionary practices exercised in their name. It is this 'recapturing capacity' of the law that is central at times for assessing the migration management policies adopted at the EU's external borders with Belarus. The 'symbiosis' or embeddedness between the rule of law and fundamental rights in the EU legal system nurtures the overall *legitimisation* of the EU's and Member States' border, asylum and migration policies; and yet, it is this symbiosis that is most at stake in the ongoing migration controversy with the Belarusian regime.

⁶ The Guardian (2021a), People used as 'living shields' in migration crisis, says Polish PM – video, 21 November 2021, available at <https://www.theguardian.com/world/video/2021/nov/21/people-living-shields-migration-polish-pm-video-belarus-morawiecki>

⁷ Politico (2021a), Lithuania slams shut the door to the EU for irregular migrants, 1 September 2021, available at <https://www.politico.eu/article/lithuania-migrants-eu-asylum-belarus-alexander-lukashenko/>

⁸ According to the European Commission, as of 16 November, during 2021 the total number of arrivals from Belarus has been 7 698, corresponding with 4 222 in Lithuania, 3 062 in Poland and 414 in Latvia. European Commission and High Representative of the Union for Foreign Affairs and Security (2021), Joint Communication, Responding to state-sponsored instrumentalisation of migrants at the EU external border, JOIN(2021) 32 final, 23.11.2021, Brussels.

⁹ J. Habermas (2001), *The Post-National Constellation: Political Essays*, Max Pensky.

¹⁰ S. Carrera, E. Guild and N. Hernanz (2013), *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, CEPS e-Book, Brussels.

The 'warlike' official framing and rhetoric of the situation has in turn justified the adoption of highly restrictive national measures between July and November 2021. These need to be understood as clear instances of 'rule of law backsliding'¹¹ or a premediated and instrumental conscious choice on the part of certain EU governments not to apply EU, international and national constitutional rules, and a refusal to allow access to asylum procedures and reception conditions to anyone in need.

3. National responses and their inhumane effects

The main policy responses by Member States sharing the EU's external border with Belarus have included the declaration of an 'extraordinary situation' by Lithuania¹² and a 'state of emergency' by Latvian and Polish authorities¹³. They have also increased the number of military troops deployed on their borders, as well as erecting of new border fences¹⁴. This has been in tangent with the passing of national laws¹⁵ and the adoption of legislative proposals¹⁶ aimed at containing the possible entry of asylum seekers at all costs or simplifying expulsion procedures back towards Belarus, even in cases where third country nationals have made an application for international protection. The militarisation of the border and the state of emergency originally adopted by the Polish government in early September 2021, and extended since

¹¹ L. Pech and K.L. Scheppele (2017), *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies, Vol. 19, pp. 3–47.

¹² ECRE (2021), *Extraordinary Responses: Legislative Changes in Lithuania 2021*, Brussels, retrievable at <https://ecre.org/wp-content/uploads/2021/09/Legal-Note-11.pdf>

¹³ InfoMigrants (2021), *Poland: Border crackdown extended amid fears more migrants may die*, 1 October 2021, available at <https://www.infomigrants.net/en/post/35460/poland-border-crackdown-extended-amid-fears-more-migrants-may-die>

¹⁴ The Guardian (2021b), *Migrants face 'desperate situation' at Poland-Belarus border*, 9 November 2021, available at <https://www.theguardian.com/global-development/2021/nov/09/unacceptable-migrants-face-desperate-situation-at-poland-belarus-border>; and Politico (2021b), *Poland plans border wall with Belarus*, 13 October 2021, available at <https://www.politico.eu/article/poland-belarus-migration-border-security-alexander-lukashenko/>

¹⁵ LRT (2021), *UNHCR: Lithuania's pushback policy 'illegal'*, 11 October 2021, available at <https://www.lrt.lt/en/news-in-english/19/1517865/unhcr-lithuania-s-pushback-policy-illegal>

¹⁶ Helsinki Foundation for Human Rights (HFHR) (2021), *Access to Asylum Denied at Polish-Belarus Border*, 24 September 2021, available at <https://www.hfhr.pl/wp-content/uploads/2021/09/HFHR-Access-to-asylum-denied-in-Poland-Sep-2021.pdf>; ECRE (2021b), *Poland: Parliament Approves 'Legalisation' of Pushbacks, Council of Ministers Adopt Bill to Construct Border Wall, Another Life is Lost at Border with Belarus*, 15 October 2021, retrievable at <https://ecre.org/poland-parliament-approves-legalisation-of-pushbacks-council-of-ministers-adopt-bill-to-construct-border-wall-another-life-is-lost-at-border-with-belarus/>; and UNHCR (2021a), *UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)*, 13 September 2021, available at <https://www.refworld.org/pdfid/61434b484.pdf>

then¹⁷, has also meant a ban on civil society actors (including those providing legal aid)¹⁸, human rights organisations and the media from having access to the people in need of humanitarian assistance at the border.

Despite the many barriers that have been put up by national authorities to hinder the independent monitoring of the situation, the practical and dramatic effects of these EU Member States' measures have been documented¹⁹. People looking for international protection have been systematically and collectively denied entry without an examination of their asylum claims or personal and family circumstances. Civil society sources have showed how they have been automatically escorted to the border line and in some cases forcibly 'pushed back' to Belarus without access to an individualised assessment²⁰ of their circumstances or an asylum procedure, and in some cases, families have been separated. Many people have been abandoned or left in a state of destitution without adequate reception services and have been unable to meet their basic needs, such as access to water and food, clothing and shelter.

An indeterminate number of asylum seekers have even died, including minors²¹. Many others continue to be stranded at the border, unable to either enter the EU or return to Belarus. A video recording recently made available has showed violent clashes and the use of water

¹⁷ DW (2021), Polish president declares 'state of emergency' at Belarus border amid migration row, 2 September 2021, available at <https://www.dw.com/en/polish-president-declares-state-of-emergency-at-belarus-border-amid-migration-row/a-59063418>; and Notes from Poland (2021), Poland extends state of emergency on Belarus border following stormy debate in parliament, 1 October 2021, available at <https://notesfrompoland.com/2021/10/01/poland-extends-state-of-emergency-on-belarus-border-following-stormy-debate-in-parliament/>

¹⁸ Fundacja Ocalenie (2021), Letter to Commissioner Johansson, Humanitarian emergency on the Polish-Belarus Border, 29 September 2021, Warsaw.

¹⁹ Amnesty International (2021), Poland/Belarus Border: A Protection Crisis, available at <https://www.amnesty.org/en/latest/research/2021/09/poland-belarus-border-crisis/>; IOM (2021a), Conditions for Migrants at EU-Belarus Border of Utmost Concern, 6 September 2021, available at <https://www.iom.int/news/conditions-migrants-eu-belarus-border-utmost-concern>; see also M. Górczyńska and M. Szczepanik (2016), A road to nowhere. The account of a monitoring visit at the Brześć-Terespol border crossing between Poland and Belarus, Helsinki Foundation for Human Rights, Warsaw.

²⁰ EUobserver (2021), Frontex documents 'collective expulsion' in Lithuania, 8 October 2021, retrievable at <https://euobserver.com/migration/153161>; and Council of Europe Commissioner for Human Rights (2021), 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, 19 November 2021, available at <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu>; IOM and UNHCR (2021a), IOM and UNHCR Call for Immediate De-escalation at the Belarus-Poland Border, 9 November 2021, available at <https://www.iom.int/news/iom-and-unhcr-call-immediate-de-escalation-belarus-poland-border>

²¹ IOM and UNHCR (2021b), IOM and UNHCR Shocked and Dismayed by Deaths Near Belarus-Poland Border, 21 September 2021, available at <https://www.iom.int/news/iom-and-unhcr-shocked-and-dismayed-deaths-near-belarus-poland-border>; and The Guardian (2021c), One-year-old Syrian child dies in forest on Poland-Belarus border, 18 November 2021, available at <https://www.theguardian.com/world/2021/nov/18/one-year-old-syrian-child-dies-in-forest-on-poland-belarus-border>

cannon and teargas fired against migrants and refugees by the Polish authorities²². Reportedly, some of the asylum seekers have been recently brought to a 'transport and logistics center' by Belarusian security forces, yet at the time of writing, irregular attempts to enter the EU and subsequent expedited expulsions are continuing to occur²³.

4. The ambivalence of EU responses

In a letter²⁴ dated 7 October 2021, the Interior Ministries of eight Member States (Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Greece, Hungary and Slovakia) expressed their support towards what they called 'resolute measures' adopted by the Polish, Lithuanian, Latvian and Estonian governments to address the 'aggression' by the Belarusian regime and the 'instrumentalisation of illegal migration for political purposes and other hybrid threats.' The same letter requested the European Commission to reform the Schengen *acquis* to foresee what Member States can do 'to protect our external borders with a maximum level of security...in case of a hybrid attack characterised by an artificially created large scale inflow of irregular migrants, facilitated, organised and/or pushed by a third country for the purpose of exerting political pressure.' The interior ministers called in particular for the use of 'physical barriers' or border fences that would be fully financed by the EU budget. The European Council President, Charles Michel, supported this idea by saying that the EU could legally fund border fences²⁵.

During her State of the Union Speech on 15 September 2021, Commission President Ursula von der Leyen addressed the situation at the EU's external borders with Belarus and stated that 'this is a hybrid attack to destabilise Europe', adding that 'The regime in Minsk has instrumentalised human beings. They have put people on planes and literally pushed them towards Europe's borders²⁶.' However, President von der Leyen publicly opposed the idea of EU-sponsored border fencing and expressed that 'there will be no funding of barbed wire and

²² The Guardian (2021d), Poland-Belarus border crisis: water cannon and teargas fired at migrants – video report, 16 November 2021, retrievable from <https://www.theguardian.com/world/video/2021/nov/16/poland-belarus-border-crisis-water-cannon-and-teargas-fired-at-migrants-video-report>

²³ Politico (2021c), Belarus clears migrant camps at Polish border, 18 November 2021, available at <https://www.politico.eu/article/belarus-migrant-camps-border-poland/>

²⁴ EU Ministers of Interior (2021), Letter to Margaritis Schinas Vice-President, European Commission, Ylva Johansson Commissioner for Home Affairs, European Commission, Adaptation of the EU legal framework to new realities, 7 October 2021, available at https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf

²⁵ Politico (2021d), Michel opens door to EU funding for border walls, 10 November 2021, available at <https://www.politico.eu/article/eu-money-for-border-infrastructure-legally-possible-charles-michel-says/>

²⁶ European Commission (2021a), 2021 State of the Union Address by President von der Leyen, Strasbourg, 15 September 2021.

walls²⁷.' This reflects a long-standing critical view by the previous Juncker Commission to a similar request previously advanced by the Hungarian government back in 2017²⁸.

The Commission's Renewed EU Action Plan on Human Smuggling (2021-2025), adopted on 29 September 2021, identifies a 'highly worrying phenomenon observed recently...the increasing role of State actors in artificially creating and facilitating irregular migration, using migratory flows as a tool for political purposes', which the Action Plan labelled as 'state-sponsored smuggling²⁹.' The Action Plan called for the phenomenon to be tackled 'jointly by the EU and its Member States'.

At the end of September 2021, the EU Commissioner for Home Affairs, Ylva Johansson, recommended that Frontex (the EU agency that is essentially the EU's common border force and coast guard, ironically based in Warsaw) be deployed and receive access to the Polish-Belarusian external borders³⁰. The idea was until recently refused by the Polish government, which on the other hand requested Frontex support in facilitating expulsions. This contrasts with the situation in Lithuania, where 104 Frontex European border guard teams have been deployed since July 2021 to support national authorities in border surveillance and border management, including with patrol cars, as well as two Europol Guest Officers. Lithuanian authorities have also worked with the Commission, Frontex and the International Organization for Migration (IOM) to reinforce their 'return capacity³¹'.

The European Asylum Support Office (EASO, now called the EU Asylum Agency) has also deployed 73 experts to Lithuania to assist both in its asylum and reception systems and perform tasks focused on enhancing the capacity in registering of applications, processing asylum applications and the reception of applicants³². Lithuania has also benefited from EUR 36.7 million in emergency aid under the Asylum, Migration and Integration Fund³³, and additional

²⁷ The Guardian (2021e), Ursula von der Leyen says EU will not fund 'barbed wire and walls', 22 October 2021, available at <https://www.theguardian.com/world/2021/oct/22/ursula-von-der-leyen-says-eu-will-not-fund-barbed-wire-and-walls>

²⁸ Politico (2021e), Juncker slaps down Orbán over border funding request: 'Solidarity is a not an à la carte dish,' Commission president tells Hungarian premier, 5 September 2017, retrievable from <https://www.politico.eu/article/juncker-slaps-down-orban-over-border-funding-request/>

²⁹ European Commission (2021b), Communication, A renewed EU action plan against migrant smuggling (2021-2025) COM(2021) 591 final, 29.9.2021.

³⁰ Politico (2021f), Poland faces blowback over its migrant policy: Brussels wants Polish government to use Frontex to help control the border, 30 September 2021, available at <https://www.politico.eu/article/poland-faces-blowback-over-its-migrant-policy/>

³¹ Frontex News Release (2021), Frontex provides support for Lithuania, Latvia at their borders with Belarus, 1 July 2021, Warsaw, available at <https://frontex.europa.eu/media-centre/news/news-release/frontex-provides-support-for-lithuania-latvia-at-their-borders-with-belarus-hqTC5M>

³² EASO News Events (2021), Lithuania to receive immediate operational support from EASO, 15 July 2021, available at <https://www.easo.europa.eu/news-events/lithuania-receive-immediate-operational-support-easo>

³³ European Commission (2021c), Commission approves €36.7 million to support migration management in Lithuania, Daily News, 141 August 2021, available at https://ec.europa.eu/commission/presscorner/detail/ro/mex_21_4181

assistance within the scope of the EU Civil Protection Mechanism (UPCM)³⁴. Frontex and EASO are also present on the Latvian external border with Belarus, where there are seven Frontex border police officers and nine EASO experts.

Another key component of the European Commission's response has been 'home affairs or migration diplomacy' and the sanctioning of airline companies. Commission Vice-President Schinas and High Representative/Vice-President Borrell have been travelling to and liaising with the main countries of origin – such as Iraq – and transit countries³⁵. HRVP Borrell travelled to Iraq, Commissioner Johansson to Turkey and Commission Vice-President Schinas toured Iraq, Lebanon, the United Arab Emirates and Turkey. The objective has been to persuade these countries to prevent their own nationals from leaving their territories and to facilitate cooperation with the EU on returns or expulsion operations. The European Commission has put high pressure on the Iraqi authorities³⁶ – including the activation of Article 25a of the EU Visa Code³⁷ – to cooperate on readmissions with the EU, including on 'non-voluntary returns' of their own citizens. Iraq has therefore suspended direct flights from Baghdad to Belarus and on 15 November 2021 announced the organisation of a 'repatriation flight' to citizens voluntarily willing to return to the country³⁸.

With regard to the specific airline carriers, the EU's focus has been to dissuade and force third country airlines to suspend flights or refuse to accept travellers from certain destination countries at the risk of potentially facing sanctions³⁹. As a consequence of EU pressure, Turkish Airlines announced on 12 November 2021 that they would no longer carry passengers from Iraq, Syria or Yemen⁴⁰, which was followed by a similar announcement by Belarusian state-owned carrier Belavia⁴¹. A recent Joint Commission and HRVP Communication 'Responding to

³⁴ European Commission (2021d), EU helps channel humanitarian support to migrants in Lithuania, European Civil Protection and Humanitarian Aid Operations, 23 July 2021, available at https://ec.europa.eu/echo/news/eu-helps-channel-humanitarian-support-migrants-lithuania_en

³⁵ European Commission (2021e), Statement by President von der Leyen on the situation at the border between Poland and Belarus, 8 November 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5867

³⁶ Politico (2021g), EU presses Iraq to halt migrant flights to Belarus: A number of new flights have been announced between Iraq and Belarus, 5 August 2021, available at <https://www.politico.eu/article/belarus-migrant-flights-eu-sanctions-iraq-turkey/>

³⁷ ECRE (2021b), Playing the Visa Card? ECRE's Assessment of the EU's Plans to Use Visa Leverage to Increase Readmission to Third Countries, Policy Note, Brussels, available at <https://www.ecre.org/wp-content/uploads/2021/06/Policy-Note-36-Playing-the-Visa-Card-June-2021.pdf>

³⁸ DW (2021b), Poland-Belarus border crisis: Iraq to start repatriating citizens, 15 November 2021, available at <https://www.dw.com/en/poland-belarus-border-crisis-iraq-to-start-repatriating-citizens/a-59818946>

³⁹ DW (2021c), Belarus crisis: Airlines threatened with sanctions, 19 November 2021, available at <https://www.dw.com/en/belarus-crisis-airlines-threatened-with-sanctions/a-59884167>

⁴⁰ DW (2021d), Turkey bars some Middle Eastern nationals from flying to Belarus, 12 November 2021, retrievable at <https://www.dw.com/en/turkey-bars-some-middle-eastern-nationals-from-flying-to-belarus/a-59801324>

⁴¹ Aljazeera (2021), Belarusian airline stops flying Middle East citizens from Turkey, 12 November 2021, available at <https://www.aljazeera.com/news/2021/11/12/belarus-to-stop-flying-syrians-iraqis-and-yemenis-from-turkey>

state-sponsored instrumentalisation of migrants at the EU external border’, published on 23 November 2021, advances a new legislative Proposal for a Regulation ‘to prevent and restrict the activities of transport operators that engage in or facilitate smuggling or trafficking of people into the EU⁴²’. The proposal aims to blacklist transport operators and lays down possible penalties which include, in addition to relevant national criminal and administrative penalties, the suspension of the right to provide transport services from, to or within the EU, transit or to fly over the EU’s territory. It also envisages the possibility to suspend licences or authorisations granted under Union law.

The EU has also arranged and adopted a set of follow-up sanctions on the Belarusian regime. Following Belarus’ decision to stop the application of the EU Readmission Agreement (which entered into force in January 2020) and block the return of third country nationals from the bordering EU Member States⁴³, the Council of the EU adopted on 9 November 2021 a partial suspension of the EU-Belarus Visa Facilitation Agreement for officials linked to the Belarusian regime, including members of Belarusian official delegations, the Belarusian national and regional governments and parliaments, the Belarusian Constitutional Court and Supreme Court⁴⁴. Furthermore, on 15 November 2021, the Council amended the sanctions regime, enabling the EU to ‘target individuals and entities organising or contributing to activities that facilitate illegal crossing of the EU’s external borders.’

The Joint Commission and HRVP Communication ‘Responding to state-sponsored instrumentalisation of migrants at the EU external border’ mentions that the Commission is now, at the time of writing, drafting a new legislative proposal on the matter. The initiative is expected to be based on Article 78.3 of the Treaty on the Functioning of the European Union (TFEU). This provision offers the possibility to the Commission to propose ‘provisional measures’ in response to ‘an emergency situation characterised by a sudden inflow of nationals of third countries’, subject to qualified majority voting in the Council and a very limited role for the European Parliament, which only needs to be consulted.

Article 78.3 TFEU was used in 2015 to adopt the temporary relocation decisions⁴⁵ of asylum seekers from Greece and Italy during the so-called ‘European refugee humanitarian crisis’. The Joint Commission/HRVP Communication emphasises that the objective of these measures will be

⁴² European Commission (2021f), Proposal Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union, COM(2021) 753 final, Strasbourg, 23.11.2021.

⁴³ Politico (2021h), Belarus parliament blocks returning migrants: There is a surge of undocumented migrants trying to enter the EU from Belarus, 4 October 2021, retrievable at <https://www.politico.eu/article/belarus-migration-europe-latvia-lithuania-poland-refugees/>

⁴⁴ Council of the EU (2021), Belarus: Council suspends visa facilitation provisions for officials of the Belarus regime, Press Release, 9 November 2021, available at <https://www.consilium.europa.eu/en/press/press-releases/2021/11/09/belarus-council-suspends-visa-facilitation-provisions-for-officials-of-the-belarus-regime/>

⁴⁵ S. Carrera, S. Blockmans, D. Gros and E. Guild (2015), The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities, CEPS Essay, Brussels.

to support 'Latvia, Lithuania and Poland in managing the current situation in a controlled and swift manner, while fully respecting fundamental rights and international obligations.' The Communication shares that 'the Commission is in contact with these Member States, providing technical advice on their legislation to ensure consistency with the respect of fundamental rights and EU law.' This sentence sends a clear signal about the Commission's doubts regarding the inconsistency of the national responses outlined in Section 3 above with the EU Charter of Fundamental Rights, EU secondary legislation and international law.

5. Violating absolute rights in international law

The EU-Belarus controversy even reached the agenda of the November 2021 UN Security Council (UNSC) meeting, where all represented EU Member States, plus Norway, the United Kingdom, the United States and the incoming Security Council member Albania issued a Joint Statement condemning the actions of the Belarusian regime and calling on Belarusian authorities 'to stop these inhumane actions and not to put people's lives at risk', as well as allow access for relevant international organisations to deliver humanitarian assistance⁴⁶.

However, the UNSC Joint Statement failed to include any self-criticism nor refer to the intrinsic incompatibility of EU Member States' own practices and policies with international and European laws, which has been raised by several UN bodies. For example, the UN High Commissioner for Human Rights, Michelle Bachelet, commented on the Belarus-Poland border situation, stating that she was 'appalled' about how refugees and migrants continued to be left in a desperate situation and with some even being allowed to die. She urged 'the States involved to take immediate steps to de-escalate and resolve this intolerable situation in line with their obligations under international human rights law and refugee law⁴⁷'.

The United Nations High Commissioner for Refugees (UNHCR)⁴⁸ and the IOM⁴⁹ issued a Joint Statement reminding all the states involved of 'the imperative to prevent further loss of life and ensure the humane treatment of migrants and refugees as the highest priority' and to uphold their international obligations.⁵⁰ A UNHCR analysis of the legislative amendments put forward

⁴⁶ Joint Statement (2021), Estonia, France, Ireland, Norway, the UK, the US and the incoming UNSC member Albania on the Belarusian authorities' activities with regard to the instrumentalisation of migrants, 11 November 2021, available at <https://un.mfa.ee/joint-stakeout-by-estonia-france-ireland-norway-the-uk-the-us-and-the-incoming-uns-member-albania-on-the-belarusian-authorities-activities-with-regard-to-the-instrumentalisation-of-migrants/>

⁴⁷ United Nations High Commissioner for Human Rights (2021), Comment on the Belarus-Poland border situation, 10 November 2021, Geneva, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27791&LangID=E>

⁴⁸ UNHCR (2021a), UNHCR calls for an end to the impasse on the Polish-Belarusian border, 24 August 2021, available at <https://www.unhcr.org/pl/13303-unhcr-apeluje-o-zakonczenie-impasu-na-granicy-polsko-bialoruskiej.html>

⁴⁹ IOM (2021b), Conditions for Migrants at EU-Belarus Border of Utmost Concern, 6 September 2021, available at <https://www.iom.int/news/conditions-migrants-eu-belarus-border-utmost-concern>

⁵⁰ IOM and UNHCR (2021b), IOM and UNHCR Call for Immediate De-escalation at the Belarus-Poland Border, 9 November 2021, available at <https://www.iom.int/news/iom-and-unhcr-call-immediate-de-escalation-belarus-poland-border>

by Poland, Lithuania and Latvia has concluded that they are incompatible with the right to seek and obtain asylum, and it has insisted that ‘a State which is presented with an asylum request at its borders is required to provide admission, at least on a temporary basis to examine the asylum claim, as the right to seek asylum and the non-refoulement principle would otherwise be rendered meaningless⁵¹’.

A group of United Nations Special Rapporteurs⁵² reiterated the obligation by the Polish government and other EU Member States’ authorities to fully respect the human rights of all the individuals involved and to ensure that all ‘all migrants, regardless of status, have the right to seek and enjoy protection’. The Rapporteurs called all EU governments to work together to save the lives of all those stranded at their common border, by offering life-saving medical assistance, food, clean water and adequate shelter. They also requested a thorough investigation on the cases of reported deaths on the border by the Polish and Belarusian authorities.

The Council of Europe Human Rights Commissioner, Dunja Mijatović, called on 19 November 2021 for immediate and unimpeded access by civil society and human rights actors and the media to Poland’s border with Belarus, and raised serious concerns on the effects of the Polish government’s ban on access to areas adjacent to the border, which has prevented international organisations and NGOs from providing much-needed humanitarian assistance and human rights monitoring⁵³. She also expressed deep concerns on the way in which prohibiting media coverage undermines freedom of expression and information and prevents transparency and accountability. She then proceeded to demand an immediate stop to ‘reprisals, harassment and intimidation’ directed against humanitarian assistance actors. The Human Rights Commissioner called on the Polish government to put an end to the state of emergency and remove current restrictions applicable to civil society and the media, which has been also supported by the OSCE Parliamentary Assembly⁵⁴.

⁵¹ UNHCR (2021b), UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265), 13 September 2021, available at <https://www.refworld.org/pdfid/61434b484.pdf>; UNHCR (2021c), UNHCR observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518), 13 October 2021, available at <https://www.refworld.org/docid/61767bea4.html>; and LRT (2021), UNHCR: Lithuania’s pushback policy ‘illegal’, 11 October 2021, available at <https://www.lrt.lt/en/news-in-english/19/1517865/unhcr-lithuania-s-pushback-policy-illegal>

⁵² United Nations Special Rapporteurs (2021), Belarus and Poland: Stop sacrificing migrant lives to political dispute—UN Special Rapporteurs, 6 October 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27615&LangID=E>

⁵³ Council of Europe Commissioner for Human Rights (2021), 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, 19 November 2021, available at <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu>

⁵⁴ OSCE Parliamentary Assembly (2021), Migrants and Locals are Victims as Human Rights Challenged in Poland-Belarus Border Area, say the OSCE Parliamentary Leaders, 18 October 2021, available at

6. Incompatibility with the European Convention of Human Rights and EU law: What have the Strasbourg and Luxembourg Courts said thus far?

The above-mentioned national responses run contrary to legal standards and the safeguards envisaged in EU Schengen, asylum and returns law and in recent judgements by the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU), in particular those related to ensuring effective access to asylum procedures (*Section 6.1*); the irrelevance of the legal fiction of non-entry and irregularity (*Section 6.2*); and the lack of genuine and effective legal means of admission (*Section 6.3*).

6.1 Ensuring effective access to asylum procedures

The implementation of pushbacks at the EU's eastern border with Belarus is unfortunately not a new phenomenon. In the recent past, the Polish authorities have been notorious for not duly and effectively implementing ECtHR rulings and interim measures calling on them to stop 'pushbacks' to Belarus. Before the current controversy, the ECtHR had ruled in the 2020 *M.K. and Others v. Poland*⁵⁵ and 2021 *D.A. and Others v. Poland*⁵⁶ cases that the Polish authorities had violated the ECHR for not ensuring effective access to asylum procedures to applicants for international protection from Belarus. The Court concluded that the Polish authorities pursued a *wider state policy* – which highlighted its systematic nature – of not receiving asylum claims and engaging in unlawful expulsions to Belarus. The ECtHR also found that Belarus is not a 'safe third country' for refugees and people seeking asylum. It also found that expulsions were contrary to the absolute prohibition of inhuman and degrading treatment, as well as the *non-refoulement* principle, collective expulsions and the absence of effective remedies in the hands of third country nationals.

The most recent malpractices characterising recent EU external border policies towards Belarus reached the Strasbourg Court in August and September 2021. The ECtHR issued a set of Rule 39 interim measures (*R.A. and Others v Poland* and *Ahmed and Others v. Latvia* of 25 August 2021 and *A.S. and Others v Lithuania* of 8 September 2021)⁵⁷ explicitly requesting the Latvian, Lithuanian and Polish authorities to halt the expedited expulsions of third country nationals from Iraq and Afghanistan stranded at the border. It requested national authorities to 'provide all the applicants with food, water, clothing adequate medical care and – if possible - temporary shelter'. The ECtHR also asked the Polish authorities to allow applicants' access to their lawyers.

<https://www.oscepa.org/en/news-a-media/press-releases/press-2021/migrants-and-locals-are-victims-as-human-rights-challenged-in-belarus-poland-border-area-say-osce-parliamentary-leaders>

⁵⁵ European Court of Human Rights (2020a), Case *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17 and 43643/17, 14 December 2020.

⁵⁶ European Court of Human Rights (2021a), Case *D.A. and Others v. Poland*, Application no. 51246/17, 8 July 2021.

⁵⁷ European Court of Human Rights (2021b), Press Release, Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland, ECHR 244 (2021), 25 August 2021; European Court of Human Rights (2021c), Press Release, Court indicates interim measure in respect of Afghan nationals at the Lithuanian Belarusian border, ECHR 265 (2021) 08 September 2021.

The response by the Polish government⁵⁸ highlighted that the persons involved remained in Belarusian territory and implementing the Interim Measure would mean interfering with Belarus' sovereign integrity in international law. However, the Polish government's response disregards its own responsibility in pushing those people back to Belarus and the extraterritorial application of human rights jurisdiction advanced by the ECtHR's own jurisprudence.

6.2 The irrelevance of the legal fiction of non-entry and irregularity

The extent to which the third country nationals entangled in the Belarus controversy have either formally or illegally arrived, or are considered to have actually entered Polish, Lithuanian or Latvian territory is not relevant for declaring responsibility in cases of human rights violations. Non-entry and irregularity, and therefore the use of border fences or physical barriers to achieve this, do not exempt them from their obligations and liability.

ECtHR jurisprudence has consistently held that parties are responsible even when they artificially frame part of their territory as 'non-territory' or 'transit zones' or use the legal fiction of 'non-entry', including through the use of border fences and other physical barriers (2020 *N.D. and N.T. v Spain* case)⁵⁹. This extends to when they act extraterritorially in border surveillance activities, including pushbacks carried out at sea (e.g. 2012 *Hirsi Jamaa v. Italy* case)⁶⁰. The connecting factor for unlocking states' liability remains the extent to which the individuals at hand have been, or are, under the jurisdiction or *de facto/de jure* control by States' authorities.

EU Member States must also provide access to an asylum procedure and examine the asylum requests on their merits. This is a fundamental condition to ensuring the universally recognised principle of *non-refoulement*, according to which no one should be expelled to a country where she or he may risk facing torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. During the assessment of these claims, national authorities are required to allow these people to stay or remain under their jurisdiction until they have been reviewed by the competent national authority. This, the ECtHR has added, is fully consistent with the provisions laid down in EU law⁶¹, in particular the Schengen Borders Code and the Asylum Procedures Directive.

⁵⁸ Polish Ministry of Interior and Administration (2021), Poland provided the ECHR with its position on the order for interim measures, 30 September 2021, available at <https://www.gov.pl/web/mswia-en/poland-provided-the-echr-with-its-position-on-the-order-for-interim-measures>

⁵⁹ European Court of Human Rights (2020b), Case *N.D. and N.T. v Spain*, Applications nos. 8675/15 and 8697/15, 13 February 2020. For an analysis see S. Carrera (2020), The Strasbourg court judgement 'N.D. and N.T. v Spain': a 'carte blanche' to push backs at EU external borders?, EUI RSCAS Working Paper, 2020/21, Florence.

⁶⁰ European Court of Human Rights (2012), Case *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012.

⁶¹ M. Górczyńska (2021), Legal Analysis of the Situation on the Polish-Belarusian Border Situation on: 9 September 2021, Helsinki Foundation for Human Rights, available at <https://www.hfhr.pl/wp-content/uploads/2021/09/Legal-analysis-ENG.pdf>

Furthermore, in the above-mentioned 2021 *D.A. and Others v. Poland* ruling, the ECtHR underlined that EU Member States are bound to follow ECHR standards, irrespective of whether people looking for international protection and who are seeking to irregularly enter EU Member States' territories come from a transit country, and not directly from their country of origin. This is compatible with the widely recognised international obligations that states do not penalise refugees 'on account of their illegal entry or presence' (Article 31.1 of the 1951 Geneva Convention), and not to criminalise migrants subject to human smuggling (Article 5 of the United Nations Protocol against the Smuggling of Migrants).

A similar line of reasoning has been advanced by the CJEU in the Case C-821/19, *European Commission v Hungary*⁶², published on 16 November 2021. The CJEU found that the Hungarian government had violated EU asylum law, and more specifically the EU Asylum Procedures Directive (Article 33.2.)⁶³. It had done this by passing a national law that considers transit through a third country as a key connecting factor for automatically rejecting an application for international protection, declaring such an application as 'inadmissible'. As a result of this law, Hungarian authorities had proceeded with subsequent unlawful expulsions to Serbia.

In the above-mentioned *N.D. and N.T. v Spain* judgement the ECtHR exempted States from the obligation to provide an individualized procedure and a decision on expulsion if the lack of such a tool 'can be attributed to the applicants' own conduct'. However, as I have argued elsewhere⁶⁴, the automatic application of the 'own conduct doctrine' to fundamental rights which are absolute in nature and accept no derogation is manifestly unfounded and legally misleading.

Furthermore, the ECtHR own conduct approach sits uneasily in the scope of EU law. In the EU legal system, the link to determine EU Member States' responsibilities is taken a step further. It is additionally concerned with the extent to which states' actions/inactions – including expulsions within the scope of both border controls and border surveillance – fall within the scope of EU law, which provides a larger set of safeguards and rights in comparison to the ECHR.

In a ruling on 17 December 2020, *European Commission v Hungary*,⁶⁵ and differently from a previous ruling on this same matter by the ECtHR, the Luxembourg Court found that the systematic practice implemented by the Hungarian authorities of keeping asylum seekers in a

⁶² Court of Justice of the European Union (2021), *European Commission v Hungary*, Case C-821/19, 16 November 2021.

⁶³ Directive (2013), 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, 26 June 2013, OJ L 180, 29 June 2013.

⁶⁴ S. Carrera (2020), The Strasbourg court judgement 'N.D. and N.T. v Spain': a 'carte blanche' to push backs at EU external borders?, EUI RSCAS Working Paper, 2020/21, Florence. Here I concluded that the Strasbourg Court should abandon this approach as it is "incompatible to the ECtHR mandate envisaged in Article 19 of the ECHR, which requires it to primarily and solely assess the extent to which the 'High Contracting Parties' observe their engagements under the ECHR and its Protocols, so that all States parties secure everyone's human rights within their jurisdiction (Article 1 ECHR). It opens questions regarding the impartiality and independence of the judges composing the Grand Chamber in this judgement, which is contrary to the Rules of the Court", page 10.

⁶⁵ Court of Justice of the European Union (2020), *European Commission v Hungary*, Case C-808/18, 17 December 2020.

transit zone situated at the border fence between Hungary and Serbia constituted ‘detention’ under Article 43 of the Reception Conditions Directive⁶⁶ and Article 8.3 of the Asylum Procedures Directive. Furthermore, the CJEU underlined that the Hungarian government had violated EU asylum law and this was irrespective of the fact that depriving asylum seekers of liberty was part of a ‘border procedure’ that artificially framed them as not having formally entered Hungarian territory. On 12 November 2021, the Commission referred the Hungarian government to the CJEU for failure to comply with this judgement⁶⁷.

Border and migration management and human rights are not in fact necessarily antagonistic. They can and should go hand-to-hand. This is not a matter of ‘choice’ for EU governments. It is a legal obligation enshrined for instance in the 2016 Schengen Borders Code Regulation (SBC)⁶⁸, which in several provisions establishes that border controls and surveillance must be carried out in full compliance with international protection and the *non-refoulement* principle, as well as a right to appeal in cases of rejected entry. Article 7 of the SBC requires border controls to ‘fully respect human dignity’ and be conducted ‘in a professional and respectful manner and be proportionate to the objectives pursued’.

Due process and procedural guarantees extend beyond border checks at specific EU external border crossing points, and cover border surveillance activities, where the SBC needs to be read in combination with the provisions laid down in the EU Asylum Procedures and Returns Directives. Recital 26 of the Asylum Procedures Directive stipulates that its scope of application covers ‘officials who first come into contact with persons seeking international protection, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks’.

Also, and unless EU Member States have not expressly made use of Article 2.1 of the EU Returns Directive⁶⁹, due process guarantees apply to third-country nationals who ‘are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border’. The Polish, Lithuanian and Latvian authorities have made use of

⁶⁶ Directive (2013), 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), of 26 June 2013, OJ L 180, 29 June 2013. This conclusion differed from the one reached by the ECtHR in the Case *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019, where the Strasbourg Court held that the applicants had not been deprived of liberty or ‘detained’ by the Hungarian authorities. In contradiction to its mandate, the ECtHR gave priority to “the rights of States to control migration” over their obligation to comply with individuals’ human rights under the ECHR.

⁶⁷ European Commission (2021h), Press Release, Migration: Commission refers Hungary to the Court of Justice of the European Union over its failure to comply with Court judgment, 12 November 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5801

⁶⁸ Regulation (2016), 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 9 March 2016, OJ L 77, 23 March 2016.

⁶⁹ Directive (2008), 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L 348, 24 December 2008.

this option. Yet they remain bound by the fundamental right of good administration (Article 41 of the EU Charter of Fundamental Rights) and Article 4.4 of the Returns Directive. This Article requires EU Member States to carry out expulsions in a way which is proportionate and not exceeding reasonable force, and with due respect of the dignity and physical integrity of the individual involved, including the *non-refoulement* principle.

Furthermore, while the SBC does not explicitly prohibit the use of border fences or physical barriers by EU Member States, the Achilles heel of border fences is their inherent lack of proportionality. They also act as magnifying glasses for a disproportionate use of violence⁷⁰ and the above-mentioned pushbacks by competent national authorities and/or EU agencies.

6.3 The lack of genuine and effective legal means of admission

According to recent Eurostat asylum statistics⁷¹, the countries of origin of many of the people 'pushed back' or stranded between the EU and Belarus come from states – such as Afghanistan, Syria and Iraq – which are internationally recognised as refugee-producing countries or whose nationals are granted international protection statuses (subsidiary protection) across the EU, both in first instance decisions and after appeal following a first instance negative decision. National and EU policymakers have given little to no regard to the fact that there are currently no genuine and effective means of legal entry for refugees and asylum seekers aiming to come to the EU.

The new Commission legislative proposal blacklisting transport operators mentioned above in Section 4 pays no attention whatsoever to the negative impacts that sanctioning and the criminalisation of airline companies raises in respect of the human right to leave a country⁷², including one's own, which is enshrined in major international human rights instruments. It is crucial to consider and study the way in which this policy gap, and the obstacles raised by multi-layered EU migration management instruments, actually co-creates and nurtures irregularity and undocumented mobility, as well as human smuggling and the loss of lives along the various trajectories both towards and inside Europe.

The non-availability of legal means of admission also runs contrary to EU Member States' obligations under the ECHR, and their commitments to the United Nations Global Compacts on Migration and Refugees. In the above-mentioned 2020 *N.D. and N.T. v Spain* case, the ECtHR held that states parties are under the obligation to design and deploy genuine and effective

⁷⁰ S. Carrera (2020), The Strasbourg court judgement 'N.D. and N.T. v Spain' : a 'carte blanche' to push backs at EU external borders?, EUI RSCAS Working Paper, 2020/21, Florence.

⁷¹ Eurostat, Asylum Statistics, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics

⁷² E. Guild (2013), The Right to Leave a Country, Issue Paper by the Council of Europe Commissioner for Human Rights, Strasbourg.

legal options and means for obtaining lawful entry by third country nationals into their territories, including those seeking asylum and refugees.

The UN 2016 New York Declaration and the Global Compact on Migration (GCM)⁷³ both recognise the fundamental role played by the rule of law, due process and access to justice in migration governance. The GCM additionally underlines the commitment by signatories to ‘enhance availability and flexibility of pathways for regular migration’ in a manner which ‘facilitates labour mobility and decent work...and upholds the right to family life’. The UN Global Compact on Refugees (GCR)⁷⁴ complements this by recalling the legally binding nature of the international refugee protection regime, centred on the cardinal *non-refoulement* principle, and called for a wider use of resettlement and other ‘complementary admission pathways’ by states, including humanitarian visas, humanitarian corridors and other humanitarian admission programmes.

7. Conclusions: Time to uphold human dignity and the rule of law in EU migration policies

The unfolding situation on the EU’s external borders with Belarus is once again testing the principles and values upon which the EU is founded. Compliance by all EU Member State governments and the EU institutions and agencies to the rule of law and fundamental rights principles and the EU Charter of Fundamental Rights are conditions *sine qua non* for the existence of mutual trust in the functioning and survival of the entire EU legal system, as well as its common policies in areas such as asylum and borders.

By refusing to provide legal means for entry and admission, as well as access to asylum procedures and reception conditions, and by illegally pushing people back to Belarus, relevant EU governments on the EU’s eastern external border have played a key role in co-manufacturing and nurturing an ‘emergency’, causing tremendous instability to the entire EU. The restrictive set of national measures implemented by the Polish and Lithuanian governments have constituted ‘pull factors’ and provided fertile ground for political blackmailing by the Belarusian regime. Instead of calmly and consistently delivering EU legal standards and principles to deal with the situation, their responses have followed very similar inhumane tactics to those practiced by the Belarusian government and have nurtured the political instability sown by the Lukashenko regime.

There are a few key lessons to be learned here. Overreliance by the EU on third country cooperation arrangements that are focused on containing the number of entries by third

⁷³ United Nations (2016), New York Declaration for Refugees and Migrants, A/71/L.1*, available at https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/ODG/GCM/NY_Declaration.pdf; and United Nations (2018), Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, 11 January 2019, available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195

⁷⁴ United Nations (2018), Global Compact on Refugees, A/73/12 (Part II), 2 August 2018, available at https://www.unhcr.org/gcr/GCR_English.pdf

country nationals, has been ineffective and inconsistent with EU principles⁷⁵. The lack of EU and national policies that genuinely and effectively provide legal means of admission for asylum seekers and immigrants and the absence of a fairer model for sharing inter-state responsibility in assessing asylum applications co-create irregularity, onward movements and human smuggling. This also exposes the entire EU internationally, making it vulnerable to the political interests and changing agendas of third countries and neighbouring states.

As advanced by the European Parliament in a Motion for a Resolution on the situation in Belarus on 4 October 2021⁷⁶, it is imperative for all EU institutions to expressly condemn and resist any attempts by any Member State government to 'wall-off' their rule of law and fundamental rights responsibilities in the scope of EU borders, asylum and migration policies. Current developments cannot be disentangled from the Polish government's rule of law backsliding and its successful attempts to systematically undermine the independence of its judiciary. Indeed, the Polish Constitutional Court ruling of 7 October 2021, questioning the primacy of EU law and the role of the CJEU, has been said to indicate the end of the era of 'mutual trust' in the EU criminal justice cooperation⁷⁷. The systematic use of pushbacks by any Member State along the EU external borders similarly undermines mutual trust and the principle of mutual recognition of administrative decisions in the scope of the Schengen and asylum *acquis*.

The proposed EU legal reforms of the Schengen and asylum *acquis* by some EU interior ministers should be resisted. As stated by Commissioner Johansson: 'Pushbacks should never be normalised. Pushbacks should never be legalised⁷⁸.' National policies in countries like Poland and Lithuania legalise malpractices which run directly contrary to their obligations in international law, the European Convention of Human Rights and EU law. There cannot be physical barriers to EU values and non-derogable human rights. Border fences and physical barriers are simply disproportionate by design and act as magnifying glasses of rule of law and human rights violations inherent to these pushbacks. The European Commission should not financially support and put the 'EU logo' on the design and implementation of disproportionate and inhumane border policies which both by their nature and their impact are contrary to the very foundations of a Union anchored on the universal values of human dignity and the rule of law.

⁷⁵ S. Carrera and A. Geddes (2021), The EU Pact on Migration and Asylum in light of the UN Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights, EUI RSCAS e-Book, Florence.

⁷⁶ European Parliament (2021), Motion for a Resolution on the situation in Belarus after one year of protests and their violent repression (2021/2881(RSP)), 4 October 2021, available at https://www.europarl.europa.eu/doceo/document/B-9-2021-0488_EN.html

⁷⁷ P. Bárd and A. Bodnar (2021), The end of an era: The Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust, CEPS Policy Insight, Brussels.

⁷⁸ European Commission (2021g), Speech, Commissioner Johansson's speech at the Plenary debate on pushbacks at the EU external border, 20 October 2021, available at https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-speech-plenary-debate-pushbacks-eu-external-border_en

Instead, priority should be given to a more effective and timely enforcement of existing EU legal standards in the Schengen *acquis* and existing EU asylum law. This should go hand in hand with ensuring effective EU and national independent investigations on what has occurred on the EU's external borders with Belarus.

If anything, these events have shown the crucial importance to ensuring access to legal aid, reception conditions and humanitarian assistance by non-governmental actors in such situations. They have also made clear the pressing need to establish an independent and effective EU monitoring and complaint mechanism⁷⁹ across all the EU's external borders. Such a mechanism should be composed of independent border monitors, with the participation of civil society actors and relevant international organisations. These would be empowered to be present during border surveillance and border control activities, to conduct unannounced visits and inspections of border surveillance authorities' establishments and files, to communicate directly with national prosecutorial authorities, and to gather real-time information on the practices undertaken by national authorities and EU agencies such as Frontex.

The role of EU agencies, such as Frontex or the EU Asylum Agency, play an increasingly crucial role in coordinating and delivering operational support in border management and to the asylum policies of EU Member States. However, there are still important unresolved issues regarding their direct and indirect responsibility in cases of fundamental rights violations.⁸⁰ EU agencies should be required to 'freeze' or suspend their operational activities in cases where there is evidence of clear violations of fundamental rights and the Schengen and EU asylum legal standards by national authorities. In this regard, and if that is not the case, the European Parliament should 'freeze' EU financial or budgetary support to their operational activities.

In short, legal accountability and access to justice to those whose dignity and rights have been violated must be fully ensured. There must not be any complacency and impunity for policies which run contrary to the European Union's identity and its core fundamental principles.

⁷⁹ E. Brouwer, G. Campesi, S. Carrera, R. Cortinovis, E. Karageorgiou, J. Vedsted-Hansen and L. Vosyliute (2021), The European Commission's legislative proposals in the New Pact on Migration and Asylum, Study for European Parliament (LIBE Committee), Brussels; and

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 1 January – 31 December 2020, 30th General Report of CPT, Strasbourg: Council of Europe, pp. 15-16.

⁸⁰ European Parliament (2021), Working Document, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, 14 July 2021, Brussels; EUobserver (2021), Dutch lawyers take Frontex to EU Court over pushbacks, 21 October 2021, available at <https://euobserver.com/migration/153294>