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“Crisis Rhetoric” and Derogations from the AFSJ: Is EU Asylum Policy Discriminatory or does its Implementation Reflect the Rule of Law?

La “retórica de la crisis” y las derogaciones al ELSJ: ¿Es la política de asilo de la UE discriminatoria o su aplicación refleja el Estado de Derecho?

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“Crisis Rhetoric” and Derogations from the AFSJ: Is EU Asylum Policy Discriminatory or does its Implementation Reflect the Rule of Law?

*La “retórica de la crisis” y las derogaciones al ELSJ:
¿Es la política de asilo de la UE discriminatoria o su aplicación
refleja el Estado de Derecho?*

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Summary: I. Introduction.—II. Securitization of Migration and the ‘Crisis Narrative’.—III. Comparison of Crisis Rhetoric. 1. The European Migration Crisis 2015/16: “What if they are terrorists?”. 2. The Belarus Border Crisis 2021/22: “This is a new form of war, a hybrid attack!”. 3. The Ukraine Refugee Crisis 2022 and ongoing: “We have to protect our European family!”.—IV. Parallels in Law. 1. The European Migration Crisis 2015/16: Collapse of the CEAS. 2. The Belarus Border Crisis 2021/22: Enhanced fortification at the Border. 3. The Ukraine Refugee Crisis 2022 and ongoing: A Temporary Protection Regime.—V. Conclusions: Reflections on Effects and Consequences.

Abstract: This paper analyses the language of EU leaders and its influence on the implementation of EU asylum law by triggering derogations, exceptions and amendments. It compares this process with regards to the 2015 refugee crisis, the Belarus border crisis and the current Ukrainian crisis to portray how the reaction to similar facts differs and, hence, to show how EU asylum policy suffers from a lack of rule of law. As the crisis in Ukraine unfolds, one can observe how strongly the narrative of EU leaders differs regarding these refugees compared to those from, e.g., Syria and Afghanistan in previous years. It shows a “U-turn” of the EU’s agenda since 2015. Hence, it has become clear that the problem lies less in sufficient contingencies for a sudden influx, but rather a feeling – or lack – of solidarity. From a legal perspective, there is no distinction between the responsibility for asylum applicants based on their nationality. To the contrary, refugee protection builds on the prohibition of discrimination. This has potentially negative implications for the rule of law in the EU. Hence, this paper investigates

how EU leaders “talk” their way into applying or not applying EU law and even create EU law at their will simply by describing the arrivals as a security threat, a “hybrid attack” or instead as neighbors in need, as “family”.

Keywords: Crisis, refugees, CEAS, enforcement, discrimination

Resumen: *Este artículo analiza el lenguaje de los líderes de la UE y su influencia en la aplicación de la legislación de la UE en materia de asilo al provocar derogaciones, excepciones y modificaciones. Compara este proceso con respecto a la crisis de los refugiados de 2015, la crisis fronteriza de Bielorrusia y la actual crisis ucraniana para retratar cómo difiere la reacción ante hechos similares y, por tanto, para mostrar cómo la política de asilo de la UE adolece de una falta de Estado de Derecho. A medida que se desarrolla la crisis de Ucrania, se puede observar cómo difiere la narrativa de los líderes de la UE con respecto a estos refugiados en comparación con los de, por ejemplo, Siria y Afganistán en años anteriores. Muestra un «giro de 180 grados» de la agenda de la UE desde 2015. Por lo tanto, ha quedado claro que el problema no radica tanto en las contingencias suficientes para una afluencia repentina, sino en el sentimiento —o la falta— de solidaridad. Desde el punto de vista jurídico, no hay distinción entre la responsabilidad de los solicitantes de asilo en función de su nacionalidad. Por el contrario, la protección de los refugiados se basa en la prohibición de la discriminación. Esto tiene implicaciones potencialmente negativas para el Estado de Derecho en la UE. Por lo tanto, este documento investiga cómo los líderes de la UE «hablan» para aplicar o no aplicar el derecho de la UE e incluso crean el derecho de la UE a su antojo simplemente describiendo a los que llegan como una amenaza para la seguridad, un «ataque híbrido» o, en cambio, como vecinos necesitados, como «familia».*

Palabras clave: Crisis, retórica, asilo, migración, SECA, aplicación, discriminación

I. Introduction

If there is anything the aftermath of the 2015 ‘refugee crisis’ has shown, it is probably that mass influx situations are by no means as exceptional as the European public discourse portrayed them back then. Although the number of arrivals to the European Union (EU) had dropped by spring 2016¹, the situation remained fragile. In 2020, Turkey was threatening to break their deal with the EU and to stop preventing refugees from arriving to Greece². In 2021, the international forces withdrew from Afghanistan causing applications of Afghans to rise again and Belarus purposefully brought refugees to the Polish, Lithuanian and Latvian borders³. Finally, in 2022, Russia invaded Ukraine and caused another massive displacement crisis⁴.

How we talk about these different incidents with different causes and characteristics in Europe seems to vary. And this matters, also from a legal perspective, because the respective semantics either cause or at least accompany different legal responses. Especially, the unfolding of the Ukrainian crisis pointed out, how strongly the storytelling of EU leaders differs regarding these refugees compared to those from, e.g., Syria and Afghanistan in previous years. The contrast is particularly obvious in view of the recent ‘emergency’ at the Belarusian border. In the latter case, the long emerging trend of securitization of asylum issues hand in hand with the fortification of the EU external borders was continued. In March 2022, the concerns of many EU Member States (Member States), particularly those who have been most vocal before, about their lack of resources to receive refugees seemed to have vanished in the face of the war in Ukraine. The EU has even found consensus to activate the Tempo-

¹ “Annual Asylum Statistics,” EUROSTAT Statistics Explained, March 18, 2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Annual_asylum_statistics.

² Achilles Skordas, “The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law (Part I),” *EU Immigration and Asylum Law and Policy* (blog), May 5, 2020, <http://eumigrationlawblog.eu/the-twenty-day-greek-turkish-border-crisis-and-beyond-geopolitics-of-migration-and-asylum-law-part-i/>.

³ “Broad Increase in Applications for Asylum, Including by Afghans,” Text, EUROPEAN ASYLUM SUPPORT OFFICE, August 18, 2021, <https://www.easo.europa.eu/news-events/broad-increase-applications-asylum-including-afghans>; Madeline Roache, “Death at the EU Border: Migrants Pay the Price of Belarus’s ‘Hybrid Warfare,’” *OpenDemocracy*, November 15, 2021, <https://www.opendemocracy.net/en/odr/death-at-the-eu-border-migrants-pay-the-price-of-belaruss-hybrid-warfare/>.

⁴ “Timeline: The Events Leading up to Russia’s Invasion of Ukraine,” *Reuters*, March 1, 2022, sec. Europe, <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/>.

rary Protection Directive (TPD)⁵, which had been declared dead letter before and was supposed to be replaced under the Commissions’ proposals for a “New Pact on Migration and Asylum”⁶.

This constitutes a U-turn of the EU’s agenda since 2015. Hence, it has become clear that the problem lies less in sufficient contingencies for a sudden large-scale influx, but rather a feeling – or absence – of solidarity⁷. From a legal perspective, there is no distinction between the responsibility for asylum applicants based on their nationality. To the contrary, refugee protection builds on the prohibition of discrimination⁸.

This has potentially negative implications for the rule of law in the EU. It seems that Member States, such as Austria, Hungary or Poland, have relied on the ‘crisis narrative’ – legally – for internal border closures and – illegally – for evading obligations to receive asylum applicants under Art 72 of the Treaty on Functioning of the European Union (TFEU). The framing of facts to fulfil certain legal thresholds has gone far in the last years, with i.a. Poland demanding EU support for border fences and the EU actually beginning to fulfil these demands in the face of a ‘hybrid threat’. The drastically different handling of the new crisis in Ukraine puts a sense of hypocrisy on this framing.

Hence, this paper seeks to investigate how EU leaders ‘talk’ their way into applying or not applying EU law and even create EU law at their will simply by describing the arrivals as a security threat, a ‘hybrid attack’ or instead as neighbors in need, as ‘family’. This paper demonstrates the language of EU leaders and compares the parallels in the implementation (or non-implementation) of EU asylum law by triggering derogations, exceptions and amendments. It compares this process with regards to the 2015 refugee crisis, the Belarus border crisis and the current Ukrainian crisis to portray how the reaction to similar facts differs and, hence, to show how EU asylum policy suffers from a lack of rule of law.

⁵ Directive 2001/55/EC of July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences thereof [2001] OJ L 212/12 (Temporary Protection Directive, TPD).

⁶ See Commission, ‘Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM (2020) 613 final.

⁷ See further Eleni Karageorgiou and Gregor Noll, “What Is Wrong with Solidarity in EU Asylum and Migration Law?,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 26, 2021), <https://doi.org/10.2139/ssrn.3974596>.

⁸ Compare Julia Kienast, Nikolas Feith Tan and Jens Vedsted-Hansen, “Preferential, differential or discriminatory? EU protection arrangements for persons displaced from Ukraine” (ASILE) (blog), April 27, 2022, <https://www.asileproject.eu/preferential-differential-or-discriminatory-eu-protection-arrangements-for-persons-displaced-from-ukraine/>

II. Securitization of Migration and the ‘Crisis Narrative’

The securitization of migration is a trend that can be observed since several decades⁹. Whereas in the very beginning of border regimes and the control of access to state territory trade and health concerns were at the forefront¹⁰ nowadays migration is frequently viewed as a balancing act between human rights and security concerns¹¹.

A general assumption of potential security threats connects border and migration control to asylum. There is little to argue with, when it comes to control over territorial access, since internal security is one of the key domains of sovereign states. However, the subtle connection of asylum and security seems to work to the detriment of persons who seek protection in Europe. For example, the threat that asylum seekers will participate in terrorist acts seems low in view of the probability of attacks in general and the convictions of forced migrants¹². In the few cases that occurred, it was usually years after entering the territory and, thus, did not stand in direct connection to the border crossing¹³. Yet, the public fear persists¹⁴.

At this point, politicians can use the emotionally charged atmosphere¹⁵. Just like in terrorism, the notion of a ‘migration crisis’ allows politicians to benefit from the public support created by fear and

⁹ See already Julia Kienast, “Forced Migrants as a Security Threat: Challenging Criminalization Trends in Austria under Presumed Links of Asylum and Terrorism,” in *Terrorism and Asylum*, ed. James C. Simeon, International Refugee Law Series (Leiden, Boston: Brill NV, 2020), 343–72.

¹⁰ Jovan Pešalj, ‘The Mobility Control of the Ottoman Migrants in the Habsburg Monarchy in the Second Half of the Eighteenth Century’ in Harald Heppner and Eva Posch (eds), *Encounters in Europe’s Southeast: The Habsburg Empire and the Orthodox World in the Eighteenth and Nineteenth Centuries*, vol 5 (Winkler 2012) 55.

¹¹ Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press, 2016), 3, <https://doi.org/10.1093/acprof:oso/9780198776833.001.0001>.

¹² Compare statistics elaborated in Kienast, “Forced Migrants as a Security Threat: Challenging Criminalization Trends in Austria under Presumed Links of Asylum and Terrorism.”

¹³ Elspeth Guild, “Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19,” *European Journal of Migration and Law* 23, no. 4 (December 21, 2021): 394, <https://doi.org/10.1163/15718166-12340111>.

¹⁴ Fritz Plasser and Franz Sommer, *Wahlen Im Schatten Der Flüchtlingskrise: Parteien, Wähler Und Koalitionen Im Umbruch*, Schriftenreihe Des Zentrums Für Angewandte Politikforschung, Band 33 (Wien: Facultas, 2018), 52.

¹⁵ Plasser and Sommer, *Wahlen im Schatten der Flüchtlingskrise*, 86; Nils Coleman, ‘From Gulf War to Gulf War - Years of Security Concern in Immigration and Asylum Policies at European Level’, in *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe*, ed. Elspeth Guild and Anneliese Baldaccini (Boston: Brill Nijhoff, 2007), 83 f.

perceived loss of control. Additionally, the social process of ‘othering’ plays an important role in this area for allowing the unequal treatment of migrants due to the reduction of solidarity¹⁶. In Austria, for instance, migration was a constant topic in the 2017 election campaigns and often convoluted with vague security concerns¹⁷. The image of a dangerous situation to be dealt with by the government or other leaders can be a very powerful tool in this sense¹⁸. Politicians can easily rely on it and, thereby, prioritize an issue on their agenda and in their communications, sometimes even create legislation and specialised institutions¹⁹. Therefore, this fear and the demand to deal with the perceived security threat by the electorate can cause the encroachment on individual rights, which otherwise would not find broad public support²⁰.

Especially, the term ‘crisis’ has proven itself as an effective tool here, since it is a very wide term without any defined legal meaning in most jurisdictions, and it has, thus, become a frequently used term²¹. The various existing understandings, usually refer to some sort of danger that must be urgently addressed²². In addition, the term ‘mass influx’ is only vaguely defined in legal instruments and, hence, has a similar quality as ‘crisis’. There is no clear definition, e.g. at which number of asylum applications a situation arises to a ‘mass influx’. The UNHCR Executive Committee

¹⁶ See David L. Altheide, “Terrorism and the Politics of Fear,” *Cultural Studies ↔ Critical Methodologies* 6, no. 4 (2006): 419 f; for the social process of “othering” and how it is regulating discourse see Michael Schwalbe *et al.*, “Generic Processes in the Reproduction of Inequality: An Interactionist Analysis,” *Social Forces* 79, no. 2 (December 2000): 434 ff.

¹⁷ Plasser and Sommer, *Wahlen Im Schatten Der Flüchtlingskrise*, 149.

¹⁸ *Ibid.* 86 f. In election campaigns, the opposition frequently uses this tool as well, either to deny the competence of the governing politicians or to emphasise their own competence to handle the crisis.

¹⁹ Tom Cockcroft, “Late Modernity, Risk and the Construction of Fear of Crime,” in *Crime, Media and Fear of Crime*, ed. Gorazd Meško *et al.* (Ljubljana: Tipografija, 2009), 19 f; Altheide, “Terrorism and the Politics of Fear,” 418 ff, 432 ff; Mike Berry, Inaki Garcia-Blanco, and Kerry Moore, “Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries” (Report prepared for the United Nations High Commission for Refugees (UNHCR), December 2015), 7 ff, <https://www.unhcr.org/56bb369c9.pdf>.

²⁰ See Altheide, “Terrorism and the Politics of Fear,” 417, 426 ff; Ruth Wodak, *The Politics of Fear: What Right-Wing Populist Discourses Mean* (London: Sage, 2015), 5; Sonia Suchday, Amina Benkhoukha, and Anthony F. Santoro, “Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective,” in *Psychology of Fear, Crime, and the Media: International Perspectives*, ed. Derek Chadee, Researching Social Psychology (New York, NY: Routledge, Taylor & Francis Group, 2016), 107 ff.

²¹ See Klaus Merten, ‘Krise, Krisenmanagement und Krisenkommunikation’ in Ansgar Thießen (ed), *Handbuch Krisenmanagement* (2nd edn, Springer VS 2014) 156.

²² Arjen Boin, Magnus Ekengren, and Mark Rhinard, *The European Union as Crisis Manager: Patterns and Prospects*. (Cambridge: Cambridge University Press, 2013), 5.

(ExCom) in its Conclusion 100 attempts a definition of mass influx and characterises it by considerable numbers of people arriving over an international border with a rapid rate of arrival and an inadequate absorption or response capacity in host States as well as individual asylum procedures that are unable to deal with the assessment of such large numbers²³. Yet, this definition leaves open what constitutes a considerable number or a rapid rate and, therefore, does not give a clear-cut frame for when to apply these guidelines²⁴. Hence, in a displacement crisis, which causes increased asylum applications to Europe, politicians have a wide playing field with these terms. This seems to create a particular challenge for the rule of law in this legal field, as is to be demonstrated in the chapters below.

A thorough semantic analysis of all statements and developments in media coverage of the three incidents covered would go beyond the scope of this paper. For this reason, the next chapter is rather to be seen as a summary of the overall narrative of the three incidents as observed by the author²⁵.

III. Comparison of Crisis Rhetoric

1. *The European Migration Crisis 2015/16: “What if they are terrorists?”*

The security narrative as set out above picked up particularly after the terrorist attacks on 9/11, 2001. At that point, the media landscape developed in a new manner and drastically influenced public perception and politics since then²⁶. Similarly, media attention on migration has increased in new ways since 2015²⁷. EUROSTAT shows that in 2015 and

²³ UNHCR ExCom Conclusion No 100 (LV) ‘Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations’ (2004).

²⁴ See Alice Edwards, ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13 Melbourne Journal of International Law 595, 603.

²⁵ Since two of the incidents are still ongoing and started fairly recently, analysis from communications sciences might be underway. For an analysis of media coverage in 2015/16 see Michael Haller, ‘Die „Flüchtlingskrise“ in den Medien: Tagesaktueller Journalismus zwischen Meinung und Information’ (Otto Brenner Stiftung 2017). Berry, Garcia-Blanco, and Moore, “Press Coverage.”

²⁶ See e.g. Altheide, “Terrorism and the Politics of Fear,” 423 ff; Suchday, Benkhokha, and Santoro, “Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective”; Jennifer S. Lerner *et al.*, “Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment,” *Psychological Science* 14, no. 2 (March 2003): 144–50.

²⁷ Plasser and Sommer, *Wahlen Im Schatten Der Flüchtlingskrise*, 140 ff.

2016, the EU received respectively approximately 1.2 million asylum applications²⁸. Especially, in autumn 2015, these persons arrived with a rapid rate and media attention was very much focused on these occurrences, including pictures that showed the dramatic scenes²⁹.

The fear of security loss is only one of several attached to migration, which generally has an ‘intimate relationship’³⁰ to fear³¹. However, it is particular regarding its influence on the law and its enforcement regarding the link to border controls as mentioned above³². For instance, the Institut de Publique Sondage d’Opinion Secteur (IPSOS) conducted a survey in 2017, which found that 59 percent of the persons interviewed thought that terrorists pretended to be refugees to enter their country³³. Amongst other factors, this is connected to the overly simplified way in which information on such incidents is disseminated³⁴.

The focus on security rather than on humanitarian issues is also reflected in the EU’s management of the 2015/16 Crisis. By way of example, a statement by (then) First Vice-President, Frans Timmermans, and Migration and Home Affairs Commissioner, Dimitris Avramopoulos, on 27 August 2015 shows this approach. It reads:

The news of the 50 migrants found asphyxiated in the hull of a ship last night, and the lost souls of 20 or more migrants discovered abandoned in a truck on an Austrian highway today are frankly shocking.

²⁸ Annual Asylum Statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844

²⁹ See e.g. William Spindler, “2015: The Year of Europe’s Refugee Crisis,” UNHCR, December 8, 2015, <https://www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html>.

³⁰ For the “intimate relationship” of fear and terrorism see Suchday, Benkhokha, and Santoro, “Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective,” 98 ff.

³¹ Magdalena Pöschl, “Migration Und Mobilität,” Gutachten für den 19. Österreichischen Juristentag, 2015, 9 ff sets out these different fears with regards to Austria, including: (1) fear of poverty; (2) fear of infiltration by outer enemies (foreign-policy); (3) fear of security loss; (4) fear of foreign diseases or the exploitation of the health system; (5) financial fears; and (6) fear of ‘otherness’ (cultural perspective). For similar observations in Germany see Jürgen Bast, *Aufenthaltsrecht und Migrationssteuerung*, Jus Publicum 207 (Tübingen: Mohr Siebeck, 2011).

³² See further Guild, “Schengen Borders and Multiple National States of Emergency.”

³³ IPSOS, “Global Views on Immigration and the Refugee Crisis” (IPSOS, September 2017), 22, 24, https://www.ipsos.com/sites/default/files/ct/news/documents/2017-09/ipsos-global-advisor-immigration-refugee-crisis-slides_0.pdf; see also James Dennison and Andrew Geddes, “OP-ED: Are Europeans Turning against Asylum Seekers and Refugees?,” *European Council on Refugees and Exiles (ECRE)* (blog), November 17, 2017, <https://www.ecre.org/op-ed-are-europeans-turning-against-asylum-seekers-and-refugees/>.

³⁴ Wodak, *The Politics of Fear*, 12.

These are sinister, criminal acts, carried out by smugglers with no scruples whatsoever. (...)

The Commission put that European response on the table - from increasing our presence at sea, to cooperating with countries of origin and transit, to clamping down on smuggling networks, making returns more effective and implementing the recently adopted common EU asylum rules whilst showing solidarity with frontline countries – we have to address the issue from all angles. We already announced that further proposals will come soon³⁵.

There are many press releases and statements from that time and, generally, they emphasize the necessity to interject migrants at sea, to cooperate with countries of origin and transit, to fight smuggling networks, to make returns more effective and to show solidarity with ‘frontline Member States’. These statements and measures show, how the focus is set on the perspective of a state or government dealing with unwanted arrivals. If attention is paid to the suffering of arriving persons, it is often in the context of pointing out the malice of smugglers. Although the entanglement of asylum with the topics of terrorism and external border controls only fully fledged after the attacks in France in November 2015³⁶, the earlier Commission Opinion finding internal border closures in Germany and Austria legitimate already relied on the terrorism argument³⁷. As set out in the section above, this security narrative is frequently engaged with on the national level and, in particular, by right-wing populist politics³⁸. Pushing this emergency theme in daily rhetoric holds the advantage for governments that they can more or less legitimately rely on derogations that hold exceptions, for instance, for threats to public order and public security or similar. How this played out during the 2015/16 crisis will be discussed below in Chapter IV.1.

³⁵ “Statement by First Vice-President Frans Timmermans and Migration and Home Affairs Commissioner Dimitris Avramopoulos,” Text, European Commission, August 27, 2015, https://ec.europa.eu/commission/presscorner/detail/en/statement_15_5544; see further “Refugee Crisis,” Text, European Commission, September 9, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_15_5596.

³⁶ As addressed e.g. in “Remarks of Commissioner Dimitris Avramopoulos at the Press Conference on the Preparation of the 20 November JHA Council,” Text, European Commission, November 18, 2015, https://ec.europa.eu/commission/presscorner/detail/en/speech_15_6125.

³⁷ Commission, ‘Opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)’ C (2015) 7100 final.

³⁸ See in detail Kienast, “Forced Migrants as a Security Threat: Challenging Criminalization Trends in Austria under Presumed Links of Asylum and Terrorism.”

2. *The Belarus Border Crisis 2021/22: “This is a new form of war, a hybrid attack!”*

Although there were several other incidents in which asylum applications rose again since spring 2016³⁹, the Belarus Border Crisis since autumn 2021 highlights a particularly interesting aspect of the crisis narrative⁴⁰. It was truly a humanitarian tragedy unfolding at the Belarusian border with Latvia, Lithuania and Poland, for which these states declared a national state of emergency. Migrants were deliberately brought to these borders by the Lukashenko regime in order to put pressure on the affected Member States and, thus, on the EU as a whole. Since the respective Member States were determined not to give in to this intimidation attempt by the Belarus regime, the affected migrants were effectively caught between the borders without humanitarian assistance in European winter⁴¹.

The number of persons arriving to the EU borders with Belarus were not even close to the ‘mass influx’ threshold that the EU experienced in 2015/16. This time, approximately 50,000 attempts to cross the border were estimated.⁴² Yet, the circumstances of their arrival, i.e. the intent of Belarus politics, made this situation into a crisis for EU leaders. The proposal for a Council Decision makes this clear with its opening sentence: ‘*The European Council Conclusions of 21 and 22 October 2021 underlined the EU’s non-acceptance of any attempt by third countries to instrumentalise migrants for political purposes*’⁴³.

³⁹ “Asylum Quarterly Report,” March 23, 2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_quarterly_report.

⁴⁰ See already Julia Kienast, “„Krise“ an der belarussischen Grenze und wie die Kommission das Feuer weiter anfacht,” *Blog Asyl* (blog), February 16, 2022, <https://www.blogasyl.at/2022/02/krise-an-der-belarussischen-grenze-und-wie-die-kommission-das-feuer-weiter-anfacht/>.

⁴¹ Madeline Roache, “Death at the EU Border”; Florian Hassel, “Polen und Belarus: Tote im Grenzgebiet,” *Süddeutsche.de*, December 9, 2021, <https://www.sueddeutsche.de/politik/belarus-polen-1.5484464>; Balkan Investigative Reporting Network, “Polish Forest Full of Fear,” accessed May 23, 2022, <https://balkaninsight.com/polish-forests/>.

⁴² According to Izabela Surwillo and Veronika Slakaityte, ‘Fortifying the EU’s Eastern Border Countering Hybrid Attacks from Belarus | DIIS’ <<https://www.diis.dk/en/research/fortifying-the-eus-eastern-border-countering-hybrid-attacks-from-belarus>> accessed 22 May 2022 there were ca 50,000 irregular attempts to cross the border from Belarus between August 2021 and March 2022. Similar numbers are listed in Commission, ‘Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland’ COM (2021) 752 final, 2.

⁴³ Commission, ‘Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland’ COM (2021) 752 final, 1.

The new wording to describe this situation was particularly drastic, as it was called a ‘hybrid attack’⁴⁴. This spin leans on military jargon and, thus, again engages with the security narrative in the context of asylum⁴⁵. Recital 5 of the proposal even states that the instrumentalization of protection seekers by Belarus constitutes a ‘real threat’ and endangers the security of the Union. Whether these assumptions correspond to the factual situation may be questioned. The language chosen implies the Commission’s desire to legitimize its actions with a considerable negative impact on the people at the border by framing asylum seekers as a ‘weapon’ and emphasizing the exceptional nature and danger of its own situation.

3. *The Ukraine Refugee Crisis 2022 and ongoing: “We have to protect our European family!”*

The crisis at the Belarus’ border was still ongoing at the outbreak of the war in Ukraine. Especially Poland, one of the primary countries of arrival for Ukrainians, has a much different approach to them leading to a schizophrenic situation at their border. On the Belarus site, refugees from the Middle East are fended off with all means. At the Ukrainian borders, humanitarian assistance is at the forefront⁴⁶. A spokesperson for Poland’s special services ministry has been asked on this situation and reportedly stated that the situation on the border with Belarus is ‘an artificial migratory movement created by Lukashenko’s regime and orchestrated by Belarusian services’ and that it cannot be compared to ‘the movement of those fleeing from war waged by Russia against Ukraine’⁴⁷.

Accordingly, European politicians surprised many observers of EU migration and asylum policy in early March 2022⁴⁸. With the Russian

⁴⁴ Commission, ‘Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland’ COM (2021) 752 final.

⁴⁵ See Agata Kleczkowska, “What Does the ‘Hybrid Attack’ Carried out by Belarus against the EU Borders Mean in Reality? An International Law Perspective,” *EJIL: Talk!* (blog), December 13, 2021, <https://www.ejiltalk.org/what-does-the-hybrid-attack-carried-out-by-belarus-against-the-eu-borders-mean-in-reality-an-international-law-perspective/>.

⁴⁶ Amandas Ong and Nils Adler, “Worlds Apart: 24 Hours with Two Refugees in Poland,” May 22, 2022, <https://www.aljazeera.com/features/2022/5/22/worlds-apart-24-hours-with-two-refugees-in-poland>.

⁴⁷ “Poland’s Two Very Different Borders,” POLITICO, April 14, 2022, <https://www.politico.eu/article/poland-two-very-different-borders-ukraine-belarus-war-refugees/>.

⁴⁸ Amongst many commentators, see in particular Meltem Ineli-Ciger, “5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022 – EU Immigration and Asylum Law and Policy,” *EU Immigration and Asylum Law and Policy* (blog), accessed March 7, 2022, <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>.

invasion of Ukraine,⁴⁹ the winds completely changed from the Belarusian border crisis. Although the number of displaced reaching the EU border certainly qualifies as a ‘mass influx’ – with 6.5 million people having fled Ukraine so far and a majority of them to Europe⁵⁰ – the securitization narrative remained silenced, and the fortification approach was foregone.

Instead, the narrative of solidarity with ‘people like us’, our European family, good people, our neighbors and similar notions shaped the public discourse⁵¹. For example, a Polish high official stated that the different approach was due to the large Ukrainian diaspora already living and working in Poland and the strong cultural connection. He also noted that the Ukrainians were trying to show more European values in an effort to integrate better, which he did not perceive with refugees from the Middle East and Africa⁵². This and further statements by European politicians painted a picture of deliberate discrimination or – from the perspective of Ukrainians – preferential treatment of refugees with European origin⁵³.

IV. Parallels in Law

1. *The European Migration Crisis 2015/16: Collapse of the CEAS*

The Common European Asylum System (CEAS), and within it the Dublin system, have been criticized for its unfair distribution mechanism even before 2015. However, at that point the Dublin mechanism had been declared as ‘dead’ by experts⁵⁴, Member States at the beginning of popular

⁴⁹ “Timeline.”

⁵⁰ See UNHCR, “Ukraine Refugee Situation,” Operational Data Portal, accessed May 22, 2022, <https://data2.unhcr.org/en/situations/ukraine>.

⁵¹ Joshua Berlinger, “Does the Ukraine Exodus Reveal a ‘Shocking Distinction’ on Refugees?,” euronews, March 1, 2022, <https://www.euronews.com/2022/03/01/does-the-ukraine-exodus-reveal-a-shocking-distinction-on-refugees-in-some-parts-of-the-eu>.

⁵² “Poland Ready to Take More Ukrainians, Deputy PM Says,” POLITICO, March 28, 2022, <https://www.politico.eu/article/poland-ready-to-take-more-ukrainians-deputy-pm-says/>.

⁵³ Julia Kienast, Nikolas Feith Tan, and Jens Vedsted-Hansen, “Preferential, Differential or Discriminatory? EU Protection Arrangements for Persons Displaced from Ukraine,” *Asile* (blog), April 27, 2022, <https://www.asileproject.eu/preferential-differential-or-discriminatory-eu-protection-arrangements-for-persons-displaced-from-ukraine/>.

⁵⁴ Compare e.g. Constantin Hruschka, “Dublin Is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission – EU Immigration and Asylum Law and Policy,” *EU Immigration and Asylum Law and Policy* (blog), accessed May 23, 2022, <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>; Marcello Di Filippo, “Dublin ‘Reloaded’ or Time for Ambitious Pragmatism?,”

migration routes simply let the arriving migrants pass on to the North and a ‘race to the bottom’ with respect to reception conditions and procedures just fuelled this dynamic.⁵⁵

The Commission’s main response in 2015/16 was the ‘European Agenda on Migration’⁵⁶, which included several legal proposals and operational measures. These can be categorized according the management of the crisis internally, securing the external border, and cooperation on the international level.

For internal crisis management, a relocation mechanism was introduced to assist Italy and Greece⁵⁷, including the establishment of ‘hotspots’⁵⁸ and the proposal to develop a genuine EU Agency for Asylum (EAA)⁵⁹. For the reform of the CEAS, a total of seven proposals were made to tackle the seemingly irreconcilable division of the EU on the topic of asylum⁶⁰. Most importantly these proposals include a

EU Immigration and Asylum Law and Policy (blog), accessed May 23, 2022, <http://eumigrationlawblog.eu/dublin-reloaded/>; Hungarian Helsinki Committee, “Summary of Bans on/ Stopping of Dublin Returns to Hungary - 2016,” December 14, 2016, <http://www.helsinki.hu/wp-content/uploads/Summary-bans-Dublin-transfers.pdf>.

⁵⁵ See e.g. Vladislava Stoyanova and Eleni Karageorgiou, eds., *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*, International Refugee Law Series (Brill Nijhoff, 2018); Jens Vedsted-Hansen, “Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?,” in *Reforming the Common European Asylum System: The New European Refugee Law*, ed. Vincent Chetail, Philippe De Bruycker, and Francesco Maiani, vol. 39, *Immigration and Asylum Law and Policy in Europe* (Leiden Boston: Brill Nijhoff, 2016), 317–52.

⁵⁶ Commission, ‘A European Agenda on Migration’ (Communication) COM (2015) 240 final.

⁵⁷ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80; Commission, ‘Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary’ COM (2015) 451 final.

⁵⁸ Commission, ‘Progress Report on the Implementation of the hotspots in Greece’ (Communication) COM (2015) 678 final; Commission, ‘Progress Report on the Implementation of the hotspots in Italy’ (Communication) COM (2015) 679 final.

⁵⁹ Regulation (EU) 439/2010 of 19 May 2010 of the European Parliament and of the Council establishing a European Asylum Support Office (EASO) [2010] OJ L 132/11; Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010’ COM (2016) 271 final (EAA); Commission, ‘Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010’ COM(2018) 633 final.

⁶⁰ Commission, ‘Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy’ (Press release, 13 July 2016) IP/16/2433.

common procedure⁶¹, uniform standards of protection and rights⁶² and the harmonisation of reception conditions⁶³ – i.a. by casting the provisions in the form of regulations instead of directives. In October 2019, the European Commission states that *‘[t]here was real progress towards a preliminary agreement on five of the seven proposals. But a majority of Member States insisted on a package approach, so a way forward needs to be found on key elements of the Dublin Regulation and the Asylum Procedure Regulation’*⁶⁴. In 2022, the reform of the CEAS is still not achieved, although major steps have been taken in the legislative path of the proposals, including the additional proposals and further amendments to the 2016 proposals⁶⁵.

For the safeguarding of the external borders more progress could be made. The Commission proposed the establishment of a new European Border and Coast Guard (EBCG) already working since October 2016⁶⁶. Moreover, several sea operations were launched⁶⁷. The focus in the external

⁶¹ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ COM (2016) 467.

⁶² Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents’ COM(2016) 466 final.

⁶³ Commission, ‘Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)’ COM (2016) 465 final.

⁶⁴ Commission, ‘Progress Report on the Implementation of the European Agenda on Migration’ (Communication) COM (2019) 481 final 18.

⁶⁵ Compare progress on “Migration and Asylum Package: New Pact on Migration and Asylum Documents Adopted on 23 September 2020,” Text, European Commission, accessed May 22, 2022, https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.

⁶⁶ Regulation (EU) 2016/1624 of 14 September 2016 of the European Parliament and of the Council 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) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1; the legal basis for the EBCG was again renewed with 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 [2019] OJ L 295/1.

⁶⁷ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122/31; Council Decision (CFSP) 2015/1926 of 26 October 2015 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 281/13; Council Decision (CFSP) 2020/471 of 31 March

borders control relied on combating migrant smuggling on the basis of the ‘EU Action Plan against Migrant Smuggling’.⁶⁸ Europol set this combat as a priority⁶⁹ and the EU established a comprehensive data collection system⁷⁰.

2020 repealing Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED Operation Sophia); Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED Operation Irini).

⁶⁸ Commission, ‘EU Action Plan against Migrant Smuggling (2015 – 2020)’ (Communication) COM (2015) 285 final.

⁶⁹ Europol, ‘Europol Launches the European Migrant Smuggling Centre’ (Press Release, 22 February 2016) <<https://www.europol.europa.eu/newsroom/news/europol-launches-european-migrant-smuggling-centre>> accessed 20 May 2022.

⁷⁰ See Chris Jones, ‘Data Protection, Immigration Enforcement and Fundamental Rights: What the EU’s Regulations on Interoperability Mean for People with Irregular Status’ (Statewatch and PICUM 2019) <<https://picum.org/wp-content/uploads/2019/11/Data-Protection-Immigration-Enforcement-and-Fundamental-Rights-Full-Report-EN.pdf>> accessed 23 May 2022. Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member State by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast) COM (2016) 272 final; Regulation (EU) No 1052/2013 of 22 October 2013 of the European Parliament and of the Council establishing the European Border Surveillance System (Eurosur) [2016] OJ L 295/11; Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 [2018] OJ L 236/1; Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] OJ L 327/20; Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA [2019] OJ L 135/27; Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 [2019] OJ L 135/85.

The most impactful measure to reduce the number of arrivals, however, was the negotiation of the EU-Turkey Statement⁷¹. Under this agreement, Turkey would prevent new arrivals by land and sea and take back all persons crossing irregularly from Turkey into Greek islands – in return, for substantial financial aid, a resettlement scheme for Syrians from Turkey⁷². Furthermore, a proposal for a resettlement programme was introduced to allow refugees qualifying for protection and waiting at the borders a legal and safe way to asylum in the EU⁷³. To prevent further migration movements to the EU, a Trust Fund for Africa with €4.5 billion⁷⁴ and a partnerships with third countries⁷⁵ were sought.

In conjunction, the proposals and measures show that most efforts were oriented towards the enforcement of external border controls and the combat of migrant smuggling. Furthermore, the EU aimed for a balance of burdens amongst Member States and a reduction of secondary migration under the umbrella of solidarity⁷⁶. Most certainly, they rather constituted a reform attempt of the CEAS instead of targeted emergency measures.

2. *The Belarus Border Crisis 2021/22: Enhanced fortification at the Border*

As set out above, the Commission called the arrivals of the migrants at the EU border a ‘hybrid attack’ in its proposal to the Council for a decision on provisional emergency measures for Latvia, Lithuania, and Poland under

⁷¹ ‘EU-Turkey Statement (Press Release)’ (*European Council – Council of the European Union*, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 23 May 2022.

⁷² Commission, ‘Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey’ C (2015) 9490.

⁷³ European Council, ‘Conclusions of the Representatives of the Governments of the member states meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection’ (Conclusions) Council Doc 11130/15, 22 July 2015; Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council’ COM (2016) 468 final.

⁷⁴ Commission, ‘Decision of 20.10.2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa’ C (2015) 7293 final. Critical hereof are Carling and Talleraas (n 40) 30 ff.

⁷⁵ Commission, ‘On establishing a new Partnership Framework with third countries under the European Agenda on Migration’ (Communication) COM (2016) 385 final.

⁷⁶ For a broader and critical overview on the EU’s responses see Sergio Carrera *et al.*, “The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities” (Centre for European Policy Studies, December 16, 2015).

Article 78(3) TFEU⁷⁷. And what to do if one finds themselves under attack, some sort of war seemingly? Fortification constitutes a long-proven measure of defense. This was also the response at the Polish border to Belarus. Pushbacks, surveillance technology and physical barriers were engaged to secure the EU’s Eastern border⁷⁸.

In contrast, the emergency measures under Article 78(3) TFEU back in 2015 for Italy and Greece looked very different as recalled in the section above. The relocation of up to 160,000 protection seekers from particularly affected states was amongst the chosen means back then. This would have been a viable path for the Belarus situation too – especially in view of the unfulfilled quotas from 2015⁷⁹.

The proposal for the Belarus border crisis, however, provides for various deviations from current law legitimizing fortification measures of the affected Member States⁸⁰. It foresees a registration period up to four weeks and exclusively at designated registration points at the border⁸¹. It also provides that contested border procedures may be conducted with regard to, both, the admissibility and the merits of the applications concerned⁸² and allows for applicants to be held at the border for up to 16 weeks. During this period, the first instance procedure and any appeals would be settled. At the same time,

⁷⁷ Commission, ‘Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland’ COM (2021) 752 final.

⁷⁸ Surwillo and Slakaityte, “Fortifying the EU’s Eastern Border Countering Hybrid Attacks from Belarus | DIIS.”

⁷⁹ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248/80; United Nations High Commissioner for Refugees, “UNHCR Calls for the EU Relocation Scheme to Continue,” UNHCR, accessed May 22, 2022, <https://www.unhcr.org/news/press/2017/9/59ca64354/unhcr-calls-eu-relocation-scheme-continue.html>.

⁸⁰ “Joint Statement: Call on the EU: Restore Rights and Values at Europe’s Borders | European Council on Refugees and Exiles (ECRE),” accessed May 23, 2022, <https://ecre.org/joint-statement-call-on-the-eu-restore-rights-and-values-at-europes-borders/>; “EU Eastern Borders: Commission Emergency Proposal Comes Under Fire, MEPs Visit Rights-Free Border Zone, Supreme Court Rules on Polish Media Ban | European Council on Refugees and Exiles (ECRE),” January 21, 2022, <https://ecre.org/eu-eastern-borders-commission-emergency-proposal-comes-under-fire-meps-visit-rights-free-border-zone-supreme-court-rules-on-polish-media-ban/>.

⁸¹ Currently, registration has to take place within three working days at the competent authority or six working days if the application was lodged with an authority that is not competent, according to Article 6 APD. See Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (Asylum Procedures Directive, APD).

⁸² PRO ASYL, “The ‘New Pact’: new border procedures, more detention, no solution to old problems” (Frankfurt: PRO ASYL, November 30, 2020), <https://www.proasyl.de/material/the-new-pact-new-border-procedures-more-detention-no-solution-to-old-problems/>. This is de lege lata only permitted under limited conditions, especially with regard to the merits (cf. Art 31 (8) and 41 (1) APD).

the automatic suspensive effect of appeals or the right of residence would be limited during the appeals period. The emergency measures would also allow for a lower standard of material benefits than Articles 17 and 18 of the Reception Conditions Directive⁸³. Admittedly, even these low standards would have been an improvement on the reality at the Belarusian border, since the reception conditions were not upheld⁸⁴.

Moreover, this proposal disregards the critical stance of Members of the European Parliament (EP) on related proposals in the ‘New Pact’, which are still under negotiation⁸⁵. The EP’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) only published its first reading amendments to the related drafts that contain numerous comments regarding the envisaged border procedures.

In addition, in December 2021, the Commission sent further proposals for an amendment to the Schengen Borders Code⁸⁶ and a related permanent emergency mechanism for the ‘instrumentalization’ of migrants⁸⁷ into the ordinary legislative procedure. This suggestion of a general regulation largely coincides with that for the emergency measures in favour of Latvia, Lithuania and Poland, but would make such emergency measures permanently available. It is therefore questionable to what extent the exceptional nature of the measures would remain.

3. *The Ukraine Refugee Crisis 2022 and ongoing: A Temporary Protection Regime*

As stated above, although the Belarus border crisis was still ongoing when Russia invaded Ukraine on 24 February 2022⁸⁸, the reaction to the

⁸³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 (Reception Conditions Directive, RCD).

⁸⁴ Compare e.g. Balkan Investigative Reporting Network, “Polish Forest Full of Fear.”

⁸⁵ Shortly after the proposal on the emergency measures in December 2021, the Commission sent two further proposals for the Schengen Borders Code into the ordinary legislative procedure, which caused ECRE to diagnose the European asylum system with a *reductio ad absurdum*. See “ECRE Weekly Bulletin 21/01/2022,” accessed May 22, 2022, <https://mailchi.mp/ecre/ecre-weekly-bulletin-21012022?e=1a3376bb31#Edito>.

⁸⁶ Commission, ‘Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders’ COM (2021) 891 final.

⁸⁷ Commission, ‘Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum’ COM (2021) 890 final.

⁸⁸ “Timeline.”

new ‘refugee crisis’ could not have been more different. For the first time since its entering into force in 2001, the TPD was activated to receive Ukrainians on a group basis⁸⁹.

The implementing Council Decision meant that EU borders would be kept open to those falling under its scope: Ukrainian nationals living in Ukraine at the time, those covered by international protection in Ukraine at the time and their families⁹⁰. Although this process did not go without difficulties, as e.g. instances of discrimination at the border have been reported⁹¹, it was an outstanding new path for the EU and its Member States as a reaction to mass displacement.

It remains to be seen what the final experience with this approach will be from an EU perspective as well as from the concerned individuals’. However, the benefits of using this regime in the reception of large groups of displaced are evident from the outset: easier and faster processing of persons falling under the scope, since under this regime no complicated individual procedure must take place⁹²; and an automatic burden-sharing function amongst the Member States, especially since there was an agreement not to apply Article 11 TPD in case of ‘secondary movement’⁹³. Initially, the set of rights granted to persons under the TPD also seems more generous compared to those of asylum applicants. This is, however, not the case in comparison to those with refugee status and, for this reason, after a certain time has passed, it might become preferential to get a recognized status under the EU asylum rules⁹⁴.

⁸⁹ See Ineli-Ciger, “5 Reasons Why.”

⁹⁰ See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71/1 (Council Implementing Decision for Ukraine).

⁹¹ See Sergio Carrera *et al.*, “The EU Grants Temporary Protection for People Fleeing War in Ukraine,” *CEPS* (blog), March 14, 2022, 7 ff, <https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/>.

⁹² However, the TPD still allows for persons under its scope to make asylum claims under the asylum procedure. See Arts 17, 19 TPD.

⁹³ See e.g. Jessica Schultz *et al.*, “Collective Protection as a Short-Term Solution: European Responses to the Protection Needs of Refugees from the War in Ukraine – EU Immigration and Asylum Law and Policy,” *EU Immigration and Asylum Law and Policy* (blog), March 8, 2022, <https://eumigrationlawblog.eu/collective-protection-as-a-short-term-solution-european-responses-to-the-protection-needs-of-refugees-from-the-war-in-ukraine/>; Daniel Thym, “Temporary Protection for Ukrainians: The Unexpected Renaissance of ‘Free Choice’ – EU Immigration and Asylum Law and Policy,” *EU Immigration and Asylum Law and Policy* (blog), March 7, 2022, <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>.

⁹⁴ Kienast, Tan, and Vedsted-Hansen, “Preferential, Differential or Discriminatory?”

Currently, we are still observing some issues regarding the implementation of the TPD and its implementing decision in the Member States. In Austria, for example, some unresolved issues at the time concern the access to work and slow processes in terms of the issuing of residence permits and work permissions. However, for the concerned persons, this approach still seems to be much preferable compared to the approaches taken in previous migration crises. In particular, this is the case, because the risk of *refoulement* and group expulsion is averted, but also the access to assistance by the state and civil society is provided.

V. Conclusion: Reflections on Effects and Consequences

What could be observed during the 2015/16 period is the resort to the semantics of crisis and emergency. Although these terms are wide in their general meaning, they nudge into a very specific direction in legal terms. The CEAS itself has several specific rules for large-scale arrivals in addition to the TPD.⁹⁵ Also, the Schengen Borders Code holds the possibility to temporarily reintroduce internal border controls, in the case of serious threats to public policy or internal security⁹⁶.

In addition to that, however, EU primary law reserves to the Member States the maintenance of law and order and the safeguarding of internal security in Article 72 TFEU⁹⁷. Some Member States have relied on this provision to derogate from the CEAS as a whole, which has been denied by the Court of Justice of the EU (CJEU)⁹⁸. However, it means that national politicians have an incentive to frame large-scale arrivals – which do not *per se* constitute a threat to public order or national security – in a way that the situation seems to fulfil the threshold of Article 72 TFEU and the exceptional provisions of the Schengen Borders Code, if they aim at disregarding EU asylum rules and closing the internal borders. Naturally, there is always room to interpret legal provisions. However, if this interpretation goes beyond the sound methods of treaty interpretation and

⁹⁵ See e.g. Art 6 (5), 14 (1), 31 (3) lit b, 43 (3) APD.

⁹⁶ See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L 77/1 (Schengen Borders Code), arts 25 ff. This exemption has been relied on excessively by, i.a., Austria, as the CJEU recently held in the joined cases C-368/20 *NW v Landespolizeidirektion Steiermark* and C-369/20 *NW v Bezirkshauptmannschaft Leibnitz* (GC) ECLI:EU:C:2022:298.

⁹⁷ Treaty on the Functioning of the European Union [2016] OJ C 202/1 (TFEU), art 72.

⁹⁸ CJEU Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland, Hungary and Czech Republic* EU:C:2020:257, paras 134 ff.

Member States simply follow the intentions of national politics in this regard, it poses a serious risk to the rule of law in the EU asylum *acquis*.

The proposal for emergency measures with regard to the Belarus border crisis is somewhat different as it works within the framework of EU law, as is to be expected from the EU institutions. Yet, also here it has been reported that the EU measures did not go far enough for the concerned Member States, which actually asked the EU to fund a border wall instead⁹⁹. The narrative of a ‘hybrid attack’ is in line with the framing of a security threat as explained above.

What is more, these emergency measures are to be taken in the form of a Council decision. According to Article 78 (3) TFEU, the EP will only be involved through a consultation procedure. Due to the many overlaps with the proposals of the ‘New Pact’ currently in the ordinary legislative procedure, the procedure appears to be a democratically problematic attempt to bypass concerns expressed by the EP or the – admittedly lengthy – ordinary legislative procedure. Again, this can raise concerns regarding the rule of law in the EU asylum *acquis*.

Furthermore, the proposal repeatedly emphasizes that it is in line with the fundamental rights and principles of the Union as well as obligations under international law. This is doubtful in view of the *de facto* access to asylum procedures, the likelihood of restrictions on freedom of movement in connection with border procedures, the lack of safeguards for vulnerable groups, the restriction of procedural rights, dwindling standards of reception, insufficient access by advisory and monitoring bodies, and the increased risk of pushback and *refoulement* at EU borders¹⁰⁰.

Sticking to the proposal further does not seem to make sense beyond the human rights concerns. It shall also be remembered that parallel asylum systems do not seem feasible and might increase the chronic implementation deficiencies of EU asylum law¹⁰¹. In terms of foreign policy, no improvement

⁹⁹ “EU - Migration über Belarus: Polen blockiert Ausnahmeregelung,” *Wiener Zeitung Online*, January 31, 2022, <https://www.wienerzeitung.at/nachrichten/politik/europa/2136138-Migration-ueber-Belarus-Polen-blockiert-Ausnahmeregelung.html>; Alexandra Brzozowski, “Twelve Member States Ask Commission to Finance ‘physical Barriers’ as Border Protection Measures,” *Www.Euractiv.Com*, October 8, 2021, sec. Justice & Home Affairs, <https://www.euractiv.com/section/justice-home-affairs/news/twelve-member-states-ask-commission-to-finance-physical-barriers-as-border-protection-measures/>.

¹⁰⁰ Compare statements by human rights experts in “EP Committee on Civil Liberties, Justice and Home Affairs: Exchange of Views on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland, with the Participation of Margaritis Schinas and Ylva Johansson,” European Commission - Audiovisual Service, January 31, 2022, <https://audiovisual.ec.europa.eu/en/video/I-216368>.

¹⁰¹ “ECRE Weekly Bulletin 21/01/2022.”

can be expected *vis-à-vis* Belarus as a result of this measure alone, since the crisis mode demonstrated once again how easily the Union and its Member States can be blackmailed. Moreover, the attempts of affected Member States to avert irregular migration and the associated breaches of law at the borders paint a picture of a disunited and weak Union that hardly takes its own values and its own legal system seriously.

Now at this point, the EU’s reaction to the new displacement crisis of Ukrainians gives a glimpse of hope. Despite the wildly different measures in comparison to the other two incidents having been called out as preferential treatment of Ukrainians and despite the difficulties of implementing the Council Decision and the TPD –, at last the EU is following its own rules on the governance of mass influx for the first time since 2001¹⁰². It is still too early to predict, whether the EU will continue to make use of the TPD in the future (also for non-Europeans) and discard its plans to retract the Directive in the New Pact. However, we might witness a moment of collective learning if the approach proves to be a success.

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¹⁰² Kienast, Tan, and Vedsted-Hansen, “Preferential, Differential or Discriminatory?”

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