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# Beyond the “Hybrid Attack” Paradigm: EU-Belarus Border Crisis and the Erosion of Asylum-Seeker Rights in Latvia, Lithuania and Poland

**Aleksandra Ancite-Jepifánova** 

Central European University, Budapest  
Refugee Law Initiative, University of London  
*Ancite-JepifanovaA@ceu.edu*

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## Abstract

While in the recent years violations of asylum-seeker rights have been increasingly documented in EU Member States, the crisis at the EU-Belarus border has opened up a whole new chapter in this area. In response to the perceived migrant instrumentalisation by the Belarusian regime, several Member States—Latvia, Lithuania and Poland—have openly introduced long-term, far-reaching and blanket legislative measures that severely restricted the right to seek asylum and formalised pushbacks—contrary to their obligations under EU law and international refugee and human rights law. This paper approaches the topic from a comparative socio-legal perspective. Apart from a legal analysis of the Latvian, Lithuanian and Polish domestic measures, it is based on interviews with non-EU nationals affected, as well as NGO representatives, volunteers and legal practitioners who have been providing legal and humanitarian assistance to people crossing from Belarus. The paper, first, offers an overview of Latvian, Lithuanian and Polish responses to the events at the border and looks at how the relevant measures affect the non-EU nationals involved. Second, it engages with the migrant instrumentalisation paradigm, relied on by the governments to derogate from EU and international legal framework, and explores the EU-level response to the crisis. This study argues that EU’s border with Belarus has *de facto* become an exclusion zone where protection seekers are deprived of their right to claim asylum and continuously exposed to various types of inhuman and degrading treatment. It also demonstrates that the migrant instrumentalisation concept is problematic on multiple levels and does not correspond to the realities on the ground.

**Keywords:** EU-Belarus border crisis, Poland-Belarus border, Lithuania-Belarus border, Latvia-Belarus border, pushbacks, border violence, asylum, refugees, migrant instrumentalisation, hybrid attack

*The Latvians used to take us to the tent for the night and bring us back to the forest at 4 or 5am. Sometimes they forced us to cross the border through the river. We cried and pleaded, “Please, we are women and cannot swim.” The water was up to my chest but it did not matter to them. It was snowing already.*

*The men were regularly taken out of the tent, beaten up and hit with electroshock. We could not do anything; we cried and waited for the men to return. Sometimes they were beating them for several minutes, sometimes it lasted for 30 minutes or one hour. Those who hit them were commandos in masks and dark uniforms.*

[Shirin,<sup>1</sup> an Iraqi national, spent nearly four months in the forest at the Latvia-Belarus border (11 August—late November 2021) and was returned to the Kurdistan region of Iraq in December 2021 without her asylum claim being registered.]

## 1. Introduction

It was August 2021 when Yousif, an Iraqi national of Yazidi origin, travelled to the Belarus border with Latvia to apply for international protection in the EU. Little did he know at the time that he would spend the following seven months in the forest—being moved back and forth by Latvian and Belarusian forces only to be ultimately returned back to Iraq without his asylum claim having even been registered.

Yousif is one of the non-EU nationals who have become target of the Latvian policy, adopted amid the so-called EU-Belarus border crisis. Its origins date back to summer 2021 when Belarus relaxed its visa regime for nationals of Middle Eastern and African countries and, in cooperation with local travel agents, started coordinating their travel to Minsk (see, e.g., Bruneau et al., 2021; Hebel & Reuter, 2021). The Belarusian authorities also stopped preventing irregular border crossings into the EU and, as widely documented, frequently facilitated such practices or, in some cases, even forced non-EU nationals to cross the border (see, e.g., Amnesty International, 2021).

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<sup>1</sup> For ethical and security reasons, all names of research participants, including NGO representatives, humanitarian aid workers and non-EU nationals who have attempted to enter the EU from Belarus, have been changed to protect their identity.

In EU Member States bordering Belarus, the issue has been widely framed as a security threat, “migrant instrumentalisation” or “weaponisation” and a “hybrid attack” orchestrated by the Belarusian regime after the EU imposed sanctions on Minsk (for an analysis, see Baranowska et al., 2021; Szytko-Kwas, 2023). In response, Latvia, Lithuania and Poland took an unprecedented step and adopted long-term and far-reaching domestic legislative measures that severely restrict the right to seek asylum and authorise pushbacks—(forceful) returns to a third country (in that particular case, Belarus) without formal return procedures and individual assessment of asylum claims. Such measures openly breach EU and international human rights law, particularly where it concerns access to the asylum procedure and compliance with the *non-refoulement* principle, which prohibits returning someone to a state where they may face persecution and/or inhuman or degrading treatment.

Although the three Member States have reacted to the events at the Belarus border in a similar manner, their responses have not been identical. This paper briefly compares the domestic legislation introduced by the Latvian, Lithuanian and Polish authorities and critically examines its compatibility with EU and international human rights law. Following that, it explores the practical implications of such measures for the non-EU nationals involved, particularly with regard to access to the asylum procedure and the prohibition of *refoulement*. Finally, it offers a brief insight into the EU-level response to the crisis and critically engages with the migrant instrumentalisation concept, relied on by national governments to derogate from fundamental rights.

## 2. Methodology

The paper approaches the topic from an interdisciplinary socio-legal perspective by combining an analysis of the relevant legislative measures with empirical research. To explore the situation in Poland and Lithuania, the author has undertaken research visits to the respective states where she conducted ~15 semi-structured interviews with local NGO representatives, humanitarian aid volunteers and legal practitioners, who have been providing assistance to non-EU nationals crossing from Belarus and/or engaged in documenting the events at the Belarus border. The visit to Poland took place in January 2023 and involved meetings with activists both in Warsaw and in the border area with Belarus. Interviews with Lithuanian activists and experts took place in Vilnius in March 2023.

In this context it is important to stress that in the beginning of the crisis, European public attention focused on the events in Poland and, to a somewhat lesser extent, in Lithuania, whilst the situation in Latvia was largely neglected. Unlike in Poland or Lithuania, there have been no local NGOs, media or academics systematically documenting the events at Latvia’s border with Belarus or

providing a comprehensive analysis of the issue from the perspective of Latvia's compliance with EU and international law. In addition, Latvian media have followed the government line of reasoning by exclusively portraying the issue as a security threat and a "hybrid attack" without publishing in-depth interviews with the non-EU nationals affected (for more details, see Ancite-Jepifánova, 2022).

To compare Polish and Lithuanian practices with those of the Latvian authorities, this paper builds upon an analysis of the empirical data the author has collected during her research into the situation at the Latvia-Belarus border. As part of her study, she has conducted in-depth interviews with over 40 non-EU nationals who had attempted to cross the Latvian border from Belarus during the autumn/winter of 2021/22, spent several weeks or months (in most extreme cases up to seven months) in the forest and were ultimately transferred to the closed detention centre for foreigners in the Latvian city of Daugavpils (Daugavpils Centre) on so-called "humanitarian grounds." From there, they were typically returned to their country of origin—in that particular case, Iraq—without their asylum applications being registered.

The author's informants were admitted in the Daugavpils centre at different times over the period from mid-August 2021 to March 2022. With several of those interviewed travelling with their family, the testimonies collected account for around 60 people; this, in turn, represents over one third of the individuals transferred to the Daugavpils Centre from the Belarus border on "humanitarian grounds" over this period. The first two informants were contacted with the help of a Latvian NGO, and the rest identified and approached using a snowball sampling method. Whilst the majority of the informants involve Iraqi nationals from the Kurdistan region of Iraq, including Yazidis, the people interviewed also include those coming from other parts of Iraq, as well as nationals of Afghanistan and Syria. Five of the interviewees are female and the rest male.

Despite multiple requests, the author was not provided access to the Daugavpils Centre during the winter of 2021/22. The Latvian authorities denied her requests first due to "security considerations" and later Covid-19 related quarantine measures allegedly introduced at the time. With a few exceptions, the interviews were conducted remotely via online video-calling software after the relevant persons had returned to Iraq.<sup>2</sup> The interviews took place between November 2021 and April 2022.

Several of the informants who could speak fluent English or Russian were interviewed in the respective languages. The rest of the interviews were conducted with the help of a Kurdish interpreter (Sorani and Kurmanji dialects).

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<sup>2</sup> With the exception of persons who remained in the Daugavpils Centre until 6 April 2022 and were allowed to apply for asylum following the amendment of Latvian domestic legislation. See Section 3.1 for more details.

The collected testimonies are detailed, consistent and supported by various types of evidence, such as documents issued to the individuals involved at the Daugavpils Centre, International Organization for Migration (IOM) voluntary return declaration forms, Belarus visas and entry stamps, as well as photos showing the same people at both sides of the border at different times of the year.<sup>3</sup>



**Image 1: The newly built border wall between Poland and Belarus, January 2023. Photo by Aleksandra Ancite-Jepifánova**

### **3. Restricting the right to claim asylum and grounding pushbacks in domestic law**

#### ***3.1. The initial stage of the crisis (summer 2021 – spring 2022)***

The violations of asylum-seeker rights at the EU-Belarus border were documented long before 2021. Because of its geographical position, Belarus had become an important transit route for those travelling to the EU’s border from the Caucasus, Central Asian countries, as well as from Afghanistan and, in certain

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<sup>3</sup> The non-EU nationals interviewed explained that their phones were confiscated and the pictures were taken by the Latvian or Belarusian authorities who agreed to send them to their relatives to show they were alive.

periods, from Vietnam—most frequently, via Russia. People attempting to cross into the EU from Belarus also often included Russian nationals (particularly of Chechen origin) (see, e.g., Yakouchyk & Schmid, 2016). Whilst for many of them, the final destination were Western European countries, some attempted to claim asylum in the countries bordering Belarus. The Polish authorities, however, frequently ignored foreigners' claims for international protection and summarily returned them to Belarus even if they had expressed their wish to apply for asylum at official border crossing points, such as in Brest and Terespol (see, e.g., Human Rights Watch, 2017). Such practices, which intensified following the so-called 2015 refugee crisis, have been considered a violation of the European Convention on Human Rights (ECHR).<sup>4</sup>

Overall, however, the number of asylum-seekers in Latvia, Lithuania and Poland has traditionally been insignificant—both in absolute numbers and per capita (for an overview and trends, see European Parliament, 2022). For example, over the period from 2018 to 2020 Latvia registered less than 200 asylum applications claims per year (Office of Citizenship and Migration Affairs [Latvia], 2024). In 2020, 315 people applied for asylum in Lithuania, whereby less than 2,800 people submitted their claims in Poland, a country with a population of around 37 million (European Parliament, 2022). The situation changed in summer 2021 with the rising numbers of irregular border crossings from Belarus. In August 2021, the Latvian authorities registered 386 asylum applications, which was 2.5 times more than during the entire preceding year (Office of Citizenship and Migration Affairs [Latvia], 2021). As of mid-August 2021, the neighbouring Lithuania had apprehended (and subsequently detained) 4,110 non-EU nationals who had irregularly crossed into the country from Belarus (nearly 3,000 people were detained in July 2021 alone), compared to around 80 people apprehended at the particular border during the entire year of 2020 (ECRE, 2021, p. 2).

Although the upward trend was still very modest in absolute numbers, for all three governments it served as a rationale for introducing radical changes to domestic asylum legislation. Lithuania was the first country that adopted a set of measures effectively excluding foreign nationals irregularly crossing from Belarus from fundamental rights protection. On 2 July 2021, the Lithuanian authorities declared an “extraordinary situation” due to a “mass influx” of foreigners.<sup>5</sup> On 13 July, the Lithuanian parliament passed a resolution which stated that “the states hostile towards Lithuania are waging hybrid aggression”

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<sup>4</sup> ECtHR, Judgment of 23 July 2020, *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17 and 43643/17.

<sup>5</sup> The Government of the Republic of Lithuania. Nutarimas Nr.517 dėl valstybės lygio ekstremaliosios situacijos paskelbimo ir valstybės lygio ekstremaliosios situacijos operacijų vadovo paskyrimo [Resolution No 517 On the Declaration of the Extraordinary situation and the Appointment of the State Commander of National Emergency Operation] (2 July 2021, TAR, 03/07/2021, No 15235).

against the country by organising “flows of third-country nationals illegally crossing the state border [...] to destabilise the situation in Lithuania.”<sup>6</sup> Following that, Lithuania amended its Law on the Legal Status of Foreigners. The changes provided that, in the event of a declared extraordinary situation due to a mass influx of aliens, in-country asylum applications could only be submitted if the person had lawfully entered Lithuania’s territory. Other designated locations for lodging such claims were limited to official border crossing points and Lithuanian diplomatic missions or consular posts abroad.<sup>7</sup> Individuals entering Lithuania irregularly outside official border crossing points were accordingly deprived of the possibility to apply for asylum (for criticism see UNHCR, 2024).

The neighbouring Latvia went even further and introduced a blanket suspension of the right to claim asylum for anyone attempting to irregularly enter the country from Belarus, including at official border crossing points. On 10 August 2021, Latvia declared a state of emergency in all administrative territories along the country’s approximately 170 km long border with Belarus. Under the relevant Cabinet of Ministers Order, the Latvian State Border Guard, the National Armed Forces and the State Police were authorised to order persons, who irregularly crossed from Belarus or attempted to do so, to immediately return to Belarus without formal return procedures.<sup>8</sup> In a “situation of extreme necessity,” the Latvian authorities were also allowed to use “physical force and special means,” including electric shock devices,<sup>9</sup> to ensure compliance.<sup>10</sup> The Order expressly provided that the structural units of the Latvian Border Guard and other authorities located in the territory where the state of emergency has been declared (including border crossing points) shall not register asylum claims,<sup>11</sup> rendering access to the asylum procedure impossible.

It was not until late March 2022 that the Latvian emergency legislation was eventually challenged before a domestic court which declared the Order incompatible with EU and international human rights law.<sup>12</sup> In early April 2022, the

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<sup>6</sup> Seimas of the Republic of Lithuania. Resolution on Countering Hybrid Aggression (13 July 2021, No XIV-505).

<sup>7</sup> Įstatymo “Dėl užsieniečių teisinės padėties” Nr. IX-2206 67 straipsnio pakeitimo įstatymas [Law Amending Article 67 of Law No IX-2206 on the Legal Status of Foreigners] (10 August 2021, No XIV-515).

<sup>8</sup> Ministru kabineta rīkojums Nr. 518 “Par ārkārtējās situācijas izsludināšanu” [Cabinet Order No 518 Regarding the Declaration of Emergency Situation] (10 August 2021, Latvijas Vēstnesis, no. 152A).

<sup>9</sup> Ministru kabineta noteikumi Nr.55 “Noteikumi par speciālo līdzekļu veidiem un to lietošanas kārtību” [Cabinet Regulation No. 55 ‘Regulations Regarding the Types of Special Means and the Procedures for the Use Thereof by Police Officers and Border Guards’] (18 January 2011, Latvijas Vēstnesis, no. 15), §2.

<sup>10</sup> n 8, § 5.

<sup>11</sup> Ibid, § 6 (in the version in force until 5 April 2022).

<sup>12</sup> Administratīvā rajona tiesa, Rēzeknes tiesu nams [Administrative district court, Rēzekne courthouse], 14 March 2022, Case No. A42-01184-22/4.

Order was amended to allow foreign nationals to submit asylum applications at officially designated border crossing points and the Daugavpils Centre.<sup>13</sup> The amendments, however, did little to change the situation on the ground,<sup>14</sup> since intermediaries typically bring people to places far from official border crossing points and Belarusian border guards prevent foreign nationals without a valid visa, granted for entry in the EU, from accessing them. The same observations apply to the situation in Poland and Lithuania.

In Poland, pushback practices were grounded within two frameworks that operated in parallel. First, in August 2021 the Polish government amended the 2020 executive Regulation, introduced within the COVID-19 response framework. The Regulation suspended and restricted border traffic at selected border crossing points to Russia, Belarus and Ukraine and limited people allowed to cross the border to exceptional categories (such as Polish citizens, their family members and foreigners with a Polish residence permit). The amendments, which are still in force at the time of writing,<sup>15</sup> specified that those who do not belong to one of the listed groups but nevertheless crossed the border were to be returned to the border.<sup>16</sup> The amended Regulation did not foresee any exception for people seeking asylum or any formal procedures for return of irregularly staying third-country nationals, which are set out in the EU Returns Directive (2008/115/EC).

Second, Poland amended its Act on Foreigners to provide that, in case a foreign national is apprehended after crossing the border in an unauthorised manner, the Border Guard shall issue a decision ordering them to immediately leave Poland.<sup>17</sup> The relevant person would also be temporarily banned from re-entering Poland and other Schengen countries for the period between six months and three years. Moreover, even if a foreigner applies for asylum, the Head of the Office for Foreigners may refuse to consider the merits of their claim if the applicant had crossed the border irregularly. The only exception is foreseen for people coming directly from the territory of a country where their life or free-

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<sup>13</sup> Ministru kabineta rīkojums Nr. 254 “Grozījums Ministru kabineta 2021. gada 10. augusta rīkojumā Nr. 518 “Par ārkārtējās situācijas izsludināšanu” [Cabinet Regulation No. 254 ‘Amendments to the Cabinet Order No 518 of 10 August 2021 Regarding the Declaration of Emergency Situation] (6 April 2022, Latvijas Vēstnesis, no. 69).

<sup>14</sup> For a description of the situation of the ground, see Section 4.

<sup>15</sup> October 2024.

<sup>16</sup> Rozporządzenie Ministra Spraw Wewnętrznych i Administracji zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych [Regulation of the Minister of the Interior and Administration amending the ordinance on the temporary suspension or limitation of border traffic at certain border crossing points], Journal of Laws 2021, item 1536.

<sup>17</sup> Ustawa o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw [Law amending the Act on Foreigners and other laws], Journal of Laws 2021, item 1918.



dom is threatened with persecution or the risk of serious harm. For their application to be considered, they are required to give credible reasons for their irregular entry and submit their claim immediately after crossing the border (for an analysis see Baranowska 2022).<sup>18</sup>

Latvian, Lithuanian and Polish domestic legislation comes into considerable tension with EU asylum law and international human rights law, most notably the principle of *non-refoulement*, which prohibits expelling someone to Belarus without an individual assessment of the person’s risk of being subjected to inhuman and degrading treatment in that country or their country of origin. The relevant principle, which is protected under Article 33(1) of the 1951 Refugee Convention, Article 3 of the ECHR and other instruments,<sup>19</sup> forms a cornerstone of international refugee law and cannot be derogated from even in the event of declared emergency.

The domestic legislation, introduced by the relevant Member States, also violates Article 18 of the EU Charter of Fundamental Rights, which guarantees every individual the right to seek asylum. The EU Asylum Procedures Directive (2013/32/EU) further confirms that every third-country national or stateless person has a right to apply for international protection in the territory of a Member State, including at the border, and obliges Member States to register and examine their claim, regardless of how the relevant national entered the country.

In addition, pushback practices are generally incompatible with Article 4 of Protocol No. 4 to the ECHR, which prohibits the collective expulsion of aliens. In *N.D. and N.T. v. Spain*, the European Court of Human Rights (ECtHR) introduced the “own culpable conduct” exception to this principle. The Court stated that, in the particular case, there was no violation of Article 4, since the foreign nationals placed themselves in an unauthorised situation (such as by storming border fences), deliberately taking advantage of the group’s large numbers and using force, despite being provided genuine and effective access to official entry procedures (i.e., a border crossing point), where they could claim asylum.<sup>20</sup>

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<sup>18</sup> It appears that, when returning apprehended foreign nationals to the border with Belarus, the Polish authorities more frequently rely on the executive Regulation, rather than the Act on Foreigners. According to the Polish Border Guard statistics, between 5 July and 31 December 2023, 6,055 persons were returned to Belarus on the basis of the Regulation without any decision issued. In the meantime, in the entire year of 2023, 1,295 persons were issued orders to leave Poland on the basis of the amended Act on Foreigners (ECRE, 2024).

<sup>19</sup> Such as Article 3 of the UN Convention against Torture and Article 19(2) of the EU Charter of Fundamental Rights.

<sup>20</sup> ECtHR Judgment of 13 February 2020, *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, § 231.

In a subsequent ruling in *A.A. & Others v. North Macedonia*, the ECtHR apparently further broadened the exception by applying it to situations where “by crossing the border irregularly, the applicants circumvented an effective procedure for legal entry.”<sup>21</sup>

The approach taken by the ECtHR is highly problematic and has attracted widespread criticism from the academic community (see, e.g., Markard, 2020; Raimondo, 2020; Schmalz, 2022).<sup>22</sup> Nevertheless, at least formally, the exception does not abolish the general requirement for the states to provide those seeking international protection with genuine and effective access to means of legal entry. In other words, everyone must be offered a possibility to apply for asylum and receive an individualised assessment of their claim—even if they have crossed the border irregularly outside official border crossing points, unless such points are easily accessible.<sup>23</sup>

The Latvian and Lithuanian domestic measures explicitly preventing irregular entrants from submitting asylum claims and formalising immediate returns give a green light to *refoulement* practices and therefore openly violate these principles. Further, given the absence of legal avenues for claiming protection, the situation at the Belarus border does not fit the ECtHR-set criteria that may exempt the states from their obligations under Article 4 of Protocol No. 4. Even where the relevant rules allow submitting applications at official border crossing points, this is impossible to do in practice. Although formally Poland does not impose a blanket prohibition to claim asylum for irregular entrants, its legislation is equally problematic. When interpreting the Asylum Procedures Directive, the Court of Justice of the European Union (CJEU) has earlier confirmed that an asylum claim must be examined even if the applicant has arrived in the EU via a third state, in which that person was not exposed to persecution or a risk of serious harm.<sup>24</sup> Moreover, as will be demonstrated in Section 4, Belarus cannot be considered a safe third country.

### ***3.2. Follow-up developments (summer 2022 – autumn 2024)***

As of October 2024, over three years on since the start of the crisis, none of the Member States involved has signalled intention to alter its policies. The rationale, relied on by the relevant governments for excluding the racialised

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<sup>21</sup> ECtHR Judgment of 5 April 2022, *A.A. & Others v. North Macedonia*, Applications nos. 55798/16 and 4 others, § 114.

<sup>22</sup> A comprehensive analysis of the relevant ECtHR case-law falls outside the scope of this paper.

<sup>23</sup> This has been a generally established principle in the ECtHR jurisprudence. Among other cases, see ECtHR, Judgment of 15 December 2016, *Khlaifia and Others*, Application no. 16483/12, §§ 238 and 248; Judgment of 13 February 2020, *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, § 198; Judgment of 8 July 2021, *Shahzad v. Hungary*, Application no. 12625/17, § 62.

<sup>24</sup> Case *C-564/18 L.H. v Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2020:218.

“other” from human rights protection, has continuously been the so-called migrant instrumentalisation by the Belarusian and Russian regimes that allegedly wage a “hybrid attack” against the EU (see, e.g., Ministry of the Interior of the Republic of Latvia, 2023). Under EU and international refugee law, however, such concepts cannot be used as a basis to legalise pushbacks and deny someone their right to seek asylum. Importantly, this has been confirmed in a seminal ruling delivered by the CJEU in June 2022, which specifically addressed the situation at the EU’s border with Belarus. In its judgment, the Court declared the Lithuanian legislation effectively depriving a non-EU national of an opportunity to apply for asylum solely because they had crossed the border irregularly as incompatible with the Asylum Procedures Directive—even in the event of declared emergency due to a “mass influx of aliens.”<sup>25</sup>

The judgment, however, has been ignored by all three Member States involved. Moreover, in April 2023 Lithuania further cemented pushback practices in its domestic law,<sup>26</sup> a move that was swiftly followed by neighbouring Latvia.<sup>27</sup> More recently, the instrumentalisation discourse has also been taken up by Finland that, first, amended its Border Guard Act<sup>28</sup> and then temporarily closed all its land border crossing points with Russia as a reaction to increasing numbers of foreign nationals attempting to cross from that country to apply for asylum in Finland (Lehto, 2023). Moreover, Finland has ultimately followed in the footsteps of its neighbours and passed legislation allowing the authorities to turn away people seeking asylum—in other words, to exercise pushbacks—at the border with Russia (Tanner, 2024; for criticism, see Palander & Farzamar, 2024).

Last but not least, Poland continues its hardline approach even after the October 2023 parliamentary elections, when the conservative populist Law and Justice (PiS) party lost power and was subsequently replaced by a liberal coalition. Poland’s new government, led by Donald Tusk, not only has shown no intention to stop pushbacks, but went as far as to reintroduce an exclusion zone on parts of the country’s border with Belarus. The exclusion zone was first introduced by the former PiS government in 2021 and later lifted after the completion of the border wall (Wądołowska, 2022). The decision to return to such measures

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<sup>25</sup> Case C-72/22 PPU *M.A. v Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:505.

<sup>26</sup> Valstybės sienos ir jos apsaugos įstatymo Nr.VIII-1666 1, 2, 4, 10, 11, 14, 15, 16, 18, 23, 26 straipsnių pakeitimo ir įstatymo papildymo 23-1 straipsniu ir nauju IX skyriumi įstatymas [Law Amending Articles 1, 2, 4, 10, 11, 14, 15, 16, 18, 23, 26 of Law No VIII-1666 on the State Border and the Guard thereof and supplementing the Law with Article 23-1 and Section IX] (25 April 2023, No XIV-1891).

<sup>27</sup> Grozījums Latvijas Republikas valsts robežas likumā [Amendments to the Law on the State Border of the Republic of Latvia] (22 June 2023, Latvijas Vēstnesis, no. 125); Grozījumi Valsts robežsardzes likumā [Amendments to the State Border Guard Law] (22 June 2023, Latvijas Vēstnesis, no. 125).

<sup>28</sup> Laki rajavartiolain muuttamisesta [Law on amending the Border Guard Act] (8 July 2022, 698/2022).

was taken following an incident when a Polish soldier was stabbed by a foreigner who attempted to cross into Poland. During his subsequent visit to the border, Tusk announced that aggression against Polish border guards was increasing and claimed that “[t]hese are organised methods of hybrid warfare, [aimed at] destabilising the Polish state and all of Europe” (Tilles, 2024a). The new rules effectively deny access to the border area for individuals without Border Guard authorisation, including journalists and volunteers, which severely limits their possibilities to monitor the situation at the border and provide humanitarian aid. Moreover, in October 2024 Poland’s government approved plans for a new migration strategy that will include the possibility to temporarily suspend the right to seek asylum if “immigrants threaten to destabilise the state” (Tilles, 2024b).

#### **4. Realities on the ground: Various forms of inhuman and degrading treatment**

Since mid-2021, following the adoption of the domestic measures described above, pushbacks in Latvia, Lithuania and Poland have become a systematic and open practice that is sanctioned and accordingly perceived as lawful at the domestic level. Individuals who have irregularly crossed the border or attempted to do so are transported back to the border and ordered to return to Belarus at places outside official border crossing points. Such practices have led to a situation where non-EU nationals are forced to remain in the forest in inhuman conditions and where deaths, disappearances and amputated limbs have become an everyday reality (see, e.g., MacGregor, 2023; Wallis, 2022; Helsinki Foundation for Human Rights, 2023).

In all three Member States, asylum claims from persons, who cross the border irregularly, are generally disregarded. Non-EU nationals are admitted into the territory of the respective Member State and allowed to apply for asylum only exceptionally. The interviewed Polish activists revealed that the chances of the claim to be registered largely depend on the presence of witnesses (such as humanitarian aid volunteers, the applicant’s legal representatives, journalists, or the Ombudsman’s Office representatives). The outcome also depends on whether the ECtHR has indicated interim measures<sup>29</sup> obliging the relevant Member State not to expel the foreign national to Belarus. Lithuanian activists underlined that in Lithuania, interim measures are the only way to largely guarantee that the person will not be pushed back.

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<sup>29</sup> Interim measures are temporary measures that are urgently granted according to Rule 39 of the Rules of Court in exceptional circumstances where there is an imminent risk of irreparable harm. There are nevertheless cases when border guards ignored interim measures and pushed foreign nationals back to Belarus (See, e.g., Euractiv.com, 2021; OMCT, 2022).

Another group with better chances of being admitted are those considered vulnerable, such as women, underage children, and people needing medical assistance. For instance, under the Lithuanian domestic legislation, the border guards are allowed to exceptionally accept asylum applications from a foreigner who has crossed the border irregularly, taking into account their vulnerability or “other special circumstances.”<sup>30</sup> The interpretation of these terms, however, is left to the discretion of the border guards. Whilst single men are obviously the most disadvantaged category in this regard, an adviser to the Lithuanian interior minister further clarified that the vulnerability category was generally limited to unaccompanied minors or persons in need of immediate medical attention; meanwhile, families with young children were not automatically considered vulnerable (Platūkytė, 2021).

Overall, however, third-country nationals are regularly taken from the border to a hospital with a variety of medical conditions, most frequently caused by being forced to remain in the forest for prolonged periods of time—such as hypothermia, frostbite, injuries, digestive or orthopaedic problems, or worsening of already existing health issues. Following the erection of border fences in all three Member States involved (Eng.LSM.lv, 2024; Skėrytė, 2023; Drabik, 2024), foreign nationals increasingly end up in hospital with broken limbs or other injuries after jumping or falling from the fence. Laurynas, a Lithuanian humanitarian aid volunteer, remarked in an interview: “There was an idea among ruling politicians that, once we build the fence, people will be afraid to come and will not try anymore, but they keep trying. They cut the fence, they climb over the fence.”

Both Lithuanian and Polish activists stress that there are numerous cases when people were taken from the hospital to the forest and pushed back to Belarus irrespective of their declared wish to apply for asylum (see also Grupa Granica, 2023a). The chances of their claim to be registered and examined depend on the rapid action by activists, which is more difficult to take if the person is only admitted in an emergency unit without further hospitalisation.

In the experience of interviewed Polish and Lithuanian activists, the longest time a non-EU national had spent in the border area was 1-1,5 month. In spring and summer 2022, they also encountered cases where people attempted to cross the border after spending the cold winter months in a makeshift camp close to the Bruzgi town on the Belarusian side, a warehouse facility used by the Belarusian authorities to temporarily host foreigners during the border crisis. The Bruzgi camp was closed in March 2022 (see Human Rights Watch, 2022). Anna, a Polish activist involved in humanitarian interventions in the forest, recalls:

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<sup>30</sup> Republic of Lithuania. Law on the Legal Status of Foreigners (29 April 2004, No IX-2206) [Consolidated version valid as of 12 August 2021], Article 67(1<sup>2</sup>).

In March-April [2022], I met quite a lot of people who had to leave Bruzgi when it was closed. They told us they came [to Belarus] in October or November [2021] and did not manage to cross the border in autumn, so they spent the winter in Bruzgi and then tried again. And in June [2022], I met a guy from Guinea who told me that he came to Belarus in September 2021, tried [to cross the border] several times and was several times pushed back. Then he spent the winter in Bruzgi and when Bruzgi was closed, he went to Grodno or Brest where he lived with an elderly lady who allowed him to stay because he helped her around the house. In the beginning of June, he heard that there was again a possibility to cross the border, so he decided to try again.

The situation in Latvia in the autumn/winter of 2021/22 differed significantly from that in Lithuania and Poland. The pushbacks, carried out by the Latvian authorities during that period, targeted a small group of largely the same people<sup>31</sup> who were forced to remain in the forest for up to seven months in life-threatening conditions without access to any means of communication to the outside world. The testimonies, collected by the author,<sup>32</sup> reveal that on the Latvian side of the border, the foreign nationals were apprehended by Latvian border guards who would typically hand them over to unidentified armed officers in black gear with covered faces,<sup>33</sup> referred to by the interviewed persons as “commandos.”<sup>34</sup>

In autumn 2021, the persons apprehended at the border used to be driven to a large heavily guarded tent, set up by the Latvian authorities several kilometres inside the Latvian territory in an undisclosed location (which changed several times) and allowed to stay there overnight. Early in the morning, they were split into smaller groups, loaded in vehicles, driven to different sections of the border and ordered to cross into Belarus. During the day, they were transported back to Latvia by Belarusian border guards who did not allow them to return to Minsk. This pattern continued every day, with the non-EU nationals involved becoming trapped in the forest—typically for several weeks or months. The people interviewed report that Latvian or Belarusian forces systematically destroyed or confiscated their SIM cards or phones; therefore, it was impossible to document what was happening at the border or get in touch with their families, who had no information about their whereabouts for months.

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<sup>31</sup> ~250 people who arrived at the border at different times during the period between 11 August 2021 and 6 April 2022, see Sections 2 and 3.1 for more details.

<sup>32</sup> See Section 2 for more details.

<sup>33</sup> It is known that, in addition to regular border guards, the law enforcement personnel deployed by Latvia at the border included the military and the police special operations unit (SUB) (Sargs.lv, 2021).

<sup>34</sup> The author’s findings are consistent with the Amnesty International report on the situation in Latvia (2022b).

Hasan, an Iraqi national who spent two months at the Latvia-Belarus border (October-December 2021), recalls:

Every day early in the morning when it was still dark, we were all taken from the tent to the forest in Belarus. The commandos entered the tent, woke us up and told we had to be ready in 10 minutes. After 10-15 minutes, they opened the tent's door and took us one by one to the cars. On the way to the border we needed to hold our heads down and not to look anywhere, so that the location of the tent was not revealed. If anybody raised their head up they would get hit. Hitting was normal for them.

Mohammad, another Iraqi national who spent three months (11 August- mid-November 2021) at the same border, describes the conditions in the tent:

The toilet was just a hole in the ground with sticks around it. There was the black plastic material wrapped around these sticks. The commandos were watching us even while we were sitting on the toilet and hit us if we looked them in the eyes. We did not have any possibility to wash ourselves in the tent. I did not shower for around three months.

It is testified that from mid-December 2021 on, the Latvian authorities drove people to the tent only occasionally, forcing them to live under an open sky in very low temperatures (up to -20C) and continuing to subject them to regular pushbacks—sometimes multiple times a day. The people stranded in the forest suffered from severe malnutrition (the Latvian authorities only gave them a pack of biscuits and a bottle of water per day), as well as burns, frostbite and other skin conditions, caused by inability to maintain hygiene. Hiwa, an Iraqi national, recalls: "It was very cold, and we needed to make fire during the night to survive. One or two people had to stay awake to keep the fire burning. I have never seen life like this, I will never forget that."

The author has also been able to familiarise herself with Latvian hospital records, provided to her by several non-EU nationals who were hospitalised (in some cases, multiple times over the course of several weeks or months) and later brought back to the forest following discharge from hospital.

The collected testimonies show that the Latvian authorities asked people trapped in the forest to agree to return to their countries of origin as a precondition for being transferred to the Daugavpils Centre. All the interviewees said that, once at the Centre, they were pressured into signing IOM voluntary return declarations and typically returned to Iraq within several days. According to their testimonies, the Latvian authorities informed them there was no possibility to apply for international protection and threatened to take them back to the forest or keep them in detention for a long time if they did not agree to return. Rashid, another Iraqi national, describes his situation as follows:

On one occasion, the Latvians asked me and several people I was with [in the forest] if we would agree to return to Iraq. I did not agree because I have serious problems in my country. After I refused to return I was beaten severely by the Latvian commandos. Three men hit me with electric shock and beat me in the ribs.

Several days after they beat me up I tried to kill myself. I went aside and tried to hang myself with a scarf on the Latvian side in the forest but my friends eventually noticed that and did not let me do that. I thought there was no way out of there.

Later they [the Latvian authorities] offered me to return home again. They took me to a border guard's office and then to the Daugavpils Centre where they forced me to sign the voluntary return papers. The inspector said that if I signed them, I would fly back to Iraq, and if I did not sign, they would take me back to the forest. I begged them not to send me back to Iraq and asked for asylum many times but they did not react. I would have never signed the papers if I were not forced to do so.

Further, third-country nationals are subjected to violence on both sides of the border. Individuals who have attempted to cross the Latvian border testify that the Latvian authorities regularly exposed them to intimidation, verbal abuse and physical violence, including beatings and electric shock. Polish and Lithuanian activists equally report the use of violence by the authorities of their respective states. Regarding the Polish side of the border, there are not only reports of beatings, but also the use of tear gas, pepper spray throwers, rubber bullets and firearms (see also Grupa Granica, 2023a; 2023b).

From a legal perspective, one can distinguish two separate situations when people irregularly crossing into the EU from Belarus are subjected to inhuman and degrading treatment in violation of Article 3 of the ECHR. First, the Latvian, Lithuanian and Polish authorities violate the *non-refoulement* principle by ordering them to return to Belarus without examining their asylum claims. As noted in Section 3.1 above, Belarus cannot be considered a safe third country. Belarus is not a party to the ECHR. There are numerous reports of the Belarusian authorities beating people and forcing them to cross the border (see, e.g., Amnesty International, 2021). On the border with Latvia, Belarusian border guards did not allow people to return to Minsk, effectively forcing them to remain in the forest in the middle of the winter in life-threatening conditions—with no opportunity to claim asylum in Belarus. Second, the actions of Latvian, Lithuanian and Polish state actors on the EU side of the border, described above, can equally be regarded as inhuman and degrading treatment.



## 5. The concept of migrant instrumentalisation and EU-level response to the situation at the border

Since the second half of 2021, the situation at the EU’s external border with Belarus has remained largely unchanged. Forced summary and repeated returns to Belarus continue to remain systematic practice irrespective of extensive criticism by multiple international bodies and organisations, including the UNHCR (2021; 2024), the Council of Europe (2022; 2023), and Amnesty International (2022a; 2022b).

The situation has been further exacerbated by the lack of a firm EU-level response to open asylum-seeker rights violations in all three Member States concerned. The migrant instrumentalisation narrative has also been accepted by the European Commission, who succumbed to the pressure of national governments and appeared willing to sacrifice its role as the guardian of the Treaties by failing to initiate any infringement procedure against the Member States involved (for an analysis, see Grzeškowiak, 2023). Moreover, in late 2021, following the call of the European Council, the Commission also presented a set of proposals codifying the instrumentalisation concept into EU asylum law.<sup>35</sup>

While the Commission proposal failed to secure a majority in the EU Council in December 2022 (ECRE, 2022), the migrant instrumentalisation concept has eventually found its way into EU law. In particular, it has been incorporated in the new Crisis and Force Majeure Regulation (2024/1359), which was adopted as part of the New Pact on Migration and Asylum and will apply from 1 July 2026. The new Regulation does not go as far as domestic legislation authorising pushbacks and restricting the right to seek asylum. It nevertheless allows Member States to derogate from the EU’s asylum standards by extending registration period for asylum applications, the extensive use of border procedures and *de facto* detention of protection seekers.

For the purposes of the Regulation, “a situation of instrumentalisation” occurs where

a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security (Article 1(4)(b)).

This formulation, however, is overly broad and does not capture the complexities of the situation on the ground. First and foremost, the migrant instrumentalisation concept diverts attention from the main reasons of why people undertake dangerous and irregular routes to seek protection in Europe—

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<sup>35</sup> Including a proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum (COM/2021/890 final).

namely, global passport inequality, the EU's externalisation and containment policies, designed to deter unwanted foreigners from entering Europe (for an analysis, see Mitsilegas, 2022; Xanthopoulou, 2024), and the consequent absence of legal routes to seek protection (ECRE, 2017). In the majority of cases, for someone holding an Iraqi, Syrian or Afghan passport obtaining a visa for Europe is nearly impossible.

The conducted interviews reveal that people who attempt to irregularly cross into the EU from Belarus make up a heterogeneous group and frequently belong to categories with relatively high asylum-recognition rates. Examples include Afghans fleeing the Taliban, Syrians fleeing compulsory military service, Iranians fleeing political persecution, and Yazidis, an Iraq-based ethno-religious minority that was persecuted by ISIS and has since been living in protracted displacement for nearly a decade. Nada, a young Yazidi woman who spent nearly four months at the Latvia-Belarus border and was forced to return to an IDP tent camp in the Kurdistan region of Iraq without her asylum claim being registered, said over a video call:

I live in a Yazidi IDP camp near the city of Zakho. I previously lived in the city of Shingal<sup>36</sup> and was forced to flee after it was taken over by ISIS. During that time I was captured by an ISIS militant who raped me and forced [me] to live with him for three months before I managed to escape. I now live in a tent and do not feel safe. I am afraid that someone will abduct me again.

Second, establishing the aim of destabilising the EU may also appear highly challenging from the perspective of legal certainty. Whilst in the summer and autumn of 2021, Belarus indeed appears to have used migration as a political leverage against the EU, the situation seems to have changed. Following pressure from the EU, foreign airline companies introduced travel restrictions on nationals of certain Middle Eastern countries. Already in November 2021, for instance, the Turkish authorities denied Syrian, Yemeni and Iraqi nationals from boarding flights to Minsk (Roth & O'Carroll, 2021). In addition, several hundreds of Iraqi nationals were returned from Belarus to Iraq on so-called "repatriation flights" (Wallis, 2021).

The conducted interviews suggest that, starting from 2022, most of the non-EU nationals arriving at the EU's external border hold Russian, not Belarus, visas that are issued for purposes such as tourism, study, work or private visits. People are typically brought to the EU's border with Belarus by intermediaries of diverse backgrounds who are non-state actors. Interviews with Polish volunteers also reveal that the Belarusian authorities now increasingly attempt to intercept people who attempt to cross into the EU, detain and return them to Russia. Many people had also previously resided in Russia for prolonged periods of time (either regularly or irregularly, including with expired visas) before deciding to seek protection in the EU due to the lack of safety, human rights

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<sup>36</sup> Also known as Sinjar.

violations, risk of being expelled or forced to fight in the war in Ukraine, or deteriorating political and economic conditions in that country (see also Walker & Ali, 2024).

The author’s informants and media reports reveal that people in such situations were also among those who recently attempted to cross from Russia into Finland (Da Costa, 2023). The latter group also included foreigners who were brought to the Russian border by fixers following previous unsuccessful attempts to cross into the EU from Belarus. Further, there are people who arrived at the Belarus border by land via Russia and Central Asian countries (e.g., from Afghanistan), had never procured Belarusian or Russian visas or had any other connection with the Belarusian or Russian authorities. In general terms, the current situation is no different to the pre-2021 state of affairs when, because of their geographical location, people coming from a variety of regions used Belarus and Russia as transit routes to the EU’s border.<sup>37</sup> Any determination that a third-country national has been instrumentalised would thus seemingly necessitate an individualised assessment of each case on the basis of unknown criteria, an impossible task to undertake.

Last but not least, putting “essential functions of a Member State” at risk is a very high threshold to meet. Although in public discourse, the situation at the EU’s border with Belarus is typically described as a “crisis,” caused by the “mass influx” of aliens, the number of people who try to irregularly enter the EU via Belarus is much lower than the number of arrivals in Europe via the Mediterranean route (Buchholz, 2023). Moreover, the situation at the Belarus border cannot be compared with the years of 2015-16 when EU Member States registered over 2.5 million first-time asylum applications (Eurostat, 2017). In 2021, at the peak of the crisis, Polish border guards recorded fewer than 40,000 “attempts of illegal border crossings” from Belarus (Straż Graniczna [Polish Border Guard], 2022), with the numbers having dropped sharply in 2022 and 2023 (Sas, 2024). Moreover, it is crucial that the number of recorded border crossing attempts does not represent the actual number of people crossing the border, as many are pushed back and forth multiple times, inviting the abuse of statistics by the relevant governments. For example, in the period from August 2021 to April 2022, the Latvian authorities claimed to have registered over 6,600 border crossing attempts (Valsts robežsardze [Latvian State Border Guard], 2022). Yet, the author’s analysis of daily border guard statistics and interviews with the non-EU nationals involved suggest that the actual number of people behind these figures was as low as around 250.

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<sup>37</sup> See Section 3.1 above for more details.

## 6. Concluding remarks

The EU-Belarus border crisis has set an unprecedented example of how far EU Member States have been prepared (and were allowed) to go in their efforts to arbitrarily exclude the racialised “other” from the scope of fundamental rights protection, even where foreign nationals have managed to reach the EU’s territory in the first place. Used as a rationale for radical departures from EU and international refugee law, the migrant instrumentalisation concept has led to the creation of a highly securitised exclusion zone where protection seekers are deprived of their rights only because they attempt to enter the EU via a certain third country. The Latvian, Lithuanian and Polish domestic legislation severely restricting the right to seek asylum and authorising pushbacks has normalised grave violations of human rights that amount to inhuman and degrading treatment. Among other things, that frequently results in serious injuries, limb amputations and deaths on the border.

This situation has been further aggravated by the *laissez faire* approach of the European Commission who has failed to initiate any infringement procedure against the Member States involved. Moreover, the migrant instrumentalisation concept has ultimately found its way into EU law as part of the New Pact on Migration and Asylum. Yet, the above analysis has shown that this term is vaguely defined, highly problematic on a variety of levels and does not accurately reflect the realities on the ground. People crossing from Belarus make up a highly heterogeneous group, find themselves in diverse situations and do not necessarily have any connection with the Belarusian or Russian authorities. To establish an instrumentalisation element, it would thus be necessary to carry out an individualised assessment of each person’s circumstances based on uncertain criteria, which is impossible to do in practice. Finally, national, as well as EU-level responses to the issue are highly disproportionate. It is highly doubtful that the modest numbers of foreign nationals crossing from Belarus can represent a serious threat to a state’s national security and put at risk the essential functions of the Member States concerned.

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**Aleksandra Ancite-Jepifánova** is an interdisciplinary scholar working in the field of European and comparative migration and asylum law. She is a Senior Research Fellow at the Rule of Law Clinic at the Central European University Democracy Institute and a Research Affiliate with the Refugee Law Initiative, University of London. She received her PhD in law from Queen Mary University of London and has held fellowships, teaching positions and visiting appointments at various institutions, including LSE, Cardiff University, Forum Transregionale Studien, and VU Amsterdam. Her ongoing research project focuses on the situation at the EU's border with Belarus, particularly where it concerns access to the asylum procedure, prohibition of inhuman and degrading treatment, and compliance with the Rule of Law.