

The “Crisification” of Migration Law: Insights from the EU External Border

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1. Introduction

The dawn of the third millennium marked a turning point in the European response to asylum and migration flows to Europe. The adoption of a Common European Asylum System (CEAS), which would afford international protection to those in need of it, and the entry into force of the Charter of Fundamental Rights (CFR) of the European Union (EU),¹ including explicit provisions on the rights to asylum and to *non-refoulement*,² should have provided fertile ground for a cohesive and principled system of migration management and international protection. Despite their limitations, these instruments provide a normative space that establishes binding legal obligations at the EU constitutional level, owed to refugees and migrants.³

Yet, thereafter, the EU has faced multiple ‘crises’, including a financial and economic crisis, Brexit, a global pandemic, and war in Ukraine. These crises have been said to include the 2015 ‘migration crisis’, considered by the European institutions as ‘a crisis of unprecedented magnitude’, provoked by ‘the largest refugee crisis since the end of World War II’.⁴ The deaths of thousands attempting to cross from Libyan to European shores prompted the adoption of a Ten Point Action Plan on Migration by then European Commissioner of Migration, Dimitris Avramopoulos, calling for the mobilisation of ‘that ... collective European sense of urgency ... consistently shown in reacting in times of crisis’, which was instantly backed by the Member States.⁵ The European Commission followed with proposals for ‘immediate’ operational, budgetary and legal measures to ‘manage’ the crisis.⁶ While loss of life in the Central Mediterranean was not considered a novel development,⁷ the greater number

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¹ Charter of Fundamental Rights of the European Union (‘CFR’), [2012] OJ C 326/02.

² Arts 18, 19 and 4 CFR.

³ For analysis, see Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017), chs 8 and 9. For a comprehensive overview, see Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2015).

⁴ European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Addressing the Refugee Crisis in Europe: The Role of EU External Action*, JOIN(2015) 40 final, 9.9.2015, 2.

⁵ Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration, European Commission Press Release, <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4813>. This was closely followed by the European Agenda on Migration, COM(2015) 240 final, 13.5.2015.

⁶ European Commission, *Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration*, COM(2015) 490 final, 29.9.2015.

⁷ Since 2014, the IOM Missing Migrants project has documented the deaths of over 26,000 people who have perished while attempting to cross to European shores <<https://missingmigrants.iom.int/region/mediterranean>>.

of people attempting to reach Europe through different points along the external borders gathered attention. However, instead of focusing on the human casualties, it was the uncontrolled nature of arrivals that was perceived as a ‘crisis’ threatening the integrity of the Schengen area and the stability of the EU.

The proliferation of crises – or, rather, the characterisation of events as such – and the European response thereto is not restricted to this period. The European Union has long been ‘failing forward’ in crisis scenarios,⁸ kicking the can down the road, avoiding structural reform, and instead adopting ‘exceptional’ measures that eventually consolidate into standard policy and become the ‘new normal’. In each case, the (re)presentation of events as a ‘crisis’ has given rise to ‘emergency’ measures, suspending the usual democratic processes of deliberation and contestation characteristic of the Community method of law- and policy-making at EU level, in favour of urgent and exceptional mechanisms that quickly address and remedy the situation.

‘Crisis’ has been theorised as an idea,⁹ a discourse,¹⁰ and a practice, with experiential and political dimensions.¹¹ It typically signals a ‘moment of danger’,¹² indicating a rupture in the temporal line, connoting a ‘before’ and an ‘after’ in its occurrence. It involves commotion and disarray, calling for ‘extraordinary’ powers, the exercise of which is made possible (and acceptable) through the invocation of some danger that requires assertive action. In less spectacular configurations, ‘crisis’ also refers to the everyday fears and anxieties about specific phenomena (like uncontrolled mass migration) that are presented as a perennial (potential) threat (that may or may not eventuate). Reactions, in this case, may fall short of the official declaration of a ‘state of exception’ in the Schmittian sense.¹³ Crisis may instead become routinised, normalised (and institutionalised) as the permanent condition in a policy field.¹⁴ In this case, ‘crisification’ allows for the targeting of exceptionalism to address specific (unwanted) events. Differently from a state of emergency/exception, which generally applies on a blanket basis to the entire population, ‘crisis’ can be utilised to circumscribe restrictions and aim them at specific segments (like unauthorised migrants) for (in principle) a limited duration. ‘Crisis’ mobilises the resources of the state of emergency/exception, but in a selective, focused way,¹⁵ enabling new patterns of action or justifying the continuation of established modalities.¹⁶

⁸ Erik Jones, Daniel Kelemen, and Sophie Meunier, ‘Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration’ (2016) 49 *Comparative Political Studies* 1010.

⁹ On the historical genealogy of the term, see Reinhart Koselleck, ‘Crisis’, Michaela Richter (transl.) (2006) 67 *Journal of the History of Ideas* 357.

¹⁰ Matthew Seeger and Timothy Sellnow, *Narratives of Crises: Telling Stories of Ruin and Renewal* (Stanford: Stanford University Press, 2016).

¹¹ Didier Fassin, ‘Crisis as Experience and Politics’ (2022) 12 *Global Discourse* 460. See also Janet Roitman, *Anti-crisis* (Durham: Duke University Press, 2013).

¹² Walter Benjamin, ‘Theses on the Philosophy of History’, Harry Zohn (transl.), in Hannah Arendt (ed), *Illuminations: Essays and Reflections* (New York: Schocken Books, 1969) 253, 255.

¹³ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (transl.) (Chicago: University of Chicago Press, 2005).

¹⁴ On the normalisation and institutionalisation of crisis in relation to refugees, see Roger Zetter, ‘Refugee Crises: An Archetype for Crisis Studies’ (2022) 12 *Global Discourse* 487.

¹⁵ I am grateful to Jaya Ramji-Nogales for discussions on this point. Cf. Jaya Ramji-Nogales, ‘Migration Emergencies’ (2017) 68 *Hastings Law Journal* 609.

¹⁶ Julien Jeandesboz and Polly Pallister-Wilkins, ‘Crisis, Enforcement and Control at the EU Borders’, in Anna Lindley (ed.), *Crisis and Migration* (London: Routledge, 2014) 115.

Situations of ‘acute’ and ‘protracted’ crises co-exist and reinforce one another,¹⁷ coalescing in a state of ‘perpetual crisis’.¹⁸ Indeed, once a policy field has been ‘crisified’, the states of crisis/non-crisis become indistinguishable. ‘Crisis’ becomes a persistent threat; its current absence does not eliminate its prospective occurrence, demanding preventative action and constant surveillance. ‘Crisification’, as the resulting mode of governance, thus transcends binaries of norm/exception, crisis/routine. It communicates a constant sense of urgency that infiltrates the area at hand on a continuous basis, securing political consent for restrictions that become embedded in policy and legal structures. It manifests in a process of ‘incremental normalization’ that legitimizes securitised understandings and extensive forms of control, foreclosing alternative visions.¹⁹

Against this background, this Chapter analyses the extent to which ‘crisis’ is exploited to transform the law; it explores the impact of ‘crisification’ on the legal order. Adding to the literatures on ‘crisis’ and its problematization, I will show how this crisis-based paradigm has permeated EU law and policy and become a system of governance in its own right in the migration and asylum sphere. My main contention is that the presentation of migration and asylum events as ‘crises’ has been utilised in the EU context not only to justify measures and practices outside the bounds of ‘normal’ politics but that it has also targeted and fundamentally affected the law as well, allowing for *legalised* expansions of power and for contractions of pre-existing *legal* safeguards, leading to the re-configuration of the EU *acquis* in this field. In the following sections, I uncover how invocations of ‘crisis’, not only in the face of full-blown emergencies but also in the routine/routinised enforcement of migration controls, enables specific legal developments that are at odds with basic principles and international standards. These developments are the products of ‘crisification’, they grow and evolve through it. ‘Crisis’ (occurred or awaited) legitimizes and justifies their consolidation.

After explaining how ‘crisification’ has become a mode of governance in Section 2, elucidating its relationship to security and the securitisation of (unwanted) migration,²⁰ Section 3 explores two complementary phenomena that illustrate the legal shapeshifting precipitated by ‘crisification’. Therein, I appraise the EU’s reactions to migration and refugee flows at the external borders of the Schengen area and the alterations to the law it has produced. I draw upon key developments from the 2015 ‘migration crisis’ in the Mediterranean and beyond to show how the European response proceeded to transform a framework supposedly anchored in fundamental rights commitments into one that, on the one hand, erodes existing binding legal standards and, on the other hand, moves towards a progressive codification of means and

¹⁷ Nina Perkowski, Maurice Stierl and Andrew Burrige, ‘The Evolution of EUropean Border Governance through Crisis: Frontex and the Interplay of Protracted and Acute Crisis Narratives’ (2023) 41 *Environment and Planning D: Society and Space* 110.

¹⁸ Julia Sachseder, Saskia Stachowitsch and Clemens Binder, ‘Gender, Race, and Crisis-driven Institutional Growth: Discourses of “Migration Crisis” and the Expansion of Frontex’ (2022) 48 *Journal of Ethnic and Migration Studies* 4670, 4682.

¹⁹ Andrew Neal, ‘Securitization and Risk at the EU Border: The Origins of Frontex’ (2009) 47 *Journal of Common Market Studies* 333, 353.

²⁰ For an approximation to the concept, see Violeta Moreno-Lax and Niovi Vavoula, ‘The (Many) Rules and Roles of Law in the Regulation of “Unwanted Migration”’, in Violeta Moreno-Lax and Niovi Vavoula (eds), (Special Issue) *Regime Interaction and “Unwanted Migration”: From Hostility to Emancipation*, (2022) 24 *International Community Law Review* 285.

practices previously considered unlawful. Overall, the ‘crisification’ of migration and border law, as the Chapter will demonstrate, occurs in a way inconsistent with human rights and undermining of international legal standards. Both the ‘softification’ of existing hard law obligations²¹ and the progressive hardening – or ‘lawification’²² – of unlawful measures translate into the lowering (or negation) of the individual’s legal guarantees. These two processes (the ‘softification’ of existing hard-law protections and the ‘lawification’ of violations) constitute examples of a larger phenomenon that is nurtured, enabled, and expanded by ‘crisification’ as a mode of governance.²³ The final effect is a degradation of the existing norms that fundamentally transforms (and disfigures) the legal and policy framework.

In the first instance, the Chapter will look at the EU-Turkey Statement²⁴ as an example of ‘softification’, which has served to bypass the EU’s existing constitutional framework. While not the first tool of migration management that appears to run counter to binding obligations, in effect, the Statement marked a critical turning point in the field of asylum and migration governance through a measure that ultimately side-steps the prohibition of *refoulement* and effectively negates the right to asylum in Europe to those seeking access to international protection through the Aegean route. The Statement ‘softifies’ the existing asylum and migration legal framework by relying on inter-governmental negotiation and decision-making, which crystallized in an agreement of informal (unenforceable) commitments that evade the judicial scrutiny of the Court of Justice of the European Union (CJEU) and the democratic oversight of the European Parliament. This will be contrasted with the EU’s response to the 2021 ‘crisis’ at the Belarus border (with Lithuania, Latvia, and Poland)²⁵ as an example of (attempted) ‘lawification’. The resulting legal reform proposals by the European Commission to address situations of ‘instrumentalisation’ of migrants, if adopted, will legalise pushbacks and other grave violations of human rights as ‘exceptional’ measures required to counter (perceived) crisis situations.²⁶ This victimises the individuals involved and reifies them as ‘weapons’ in a ‘hybrid war’ against third countries that may seek political advantage in their relations with the EU²⁷ (through the exploitation of the very violence embedded in the

²¹ For an early use of the term, see Karsten Nowrot, ‘Aiding and Abetting in Theorizing the Increasing Softification of the International Normative Order – A Darker Legacy of Jessup’s Transnational Law?’, *Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie* (Heft 17, March 2018). On the impact of ‘softification’ on EU external relations regarding migration, see Violeta Moreno-Lax, ‘The Migration Partnership Framework and the EU-Turkey Deal: Lessons for the Global Compact on Migration Process?’, in Thomas Gammeltoft-Hansen et al., *What is a Compact? Migrants’ Rights and State Responsibilities regarding the design of The UN Global Compact for Safe, Orderly and Regular Migration* (Raoul Wallenberg Institute of International Human Rights Law, 2017) 27 <https://rwi.lu.se/app/uploads/2017/10/RWI_What-is-a-compact-final2.pdf>.

²² On ‘lawification’, see Violeta Moreno-Lax and Martin Lemberg-Pedersen, ‘Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalization’ (2019) 56 *Questions of International Law* 5.

²³ Arguably, other policy/law manifestations of ‘crisification’ include externalisation, ‘crimmigration’, or the datafication of border/migration controls.

²⁴ EU-Turkey Statement, 18 March 2016 <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

²⁵ The situation has been described as a ‘crisis’ and ‘not [as] a migration crisis’ by European Commission President in ‘Von der Leyen on Belarus: The EU has the will, the unity and the resolve to face this crisis’, 23 November 2021 <https://ec.europa.eu/commission/presscorner/detail/en/AC_21_6254>.

²⁶ Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890 final, 14.12.2021 (‘Anti-instrumentalisation Regulation Proposal’).

²⁷ Responding to state-sponsored instrumentalisation of migrants at the EU external border, JOIN(2021) 32 final, 23.11.2021.

Schengen *acquis*). In this manner, sub-par standards, which undermine individual protections, are progressively incorporated into the legal system. As the Chapter will conclude, the ‘crisification’ of law in the migration and asylum field, through the mechanisms of ‘softification’ of existing protections and the ‘lawification’ of violations, dismantles the ‘normal’ texture and functioning of the legal framework.

2. ‘Crisification’ as Mode of Governance

Crises have long been considered important in fostering decisional cycles that propel European integration as well as disintegration dynamics. Research confirms that the multiple crises affecting the EU over the years have had an impact on the EU modes of governance.²⁸ ‘Spill-over’, ‘spill-back’, and ‘encapsulation’ are some of the effects identified by political scientists that result from crises and impact the level and intensity of cooperation at the supranational level, either fostering or detracting from further regional integration.²⁹ Their influence may vary. Crises can trigger progression, stagnation, or recession, depending on the circumstances. They may threaten to reduce the current degree of centralisation or lead to a realisation that, without the pooling of further governmental authority and additional transfers of power to the EU institutions, transnational problem-solving becomes impossible.³⁰ The main theories of European integration, as the next section expounds, while formulating different propositions on their drivers and potential outcomes, perceive crises as ‘an integral part of the process’ of supranationalisation.³¹ There is a broad consensus on their significance.

2.1 From Crisis Governance to ‘Crisification’

The theory of ‘intergovernmentalism’ considers crises as being caused by exogenous factors, external to the EU, originating in the wider international environment or in domestic politics at Member State level.³² By contrast, the theories of ‘neofunctionalism’ and ‘post-functionalism’ regard crises as contingent on endogenous processes, competence limitations and dysfunctions at EU level.³³ Although neofunctionalism attributes some role to international conditions in the onset of a crisis (characterising them as ‘external shocks’ or ‘precipitating events’), it highlights the path-dependency at play in the way in which the situation will be handled and attaches importance to the weight and autonomy of supranational actors and

²⁸ Matthias Matthijs, ‘Lessons and Learnings from a Decade of EU Crises’ (2020) 27 *Journal of European Public Policy* 1127.

²⁹ Philippe Schmitter, ‘A Revised Theory of Regional Integration’ (1970) 24 *International Organisation* 836, at 842, 845. See also Arne Niemann, *Explaining Decisions in the European Union* (Cambridge: Cambridge University Press, 2006).

³⁰ Frank Schimmelfennig, ‘Theorising Crisis in European Integration’, in Desmond Dinan, Neill Nugent, and William Paterson (eds), *The European Union in Crisis*, (Basingstoke: Palgrave Macmillan, 2017) 316.

³¹ Zoe Lefkofridi and Philippe Schmitter, ‘Transcending or Descending? European Integration in Time of Crisis’ (2015) 7 *European Political Science Review* 3, 5.

³² See e.g. Andrew Moravcsik, ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’ (1993) 31 *Journal of Common Market Studies* 473; Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press, 1998).

³³ Ernst Haas, ‘International Integration: The European and the Universal Process’ (1961) 15 *International Organisation* 366.

institutions in its resolution.³⁴ From its part, post-functionalism assigns fundamental relevance to national forces and the politicization of certain issues that may impede (further) regional integration, with crises resulting in the contestation of (further) ‘Europeanisation’.³⁵

Therefore, in terms of results, while for neofunctionalism crises provide opportunities for self-renewal, produce resilience, and generate ‘positive’ feedback once addressed,³⁶ thereby reinforcing Europeanisation (such as in the example of the Euro crisis),³⁷ for post-functionalism crises tend to destabilize, mobilize Eurosceptic dissensus, and may ultimately catalyse disintegration³⁸ (like in the case of the ‘migration crisis’ per certain accounts).³⁹ In turn, intergovernmentalism considers outcomes as subordinate mainly to intergovernmental preferences, power differentials, and the bargaining capabilities of the different actors. Accordingly, crises can either be the motor of (additional) integration or mark a hiatus or even the discontinuation of supranational cooperation with more or less lasting effects.⁴⁰ It all depends on the (perceived) efficacy of unilateral action when compared with integrated responses to the challenges faced, the constellation of interests at stake, their (perceived) significance, and the sense of urgency they may elicit.⁴¹ The degree of prior centralisation, exit costs, and interdependence levels between the Member States also plays a role.⁴² Thus, despite disagreement regarding causes, processes and effects, all major theories of European integration accord crises an important part, as triggers of change, in markedly advancing or pausing supra-nationalisation.

What has only recently been theorised is the ‘crisification’ of law- and policy-making at EU level or the manner in which crisis (regardless of whether they are viewed as ‘positive’ or ‘negative’) shapes the means and modes of European governance (in either ‘advancing’ or ‘restricting’ integration).⁴³ A succession of crises (the financial crisis, Brexit, the war on terror,

³⁴ Paul Pierson, ‘The Path to European Integration: A Historical Institutionalist Analysis’ (1996) 29 *Comparative Political Studies* 123.

³⁵ Pieter De Wilde, ‘No Polity for Old Politics? A Framework for Analyzing the Politicization of European Integration’ (2011) 33 *Journal of European Integration* 559.

³⁶ Alec Stone Sweet and Wayne Sandholtz, ‘European Integration and Supranational Governance’ (1997) 4 *Journal of European Public Policy* 297.

³⁷ Cf. Sandrino Smeets and Natascha Zaun, ‘What is intergovernmental about the EU’s “(new)intergovernmentalist” turn? Evidence from the Eurozone and asylum crises’ (2021) 44 *West European Politics* 852.

³⁸ Liesbet Hooghe and Gary Marks, ‘A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus’ (2008) 39 *British Journal of Political Science* 1.

³⁹ On the structural constraints regarding the Eurozone and migration crises and comparing the two, see Philipp Genschel and Markus Jachtenfuchs, ‘From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory’ (2018) 56 *Journal of Common Market Studies* 178. Cf. Tanja Börzel and Thomas Risse, ‘From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics’ (2018) 25 *Journal of European Public Policy* 83.

⁴⁰ Christopher Bickerton, Dermot Hodson and Uwe Puetter, ‘The New Intergovernmentalism: European Integration in the Post-Maastricht Era’ (2015) 53 *Journal of Common Market Studies* 703.

⁴¹ Explaining the ‘strategic non-use of Europe’, see Peter Slominski and Florian Trauner, ‘How do Member States Return Unwanted Migrants? The Strategic (Non-)Use of “Europe” during the Migration Crisis’ (2018) 56 *Journal of Common Market Studies* 101.

⁴² Smeets and Zaun (n 37). Cf. Felix Biermann, Nina Guérin, Stefan Jagdhuber, Berthold Rittberger and Moritz Weiss, ‘Political (Non)Reform in the Euro Crisis and the Refugee Crisis: A Liberal Intergovernmentalist Explanation’ (2019) 26 *Journal of European Public Policy* 246.

⁴³ See especially Mark Rhinard, ‘The Crisification of Policy-Making in the European Union’ (2019) 57 *Journal of Common Market Studies* 616. See also, Jonathan White, ‘Constitutionalizing the EU in an Age of Emergencies’ (2023) 61 *Journal of Common Market Studies* 781.

the ‘migration crisis’, the Covid-19 pandemic, war in Ukraine) has determined the way in which collective decisions are taken in the EU in times of ‘emergency’. For Rhinard, these crises have a ‘deep-seated impact’ that transforms how EU law/policy is made.⁴⁴ This impact crystallises in ‘a crisisification [sic] of European policy-making’, which emphasises anticipatory law- and policy making in an attempt to forecast and stamp out future crises, prizing speed of action over the traditional deliberative discussion of a given issue.⁴⁵

‘Crisification’ privileges quick decision-making, ushers in special kinds of actors, develops purpose-built technologies, generates new narratives on ‘risks’ and ‘threats’ to the security and integrity of the European project, and adopts abridged processes to tackle and resolve the urgent problems (perceived to be) involved. A whole range of activities become geared towards preparing for, responding to, and recovering from (potentially) critical events – that may or may not materialise in the end, but which are defined as threats to fundamental values, key societal structures, or core pillars of European integration, thus giving rise to (possibly) existential predicaments that demand urgent attention.⁴⁶ The complex forces that crises (are supposedly likely to) unleash reveal the limitations of ‘normal’ law- and policy-making procedures to ‘protect’ the Union and, thus, justify ‘exceptional’ interventions.

The Community method, characterised by extensive analysis and consultation on the issues to be addressed, marked by collective deliberation with participation by stakeholders, the involvement of the European Parliament (typically as co-legislator), the adoption of detailed policy and legal provisions followed by implementation, monitoring, and potential enforcement by the CJEU, is displaced when ‘crisification’ steps in. Special crisis-response protocols, early-warning mechanisms, risk analyses, threat-detection tools, and plans of action are pursued instead by (unelected) ‘experts’ with specific ‘knowledge’ and the capacity to act quickly, sometimes under secrecy (in confidential procedures), and often without political and legal accountability. The usual democratic and judicial guarantees are suspended. New decisional modes, participation arrangements, and legitimacy claims emerge instead.

However, the effects of ‘crisification’ are not limited to exceptional times of necessity, nor do they vanish once the extraordinary event finishes. They are wider and run much deeper than any of the immediately resulting (‘positive’ or ‘negative’) policy outcomes. ‘Crisification’ fundamentally alters the nature of European integration in the specific domain, affecting purposes, methods, approaches, and final justification on a durable basis. Its relationship to security becomes symbiotic and deeply entrenched, as the next section turns to elucidate. It is the association of crisis with security (and related perceptions of *constant risk/threat*) that leads to the consolidation of ‘crisification’ – as both a state of affairs and a governance strategy.

2.2 *The Crisis-Security Nexus*

When crisis enters the scene (whether in acute or protracted form), as Rhinard has noted, a security logic hijacks decision-making ‘beyond the field of security per se’.⁴⁷ An overwhelming

⁴⁴ Rhinard (n 43), 619.

⁴⁵ *ibid*, 620.

⁴⁶ Generally, Uriel Rosenthal, Michael Charles and Paul ‘t Hart, *Coping with Crises: The Management of Disasters, Riots and Terrorism* (Springfield: Charles Thomas, 1989).

⁴⁷ Rhinard (n 43), 617.

concern with risk, threat, and emergency, ‘crisifies’ politics, with crisis-imbued law- and policy-making becoming the rule, particularly in ‘sensitive’ areas (like crime prevention, anti-terrorism, and indeed migration management or border control). This generates abundant leeway for executive fiat, discretionary action and (possibly) arbitrariness.

(Actual or perceived) crises require answers, especially in their immediate aftermath. At that point, political symbolism becomes paramount and law- and policy-makers expected to ‘do more’ and pressed to be ‘seen’ as taking all the necessary measures to respond to the event.⁴⁸ The most pressing are questions of efficacy and efficiency to ‘solve’ the problem, regardless of how ‘solutions’ are formulated or arrived at. Whether they are in accordance with EU values and legal standards becomes secondary in such circumstances. And this situation can (and is prone to) be exploited by the actors concerned to gain leverage, justify their role, legitimise their decisions, and further their own policy goals beyond the bounds of what may be technically allowed (in the absence of a clear legal basis).⁴⁹

Administrative pursuits, executive authority, and the role of the Council, the Member States, and the Commission, alongside specialised agencies (such as Frontex or Europol) as well as (unaccountable) ‘experts’ and ‘advisers’ outside the EU institutional apparatus, expand as a result. They increase their sway and dominate the crisified field at the expense of the European Parliament (and the democratic interests it represents, which are sidelined and impeded from influencing decisional outcomes).⁵⁰ The technological know-how, risk-detection credentials, and threat-prevention skills of these actors put them in a privileged position. Their enhanced crisis-management capacities are relied on to demonstrate ‘added value’, which then serves to incorporate the technologies and instruments they have developed into the mainstream. Subsequently, these tend to consolidate and perpetuate themselves, reaching a state of ‘permanent exceptionalism’,⁵¹ which becomes the ‘new normal’ and durably changes the field.⁵² Once the ‘innovations’ enter the scene, they are tested, perfected, and eventually retained (as seen in counter-terrorism programmes, cyber-crime prevention, or Eurozone consolidation mechanisms⁵³).

As mentioned earlier, ‘crisis’ is not simply a discourse. It is a technology.⁵⁴ It becomes a mode of governance with specific traits. Indeed, once an area becomes ‘crisified’, it generates its own dynamics and inertia, which makes a return to the (real or imagined) status quo ante unlikely. Knowledge of past events, cause-effect connections, and learning from the

⁴⁸ Sanneke Kuipers and Paul ‘t Hart, ‘Accounting for Crisis’, in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014) 589.

⁴⁹ For an illustration, see Karin Vaagland, ‘Crisis-Induced Leadership: Exploring the Role of the EU Commission in the EU-Jordan Compact’ (2021) 9 *Politics and Governance* 52.

⁵⁰ Sarah Backman and Mark Rhinard, ‘The European Union’s Capacities for Managing Crisis’ (2017) 26 *Journal of Contingencies and Crisis Management* 261. See also Arjen Boin, Magnus Ekengre and Mark Rhinard, *The European Union as Crisis Manager: Problems and Prospects* (Cambridge: Cambridge University Press, 2013).

⁵¹ Andrew Neil, *Exceptionalism and the Politics of Counter-Terrorism* (London: Routledge, 2010).

⁵² Tim Houghton, ‘Is Crisis the New Normal? The European Union in 2015’ (2016) 54 *Journal of Common Market Studies* 5.

⁵³ Tracing this iter, see Fabien Terpan and Sabine Saurugger, ‘Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity’ (2021) 44 *West European Politics* 21.

⁵⁴ Cf. Jeandesboz and Pallister-Wilkins, who define it as ‘a category of practice’ (n 16), 115.

management of a previous crisis feed into policy structures.⁵⁵ When ‘crisified’ thinking enters a policy domain, the logics that guide law- and policy-making are overtaken by a new paradigm that transforms behaviour, short-circuiting politics and crowding out the time and space for paused consideration of issues that could be regulated through the ‘normal’ conduits of democratic deliberation.

There is a shift towards ‘proactive’ (crisis-prevention) law- and policy-making, reorienting attention and resources towards ‘what matters most’.⁵⁶ Choices are made quickly, including decisions affecting essential interests (and typically also individual rights). They tend to be presented as zero-sum games (independently from actual facts), in terms of trade-offs involving ‘tragic choices’, net costs, and winners-losers outcomes, playing on the public’s fears.⁵⁷ *Output-oriented* legitimacy arguments become prevalent, above and beyond *input* and *throughput* justifications⁵⁸ – after all, the ‘normal’ working of democratic processes is (considered) incapable of responding properly to the crisis, which legitimises ‘exceptional’ methods.

In the longer run, ‘crisification’, and its overwhelming concern with risk, threats and security, filters reality and moulds its perception, more readily identifying certain events or situations as ‘crises’ (by default) and broadening the spectrum of issues requiring a ‘crisified’ response. Thereafter, the law and policy agenda of a ‘crisified’ field become driven by a succession of emergencies that the system searches for, anticipates, and responds to. Naming a ‘crisis’ as such sets in motion the ‘crisification’ machinery, which becomes ‘increasingly occupied with debating, preventing, and managing risks that it itself has produced’.⁵⁹ Crisis identification, prevention, and neutralisation becomes a mode of governance of its own, embedding named risks and threats and their avoidance as the key normative justification for action. Crises are no longer rupture points or anomalous junctures in a continuum of ‘normal’ politics; they become the continuum itself, offering a parallel pathway to further integration.⁶⁰

Whether they have any ontological reality is not important.⁶¹ Crises are constructs – dependent on the specifics of a situation, the prevailing political climate, and the mood and anxieties of relevant audiences. There is no objective measure to identify them. What matters is their perception and portrayal as existential constraints, regardless of their nature as sudden, unforeseen events or as perfectly predictable developments of well-known phenomena. Crisis-thinking is self-referential, self-generating, and self-fulfilling. ‘Crisification’, therefore, is no

⁵⁵ Concurring, see Giuseppe Campesi, ‘Crisis, Migration and the Consolidation of the EU Border Control Regime’ (2018) 4 *International Journal of Migration and Border Studies* 196.

⁵⁶ Marieke de Goede, Stephanie Simon and Marijn Hoijsink, ‘Performing Preemption’ (2014) 45 *Security Dialogue* 411, 419.

⁵⁷ Arjen Boin, Paul ‘t Hart, Eric Stern, and Bengt Sundelius, *The Politics of Crisis Management* (Cambridge: Cambridge University Press, 2016), 43.

⁵⁸ Vivien Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and “Throughput”’ (2013) 61 *Political Studies* 2.

⁵⁹ Ulrich Beck, ‘Living in the World Risk Society’ (2006) 35 *Economy and Society* 329, 332.

⁶⁰ On a similar vein, see Perkowski, Stierl and Burridge (n 17).

⁶¹ Cf. Regine Paul and Christof Roos, ‘Towards a New Ontology of Crisis? Resilience in EU Migration Governance’ (2019) 28 *European Security* 393.

accident. It is a choice.⁶² And it does not happen ‘outside of politics’, as some may think.⁶³ It constitutes a (more or less deliberate) strategy that responds to ‘manufactured risks’,⁶⁴ calling for the pre-emption of (yet-unproven, unmaterialised) threats.⁶⁵ Therefore, the (re)interpretation of a set of circumstances as a ‘crisis’ (re)orients law- and policy-making (as well as their justification).

‘Crisification’ constitutes a tactical option available to crisified actors – relied upon to maintain their relevance, sanction their authority, legitimise their decisions, and justify their consequences. It becomes a governmentality tool that addresses (supposedly) abnormal (or, at least, unwanted) phenomena, while curtailing political contestation; a rationality of government that justifies, sustains, and legitimises ‘crisified’ interventions in the face of named risks and threats, affirming the role of ‘crisified’ actors as ‘providers of ... security’.⁶⁶ This is particularly evident in the migration and border control field,⁶⁷ as the next section elaborates.

2.3 *The Security-Migration-Crisification Continuum*

Securitisation is a key feature of crisification.⁶⁸ In my view, each nurtures, accelerates, and reinforces the other. Securitisation provides the referent object to be governed through crisification, while crisification denotes the institutionalisation of securitisation as a system of governance. The idea of crisis (and the possibility of its occurrence, whether it actually happens or not) mobilizes and rationalizes a security response. It facilitates the production and performance of the special type of politics, targeted at the specific threat/risk to be avoided, that allows for a reinforcement of securitisation.⁶⁹ When existential interests are (designated to be) at stake, the security response spirals and becomes the ‘natural’ approach of crisification, entering the everyday activity of government officials and the decision-making apparatus. Rather than examining the structural conditions and systemic inertia that produce and inhabit securitisation, crisification encourages their (uncritical) prolongation. Although crisis may

⁶² Compare EU approaches to the 2015 ‘refugee crisis’, where most refugees came from Syria, to the Ukrainian refugee outflow, with over 8 million persons having been granted either Temporary Protection or a similar national protection arrangement, according to: UNHCR, Operational Data Portal: Ukraine Refugee Situation, updated 18 April 2023 <<https://data.unhcr.org/en/situations/ukraine>>. The Ukrainian situation has not been addressed with the same moral panic that pervaded the response to the Syrian exodus. Crisis-labelling has been much less present.

⁶³ Craig Calhoun, ‘The Idea of Emergency: Humanitarian Action and Global (Dis)Order’, in Didier Fassin and Mariella Pandolfi (eds), *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (New York: Zone Books, 2010) 29.

⁶⁴ Anthony Giddens, *Runaway World: How Globalization is Reshaping Our Lives* (London: Profile Books, 2002).

⁶⁵ Louise Amoore, *The Politics of Possibility: Risk and Security beyond Probability* (Durham: Duke University Press, 2013).

⁶⁶ Didier Bigo, ‘Security and Migration: Toward a Critique of the Governmentality of Unease’ (2002) 27 *Alternatives: Global, Local, Political* 63, 65.

⁶⁷ Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (London: Routledge, 2006).

⁶⁸ Claudia Aradau and Rens Van Munster, ‘Governing Terrorism through Risk: Taking Precautions, (Un)Knowing the Future’ (2007) 13 *European Journal of International Relations* 89; Olaf Corry, ‘Securitisation and “Riskification”: Second-order Security and the Politics of Climate Change’ (2012) 40 *Millennium: Journal of International Studies* 235.

⁶⁹ Julien Jeandesboz and Polly Pallister-Wilkins speak of a ‘doubling-down’ of securitisation in ‘Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis’ (2016) 21 *Mediterranean Politics* 316.

seem to call for a change of tack and ‘a governmental breakthrough of some sort’, what usually occurs is a multiplication of ‘more of the same’.⁷⁰

The EU ‘migration crisis’ demonstrates this well. While increasing death rates arguably called for a humanitarian response, relaxing controls and opening up safe passage channels to protection, pre-existing tendencies of militarized deterrence and coercive containment inbuilt in the Schengen regime were instead reinforced.⁷¹ Thereafter, the characterisation of (unwanted) migration *qua* crisis has become recurrent, ‘natural’, and expected,⁷² with ‘crisification’ emerging as its apposite mode of governance, inscribed in the daily routines of EU border enforcement. There is indeed a history of treating (unwanted) migration as a crisis in the EU realm, particularly when it happens through uncontrolled, unauthorised pathways.⁷³ The (intrinsically) messy, organic, and complex nature of migration is usually disregarded. Instead, a longing for ‘orderly’ and ‘managed’ migration has become the ultimate aspiration of EU policy⁷⁴ – regardless of its desirability or feasibility in light of universal rights and pre-existing legal obligations vis-à-vis those concerned (including at the EU constitutional level).

The genealogy of the migration-crisis nexus can be traced back, at least, to the 1990s and the post-Cold War movements and the mass displacement generated by the dissolution of the USSR, the fall of the Berlin Wall, and the struggle for independence of the former colonies.⁷⁵ In the 2010s, the crisis discourse has become dominant in media, policy, and academic analyses of migration.⁷⁶ From the 2011 ‘Arab Spring’ to the 2015 ‘migration crisis’ and the 2021 Belarus ‘hybrid attacks’, further investigated below, prejudiced narratives and negative stereotypes about (unwanted) migration have taken hold,⁷⁷ presenting it as ‘an abnormal event that disrupts the ordinary course of social and economic activity’.⁷⁸ The field has thereby arisen as an area of ‘routinized emergency’,⁷⁹ which is not entirely unpredictable but not completely determined either, necessitating of a permanent ‘crisified’ response that

⁷⁰ Rogier van Reekum, ‘The Mediterranean: Migration Corridor, Border Spectacle, Ethical Landscape’ (2016) 21 *Mediterranean Politics* 336, 336.

⁷¹ Violeta Moreno-Lax ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-Through-Interdiction/Rescue-Without-Protection” Paradigm’ (2018) 56 *Journal of Common Market Studies* 119.

⁷² Jef Huysmans and Vicky Squire, ‘Migration and Security’, in Myriam Dunn Cavelty and Victor Mauer (eds), *The Routledge Handbook of Security Studies* (Abingdon: Routledge, 2010) 169.

⁷³ See e.g. Susan Martin, Sanjula Weerasinghe, and Abbie Taylor (eds), *Humanitarian Crisis and Migration: Causes, Consequences and Responses* (London: Routledge, 2014); and Anna Lindley (ed.), *Crisis and Migration* (London: Routledge, 2014).

⁷⁴ Note also the very name of the UN ‘Global Compact for Safe, Orderly and Regular Migration’, A/RES/73/195(2019).

⁷⁵ See e.g. Myron Weiner, *Global Migration Crisis: Challenge to State and to Human Rights* (New York: Harper Collins, 1995); Cecilia Menjivar; Marie Ruiz; Immanuel Ness, ‘Migration Crises: Definitions, Critiques, and Global Contexts’, in Cecilia Menjivar; Marie Ruiz; Immanuel Ness (eds), *The Oxford Handbook of Migration Crises* (Oxford: Oxford University Press, 2019) 1.

⁷⁶ Céline Cantat, Hélène Thiollet, and Antoine Péroud, *Migration as Crisis: A Framework Paper* (April 2020) <<https://www.magyc.uliege.be/upload/docs/application/pdf/2021-09/d3.1-v2-april-2020-1.pdf>>. See also Anniken Hagelund, ‘After the Refugee Crisis: Public Discourse and Policy Change’ (2020) 8 *Comparative Migration Studies* 13; and Tommaso Trillò, ‘Mediterranean Migration and the Language of Crisis: An Italian Case Study’ (2017) *Janus - A comunicação mundializada* 122.

⁷⁷ On the effect of ‘prejudice’ on the securitisation of migration, see Valeria Bello, *International Migration and International Security: Why Prejudice is a Global Security Threat* (New York: Routledge, 2017).

⁷⁸ Zeynep Sahin-Mencutek, Soner Barthoma, Ela Gökalp-Aras and Anna Triandafyllidou, ‘A Crisis Mode in Migration Governance: Comparative and Analytical Insights’ (2022) 10 *Comparative Migration Studies* 1, 1.

⁷⁹ van Reekum (n 70), 339.

builds on short-term interventions and pre-existing practices, leading to their expansion and consolidation – their legitimacy or plausibility becoming secondary.

The labelling of (unwanted) migration as a ‘crisis’ reinforces a securitised view of migration and the apprehension of (racialised) non-citizens as security threats.⁸⁰ The ‘crisification’ of migration (and the fear of mass uncontrolled movement on which it rests) frames (particularly non-white) migrants as ‘invasive, undeserving and exploitative vis-à-vis Europe’, as anathema to the ‘socio-cultural and political-economic space [of] prosperity, welfare, and security’ that it represents, based on postcolonial hierarchies.⁸¹ The issue is that, once securitised as a threat, the process is unlikely to be reversed, to the extent that migration will continue to be regarded as menacing the social and political order on a permanent basis. Securitisation (as a cognitive frame, a discourse, a practice, and a technology of governance) spirals,⁸² becoming the ‘new norm’ – with ‘crisification’ the preferred means to deal with the related uncertainty and ambiguity that ensues. This is made particularly clear at times where different (designated) crises overlap to expose the brutality of the EU border regime. Stierl and Dadusc highlight how, in the Central Mediterranean, Covid-19 acted as an excuse for Member States to amplify their ‘[p]ractices of migrant expulsion, confinement, and abandonment’⁸³ – the combination of the two events (unwanted migration+pandemic) exacerbated (rather than minimized) the violence inherent in the EU external border (and with still lasting effects).

‘Crisis’ assists in construing (unwanted) arrivals and Europe’s supposed inability to accommodate them in a way that allows for the depiction of unauthorised migrants as a burden and as a potential (if unspecified) security risk. It also allows for a framing of border deaths as the result of ‘tragic accidents’ beyond Europe’s control, calling for and legitimizing drastic deterrence and containment tools to ‘solve’ the problem. Stopping unauthorised crossings and closing off the border are, thereafter, (re)presented as the most effective way to reduce the death toll, laundering as acceptable practices of questionable ethics and improbable legality.⁸⁴ As a result of the crisis-migration-security continuum, ‘the hardships migrants face can be turned around to label control measures [as] protective and benevolent’,⁸⁵ obscuring the structural causes of violence and Europe’s implication in their making.

⁸⁰ On the role of racialised stereotypes in the distinction of treatment between (white, Christian) Ukrainian refugees and other (typically brown, Muslim) protection seekers, see e.g. European Network Against Racism (ENAR), *Racist Double-standards Persist at EU/Ukraine Borders and Beyond*, 30 March 2022 <<https://www.enar.eu.org/racism-borders-eu-ukraine/>>.

⁸¹ Sachseder, Stachowitsch and Binder (n 18), 4679.

⁸² Valeria Bello, ‘The Spiralling of the Securitisation of Migration in the EU: From the Management of a “Crisis” to a Governance of Human Mobility?’ (2022) 48 *Journal of Ethnic and Migration Studies* 1327.

⁸³ Maurice Stierl and Deanna Dadusc, ‘The “Covid Excuse”: EUropean Border Violence in the Mediterranean Sea’ (2022) 45 *Ethnic and Racial Studies* 1453, 1468.

⁸⁴ Elias Steinhilper and Rob Gruijters, ‘A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean’ (2018) 52 *Sociology* 515, 528-530.

⁸⁵ Jørgen Carling and María Hernández-Carretero, ‘Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorised Migration from Africa’ (2011) 13 *British Journal of Politics and International Relations* 42, 55.

Crisification is concerned with (re)imposing ‘order’ and (re)gaining ‘control’, rather than with guaranteeing rights and complying with existing rules and underlying values.⁸⁶ The sense of urgency that pervades the (crisified/secured) migration field justifies exceptions and an approach that routinises the suspension of the ‘normal’ working of the law. Crisified governance works at the margin of legal protections, downgrades the ‘quality’ of the law, and prorogues democratic legislative and policy structures until the point of imagined ‘stability’ may be reached (i.e. supposedly once irregular/unwanted migration will have ceased). This opens a vast (and indeterminate) space for experimentation with novel techniques of regulation, privileging ad hoc-ism, informality, executive discretion, and short-termism, without a clear plan or vision – unless the untold target is the dismantling of legal protections themselves. The next section explores two crisified modes of law- and policy-making resulting from the crisification of migration.

2.4 Crisified Techniques of Regulation: ‘Softification’, ‘Lawification’ and Their Implications

Crisis-security framing has permeated the EU migration and asylum framework, where a suite of ‘new governance’ tools have crystallised,⁸⁷ with a penchant for swift (preferably informal) solutions, sacrificing ordinary democratic processes, and pre-emptively targeted to the detection and prevention of future crises. Against this background, ‘softification’ and ‘lawification’ emerge as two main vehicles of crisification, functioning as mechanisms that fragment the law, discontinue legal protections, and ultimately stratify human dignity. (Unwanted) migrants become the target of measures of segregation, control, and reification, no longer deemed the bearers of human rights, but treated as the security threats that crisified techniques of governance are meant to neutralise.

A restrictive approach dominates legal ‘crisification’, combining the weakening of existing protections (through ‘softification’) with the legalisation of rights violations (through ‘lawification’). ‘Softification’ is, indeed, characterised by the introduction of ad hoc, informal measures supposedly adopted to (temporarily) address abnormal, crisis situations. While theoretically aligned and ensuring compliance with existing legal standards, in effect they undermine hard-law commitments, which become unenforceable through the intermediation of a maze of soft-law provisions. They impede the exercise of rights, obstruct access to Courts, evade judicial scrutiny, resist validity review, deny enforceability, and negate effective remedies, ultimately lowering (if not nullifying) the protection individuals derive from the legal framework. ‘Lawification’, from its part, consists in the move towards ‘hardifying’ crisis-inspired (mal)practices, whitewashing them and codifying them into law. It is a strategy that uses the law to generate and legitimise rightlessness beyond the point of supposed resolution of a (time-limited) crisis.⁸⁸ In this manner, sub-par standards, which neglect individual rights

⁸⁶ Frank Gadinger, ‘Polycentric Governance through the Lens of Practice’, in Maria Koinova, Maryam Zarnegar Deloffre, Frank Gadinger, Zeynep Sahin Mencutek, Jan Aart Scholte, and Jens Steffek (eds), *It’s Ordered Chaos: What Really Makes Polycentrism Work* (Research Forum), (2021) 23 *International Studies Review* 1988.

⁸⁷ Paul James Cardwell, ‘Tackling Europe’s Migration “Crisis” through Law and “New Governance”’ (2018) 9 *Global Policy* 67.

⁸⁸ Making a similar point, see Dimitry Kochenov and Sarah Ganty, ‘EU Lawlessness Law: Europe’s Passport Apartheid From Indifference To Torture and Killing’, Jean Monnet Working Paper No 2/2022 (NYU Law School) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4316584>.

and contradict existing (international and EU) law protections, are progressively incorporated into the legal regime.

Through ‘softification’ and ‘lawification’, crisisification ends up reversing the relation between the rule (rights/legal safeguards) and its exception (limits/restrictions/derogations). As a result, (supposedly) exceptional, ‘defensive’ instruments are adopted and normalized as valid, including pushbacks, collective expulsion, detention, and *refoulement*. Containment and deterrence become the norm, no longer requiring specific (or any) justification, assumed as legitimate means to manage (unwanted) unauthorised movement. This happens at different levels, infiltrating the legal and institutional order and the implementation of policy and everyday practices of government authorities, deeply impacting migrant and refugee rights.⁸⁹

The cases of the EU-Turkey Statement and the anti-instrumentalisation of migration package proposed by the European Commission in the aftermath of the 2021 Belarus ‘crisis’, investigated in the next section, exemplify the progressive normalisation of practices previously considered unthinkable, marginal, and unlawful.

3. Insights from the Schengen Area

3.1 *The EU – Turkey Statement: Dismantling Protection through ‘Softification’*

The 2016 EU-Turkey Statement epitomises the strategic recourse to ad hoc and informal measures to tackle ‘crisis’ situations.⁹⁰ This is emblematic of the ‘crisisification’ of EU migration law, achieved through its ‘softification’. The runup to the Statement’s adoption is well-documented: in 2015-16, the ‘migration crisis’ and the increase in the numbers of individuals irregularly crossing into the EU provided the impetus for a strategy that would drastically reduce migration flows to Europe.⁹¹ In the case of the Aegean route, where the increase in arrivals stemmed largely from those crossing from Turkey to the Greek islands in search of refuge from the war in Syria, EU-Turkey cooperation led to a Joint Action Plan on migration containment.⁹² In the face of ‘an unprecedented crisis’, the Joint Action Plan tracked ‘the understanding between the [EU] ... and the Republic of Turkey to step up their cooperation on support of Syrians under temporary protection and migration management in a coordinated effort to address the crisis created by the situation in Syria’.⁹³ The reference to ‘the situation in Syria’ underscores awareness that the population selected for deflection and deterrence consisted of individuals fleeing the conflict (presumably in need of international protection).

Building on the Joint Action Plan, the EU-Turkey Statement of March 2016 established the framework for cooperation and fleshed out the modalities of the agreement. Through the Statement, ‘Members of the European Council’ (rather than the EU itself) agreed with ‘their

⁸⁹ Sahin-Mencutek et al (n 78), 6, speak of crisis as mode of governance as affecting the ‘macro’, the ‘meso’ and the ‘micro’ level of migration policy.

⁹⁰ EU-Turkey Statement (n 24).

⁹¹ William Spindler, ‘2015: The Year of Europe’s Refugee Crisis’ (UNHCR 8 December 2015) <<https://www.unhcr.org/uk/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html>>.

⁹² EU-Turkey Joint Action Plan <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860>.

⁹³ Ibid.

Turkish counterpart’ to target individuals crossing from Turkey into the Greek islands.⁹⁴ The Statement sought to provide for the rapid ‘return’ (i.e. expulsion) to Turkey of all ‘new irregular migrants’ intercepted,⁹⁵ using this strategy ‘to break the business model of the smugglers’ as well as, supposedly, ‘to offer migrants an alternative to putting their lives at risk’.⁹⁶ Containment was thereby presented as a humanitarian measure that simultaneously served to address security concerns; it would fight cross-border crime and avoid unwanted arrivals, while sparing the lives of ‘irregular migrants’. Any reference to their protection needs (let alone legal rights) comes in later in the document, when providing that, prior to being (forcibly) returned to Turkey, the individuals concerned were to be ‘duly registered’ and allowed to apply for international protection in line with the Asylum Procedures Directive.⁹⁷ Those who would not qualify for international protection, or whose claim were deemed (*prima facie*) unfounded or inadmissible (including on account of having arrived ‘illegally’ or via a ‘safe third country’⁹⁸), would be returned to Turkey without a thorough examination of their situation or consideration of the merits of their claims. Throughout, expulsions, in the Statement, were supposed to be carried out in line with the relevant obligations under EU and international law, including the principle of *non-refoulement*,⁹⁹ although no specific safeguards were contemplated to ensure this outcome. In exchange, a resettlement mechanism (voluntary for the EU Member States, who would discretionarily decide whether to participate in it or not) was offered, so that, for every Syrian expelled to Turkey from the Greek islands, one Syrian (preferably among those who would not yet have attempted an unauthorised crossing) could be resettled to the EU.¹⁰⁰ Most crucially, Turkey also committed to cooperate with the EU and take ‘any necessary measures’ to prevent new arrivals to the Greek islands (through unspecified means).¹⁰¹ In return, Turkey would see EU Member States accelerate the visa liberalisation process for Turkish nationals, re-engage in Turkey’s EU accession negotiations, and provide financial aid, in the form of a ‘Refugee Facility’, to cater for the cost of hosting asylum seekers on Turkey’s territory.¹⁰² What the Statement (strategically) ignores is that forced migration flows cannot be stopped without violence, especially if the root cause driving people to flee persist. Therefore, at the heart of the Statement sits a tacit acceptance that human rights violations may ensue as part of the implementation of the terms agreed.

The Statement was adopted amidst the 2015 ‘migration crisis’, with the crisis framing generating the necessity for an urgent response,¹⁰³ which was said to require ‘bold moves’

⁹⁴ EU-Turkey Statement (n 24), opening para., first indent.

⁹⁵ *Ibid.*, para 1).

⁹⁶ *Ibid.*, opening para., third indent.

⁹⁷ *Ibid.*, para 1). See also Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (‘Asylum Procedures Directive’ or ‘APD’).

⁹⁸ Arts 32 (unfounded applications), 33 (inadmissible applications), 35 (first country of asylum), and 38 (safe third country) APD.

⁹⁹ EU-Turkey Statement (n 24), para 1).

¹⁰⁰ *Ibid.*, para 2).

¹⁰¹ *Ibid.*, para 3).

¹⁰² *Ibid.*, paras 5), 6) and 8).

¹⁰³ See, for example, repeated references to ‘crisis’/‘refugee crisis’ in the press release on the meeting of the EU Heads of Government with Turkey, 7 March 2016 <<https://www.consilium.europa.eu/en/meetings/international-summit/2016/03/07/>>.

given the ‘need to break the link between getting in a boat and getting settlement in Europe’.¹⁰⁴ The resulting instrument was a product of ‘crisification’ – of ‘crisis-led governance’, falling outside and challenging the EU legal framework.¹⁰⁵ The Statement’s process of negotiation, conclusion and implementation has been criticised for constituting a form of ‘reverse Lisbonisation’¹⁰⁶; a form of EU disintegration, identified by the absence of a role for the European Parliament and the CJEU, marked by a ‘crisified’ mode of decision-making that torpedoes the Union’s own foundations.¹⁰⁷

In concluding international agreements affecting borders and asylum, EU Treaty provisions explicitly require the Council to obtain the consent of the European Parliament.¹⁰⁸ In March 2016, the Council neither consulted the European Parliament nor sought its consent, purportedly on the basis that the Statement was not (formally) an international agreement.¹⁰⁹ Instead, the adoption of the Statement was communicated through a press release and presented as an innocuous, aseptic political declaration by the EU Heads of State – rather than as an act of the EU institutions which created legal obligations, including the obligation to respect EU fundamental rights and international law in its design and implementation.

The recourse to a Statement negotiated outside the Community method and in lieu of a (legally binding) international agreement further meant shielding the Statement from judicial scrutiny. The General Court, when faced with three applications for annulment lodged before it, considered it lacked the authority to pronounce on the Statement’s validity.¹¹⁰ The applicants argued that the Statement was unlawful, given the failure to follow the stipulated procedure established in the EU Treaty for the adoption of an international agreement and that, in substance, it breached multiple fundamental rights enshrined in the EU Charter, including the prohibition of collective expulsion and the principle of *non-refoulement*. Yet, the General Court disclaimed jurisdiction, holding that the Statement had been ‘informally concluded’,¹¹¹ and without the intention to create binding legal obligations, by the Heads of Government of the EU Member States in their own capacity, rather than as representatives of the EU. This made the instrument non-attributable to the organisation and fall outside the scope of application of EU law.¹¹² The ensuing appeal lodged before the CJEU was declared inadmissible.¹¹³ The Court’s refusal to examine the substance of the Statement meant that the Statement was not

¹⁰⁴ European Council, Statement of the EU Heads of State or Government, 7 March 2016 <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>>.

¹⁰⁵ Sergio Carrera, Leonard den Hertog and Marco Stefan ‘It Wasn’t Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal’, CEPS Policy Insights No 2017-15 (April 2017), 8 <<https://www.ceps.eu/ceps-publications/it-wasnt-me-luxembourg-court-orders-eu-turkey-refugee-deal/>>.

¹⁰⁶ Sergio Carrera, Leonard den Hertog and Marco Stefan, ‘The EU-Turkey Deal: Reversing “Lisbonisation” in EU Migration and Asylum Policies’, in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019) 155, 156.

¹⁰⁷ Art 2 TEU.

¹⁰⁸ Art 218 TFEU.

¹⁰⁹ Art 216 TFEU. As argued by the European Council before the General Court in *NF, NG, and NM* (n 110).

¹¹⁰ Orders of the General Court, T-192/16 *NF v European Council*, ECLI:EU:T:2017:128; T-193/16 *NG v European Council*, ECLI:EU:T:2017:129; and T-257/16 *NM v European Council*, ECLI:EU:T:2017:130.

¹¹¹ *Ibid.*, para. 72 (*NF*), para. 73 (*NG*), and para. 71 (*NM*).

¹¹² Confirming: CJEU, Joined Cases C-208/17 P to C-210/17 P, *NF and Others v European Council*, ECLI:EU:C:2018:705. For analysis see, Carrera, den Hertog and Stefan (n 105).

¹¹³ *Ibid.*

reviewed for its compliance with fundamental rights, particularly in relation to the right to asylum.¹¹⁴ Consequently, the CJEU *qua* ultimate arbiter of EU law,¹¹⁵ emphasising form over substance, tacitly legitimised the informalisation of cooperation with non-EU countries, thereby indirectly allowing a means of circumventing substantive protections and ‘softifying’ individual rights, rendering them unenforceable within the sphere of EU law.¹¹⁶

The ‘softification’ of the asylum field in this context raises multiple concerns for the EU’s commitment to fundamental rights. The practical implications of the Statement for forced migrants and its effect in the region are well-documented.¹¹⁷ UNHCR recorded 2,140 people, including nationals of Syria, Afghanistan, and Iraq, being forcibly returned from Greece to Turkey over the period April 2016 to March 2020,¹¹⁸ to conditions that belie Turkey’s designation as a ‘safe third country’.¹¹⁹ Many more have made the object of illegal ‘pushbacks’ by the Greek authorities and ‘pullbacks’ by the Turkish Coastguard.¹²⁰ Up until March 2020, Turkey claims to have (forcibly) ‘prevented’ some 200,000 irregular crossings to Greece.¹²¹ This has led to a 94% drop in irregular arrivals to the Greek islands, which has been praised by the European Commission.¹²² Overall, the ‘crisified’ dynamics underpinning the Statement’s implementation have focused on ‘speeding up ... the processing of asylum applications’ in Greece, ‘ensuring ... [its] pre-removal capacity’, and ‘prevent[ing] new sea and land routes for irregular migration’,¹²³ ignoring the rights and legal protections of those concerned.

The Covid-19 pandemic saw a worsening of the situation, with Home Affairs Commissioner Johansson admitting to the ‘terrible conditions’ facing refugees on the Greek

¹¹⁴ Art 18 CFR.

¹¹⁵ Per Art 19 TFEU.

¹¹⁶ For further analysis on the forms and consequences of informalisation in the asylum realm, see Violeta Moreno-Lax, ‘The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law’, in Evangelia (Lilian) Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Immigration and Asylum Law* (Edward Elgar, 2022) 282.

¹¹⁷ For an overview and additional sources, see Violeta Moreno-Lax, Jennifer Allsopp, Evangelia (Lilian) Tsourdi, Philippe De Bruycker and Andreina De Leo, *The EU Approach on Migration in the Mediterranean*, PE 694.413 (Brussels: European Parliament, 2021), 122-129 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU\(2021\)694413_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf)>.

¹¹⁸ UNHCR, Returns from Greece to Turkey (under EU-Turkey statement) as of 31 March 2020 <<https://data.unhcr.org/en/documents/details/75075>>.

¹¹⁹ Refugee Support Aegean and ProAsyl, *Greece arbitrarily deems Turkey a “safe third country” in flagrant violation of rights* (February 2022) <https://rsaegean.org/wp-content/uploads/2022/02/RSA_STC_LegalNote_EN.pdf>. On the continuing violence facing migrants on the Turkey-Greece route, see Human Rights Watch, “‘Their Faces Were Covered’ Greece’s Use of Migrants as Police Auxiliaries in Pushbacks”, 7 April 2022 <<https://www.hrw.org/report/2022/04/07/their-faces-were-covered/greeces-use-migrants-police-auxiliaries-pushbacks>>.

¹²⁰ See, among others, Roberto Cortinovis, ‘Pushbacks and Lack of Accountability at the Greek-Turkish Borders’, CEPS Paper in Liberty & Security No 2021-01 (February 2021) <<https://www.ceps.eu/ceps-publications/pushbacks-and-lack-of-accountability-at-the-greek-turkish-borders/>>.

¹²¹ Human Rights Watch, ‘Greece: Violence Against Asylum Seekers at Border’, 17 March 2020, reporting that ‘[b]etween January 2015 and March 12, 2020, Turkey’s coastguard reportedly intercepted 186,766 asylum seekers and migrants in the Aegean Sea’. Cf. Turkish government statistics increase the number to 258,530 (20,380 (2020); 60,802 (2019); 26,678 (218); 21,937 (2017); 37,130 (2016); 91,611 (2015)) <<https://en.sg.gov.tr/irregular-migration-statistics>>.

¹²² Seventh Report on the Progress made in the Implementation of the EU-Turkey Statement, COM(2017) 470 final, 6.9.2017, 9-11.

¹²³ Progress Report on the Implementation of the EU Agenda on Migration, COM(2019) 126 final, 6.3.2019.

islands¹²⁴ – detained *en mass* and quarantined in unsanitary, overcrowded spaces, arguably reaching the threshold of inhuman treatment.¹²⁵ The circumstances sharply deteriorated when, in February 2020, Turkey stopped accepting expulsions from Greece, purportedly on public health grounds.¹²⁶ In response, Greece officially suspended the right to asylum and blocked large numbers at the border,¹²⁷ leaving them in severe hardship.¹²⁸ In addition, the government formally designated Turkey a ‘safe third country’ for nationals of Syria, Afghanistan, and Somalia.¹²⁹ Pushbacks continued and became even more brutal, both over land and at sea.¹³⁰ Turkey’s record of violent *refoulements*, mass deportations, indiscriminate shootings at the border with Syria, and its continued violation of refugees’ human rights was disregarded,¹³¹ not only by the Greek government, but also by the European Commission, whose initial reaction was to congratulate Greece for acting as ‘Europe’s shield’ in a time of crisis.¹³²

The Statement, however, has not been abandoned. To the contrary – and in line with the ‘crisification’ paradigm – it has been embraced as reflecting the ‘deeper engagement and dialogue with Turkey’, as one of the key external partners of the EU, and considered to provide a blueprint for EU-third country relations regarding the management of (unwanted) migration.¹³³ The Statement’s role in advancing ‘crisification’ goes beyond the implications for those traversing the Aegean. It has served to entrench the exceptional as the normal state of affairs. What was purportedly a ‘temporary and extraordinary measure ... necessary to end the

¹²⁴ Opening statement at European Parliament plenary debate about the humanitarian situation Greek islands, 29 January 2020 <https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/opening-statement-european-parliament-plenary-debate-about-humanitarian-situation-greek-islands_en>.

¹²⁵ Refugees International, ‘Blocked at Every Pass: How Greece’s Policy of Exclusion Harms Asylum Seekers and Refugees’, 24 November 2020 <<https://www.refugeesinternational.org/reports/2020/11/20/blocked-at-every-pass-how-greeces-policy-of-exclusion-harms-asylum-seekers-and-refugees>>.

¹²⁶ As acknowledged by the European Commission, Turkey Report 2021 SWD(2021) 290 final/2, 48 <<https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Turkey%202021%20report.PDF>>. See also European Parliament, ‘Answer given by Ms Johansson on behalf of the European Commission’ Parliamentary Question P-000604/2021(ASW) (2021) <https://www.europarl.europa.eu/doceo/document/P-9-2021-000604-ASW_EN.html>.

¹²⁷ ‘Refugees told “Europe is closed” as tensions rise at Greece-Turkey border’, *The Guardian*, 6 March 2020 <<https://www.theguardian.com/world/2020/mar/06/refugees-europe-closed-tensions-greece-turkey-border>>.

¹²⁸ UNHCR, ‘Statement on the situation at the Turkey-EU border’, 2 March 2020 <<https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>>.

¹²⁹ Joint Ministerial Decision 42799/2021, Government Gazette 2425/B/7-6-2021 <<https://www.e-nomothesia.gr/kat-allodapoi/prosphuges-politiko-asulo/koine-upourgike-apophase-42799-2021.html>> (Greek version). For a translation, see Greek Council for Refugees, ‘Safe Third Country’ (ECRE 2022) <<https://asylumineurope.org/reports/country/greece/asylum-procedure/the-safe-country-concepts/safe-third-country/>>.

¹³⁰ See, e.g., ‘Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations’, *Just Security*, 22 May 2020 <<https://www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations/>>.

¹³¹ Amnesty International, ‘Turkey: Halt Illegal Deportation of People to Syria and Ensure Their Safety’, 29 May 2020 <<https://www.amnesty.org/en/documents/eur44/2429/2020/en/>>. For the continuation of these practices, see Human Rights Watch, ‘Turkey: Hundreds of Refugees Deported to Syria’, 24 October 2022 <<https://www.hrw.org/news/2022/10/24/turkey-hundreds-refugees-deported-syria>>.

¹³² ‘Greece is “Europe’s shield” in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, *Euronews*, 4 March 2020 <<https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>>. Cf. ‘Commissioner Johansson in “Greece warned by EU it must uphold the right to asylum”’, *The Guardian*, 12 March 2020 <<https://www.theguardian.com/world/2020/mar/12/greece-warned-by-eu-it-must-uphold-the-right-to-asylum>>.

¹³³ New Pact on Migration and Asylum, COM(2020) 609, 18.

human suffering and restore public order'¹³⁴ remains in place years after its inception, with the Commission continuing to present the Statement as a success meriting continuation.¹³⁵

This legitimisation of extra-legal measures adopted through (extra-EU) intergovernmental cooperation (but with a view to serving EU interests), alongside the fundamental rights subversion it entails, has heralded a new era for EU external migration management; the approach in the Statement has been replicated in subsequent dealings with other countries of origin and transit.¹³⁶ Although, formally, the EU and its Member States remain bound by their obligations under EU and international human rights and refugee law, the impact of the Statement has been a stark devaluing of access to asylum and the concomitant negation of the right to international protection.¹³⁷ The effectiveness, accessibility, and exercisability of attendant protections have been virtually nullified.

Hereinafter, the informalisation of engagements with non-EU States is not only deemed acceptable, but also follows the model of the EU-Turkey Statement – thereby normalising the bypassing of processes considered central to the Union's own legitimacy and its adherence to the rule of law.¹³⁸ In the ensuing 'crisified' environment, the 'softification' of commitments implies not only the elimination of democratic accountability and judicial oversight, but also the non-enforceability of individual guarantees. Insofar as informal arrangements exclude the European Parliament's input and the CJEU's jurisdiction, they become structurally incapable of ensuring compliance with EU fundamental rights, if only because, to avoid arbitrariness, all measures that interfere with individual rights must be provided for 'by law'.¹³⁹ The principle of legality, as formulated in the Charter, renders soft-law instruments unsuitable by definition.

3.2 Weaponising Migration: The Proposed anti-Instrumentalisation Regulations and the Intended 'Lawification' of Unlawful Practices

In July 2021, another 'migration crisis' erupted at the EU's doorstep. This time, it was Lukashenko's Belarusian regime which, in retaliation to EU-imposed sanctions earlier in the year, started facilitating and channelling migration flows of Afghan, Syrian, Iraqi and Yemeni nationals in the direction of the Member States of Poland, Lithuania, and Latvia.¹⁴⁰ The joint statement by the Prime Ministers of the affected countries noted that the 'ongoing crisis' resulted from systematic planning by the Belarusian State, which had organised the arrival of individuals onto its territory before they were 'unlawfully direc[ted] to the EU external border

¹³⁴ EU-Turkey Statement (n 24), para 1).

¹³⁵ For the Commission's continued praise of the Statement see e.g. 'Key findings of the 2021 Report on Turkey', 19 October 2021 <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5282>.

¹³⁶ The Commission has recognised to have concluded similar informal arrangements with: Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia and Ivory Coast, in Return and Readmission (undated) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en>. For an overview of their effects, see, Moreno-Lax et al. (n 117), 118-140.

¹³⁷ Recognised in binding form in Art 18 CFR.

¹³⁸ Art 2 TEU. For commentary, see Andrea Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) 39 Yearbook of European Law 569.

¹³⁹ Art 52(1) CFR.

¹⁴⁰ European Council, Conclusions on Belarus, Special meeting of the European Council, EUCO 5/21, 24 and 25 May 2021, Brussels. See also 25 June 2021 Conclusions welcoming their implementation <<https://www.consilium.europa.eu/media/50763/2425-06-21-euco-conclusions-en.pdf>>.

[and] ... later prevented from returning to their countries of residence'.¹⁴¹ This joint Statement acknowledged the apparent protection needs of the individuals concerned and decried their 'weaponisation', which marked a threat to 'the regional security of the European Union and constitutes a grave breach of human rights'.¹⁴² While the Statement spoke of their readiness to provide asylum in line with international refugee law and other obligations, the three EU Member States also asserted their preparedness to 'take all necessary actions, including advancing advocating [sic] for the possible new restrictive measures by the EU to prevent any further illegal immigration orchestrated by the Belarusian State'.¹⁴³

Later statements forwent any references to the rights or protection needs of the individuals affected, emphasising instead Belarus' actions as a 'hybrid attack against the EU', consisting of the facilitation of irregular movements from third countries to the EU Member States, condemning Lukashenko's attempt to 'weaponis[e] irregular migration for achieving political goals'.¹⁴⁴ The conversation progressively dehumanised the migrants being instrumentalised – and ignored the absence of any legal routes for them to reach safety. The events ultimately became officially framed as a 'hybrid war' that utilized (forced) migrants as 'living weapons' or 'living shields', referring to their instrumentalisation as rendering the situation 'unmanageable',¹⁴⁵ despite the small numbers involved – according to the European Commission, from July to November 2021, total arrivals in the EU amounted to 7,698.¹⁴⁶

The warlike conceptualisation allowed for the adoption of highly restrictive measures by all three Member States – most of which are still in place today. While Lithuania declared an 'extraordinary situation', warranting the disapplication of essential EU, international and constitutional protections vis-à-vis third country nationals arriving at the border, the Latvian and Polish governments declared a 'state of emergency' and adopted similar derogations¹⁴⁷ – in Latvia, the state of emergency has continued to be extended on the ground that the risks of

¹⁴¹ Joint Statement of the Prime Ministers of Poland, Lithuania, Latvia and Estonia, on the hybrid attack on the borders by Belarus, 23 August 2021 <<https://www.gov.pl/web/nato-en/statement-of-the-prime-ministers-of-poland-lithuania-latvia-and-estonia-on-the-hybrid-attack-on-our-borders-by-belarus>>.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Joint Statement by the Assembly of the Seimas of the Republic of Lithuania and the Sejm and Senate of the Republic of Poland on irregular migration at the EU's external border, 20 October 2021 <https://www.lrs.lt/sip/portal.show?p_r=35403&p_k=2&p_t=278631>.

¹⁴⁵ 'Is Belarus using migrants as part of a "hybrid war" against the EU?', *Euronews*, 11 August 2011 <<https://www.euronews.com/2021/08/11/is-belarus-using-migrants-as-part-of-a-hybrid-war-against-the-eu>>;

'Lithuania slams shut the door to the EU for irregular migrants', *Politico*, 1 September 2021 <<https://www.politico.eu/article/lithuania-migrants-eu-asylum-belarus-alexander-lukashenko/>>; 'People used as "living shields" in migration crisis, says Polish PM', *The Guardian*, 21 November 2021 <<https://www.theguardian.com/world/video/2021/nov/21/people-living-shields-migration-polish-pm-video-belarus-morawiecki>>.

¹⁴⁶ Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Responding to State-sponsored Instrumentalisation of Migrants at the EU External Border, JOIN(2021) 32 final, 23.11.2021, 2 (of the total 7698, 4222 arrived in Lithuania, 3062 in Poland, and 414 in Latvia).

¹⁴⁷ ECRE Legal Note 11, *Extraordinary Responses: Legislative Changes in Lithuania, 2021*, 3 September 2021 <<https://ecre.org/ecre-legal-note-11-extraordinary-responses-legislative-changes-in-lithuania-2021/>>; 'Poland: Border crackdown extended amid fears more migrants may die', *InfoMigrants*, 1 October 2021 <<https://www.infomigrants.net/en/post/35460/poland-border-crackdown-extended-amid-fears-more-migrants-may-die>>.

‘illegal migration’ still remain,¹⁴⁸ and with five extensions between 2021-22 is ‘effectively becoming a permanent condition’.¹⁴⁹ The three countries have also increased the militarization of their respective border zones,¹⁵⁰ banned the press, humanitarian actors and civil society organisations from approaching the area,¹⁵¹ erected new fences,¹⁵² and passed national laws, allowing for extraordinary powers to the military, police forces, and border guards, including to deny entry and perform summary expulsions, effectively regularising pushbacks.¹⁵³ Their responses have, in effect, ‘followed very similar inhumane tactics to those practiced by the Belarusian government’,¹⁵⁴ which they were supposed to counter.

The pattern of institutionalised pushbacks continues, with 50,000 cases documented from Poland to Belarus and a further 12,000 ‘preventions of irregular crossings of the border’ since the start of the ‘crisis’.¹⁵⁵ An additional 11,000 summary expulsions have been recorded from Lithuania,¹⁵⁶ and another 4,000 from Latvia in 2022.¹⁵⁷ The main countries of origin of the persons affected are Syria and Afghanistan – which remain top refugee-producing

¹⁴⁸ ‘Latvia Extends State of Emergency on Its Border Area with Belarus Until February 2023’, *Schengen Visa Info*, 3 November 2022 <<https://www.schengenvisainfo.com/news/latvia-extends-state-of-emergency-on-its-border-area-with-belarus-until-february-2023/>>.

¹⁴⁹ Aleksandra Ancite, ‘Seven Months in the Freezing Forest: Why Events at the Latvian-Belarus Border Were Long Hidden From the Public’, *Verfassungsblog*, 15 November 2022 <<https://verfassungsblog.de/seven-months-in-the-freezing-forest/>>.

¹⁵⁰ ‘Migrants face “desperate situation” at Poland-Belarus border’, *The Guardian*, 9 November 2021 <<https://www.theguardian.com/global-development/2021/nov/09/unacceptable-migrants-face-desperate-situation-at-poland-belarus-border>>.

¹⁵¹ See, e.g., Fundacja Ocalenie, *Letter to Commissioner Johansson, Humanitarian emergency on the Polish-Belarus Border*, 29 September 2021 <https://ocalenie.org.pl/wp-content/uploads/2021/09/List-do-komisarz-Ylvy-Johansson_EN.pdf>.

¹⁵² ‘Poland completes 186-kilometre border wall with Belarus after migration dispute’, *Euronews*, 7 July 2022 <<https://www.euronews.com/2022/06/30/poland-completes-186-kilometre-border-wall-with-belarus-after-migration-dispute>>.

¹⁵³ UNHCR, Observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265), 13 September 2021 <<https://www.refworld.org/docid/61434b484.html>>; UNHCR, Observations on draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No 21-29207), 27 September 2021 <<https://www.refworld.org/docid/615322844.html>>; and UNHCR, Observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518), 13 October 2021 <<https://www.refworld.org/docid/61767bea4.html>>.

¹⁵⁴ Sergio Carrera, ‘Walling Off Responsibility? The Pushbacks at the EU’s External Borders with Belarus’, CEPS Policy Insights No 2021-18/November 2021, 16 <<https://www.ceps.eu/ceps-publications/walling-off-responsibility/>>.

¹⁵⁵ The exact number reported since August 2021 is 50,668. See ECRE News, ‘EU Eastern Borders: More Deaths at Poland Belarus Border as Reports of Pushbacks, Detention and Crack-down on Solidarity Continue, Council of Europe Concerned over Pushbacks and Criminalisation in Latvia’, 17 February 2023 <<https://ecre.org/eu-eastern-borders-more-deaths-at-poland-belarus-border-as-reports-of-pushbacks-detention-and-crack-down-on-solidarity-continue-council-of-europe-concerned-over-pushbacks-and-criminalisation-in-lat/>>.

¹⁵⁶ Danish Refugee Council, ‘Protecting Rights at Borders: Beaten, punished and pushed back’, January 2023 <<https://pro.drc.ngo/media/cxihgutp/prab-report-january-to-december-2022.pdf>>.

¹⁵⁷ ECRE News, ‘EU Eastern Borders: MSF Closes Operations in Latvia and Lithuania over Violent Pushbacks as Polish Border with Belarus Sees More Deaths’, 20 January 2023 <<https://ecre.org/eu-eastern-borders-msf-closes-operations-in-latvia-and-lithuania-over-violent-pushbacks-as-polish-border-with-belarus-sees-more-deaths/>>.

countries.¹⁵⁸ In addition, deaths, disappearances,¹⁵⁹ detention in inhuman conditions, and destitution on both sides of the border have become commonplace.¹⁶⁰

Many have expressed criticism, including UN bodies,¹⁶¹ Council of Europe institutions,¹⁶² and other organisations.¹⁶³ The European Court of Human Rights has condemned Poland for not providing effective access to asylum procedures to applicants arriving from Belarus, finding the country unsafe and removals thereto in contravention with the principle of *non-refoulement* and the prohibitions of ill treatment and collective expulsion.¹⁶⁴ The Court has also granted interim measures against Poland, Latvia and Lithuania, requiring State authorities to stop the summary expulsions that they were about to perform.¹⁶⁵ However, the EU has by and large sided with its Member States.

The use of ‘migration diplomacy’, whereby States utilize migration flows strategically to achieve specific ends in their dealings with other States or regional blocs, had already

¹⁵⁸ UNHCR, Refugee Data Finder <<https://www.unhcr.org/refugee-statistics/>>.

¹⁵⁹ Since the start of the crisis, 37 persons have been confirmed to have died on the Polish-Belarus border and 317 are currently missing. See ‘Vigils held in Poland after migrants’ bodies found at Belarus border’, *Balkan Insight*, 28 February 2023 <https://balkaninsight.com/2023/02/28/vigils-held-in-poland-after-migrants-bodies-found-at-belarus-border/>>. See also IOM and UNHCR, ‘IOM and UNHCR Shocked and Dismayed by Deaths Near Belarus-Poland Border’, 21 September 2021 <<https://www.unhcr.org/news/press/2021/9/6149dec74/unhcr-iom-shocked-dismayed-deaths-near-belarus-poland-border.html>>.

¹⁶⁰ See e.g. Amnesty International, ‘Poland: Cruelty not Compassion, at Europe’s Other Borders’, Public Statement, EUR 37/5460/2022, 11 April 2022 <<https://www.amnesty.org/en/wp-content/uploads/2022/04/EUR3754602022ENGLISH.pdf>>.

¹⁶¹ UN OHCHR, ‘Comment by UN High Commissioner for Human Rights Michelle Bachelet on the Belarus-Poland border situation’, 10 November 2021 <<https://www.ohchr.org/en/2021/11/comment-un-high-commissioner-human-rights-michelle-bachelet-belarus-poland-border-situation>>; UNHCR and IOM, ‘UNHCR and IOM Call for Immediate De-escalation at the Belarus-Poland Border’, 10 November 2021 <<https://www.unhcr.org/neu/70501-unhcr-and-iom-call-for-immediate-de-escalation-at-the-belarus-poland-border.html>>; UN Special Rapporteurs, ‘Belarus and Poland: Stop sacrificing migrant lives to political dispute’, 6 October 2021 <<https://www.ohchr.org/en/press-releases/2021/10/belarus-and-poland-stop-sacrificing-migrant-lives-political-dispute-un>>.

¹⁶² Council of Europe Commissioner for Human Rights (CoECHR), ‘European states must stand up against pushbacks and the attempt to legalise them’, 21 October 2021 <<https://www.coe.int/en/web/commissioner/-/european-states-must-stand-up-against-pushbacks-and-the-attempt-to-legalise-them>>; CoECHR, ‘Pushed beyond the limits. Urgent action needed to stop pushbacks at Europe’s borders’, 7 April 2022 <<https://www.coe.int/en/web/commissioner/-/pushed-beyond-the-limits-urgent-action-needed-to-stop-push-back-at-europe-s-borders>>.

¹⁶³ Among others, Amnesty International (n 160) and ‘Latvia: Return Home or Never Leave The Woods: Refugees and Migrants Arbitrarily Detained, Beaten and Coerced Into “Voluntary” Returns’, 12 October 2022 <<https://www.amnesty.org/en/documents/eur52/5913/2022/en/>>; Human Rights Watch, ‘Violence and Pushbacks at Poland-Belarus Border’, 7 June 2022 <<https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>>; ‘MSF calls for stopping migrant rejections at Belarus border’, *InfoMigrants*, 21 December 2022 <<https://www.infomigrants.net/en/post/45559/msf-calls-for-stopping-migrant-rejections-at-belarus-border>>.

¹⁶⁴ ECtHR, *M.K. and Others v. Poland*, Appl. Nos 40503/17, 42902/17 and 43643/17, 23 July 2020; *D.A. and Others v. Poland*, Appl. No. 51246/17, 8 July 2021; *A.I. and Others v. Poland*, Appl. No. 39028/17, 30 June 2022; and *A.B. and Others v. Poland*, Appl. No. 42907/17, 30 June 2022. These rulings relate to events occurring before, but which are very similar to those of the current ‘crisis’, highlighting the long-lasting and systematic nature of pushbacks to Belarus by the Polish authorities.

¹⁶⁵ ECtHR, ‘Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland’, Press Release ECHR 244(2021), 25 August 2021, regarding cases *R.A. and Others v. Poland*, Appl. No. 42120/21 (pending), and *H.M.M. and Others v. Latvia*, Appl. No. 42165/21 (pending); ‘Court indicates interim measure in respect of Afghan nationals at the Lithuanian Belarusian border’, Press Release ECHR 265(2021), 8 September 2021, concerning case *A.S. and Others v. Lithuania*, Appl. No. 44205/21 (pending).

featured significantly in the relations between Gaddafi's Libya with the EU.¹⁶⁶ Migration diplomacy might be said to have become routine in inter-state negotiations, where the salience and politicisation of migration is most pronounced. Yet, it is the threat of 'punishment', whereby individuals on the move are transformed into objects of retribution to be unleashed if the other State does not acquiesce to a specific request, which is theorised as '*coercive migration diplomacy*'.¹⁶⁷ This exploitation of 'migration and refugee crises as instruments of persuasion' has been designated as the use of 'weapons of mass migration'.¹⁶⁸ For Greenhill, this is an instance of '*coercive engineered migration*', which encompasses situations where 'cross-border population movements ... are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or states'.¹⁶⁹

So, buying into the characterisation of events at the EU-Belarus border not only as an ordinary 'crisis', but as a 'hybrid attack to destabilise Europe', in the words of European Commission President von der Leyen,¹⁷⁰ has led to an exaggerated and overwhelmingly defensive approach. Without providing any specific details, in subsequent pronouncements, the Commission speaks of a 'hybrid threat', part of 'a continuing and protracted crisis' that 'represent[s] a real and present danger to the EU's security'.¹⁷¹ How exactly the instrumentalisation of human suffering may be capable of 'destabilising or undermining [EU] society and key institutions', of 'putting [EU] citizens at risk', even with potential 'global ramifications ... for the [entire] international community', is never explained.¹⁷² But it is this assumption that justifies the mobilisation of a superlative response. It is on this basis that the EU deploys a 'holistic' and 'comprehensive action against the Belarus strategy of state-sponsored instrumentalisation of migrants',¹⁷³ including substantial funds,¹⁷⁴ emergency aid,¹⁷⁵ operational assistance through its agencies,¹⁷⁶ sanctions against the Belarusian regime and against 'individuals and entities organising or contributing to activities that facilitate illegal crossing of the EU's borders',¹⁷⁷ as well as unparalleled diplomatic efforts vis-à-vis countries

¹⁶⁶ Gerasimos Tsourapas, 'Migration Diplomacy in the Global South: Cooperation, Coercion and Issue Linkage in Gaddafi's Libya' (2017) 38 *Third World Quarterly* 2367, 2367-2368.

¹⁶⁷ *Ibid.*, 2370-2371 (emphasis added).

¹⁶⁸ Kelly Greenhill, 'Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion' (2010) 9 *Strategic Insights* 116, 116. Cf. Marder, who criticises the use of the 'weapons of mass migration metaphor' given it connotes 'weapons of mass destruction' and is likely to contribute to the securitisation of responses to refugees, as it frames them as weapons in and of themselves, Lev Marder, 'Refugees are Not Weapons: The "Weapons of Mass Migration" Metaphor and Its Implications' (2018) 20 *International Studies Review* 576.

¹⁶⁹ Kelly Greenhill, *Weapons of Mass Migration: Forced Displacement, Coercion and Foreign Policy* (Cornell University Press, 2010), 13 (emphasis added).

¹⁷⁰ European Commission, 2021 State of the Union Address by President von der Leyen, 15 September 2021 <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_21_4701>.

¹⁷¹ Joint Communication (n 146), p 1.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, p 12.

¹⁷⁴ *Ibid.*, p 3, 8-9.

¹⁷⁵ *Ibid.*, p 3, 7-8.

¹⁷⁶ *Ibid.*, p 3, 9, 10.

¹⁷⁷ *Ibid.*, p 4. See also Proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union, COM(2021) 753 final, 23.11.2021.

of origin and transit to ‘cut off opportunities for migrant smuggling’.¹⁷⁸ The overall objective is to ‘bolster border management’ and ‘cater to humanitarian needs’.¹⁷⁹

The Commission notes that ‘[t]here have been over 40,000 ... attempts to cross [EU] borders [that have been] prevented during 2021’.¹⁸⁰ And interventions with partner countries, ‘asked to fight smuggling networks and to impose tighter controls on flights and passengers to mitigate the risk of irregular movement to Europe’ or to start ‘organising repatriation flights’,¹⁸¹ are presented as innocuous attempts at ‘helping people to return home’.¹⁸² No reference is made to their rights to leave and to asylum in Europe or to the principle of *non-refoulement* as having to be respected by the Member States affected. The effects of ‘direct contacts with airlines and civil aviation authorities ... to help limit non bona fide travel to Belarus’ and cooperation with ‘key States’ that ‘now [are] declining to allow ... Iraqi, Syrian, Afghan, and Yemeni passengers to travel or transit to Minsk’ are portrayed as an achievement.¹⁸³ For the Commission, it is Belarus that has ‘created a humanitarian crisis’ and it is Belarus that ‘bears the primary responsibility for addressing this crisis’, including the provision of protection to ‘the refugees it invited onto its territory’.¹⁸⁴ This is highly unusual and appears as a direct reaction to the ‘unprecedented’ character of the situation.¹⁸⁵

Be it as it may, and despite Commissioner Johansson affirming that ‘pushbacks should never be normalised ... [and] should never be legalised’,¹⁸⁶ this is precisely what the package of legislative reforms tabled by the Commission to solve the ‘crisis’ and prepare the EU to respond to similar events in the future actually entails. Following a petition by twelve Member States ‘to adapt the existing legal framework to the new realities’ and with a view to ‘enabling [the EU Member States] to adequately address [future] attempts of instrumentalisation of illegal migration’, ensuring a ‘maximum level of security [of the external borders]’,¹⁸⁷ the European Commission has proposed a series of instruments. Not only has it submitted a proposal for a Regulation on ‘provisional emergency measures’ in support of Latvia, Lithuania and Poland, as the three Member States affected by Belarus’ ‘attack’,¹⁸⁸ but it has also tabled additional proposals for measures that, if adopted, will embed and consolidate the provisional ones within the EU legal framework, providing a ‘permanent toolbox’.¹⁸⁹

¹⁷⁸ Joint Communication (n 146), p 12.

¹⁷⁹ Ibid., p 1.

¹⁸⁰ Ibid., p 2.

¹⁸¹ Ibid., p 6.

¹⁸² Ibid., p 8.

¹⁸³ Ibid.

¹⁸⁴ Ibid., p 3.

¹⁸⁵ Ibid., p 1.

¹⁸⁶ European Commission, ‘Commissioner Johansson’s speech at the Plenary debate on pushbacks at the EU external border’, 20 October 2021 <https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/commissioner-johanssons-speech-plenary-debate-pushbacks-eu-external-border_en>.

¹⁸⁷ Letter to the European Commission on the ‘adaptation of the EU legal framework to new realities’ by the governments of Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, and the Slovak Republic, 7 October 2021 <<https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter-Adaptation-of-EU-legal-framework-20211007.pdf>>.

¹⁸⁸ Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania, and Poland, COM(2021) 752 final, 1.12.2021 (‘Provisional Measures Proposal’).

¹⁸⁹ Joint Communication (n 146), p 2.

The proposal for provisional measures is presented with a view to ‘countering the ongoing hybrid attack launched by the Belarusian regime’ so as to ‘ensure effective control of [the EU’s] external borders’.¹⁹⁰ Reiterating the idea that ‘primary responsibility for addressing this crisis lies with Belarus’, including with regard to refugee protection and *non-refoulement*,¹⁹¹ the proposal aims to introduce ‘a temporary emergency migration and asylum management procedure tailored to the needs ... [of] the current situation’.¹⁹² This procedure amounts to the ‘lawification’ of pushbacks, which are excused – in the eyes of the Commission – by the Member States concerned having been ‘*forced by the current circumstances* to limit the number of border crossing points open’ along their external frontiers.¹⁹³ The codification proposed involves derogations from the EU asylum and expulsion *acquis* and is understood as ‘temporary, extraordinary and exceptional’.¹⁹⁴

The main features of the procedure¹⁹⁵ include the possibility for the Member States affected to register asylum applications only at specific registration points (possibly implying that claims not presented at those points may be rejected). It also contemplates the extension of the deadline to register claims to up to four weeks (leaving claimants in limbo in the interim and allowing for pushbacks to go unaccounted for). It provides the option to apply the ‘accelerated border procedure’ to all applicants – justified as a means to ‘limit the possibility for Belarus to target for instrumentalisation third-country nationals to whom the border procedure cannot [normally] be applied’¹⁹⁶ – the idea being to reduce procedural guarantees across the board and ‘examine an application at the border without authorising entry to the territory’,¹⁹⁷ thus generalising containment and detention at the border.¹⁹⁸ The procedure would also entail the power to extend the total duration of the assessment process for sixteen weeks, including appeals – so as to ‘help the Member State [concerned] to apply the fiction of non-entry [and the concomitant exclusion of attendant rights] for a longer period of time’.¹⁹⁹ It will also allow the possibility to ‘limit the automatic suspensive effect of an appeal to all border procedures’²⁰⁰ – which runs foul of effective remedy standards; the option to reduce material reception conditions ‘to cover only basic needs’²⁰¹; and the possibility to derogate from specific safeguards applicable during removal proceedings.²⁰² This divestiture of rights is supposed to be needed to provide for ‘the necessary flexibility’ to counter a situation of grave ‘urgency’ and against the backdrop of the Member States’ ‘obligation to control borders’.²⁰³ How exactly the arrival of a few thousand refugees may violate the ‘the territorial integrity and security of

¹⁹⁰ Provisional Measures Proposal (n 188), Explanatory Memorandum, p 1.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, p 4.

¹⁹³ *Ibid.* (emphasis added).

¹⁹⁴ *Ibid.* See also Recital 17 of the proposed Regulation.

¹⁹⁵ *Ibid.*, Art 2 of the proposed Regulation.

¹⁹⁶ *Ibid.*, Explanatory Memorandum, p 6.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Cf.* CJEU, Case C-808/18 *Commission v. Hungary* ECLI:EU:C:2020:1029.

¹⁹⁹ Provisional Measures Proposal (n 188), p 7. See also Recital 24 of the proposed Regulation.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.* See also Art 3 of the proposed Regulation.

²⁰² *Ibid.*, Art 4 of the proposed Regulation.

²⁰³ *Ibid.*, Explanatory Memorandum, p 10; Recital 21 of the proposed Regulation.

the Member States’ is never told.²⁰⁴ Their presence is depicted as a ‘violent act[]’ per definition that ‘must be avoided at all costs’.²⁰⁵

This supposedly provisional framework has been incorporated into a separate proposal for a general anti-instrumentalisation Regulation²⁰⁶ and reinforced via an amendment to the Schengen Borders Code – the general instrument governing the movement of persons across borders under EU law.²⁰⁷ What these mechanisms will do is to consolidate the ‘emergency migration and asylum management procedure’, putting it at the disposal of EU Member States in any future situations of instrumentalisation.²⁰⁸ When confronted with any such future situations, the EU Member States ‘shall intensify border surveillance as necessary in order to address the increased threat’, in particular, the authorities concerned ‘shall enhance, as appropriate, the resources and technical means to *prevent* an unauthorised crossing of the border’,²⁰⁹ which invites recourse to coercive methods – including pushbacks.

The exception will become the norm through ‘crisification’. Indeed, the proposed definition of ‘instrumentalisation’ is so large and so vague that it engenders the risk that the downgraded set of protections it involves becomes generalised. ‘A situation of instrumentalisation’ is one

‘where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals [possibly including its own citizens] to the external borders [of the EU], onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security’.²¹⁰

Which factors will count as ‘indications of an intention ... to destabilise’ is not specified. And how large the number of persons being instrumentalised may be seems irrelevant for them to constitute a ‘risk’ to ‘essential State functions’ or to the ‘territorial integrity’ of the State concerned, or its capacity to maintain law and order or ‘safeguard ... its national security’. Basically, any designation of a situation by the EU Member State concerned as one of instrumentalisation will allow it to have recourse to the lawified regime of pushbacks, legitimized as the (proposed) new normal within the EU legal order.

²⁰⁴ Ibid., Explanatory Memorandum, p 9; Recitals 7 and 16 of the proposed Regulation.

²⁰⁵ Ibid., Recital 25 of the proposed Regulation.

²⁰⁶ Anti-instrumentalisation Regulation Proposal (n 26).

²⁰⁷ Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final, 14 December 2021 (‘SBC Amendment Proposal’).

²⁰⁸ Anti-instrumentalisation Regulation Proposal (n 26), Recital 3 and Arts 2-4 of the Proposed Regulation; and recast Arts 5 and 13 SBC, in the SBC Amendment Proposal (n 207).

²⁰⁹ SBC Amendment Proposal (n 207), recast Art 13(5) (emphasis added).

²¹⁰ Anti-instrumentalisation Regulation Proposal (n 26), Recital 1 of the proposed Regulation; and Recitals 8-16, proposed recast SBC (n 207).

4. Conclusion

The years building to and since 2015 ‘migration crisis’ have witnessed the intertwining of securitisation and humanitarian discourse in the EU, where a ‘rescue’ / ‘saving lives’ script has been used to portray the individual (unwanted / irregular) migrant as simultaneously a victim to be saved (from unscrupulous smugglers and traffickers) and a threat requiring pre-emption (to maintain the security of the EU and its Member States).²¹¹ In this context, the crisis narrative and its presentation as an ‘exception’, rupturing the normal course of law- and policy-making, have facilitated the introduction of (ever more) restrictive measures that supposedly simultaneously control and care for migrants at the external border.²¹² The final result has been the ‘crisification’ of the migration and asylum field and a degradation of the accompanying legal framework through the mechanisms of ‘softification’ and ‘lawification’, as the examples of the EU-Turkey Statement and the 2021 Belarus ‘hybrid attack’ have shown.

While the ‘softification’ of existing legal obligations leads to the progressive debilitation of the constitutional principles and international conventions that apply in the area, the ‘lawification’ of malpractices empties these norms of real value, both in terms of legal content and in terms of the ability of the individual to effectively claim and action their protection. The ‘crisification’ paradigm – through the instrumental use of ‘crisis’ – enables the consolidation of rhetoric and the codification of policies previously considered unacceptable and in clear violation of the relevant legal standards. The mobilization of ‘crisis’ is tactical, intended to generate situations of exception that justify the expansion of power and the contraction of rights vis-à-vis specific populations. The ‘crisis’ discourse launders related measures into the ‘new norm’, ensuring their acceptability as necessary/inevitable and facilitating their subsequent integration in the legal framework. Their conversion into (the new) rules provides them with a gloss of tolerability that, in turn, warrants the ‘crisified’ approach underpinning them, consolidating the ‘crisified’ mode of governing (unwanted) migration. The perception of (unwanted) migration as persistently menacing to get out of control legitimises ‘extraordinary’ measures of constant vigilance – different from those that normally apply to the general public. This framing of migration *qua* crisis is essential in the articulation of migration governance as also persistently in crisis and requiring a ‘crisified’ response.

In this cycle, deterrence and coercion become justified under the guise of humanitarianism,²¹³ masking the violence implicated and the fact that it is not an ‘accidental’ but a structural and ‘systemic’ feature of the EU’s external border – part of a biopolitical strategy integrated within the overall European agenda that utilises law as a means of control. Within this scheme, as Davitti has put it, given that ‘an “emergency” demands immediate action’ – whether to confront it or to avoid its materialisation, it leaves ‘no time for further analysis, conceptualisation, identification of longer-term solutions, or for governance through

²¹¹ Moreno-Lax (n 71) and references therein.

²¹² Polly Pallister-Wilkins, ‘The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros’ (2015) 9 *International Political Sociology* 53; and Miriam Ticktin, *Casualties of Care* (Berkeley: University of California Press, 2011).

²¹³ Maarten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer, ‘Coercion, Prohibition, and Great Expectations. The continuing failure of the Common European Asylum System’ (2016) 53 *Common Market Law Review* 607.

law'.²¹⁴ 'Crisification' allows for rights and legal protections to be sacrificed in order to respond to the 'exceptional' state of affairs and (re)establish order. Urgency focuses attention on the 'here and now' and legitimises attendant decisions and resulting measures.²¹⁵ This occurs, even if, in design and effect, such measures fail to engage with the underlying causes and overlook the extent to which European 'borderism' itself,²¹⁶ and the violent, securitised, exclusionary logic it deploys, contributes to the 'crisis'.²¹⁷ The conditions that produce migrant displacement are disregarded; the focus is on the inconvenience that uncontrolled mobility may cause to the EU, relying on associations that securitise migrants as dangerous (as posing a threat akin to criminality or terrorism). In consequence, a migration crisis becomes (always and by default) a security crisis, posing an existential threat to the Union and the Member States.

This framing allows for *legalised* forms of violence as a response. My main conclusion is that 'crisis' acts as a powerful destabiliser of established norms, justifying an open-ended set of measures, justified outside formal legal and democratic safeguards, that endure and are eventually normalised. At the same time, crisification is co-constituted by legal technologies that achieve the desired result. Law is both a victim and an instrument of 'crisification'. 'Softification' and 'lawification' do not just 'happen', they are actively enlisted in the production of crisis and its response, aggrandising flexibility, discretion, and exceptionalism.

It is worth recalling that *fundamental* rights – as foundational norms – constitute the basis of a Union's asylum and migration policy premised on democracy, rule of law and respect for human dignity.²¹⁸ The effect of 'crisification' has been to erode these foundations in the name of crisis *qua* exception(-become-the-rule). The 'softification' of commitments that undermine pre-existing obligations chip away at those foundations and facilitate 'lawification' through the gradual introduction of measures that become embedded in the system as the new norm. In time, those (now-legitimised) measures may eventually replace the existing foundations with ramifications yet unknown.

The instrumentalization of 'crisis' used to selectively degrade legal protections of specific populations is not a European phenomenon. It has global reach. The 'crisification' of migration law, witnessed at Europe's external borders, is representative of a wider and expanding trend worldwide that normalises violence against non-citizens and legitimises the coercive containment of unauthorised mobility at the expense of individual rights. Further research is necessary to explore the full extent of this phenomenon and to test the theory in other settings. 'Crisification' works to legitimate a state of affairs that embeds rightlessness from within for a special category of (unwanted and racialised) 'Other'. Establishing its inner functioning and insidiousness beyond Europe is key to countering its normalisation.

²¹⁴ Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' (2018) 29 *European Journal of International Law* 1173, 1185.

²¹⁵ Polly Pallister-Wilkins, 'Interrogating the Mediterranean "Migration Crisis"' (2016) 21 *Mediterranean Politics* 311.

²¹⁶ Henk van Houtum, 'Beyond "Borderism": Overcoming Discriminative B/Ordering and Othering' (2021) 112 *Tijdschrift voor Economische en Sociale Geografie* 34, 40, defining 'borderism' as 'the discriminatory politics of b/ordering and othering that essentializes and politicizes the value of human beings on the basis of the bordered (id)entity they are born into, reside in, and/or travel from'.

²¹⁷ Jeandesboz and Pallister-Wilkins (n 69).

²¹⁸ Arts 2 and 6 TEU; Art 67 TFEU.