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**THE CHALLENGES OF THE INSTRUMENTALIZATION OF  
MIGRATION AND ASYLUM IN THE FIELD OF EU LAW AND  
SECURITY**

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I hereby declare that I have compiled the thesis independently and all works, important standpoint and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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## **ABSTRACT**

Recent geopolitical disturbances have given rise to two specific security concerns around the European Union; mass influxes of irregular migrants and refugees posing a threat to the absorb capacity of the Member States humanitarian and legal systems, and more recently, the “instrumentalization” of migrants used by third countries as a “hybrid threat tool” against the European Union and its Member States.

The past decades have shown that EU asylum and migration policy often effected by the attracting “pull factors“ of the Member States is prone to abuse and outside pressure making the EU especially vulnerable to hybrid threats such as instrumentalized migration

EU Member States and particularly the Schengen area countries have been the subject of increasing migratory pressure from third countries, peaking at the 2015-16 migration crisis. Meanwhile EU has witnessed unprecedented destabilization, border chaos and terrorism. Many of these events have occurred in connection with third-state or non-state actors issuing public threats to use mass influxes of people as a policy weapon against the EU.

In connection with the 2021-2022 Belarus-EU border events, EU has recently raised more focus on the issue of instrumentalized migration, which requires new legislative approaches as Member States have a right to certain sovereignty, internal security, and border protection. EU also has the legal obligation to protect its external borders from the evolving threats.

This expository thesis seeks to present how instrumentalized migration has been used against EU Member States and how it’s reflected in EU & international law and its principles.

Methods of the study include reviewing legal instruments, observational reports, looking at case studies and using existing and available information & analysis. Awareness is expanded on the key issues to deliver the conclusions that instrumentalized migration is real, evolving, unpredictable, and complex threat. Raising preparedness for hybrid threats requires hybrid resilience that EU and international law might not fully possess at the moment, even though a considerable change in legislation has started to emerge.

**Keywords:** border control, EU law, hybrid threats, instrumentalized migration, migration crisis

# INTRODUCTION

Migratory flows to the area of European Union (EU) have been increasingly growing over the past decades.<sup>1</sup> Meanwhile the number of asylum applications launched in Europe has greatly increased since 1985.<sup>2</sup> The motivating reasons of individuals to migrate can vary but as noted in the Vienna Institute study on migration and other recent studies, the preferred locations of the arrivals are seemingly driven by financial considerations and existing networks and are largely limited to a restricted number of Northwest EU member states.<sup>3</sup> In connection the recent phenomenon of flow of large migratory groups has raised the concern of security analysts and people working in the field of international security.<sup>4</sup>

In 1992 United Nations (UN) Security Council stated that the absence of war and military conflicts among States does not in itself ensure international peace and security and that the non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.<sup>5</sup> Analyses and observations of crises and modern conflicts has led to a better understanding of the “hybrid“ nature of modern day threats. Further it has led to the creation of the concepts of cyber and hybrid threats on the EU level.<sup>6</sup> Together with the development of EU’s strategic foresight capabilities, new assessments have been made about the “absence of war and military conflicts” and how the threat of “non-military sources” could specifically become utilized against the peace and security of the present-day EU.<sup>7</sup>

In the wake of the events of 2021–2022 Belarus–EU border crisis, EU has very publicly identified instrumentalization in the field of migration and asylum (instrumentalized migration) as a security threat on the EU level, raising the issue of irregular migratory flows in the “hybrid” context. As a result, new legislation has been proposed.<sup>8</sup> From this perspective it is reasonable to question exactly

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<sup>1</sup> The Vienna Institute for International Economic Studies. (2021). Migration from Africa, Middle East and EU Eastern Partnership countries towards the EU-27: Challenges and prospects ahead. Accessible at: <https://wiiw.ac.at/new-migration-challenges-for-the-eu-in-the-2020s-n-509.html>

<sup>2</sup> Pew Research Center. (2016). Number of Refugees to Europe Surges to Record 1.3 Million in 2015. p.29. Accessible at: <https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>

<sup>3</sup> Kang, Y. D. (2021). Refugee crisis in Europe: determinants of asylum seeking in European countries from 2008–2014. *Journal of European Integration*, 43(1). p 33-48.

<sup>4</sup> Le Gloannec, A. M., Irondelle, B., & Cadier, D. (2013). *New And Evolving Trends in International Security*. Transworld, FP7 Working Paper, 14. p.11.

<sup>5</sup> UN Security Council. Decision of 31 January 1992 (3046th meeting). p. 821.

<sup>6</sup> <https://eu2019.fi/en/priorities/comprehensive-security/hybrid-and-cyber-threats>

<sup>7</sup> European Commission. 9 September 2020. Press release. Retrieved from: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1586](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1586)

<sup>8</sup> Ministry of the Interior of Finland. Press release 29/2022. Published in English on 17.2.2022. Accessible at: <https://intermin.fi/en/-/commission-proposes-common-model-to-respond-to-instrumentalisation-of-migrants>

how hostile actors could use migratory flows or EU's commitment to international law as a potential hybrid threat tool against EU Member States.

Regarding research, Greenhill (2010) mapped out the phenomenon from the theoretical and empirical point of view, exhibiting that the use of instrumentalized migration as a non-military persuasive instrument is *de facto* most frequently and most successfully used against liberal democratic countries, in essence against countries that are most actively engaged in upholding human right and humanitarian law principles.<sup>9</sup> Greenhill's description fits quite well with the *modus operandi* of instances of instrumentalized migration witnessed by the EU Member States from the last decade to the present day. As witnessed in these cases, a third state deploys pressure upon an EU Member State and their government in order to achieve some objective. The pressure can be in the form of action or threats and the threats can be aimed against the Member States or EU as an international organization. The targeted Member State can then face irregular groups or a diaspora/uncontrollable flow of migration at the border which will further create tensions in the host society and place burden on the systems set in place. This can further lead into dissatisfaction with EU mechanisms and to even deeper internal political turmoil domestically.

The line between EU and national security interests and international law principles are debatable questions when trying to determine the "correct" legal response, while keeping in mind the legal duty of authorities, legal institutions, and international organizations to prevent threats, crises, and destabilization. Guarding of EU's external borders and the firm handling of all kinds of threats is the shared responsibility of the Member States with the help of EU mechanisms, institutions, and agencies. These responsibilities are *de jure* laid out in the founding treaties.

As instrumentalized migration could be seen as a hybrid threat concept and at the same time also as a potential violation of international law principles, it becomes complex to break down and interpret in the legal sense alone. Thus, this thesis seeks to clarify the understanding of instrumentalized migration from a combined hybrid threat and legal perspective as it has been witnessed in the EU context. In the process the thesis also seeks to answer how EU Member States have been targeted with instrumentalized migration by third countries while expanding on the following conclusions:

- Instrumentalized migration has become an evolving hybrid threat tool used against EU interests and the cases exhibit similar pattern and methods.
- Despite the most recent Belarus-EU border crisis raising the issue, the phenomenon of manufactured migratory pressure aimed against EU is not unprecedented.
- Effects of instrumentalized migration can pose multifaceted risks that blend in with EU's humanitarian efforts.
- There is a new policy shift and potential legal basis to harden EU responses utilizing EU & international law.

The thesis is structured in the following way: Chapter 1 presents the historical background and recent developments. Chapter 2 defines relevant terms, describes instrumentalized migration and

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<sup>9</sup> Greenhill, K. M. (2010). *Weapons of Mass Migration*. Cornell University Press. p.73-78.

tries to clarify them from the legal perspective. Chapter 3 presents an overview of EU and international law framework from the perspective of hybrid resiliency. Chapter 4 provides other example cases of instrumentalized migration used against EU Member States. Chapter 5 presents the conclusions.

## 1. BACKGROUND

The need to address the source actors responsible for causing mass influxes of people in the field of humanitarian migration was addressed already by Jennings (1939), who made the assessment that the “*willful flooding of other states with refugees constitutes an actual illegality.*” Even though the assessment was made in the context of humanitarian migration, Robert Jennings who later served as a Judge and President of the International Court of Justice, recognized an injustice in that there had to exist some legal liability behind actions resulting in influxes of refugees to other states.<sup>10</sup> Without such legal liability and legal dimension this act could be used in unlimited ways, also deliberately for hostile purposes.

The practice of instrumentalizing migration movements is undoubtedly older than references about the theoretical use of it. However, the use of instrumentalized migration as a non-military hybrid threat option has been entertained in *Unrestricted Warfare* (translated name), a Chinese book on innovative military strategies dating back to 1999, which references the method in the second part *New Methods of Operation*.<sup>11</sup> The footnotes further reference two National Defense Reports created by the United States Executive Office of the President. The report of 1997 describes the principal security concerns and lists irregular migration as one of the serious threats to the sovereignty, democracy and national security of nations.<sup>12</sup> The report of the following year continues with the assessment describing how the security environment in which we live is dynamic and uncertain with uncontrolled “refugee migration” having important implications for national security but also describing it as a “transnational threat”.<sup>13</sup> Essentially in this part *Unrestricted Warfare* underlines the exploitable fears a democratic country like the United States holds for the use of “grey zone tactics” such as instrumentalized migration.

Teitelbaum (1984) pointed out that the change in migratory crises from 1979 to 1984 started to exhibit serious foreign-policy implications stating that the scale, character and “use” of international migration had changed.<sup>14</sup> He assessed that even though effects of foreign policy upon international

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<sup>10</sup> Jennings, R. (1939). Some International Law Aspects of the Refugee Question, 20 BYIL. p.10-12.

<sup>11</sup> Liang, Q. & Xiangsui, W. (1999). *Unrestricted warfare*. Beijing: PLA Literature and Arts Publishing House Arts. p.114-123.

<sup>12</sup> Clinton, B. (1997). A national security strategy for a new century. White House. Section 1.

<sup>13</sup> Clinton, B. (1998). A national security strategy for a new century. White House. p.1-7.

<sup>14</sup> Teitelbaum, M. (1984). Immigration, refugees, and foreign policy. *International Organization*. Cambridge University Press, 38(3), p.450.

migration trends can usually be unintended and unanticipated, the creation of mass migration flows was becoming more frequently a political tool used by the source country.<sup>15</sup> The article further referenced example cases like the 1980 US-Cuba migration crisis also known as the *Marief boatlift*, which saw the arrival of around 125 000 Cubans. The event was seemingly used by the government of Cuba as a tool to create pressure on the US government and also as tool to get rid of individuals the Cuban government deemed as “undesirable” including people viewed as political dissidents.<sup>16</sup> The group also included at least 2,700 people convicted of serious crimes.<sup>17</sup>

Wiener (1992) described “forced emigration” as a strategy to achieve foreign policy objectives. According to Wiener, governments may force migration as a way of putting pressure on neighboring states, although they may subsequently deny it. The receiving country often understands that in order to stop the movement, they need to yield to demands made by the source country.<sup>18</sup>

Greenhill (2010) identified 64 cases worldwide between different countries since the creation of the Geneva convention between the years 1953-2006 where influxes of migrants were used as a *de facto* hybrid threat tool.<sup>19</sup> Greenhill coined the term “Coercive Engineered Migration” to refer to situations where a “challenger” tries to obtain political, economic or military concessions by using migration or tapping into the effects of a “migration crisis” as an instrument to achieve the goal.<sup>20</sup> As an example of this, in 2010 the Libyan leader Muammar Gaddafi publicly threatened to unleash massive migration flows upon EU unless he received a payment of 5 billion euros.<sup>21</sup> Greenhill further described the theory of instrumentalized migration by splitting the methods of using instrumentalized groups in to two: methods related to targeting state capacity and methods related to political agitation. With capacity targeting the aim is as stated - to manipulate the ability of the targeted country to accept, accommodate and assimilate the arrivals. With political agitation the aim is to manipulate the willingness of the targeted country to accept, accommodate and assimilate.<sup>22</sup>

In the EU context NATO has been on the forefront of recognizing hybrid threats in the past two decades also identifying mass migration as part of their recent security assessment in 2020.<sup>23</sup> The European Centre of Excellence for Countering Hybrid Threats (Hybrid CoE), a think tank/expertise center focused on countering evolving threats working in cooperation with EU and NATO was established under the jurisdiction of Finland in 2017.<sup>24</sup> The center has placed special focus on

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<sup>15</sup> Ibid. p.447.

<sup>16</sup> Ibid. p.438.

<sup>17</sup> Shanty, F., & Mishra, P. P. (2008). Organized crime: from trafficking to terrorism (Vol. 1). p. 461

<sup>18</sup> Weiner, M. (1992). Security, stability, and international migration. *International security*, 17(3). p.7-8.

<sup>19</sup> Greenhill, K. (2010). *Weapons of Mass Migration*. Cornell University Press. p.44-47.

<sup>20</sup> Ibid. p.10.

<sup>21</sup> Tsourapas, G. (2017). Migration diplomacy in the Global South: cooperation, coercion and issue linkage in Gaddafi’s Libya. *Third World Quarterly*, 38(10). p. 2377.

<sup>22</sup> Ibid. p. 51-54.

<sup>23</sup> General, N. S. (2020). *NATO 2030: United for a New Era*. p.18.

<sup>24</sup> Act on the European Centre of Excellence for Countering Hybrid Threats 417/2017.

instrumentalized migration as a hybrid threat tool in the context of humanitarian law as part of their vulnerability and resiliency research.<sup>25</sup>

Considering why these threat assessments were made in light of the knowledge we have in 2022, it could be summarized that sudden mass influxes of migrants can escalate to crises where the handling and differentiating individual people or their motives becomes very challenging if not impossible.<sup>26</sup> Sudden influxes can also create situations that increase serious risk to public safety and national security as in 2015-16 when the migration crisis was used as an opening by organized crime and terrorist cells.<sup>27</sup> It is also apparent that migratory crises cause political division inside EU, as was evidenced by the 2015-16 migration crisis and its effects on the Brexit vote. Thus, they might cause further disintegration of EU.<sup>28</sup> This was further emphasized by Antonio Tajani (President of the European Parliament from 2017 to 2019) who publicly stated that: “*The migration crisis threatens to destroy the EU.*”<sup>29</sup> As a testament to the hybrid vulnerability of the European Union, when polled about the two most important issues facing the EU, the annual Eurobarometer surveys have listed “immigration” in the top two consistently from 2015 to 2019.<sup>30</sup> (And with some seasonal exceptions in top three from 2020 to *Winter 2021-2022* survey.)

## 2. PRESENT DAY

### 2.1 Belarus–EU border crisis 2021-2022

After EU sanctions against Belarus following the forced landing of Ryanair Flight 4978, the Belarusian president Alexander Lukashenko publicly threatened to “flood EU with drugs and migrants” in early July of 2021. Soon after the threats in July of 2021, thousands of people mostly from the Middle East, emerged from the Belarus side at the border crossings of Latvia, Lithuania, and Poland.<sup>31</sup> During an official governmental meeting on 20 July, Lukashenko hinted at the possibility of armed migrants showing up at the border crossings as a response to the claimed actions of Lithuanian border guards.<sup>32</sup> Videos published between September and October of 2021

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<sup>25</sup> <https://www.hybridcoe.fi/coi-vulnerabilities-and-resilience/>

<sup>26</sup> IMF Staff Discussion Note. (January 2016) The Refugee Surge in Europe: Economic Challenges. p.11.

<sup>27</sup> Schmid, A. P. (2016). Links between terrorism and migration. *International Centre for Counter Terrorism*, 7(4). p.43-44.

<sup>28</sup> Outhwaite, W., & Menjivar, C. (2019). Migration crisis and “Brexit”. *The Oxford Handbook of Migration Crises*, 93-110.

<sup>29</sup> <https://www.theguardian.com/commentisfree/2018/jun/27/migration-crisis-destroy-eu-collapse-schengen>

<sup>30</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6839](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6839)

<sup>31</sup> <https://www.reuters.com/world/europe/lithuania-says-belarus-is-helping-middle-eastern-migrants-cross-its-borders-2021-06-15/>

<sup>32</sup> [https://reform-by.translate.googleusercontent.com/242680-lukashenko-prigrozil-es-pojavleniem-na-granice-vooruzhennyh-migrantov? x\\_tr\\_sl=auto& x\\_tr\\_tl=en& x\\_tr\\_hl=fi& x\\_tr\\_pto=wapp](https://reform-by.translate.googleusercontent.com/242680-lukashenko-prigrozil-es-pojavleniem-na-granice-vooruzhennyh-migrantov? x_tr_sl=auto& x_tr_tl=en& x_tr_hl=fi& x_tr_pto=wapp)

showed Belarusian authorities facilitating flows of people on to the EU border.<sup>33</sup> During many incidents the arrivals tried to destroy border fences and push through the borders by force. According to witnesses, wire cutters were distributed by Belarusian border guards. Violent attacks against Polish border guards were also witnessed.<sup>34</sup> Poland ended up reporting over 33,000 illegal border crossings during the year of 2021, with 17,000 in October alone.<sup>35</sup> The planned destination of many of the migrants was Germany and other Northwestern EU Member States.<sup>36</sup>

Officials from the Baltic states together with investigative journalists soon reported that Belarusian actors were involved in a scheme to transport migrants to the EU border. According to Lithuania, this included simplified visa proceedings for “tourists” arriving to Belarus from Iraq and as referenced by the BBC, the use of social media to get people involved.<sup>37</sup> It was also reported that many migrants were flown in from the Middle East and Turkey by the Belarusian state-run airline Belavia.<sup>38</sup> In late November 2021 Lukashenko publicly stated in an interview with the BCC that Belarusian authorities might have been involved in facilitating the entry of migrants to Poland.<sup>39</sup> Belarusian government also stated that sanctions placed against Belarus must be lifted if EU wants to resolve the crisis.<sup>40</sup> In a joint statement the defense ministers of the Baltic states publicly expressed their concern whether Belarusian provocations could lead to an international armed conflict.<sup>41</sup>

## 2.2 EU response

During the Belarus-EU border crisis, 12 EU governments stated their support for physical border barriers. Their country representatives described how an effective border barrier is a measure that serves the interest of the whole EU, not just member states of first arrival.<sup>42</sup>

European Commission’s (EC) *Strategic Foresight Report* released in 8.9.2021 warned against zones of instability and conflicts close to the EU and beyond, assessing that both state and non-state actors are likely to strengthen their hybrid tools, including both military and non-military influence. The report also assessed that instrumentalization of migration for political purposes could pose an

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<sup>33</sup> <https://www.theguardian.com/world/2021/nov/08/belarus-escorts-hundreds-of-migrants-towards-polish-border>

<sup>34</sup> <https://www.reuters.com/world/europe/poland-reports-violent-clashes-overnight-migrants-attempt-new-border-breach-2021-11-11/>

<sup>35</sup> <https://www.bbc.com/news/59233244>

<sup>36</sup> <https://www.reuters.com/world/europe/night-crossings-germany-braces-belarus-route-swells-migrant-flows-2021-10-14/>

<sup>37</sup> <https://www.bbc.com/news/world-58952867>

<sup>38</sup> <https://www.bbc.com/news/59233244>

<sup>39</sup> <https://www.bbc.com/news/world-europe-59343815>

<sup>40</sup> <https://www.aljazeera.com/news/2021/11/18/minsk-proposes-plan-to-ease-belarus-poland-border-crisis>

<sup>41</sup> <https://www.reuters.com/world/europe/poland-reports-violent-clashes-overnight-migrants-attempt-new-border-breach-2021-11-11/>

<sup>42</sup> <https://www.bloomberg.com/news/articles/2021-10-08/eu-should-pay-for-walls-against-migrants-12-nations-tell-bloc>

increased risk for EU security.<sup>43</sup> The Commission raised the issue again on 29.9. in “A *renewed action plan against migrant smuggling (2021-2025)*” where it was stated that the role of State actors in facilitating irregular migration and the use of human beings to create pressure at the EU’s external borders has increased. It assessed that the instrumentalization of migrants is politically driven.<sup>44</sup> Conclusion adopted by the European Council on 22.10.2021 outlined that EU would not accept any attempts by third countries to instrumentalize migrants for political purposes. It condemned all hybrid attacks at the EU’s borders and announced of incoming legislative counteractions.<sup>45</sup> 14.12.2021 the Commission proposed a new regulation: “*Addressing situations of instrumentalization in the field of migration and asylum*”, which will be referred to as the Instrumentalization Regulation.<sup>46</sup>

### **3. DEFINING AND DESCRIBING INSTRUMENTALIZED MIGRATION & HYBRID THREATS**

The proposed instrumentalization regulation and the proposed amendments to the Schengen Borders Code define instrumentalized migration legally: “*As a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third-country nationals to the external borders, 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 destabilize 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.*”<sup>47</sup>

It has been pointed out that the normative definition of instrumentalized migration is broad and includes terms that are unclear from legal perspective.<sup>48</sup> However, as underlined by the Committee on Civil Liberties, Justice and Home Affairs study, when framing something as a matter of national security, Member States do have the competence to act outside the scope of EU law and also the competence to judge when domestic national security is at risk.<sup>49</sup> Similar lack of precise defining

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<sup>43</sup> COM(2021)750 final

<sup>44</sup> COM(2021)591 final.

<sup>45</sup> EUCO 17/21. (22 October 2021). Communication from the General Secretariat of the Council to Delegations.

<sup>46</sup> COM(2021) 890 final.

<sup>47</sup> Ibid. Section 1. *Context Of the Proposal*. Also see: COM(2021) 891. Article 1. (Article 2(27)) in the amended Schengen Borders Code.

<sup>48</sup> Forti.M. (10 March 2022). Weaponisation of Migrants? Migrants as a (Political) Weapon and the EU Regulatory Response: What to Expect Now. EJIL:Talk! Blog of the European Journal of International Law. Retrieved from: <https://www.ejiltalk.org/weaponisation-of-migrants-migrants-as-a-political-weapon-and-the-eu-regulatory-response-what-to-expect-now/>

<sup>49</sup> O., Gutheil, M., Liger, Q., Moller, C., Eager, J., & Henley, M. (2017). EU and Member States' policies and laws on persons suspected of terrorism related crimes. p.10.

could be seen with the normative definitions on terrorism.<sup>50</sup> Although the two are not comparable *per se*, they both have very serious national security implications as pointed out in the earlier chapter.

As summarized by Dumbrava (2022), instrumentalization of migration refers to attempts by third countries to instrumentalize irregular migrants as a tool of destabilizing the EU borders or as a tool to blackmail the EU.<sup>51</sup> Some authors like Greenhill (2010) use the concept more generally to refer to both; irregular migrants and refugees, essentially to all forms of migration that could be utilized to extort concessions from the targeted country.

### 3.1 Defining migration terms

In EU context the phenomenon might involve the instrumentalization of mixed migrant groups. Essentially masses of people with mixed legal statuses. For practicality the term “migrant” is used in this thesis as a general term. It is not clearly defined in international law. As stated in an EU fact sheet on the management of the external borders: *“The challenges linked to the increase in mixed migration flows into the EU and heightened security concerns have triggered a new period of activity in EU external border protection, which also has an impact on its internal borders.”*<sup>52</sup>

“Mixed migration flows” refers to refugees and irregular migrants. In the context of EU law, the term refugee should be understood as a third country national who has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country and to whom Article 12 of the Exclusion Directive, which excludes certain individuals from the refugee status, does not apply. The definition applies to both refugee and subsidiary protection status.<sup>53</sup> In connection, “asylum seeker” refers to persons who are seeking international protection but whose claims for refugee status have not yet been determined.

Irregular migration refers to migrants operating outside of the laws, regulations, or agreements governing the entry into EU. It can include people committing illegal entry at the EU border and illegal stay in the Schengen area without the proper documents and procedures as set in Article 5 of the Schengen Borders Code.<sup>54</sup> Essentially people who enter without legal permission and people who are unauthorized to stay after the issue of a negative asylum decision.

Issues arise with the procedural handling of instrumentalized migratory flows since the 1948 Universal Declaration of Human Rights (UDHR) Article 14 states that everyone has the right to

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<sup>50</sup> Hodgson, J. S., & Tadros, V. (2013). The impossibility of defining terrorism. *New Criminal Law Review*, 16(3). p.524-526.

<sup>51</sup> Dumbrava, C. (2022). Revision of the Schengen Borders Code. European Parliamentary Research Service. p.3.

<sup>52</sup> <https://www.europarl.europa.eu/factsheets/en/sheet/153/management-of-the-external-borders>

<sup>53</sup> Directive 2011/95/EU. Article 2 (c).

<sup>54</sup> Regulation (EU) 2016/399. Also see: Directive 2008/115/EC. Article 3 (2).

seek and to enjoy asylum from persecution in other countries. In EU context the right to seek asylum is supported by the 1951 Convention Relating to the Status of Refugees (The Geneva Convention) and the 1967 Protocol Relating to the Status of Refugees. The right to seek asylum is also enshrined in the EU founding treaties and the Charter of Fundamental Rights of the European Union (CFR) Article 18. There is no definition in the TFEU nor the Charter for the terms “asylum” or “refugee” but both refer to the Geneva Convention and its Protocol. The principle of non-refoulement is enshrined in CFR Article 19 (2). The principle of non-refoulement sets that people should not be returned to their homeland unwillingly if they have a well-founded fear of persecution. Ultimately granting of asylum remains as a state level decision, as international law recognizes the right to seek asylum but does not oblige states to provide it. Cases of mass influx form an exception and temporary protection should be provided according to the Geneva Convention. Mass influx is defined as *“the arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.”*<sup>55</sup>

### 3.2 Describing instrumentalized migration

Because of the procedural handling of the migratory flows, the use of instrumentalized migration on a larger scale can easily cause a sudden migration crisis by overwhelming the targeted countries. The facilitators can beforehand rely on the perceived commitment of the targeted country in upholding international law and mandatory humanitarian border procedures in every situation, regardless of the circumstances or scale of the crisis. This type of strategical use of international law for hostile purposes is referred to in some instances as “lawfare”.<sup>56</sup>

For the facilitators instrumentalized migration serves as a seemingly low-cost hybrid threat tool. In most cases the facilitators try to pass the humanitarian legal obligations arising from the handling of the exploited people to the targeted country. As stated by Alexander Lukashenko when asked about being responsible for the Belarus-EU crisis: “They are not coming to my country, they are going to yours”.<sup>57</sup> As witnessed in the Belarus-EU case, instrumentalized migration can involve actions such as violent attacks on authorities, migrant smuggling, encouraging of illegal entry, tampering with border controls, destroying border infrastructure, and preventing authorities in carrying out their duties. According to Interpol migrant smuggling is closely tied to the use of fraudulent travel documents, linked to corruption, illicit money flows and trafficking in illicit goods.<sup>58</sup> As also presented in the Belarus-EU case and in cases described in further sections, there has been signs of third country authorities, possibly in co-operation with organized crime, making financial gain from the process of facilitating migrant flows to EU borders.

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<sup>55</sup> Council Directive 2001/55/EC. Article 2 (d).

<sup>56</sup> McKeown, R. (2017). The power and perils of international law: A review essay on lawfare, constructivism and international lawpower. *International Politics Reviews*, 5(2). p.105.

<sup>57</sup> <https://www.theguardian.com/world/2021/nov/19/lukashenko-says-belarusian-troops-may-have-helped-refugees-reach-europe>

<sup>58</sup> <https://www.interpol.int/Crimes/People-smuggling>

Another phenomenon observed in connection with instrumentalized migration is the formation of migrant “caravans”. (As described by Frontex in another context). Caravans are organized groups of people communicating via social media messaging services potentially attempting to overwhelm border authorities while trying to cross EU’s external borders by force.<sup>59</sup> As witnessed in the EU-Belarus case, the caravans can be further directed and even armed by the facilitators.<sup>60</sup>

In summary, instrumentalization of migration can serve many purposes as it could be seen as a hybrid threat tool used for political retribution or as tactic of inserting diplomatic pressure to make the targeted country to cave in on political demands and goals. It could also be seen as form of asymmetrical “hybrid warfare”.

### **3.3 Other forms of instrumentalization**

Non state actors instrumentalizing migrants and refugees for the purposes of terrorism has also been observed in the EU. During the 2015-2016 migration crisis large numbers of people arrived at EU territory bypassing the first receiving Member State and continuing further through multiple State borders. It became difficult, if not practically impossible to keep track of the arrivals, especially the people arriving without documents. This meant that many individuals who would not have been entitled to asylum in the first place, or in the worst-case scenario, individuals who posed a serious security risk, managed to freely make their way from one Member State to another.<sup>61</sup>

Extremist groups took advantage of the migration crisis and in 2016 it was reported that the German Federal Intelligence Service (BND) was concerned that the Islamic State (ISIS) terrorist organization was preparing potential terrorists to infiltrate the refugee flows and training them for the asylum-seeking process at EU borders.<sup>62</sup> ISIS also abducted migrants who were on their way from Sub-Saharan Africa through the Sahara to Europe. Controlling the abducted migrants with fear and violence, ISIS then started to train the abductees for their own purposes.<sup>63</sup>

Between January 2014 and 18 June 2018, 44 refugees or asylum seekers were involved in 32 Islamist terror attacks in Europe, leading to 814 people injured and 182 deaths. These attacks occurred in 12 different countries, with Germany being the most frequent target. 24 of the 44 individuals registered as asylum seekers (55 %) and further 11 were given refugee status (25 %). The status of the other nine (20 %) was unclear. Of the 24 asylum seekers, at least 9 had their applications rejected but remained in Europe.<sup>64</sup> The effects of constant terrorist threats in EU

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<sup>59</sup> Frontex. (2020). Risk Analysis for 2020. p.56.

<sup>60</sup> <https://www.telegraph.co.uk/world-news/2021/11/16/belarus-arming-migrants-stun-grenades-amid-worst-clashes-far/>

<sup>61</sup> Leenen, L (2018). Proceedings of the 13th International Conference on Cyber Warfare and Security. p.231-232.

<sup>62</sup> <https://www.dw.com/en/islamic-state-reportedly-training-terrorists-to-enter-europe-as-asylum-seekers/a-36389389>

<sup>63</sup> Schmid, A. P. (2016). Links between terrorism and migration. International Centre for Counter Terrorism, 7(4). p.45.

<sup>64</sup> Simcox, R. (2018). The Asylum-Terror Nexus: How Europe Should Respond. Heritage Foundation. p.1-7.

Member States reflected to border control as well as France resumed all internal border controls from 27 February to 15 July 2017.<sup>65</sup>

### 3.4 Defining hybrid threats and hybrid warfare

Different terms used to describe the actions of Belarus at the EU border were used. While definitions of hybrid threats and hybrid warfare can vary and they understandably remain flexible to better respond to their evolving nature, we still might need to distinct between hybrid threats and hybrid warfare. The question is not about semantics, but rather about the real-life consequences of what might be used as *casus belli* (cause of war) or what might constitute *jus ad bellum* (a justly reason to go to war) under international law and also how these concepts could evolve in the future.

The European Commission describes hybrid threats as a concept that: “*Aims to capture the mixture of coercive and subversive activity, conventional and unconventional methods (i.e. diplomatic, military, economic, technological), which can be used in a coordinated manner by state or non-state actors to achieve specific objectives while remaining below the threshold of formally declared warfare.*” Commission further point out that hybrid threats usually focus on exploiting the vulnerabilities of the target and seek to generate ambiguity to hinder decision-making processes. Hybrid threats can be amplified with disinformation campaigns, using social media to control the political narrative or to radicalize, recruit and direct proxy.<sup>66</sup>

On hybrid warfare EU Parliamentary Assembly notes that the main feature of hybrid warfare is legal asymmetry. Adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit gaps in the law and benefit from legal complexity, which allows them to operate across legal boundaries and in under-regulated spaces, exploiting legal thresholds. The hybrid adversaries are prepared to commit substantial violations of the law while generating confusion to mask their actions.<sup>67</sup>

The Parliamentary Assembly also states that there is neither, universal definition of hybrid war or law of hybrid war.<sup>68</sup> However, as noted by Monaghan (2019), a reasonably similar distinction between the concepts has been made multiple times by several authors:

*“Hybrid threats combine a wide range of non-violent means to target vulnerabilities across the whole of society to undermine the functioning, unity, or will of their targets, while degrading and subverting the status quo. This kind of strategy is used by revisionist actors to gradually achieve their aims without triggering decisive responses, including armed responses.”*

In contrast:

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<sup>65</sup> <https://www.consilium.europa.eu/en/press/press-releases/2017/03/07/regulation-reinforce-checks-external-borders/>

<sup>66</sup> JOIN(2016) 18 final.

<sup>67</sup> EU Parliamentary Assembly Report. Doc. 14523. (06 April 2018).

<sup>68</sup> Ibid

*“Hybrid warfare is the challenge presented by the increasing complexity of armed conflict, where adversaries may combine types of warfare plus nonmilitary means to neutralize conventional military power.”<sup>69</sup>*

With this distinction it could be roughly divided that hybrid threats are related to national security and crisis management, whereas hybrid warfare is an evolving military concept.

## **4. LEGISLATION**

As pointed out by Debbas (1996) in relation to broadening the scope on refugee laws, connecting problems such as state responsibility and international security are “artificial exercises”. Even with existing factual, practical or policy links, it is not always easy to establish juridical links between different fields.<sup>70</sup> Even though the subject matter is not compatible, this lack of judicial links is also partly the problem when connecting legal and national security aspects with the event of instrumentalized migration.

As the event acts as a hybrid threat and as a potential violation of international law, legislation related to it could be seen from two perspectives: 1.) EU law - essentially mitigating and preventive legislation for the purposes of Intra-EU security and crisis management. 2.) International law principles that are being potentially violated with instrumentalization of migration.

### **4.1 EU law**

To further establish the scope of this chapter, this thesis will only look at subject from the EU law perspective as it relates to EU’s hybrid resiliency in enabling the immediate handling and prevention of instrumentalized migration as the event is defined in chapter 3.

EU legislation has established a wide collection of regulations, directives, strategic guidelines, agencies, and organizations operating in the field of crisis management, security, and border control. Due to the sheer volume of the material, only a summary of the most relevant legislation related to the issue is presented.

#### **4.1.1 EU security framework**

Founding EU treaties; Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) lay the constitutional basis for the establishment of a common security

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<sup>69</sup> Monaghan, S. (2019). Countering hybrid warfare. Prism, 8(2). p.87.

<sup>70</sup> Debbas, V. G. (Ed.). (1996). The problem of refugees in the light of contemporary international law issues (Vol. 12). p.13.

framework and the common external border protection system, while still leaving room for the Member States to operate individually, especially regarding national security.

TEU Articles 3-4 establish the creation of an area of freedom, security, and justice with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. They also state that EU should contribute to peace and security. Article 4 (2) states that the Union shall respect essential State functions such as ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. It further differentiates that national security remains the sole responsibility of each Member State.

TFEU Article 72 states that the Articles under title 5, the area of freedom, security and justice “*shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.*” Article 73 further specifies that Member States have a right to organize among them forms of co-operation that is deemed appropriate between the competent departments of the administrations that are responsible for safeguarding national security in those specific Member States. Article 79 sets that the Union shall develop a common immigration policy aimed to combat irregular migration and trafficking in human beings.

In summary, TEU and TFEU clearly establish the basis for Member States to exercise independent judgement case by case against hybrid threats such as instrumentalized migration when they are assessed to pose a threat to national security. The treaties also obligate EU to respond to evolving threats at the Union level.

#### **4.1.2 Various EU countermeasures**

TFEU Article 78 (3) states: “*In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.*”

This article was officially applied in connection with the Belarus-EU crisis and in connection with the 2015-2016 migration crisis to aid Greece and Italy in the handling of the arrivals.

The *ad hoc* “provisional measures” referred to in Art. 78 (3) are not clearly defined. Their duration is 6 months maximum, and when interpreted together with TFEU Art. 80 that emphasizes solidarity and sharing of responsibility, the measures can include relocation schemes, as in the context of the Council’s decision on provisional measures regarding Greece and Italy in 2015. As in the Council’s decision on provisional measures regarding the Belarus-EU border crisis, the measures can include extension of the registration period for asylum applications, the use of border asylum procedure for processing all asylum claims and limiting reception conditions to only basic needs, as well as simplified faster national return procedures for rejected asylum-seekers. In 2020 during the Turkey-EU border crisis involving aggressive use of instrumentalized migration, Greek authorities announced they would apply Article 78 unilaterally connecting it to domestic emergency legislative

act instead of going through the process of involving Council, Commission, and consulting of the Parliament. This decision was criticized by the United Nations High Commissioner for Refugees. UNHCR criticized that Greece could not trigger the article unilaterally and that the Geneva Convention or EU refugee law do not allow the suspension of the right to asylum or for expulsions against the principle of non-refoulement.<sup>71</sup> In practice in cases of instrumentalized migration, the provisional measures described in Article 78 (3) would be amended with measures included in the proposed Instrumentalization Regulation if/when it enters into force.

TFEU Article 222 (1), the *solidarity clause*, acts as the article on cooperative action on responding, preventing, and combating *inter alia* potential large scale man-made disasters when a Member State has exhausted all resources available to it. The solidarity clause is intended to be used as a “last resort” mechanism. To enable faster coordination and response for crises and to support the arrangements of the solidarity clause, the implementing decision on the EU Integrated Political Crisis Response (IPCR) was adapted in 2018. In this decision we can also find the most up to date EU definition for “crisis”. Article 3 (a) states that: “‘crisis’ means a situation of such a wide-ranging impact or political significance, that it requires timely policy coordination and response at Union political level.”<sup>72</sup> In general, situations can clearly form a threat to national security without exceeding the described EU crisis threshold.

In addition to the solidarity clause, TEU 42 (7), only intended to be used in connection with armed attacks, acts as the EU’s *mutual defence clause*. The article obligates other Member States to aid and assistance “by all the means in their power”. It was invoked by France after the 2015 Paris terrorist attacks.<sup>73</sup>

Regulation 2019/1896 presents the legal mandate and tasks of Frontex, which acts as the EU agency for the management of operational cooperation at the external borders and holds a role in EU’s first response to external border crises. It has the capability under Article 10 to deploy rapid border interventions.<sup>74</sup> These rapid intervention teams were used in Lithuania in 2021 in connection with the EU-Belarus border crisis.<sup>75</sup>

Regarding facilitation of illegal entry and irregular migration, Council Directive 2002/90/EC defines the facilitation of irregular migration and Council framework decision 2002/946/JHA improves the application of the penal framework related to the facilitation of irregular migration.

#### **4.1.3 The Dublin System & Schengen Borders Code**

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<sup>71</sup> Micaela, D. M., & Katrien, L. (2021). Emergency measures on migration: Article 78 (3) TFEU. p.3-8.

<sup>72</sup> Council Implementing Decision (EU) 2018/1993.

<sup>73</sup> Anghel, S. E., & Cirlig, C. C. (2016). Activation of Article 42 (7) TEU France's request for assistance and Member States' responses. p.2.

<sup>74</sup> Regulation (EU) 2019/1896.

<sup>75</sup> <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-rapid-intervention-in-lithuania-MwIEXJ>

The Dublin System (Comprising of the Dublin Regulation and the EURODAC Regulation) forms a part of the EU asylum system and has a primary role in the management of EU external borders. According to the system the first Member State taking the fingerprints of an arrival, or the first state that receives an asylum claim, is also responsible for processing that person's asylum claim.<sup>76</sup> However, later evaluation of the Dublin regulation stated that the system was not designed to deal with situations of mass influx, which has severely reduced its relevance in the context of crisis like situations and has undermined achieving its objectives.<sup>77</sup>

The Schengen Borders Code Art.5 (3) states that Member States shall introduce penalties, in accordance with their national law, for the unauthorized crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. It further states that the penalties shall be effective, proportionate, and dissuasive. Art. 13 enables surveillance at the EU external borders. The Border Code also gives Member States several preventive tools in enabling reintroduction of border controls at internal borders in the face of a crisis that expels over the external borders. As stated in Art. 25 (1), the reintroduction of border controls is to happen at: “*all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days.*” According to Art. 25-30 the use of special border controls needs to be connected to situations where a threat to public policy or internal security is reasonably apparent or to exceptional circumstances where the overall functioning of the Schengen area is put at risk.<sup>78</sup>

The duration of border controls at the internal borders is limited and depends on the legal basis used to invoke the reintroduction of border control. The duration can vary and can be extended from two months to six months and to two years. According to Art.28, immediate action in relation to unforeseen circumstances, can be taken simultaneously with the notification of the reintroduction of border control. In this case the border controls can last for two months maximum. In accordance with Art.25 (4), in cases of exceptional circumstances, the control can be extended to maximum of two years.<sup>79</sup>

The recent proposed amendments to the Schengen Borders Code *inter alia* give Member States the ability to unilaterally introduce border controls for 30 days (can be extended up to 3 months) in cases of unforeseen threats. For foreseeable events requiring the reintroduction of controls, the period would be up to 6 months and should not exceed 2 years but could be extended longer in exceptional situations. The proposal also acknowledges instrumentalization (the definition presented in Article 1 of the proposal is equal to the one presented in the Instrumentalization Regulation) and includes additional measures Member States can use to respond to it at the external borders. In Art. 1 (3) of the proposal amendment is made to the definition of “border surveillance” to include the surveillance of borders between crossing points and border crossing points outside fixed opening hours. This also includes preventative measures to detect and prevent unauthorized

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<sup>76</sup> Regulation (EU) No 604/2013. Article 3

<sup>77</sup> DG Migration and Home Affairs. (2015). Evaluation of the Dublin III Regulation Final Report. p. 4.

<sup>78</sup> Regulation (EU) 2016/399.

<sup>79</sup> Gülzau, F. (2021). A “New Normal” for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls?. Journal of Borderlands Studies. p.4.

border crossings or the circumvention of border checks. For cases of instrumentalization the proposal gives Member States the ability to limit the number of border crossing points or their opening hours where the circumstances so require (Art.1 (2) of the proposal) while allowing third-country nationals to seek international protection. In Art. 3 of the proposal the detection as well as prevention of unauthorized border crossings is now defined as one of the main purposes of border surveillance and in cases of instrumentalization, intensified border surveillance should be applied. (Including the use of advanced surveillance technology such as drones, motion sensors, as well as mobile units.) As stated in Article 1 (6) of the proposal, a new procedure for transferring irregular migrants apprehended at the internal borders is introduced. The persons can be transferred, without an individual assessment, back to the EU country from which it is assumed they arrived.<sup>80</sup>

#### **4.1.4 Instrumentalization Regulation**

The Instrumentalization Regulation recently proposed by the EU Commission is the most up to date and most specific EU legal act proposed for the mitigation of instrumentalized migration. The proposal defines the circumstances of instrumentalization of migrants and its main functions aim to mitigate the effectiveness of instrumentalization as hybrid threat tool.

Member States facing a situation of instrumentalization of migrants would be allowed to restrict flows of people at the border by limiting the number of border crossing points open with a view to preventing unauthorized entry and protecting national security. The proposal allows extending the period in which asylum claims can be registered and it would make the abuse of burdening the system with endless appeals against negative asylum decisions more difficult. It would also allow derogating from several EU asylum law instruments by allowing Member States to examine asylum applications already at the border or near the border and allow faster removal of individuals by derogating from the EU Return Directive. Article 3 allows limiting the reception conditions to only cover basic needs, in particular food, water, clothing, adequate medical care, and temporary shelter against seasonal weather conditions (when possible). Article 5 gives potential basis for further support and solidarity measures in the event of instrumentalized border crisis.<sup>81</sup>

## **4.2 International law principles**

### **4.2.1 State sovereignty & territorial integrity**

The general principle of sovereignty in international law establishes that nation states are free to decide who resides or enters their territories. According to Art. 2 (1) UN Charter, States have supreme authority within their territory. This also means that States have no legal “duty” to admit aliens (individuals who do not have the nationality of the State which they are seeking to enter)

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<sup>80</sup> COM(2021) 891

<sup>81</sup> COM/2021/890 final.

according to the European Convention of Human Rights.<sup>82</sup> Taken that national security is not at risk, only in cases of mass influxes, as defined by the EU and UN and where *prima facie* refugee determination is conducted, temporary protection is to be provided based on the Geneva Convention.<sup>83</sup> Art. 2 (7) further establishes that UN should not intervene in matters which are essentially within the domestic jurisdiction of any state (e.g., national security).

The European Court of Human Rights cases *R.A. and Others v. Poland* (application no. 42120/21) and *H.M.M. and Others v. Latvia* (application no. 42165/21) emphasized state sovereignty in the Belarus-EU context. In both cases groups of arrivals were stranded at the border between Belarus seeking to enter Latvia and Poland. ECHR's 2021 decision on interim measures indicated, that despite the fundamental humanitarian assistance under rule 39 that should be provided to Iraqi and Afghan nationals at the border (food, water, clothing, adequate medical care and, if possible, temporary shelter), that at the same time this does not require Poland or Latvia to grant entry into their territories. According to the Court this decision was made in consideration with the fact that contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence, and expulsion of aliens.<sup>84</sup>

The principle of territorial integrity is enshrined in the Charter of the United Nations Article 2 (4) prohibiting all Members exercising their international relations from threatening or using force against the territorial integrity or political independence of any State in any manner that is inconsistent with the purposes of the United Nations. Artificially instigating or tampering with population movements could constitute a violation, especially when the purpose is to create internal disturbances in another State and especially when amplified with violent attacks against State authorities guarding the borders.

From the legal point of view the relationship between the threats or actions and effects caused by instrumentalized migration relating to what might constitute aggression or use of force should be further explored case by case.

“Proxy actions” can violate international law and rise to the level of use of force. In the judgement of International Court of Justice (ICJ) on *Nicaragua v. United States*, the court found the actions of the United States to be in violation of international law. Arming and training rebel forces in Nicaragua was found to be in breach of obligations under customary international law on not to use force against another State and not to intervene in affairs of another State.<sup>85</sup>

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<sup>82</sup> Lambert, H. (2006). The position of aliens in relation to the European Convention on Human Rights (No. 8). Council of Europe. p.11.

<sup>83</sup> Bazanth, B., & Kajtar, G. (2017). The Duty to Compensate for Expenses Occurring as a Result of Mass Migration in International Law. *Hungarian YB Int'l L. & Eur. L.* p.44.

<sup>84</sup> ECHR 244 (25.08.2021). Press release issued by the Registrar of the Court

<sup>85</sup> Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. United States of America*); Merits, International Court of Justice (ICJ), 27 June 1986.

#### 4.2.2 State responsibility

The international law principle of *sic utere tuo ut alienum non laedas* prohibits all States from using their territory in a manner causing harm or injury to other States, as pointed out by Bazanth & Kajtar (2017).<sup>86</sup>

We could also make the case, as presented by Hofmann (1985), that in international law there exists a “duty not to create refugees“ (and certainly a duty not to create or instigate migratory crises). In 1992 the International Law Association’s Cairo Declaration, a declaration aimed at setting a standard of conduct for the State of origin in international law, proclaimed that policies introduced by States that result in the fleeing of people constitute an internationally wrongful act.<sup>87</sup>

Two United Nations General Assembly (UNGA) Resolutions 35/124 and 36/148 (The latter accepted unanimously by the General Assembly) specifically concerning international cooperation to avert new flows of refugees, as well as the Security Council resolution 688 in 1991 on repression of the Iraqi civilian population, emphasized that:

- 1.) Influx of refugees/migrants affect the domestic order and stability of the receiving States
- 2.) Mass influxes jeopardize the stability of entire regions, as they threaten international peace and security.<sup>88</sup>

With the International Law Commission (ILC) adopting the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001, we could more effectively try to determine cases of state responsibility. This would allow States effected by instrumentalized migration to claim damages more effectively.<sup>89</sup>

## 5. OTHER INDICATIONS OF INSTRUMENTALIZATION AT EU BORDERS

### 5.1 EU - Russia

During the 2015-16 migration crisis the Finnish Eastern border with Russia suddenly started to become more active with a total of 1,713 asylum seekers arriving in Finland from Russia during the winter months through this remote and very unusual migratory route. In January and February 2016 almost 1,000 migrants arrived at the far Arctic border post between Finland and Russia. Their sudden appearance and methods of travelling through Russia were surprising and unclear and the

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<sup>86</sup> Bazanth, B., & Kajtar, G. (2017). The Duty to Compensate for Expenses Occurring as a Result of Mass Migration in International Law. Hungarian YB Int'l L. & Eur. L. p.44

<sup>87</sup> Ibid. p.48.

<sup>88</sup> Ibid. p.48.

<sup>89</sup> UN General Assembly. Resolution 56/83.

situation exhibited signs of Russian interference to facilitate the flow.<sup>90</sup> Finnish officials suspected the movements were facilitated by Russian authorities with bus transport and hotel accommodation on their journey north while given instructions to claim asylum once they got over the border. Finnish authorities discovered that at one point more than half of the migrants who claimed asylum had lived legally in Russia for five to 10 years and came from nearly 40 different countries. The flow of people halted only after the signing of a bilateral six-month agreement that allowed two popular border posts to be reserved just for Finnish, Russian and Belarusian citizens, and their families.<sup>91</sup>

Jussi Niinistö - the Finnish Minister of Defense at the time, publicly described the event as a Russian hybrid operation.<sup>92</sup> Several researchers who studied the Finnish border situation during the 2015-2016 migration crisis, assessed that Russia sought to exploit or even escalate the situation for political purposes.<sup>93</sup>

In April of 2016, the New York Times conducted interviews with some of the migrants. According to these interviews, the arrivals paid large sums of money to individuals working closely with the Russian officials in exchange for arrangements to get them to the Finnish border. After making the payment they were issued with a deportation order arranged by the Russian authorities. One of the interviewed arrivals stated that: *“They are all in the same clique: the officials, the hotel people, the drivers. This is their business.”*<sup>94</sup>

## 5.2 EU - Turkey

It has been widely acknowledged that the EU-Turkey deal created during the 2015-2016 migration crisis (which was meant to curb, or at least mitigate future crises) was later invalidated by the Turkish government and then used as a political tool to publicly extort economic and political favors from the EU almost immediately after its creation from 2016 to 2019.<sup>95</sup>

On 10 October 2019, following Turkey’s involvement in the Syrian civil war and EU’s critique, the Turkish president Recep Edorgan made a public threat: *“Hey EU, wake up! I say it again; if you try to frame our operation there as an invasion, our task is simple: we will open the doors and send 3.6 million migrants to you.”*<sup>96</sup>

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<sup>90</sup> Pynnöniemi, K., & Saari, S. (28 June 2017). Hybrid influence—lessons from Finland. NATO review.

<sup>91</sup> <https://www.euronews.com/my-europe/2021/11/19/finns-fear-migrants-will-be-sent-to-their-border-with-russia>

<sup>92</sup> Itta-Sanomat (29 Feb 2016)

<sup>93</sup> ECCWS 2021 20th European Conference on Cyber Warfare and Security. p. 14.

<sup>94</sup> <https://www.nytimes.com/2016/04/03/world/europe/for-migrants-into-europe-a-road-less-traveled.html>

<sup>95</sup> Léonard, S., & Kaunert, C. (2021). De-Centring the securitisation of Asylum and migration in the European Union: Securitisation, vulnerability and the role of Turkey. *Geopolitics*. p. 140-142. See also: Tsourapas, G. (2017). Migration diplomacy in the Global South: cooperation, coercion and issue linkage in Gaddafi’s Libya. *Third World Quarterly*, 38(10). p. 2367.

<sup>96</sup> Jennequin, A. (2016). Turkey and the weaponization of Syrian refugees. *Journal of International Affairs*, 51(4). p.1-2.

From the end of February to end of March 2020, EU's external border between Greece and Turkey experienced massive unrest that has been largely perceived as an organized attempt of the Erdogan regime to undermine Greek state sovereignty in its border regions and to exert diplomatic pressure on the EU.<sup>97</sup> Following Erdogan's 27 February announcement that the country's western borders would be opened, Turkish personnel actively facilitated transportation of migrants to the Greek border and instructed them where to cross it.<sup>98</sup> Starting from 29 February 2020, tens of thousands of migrants who had resided in Turkey for years prior, suddenly started to gather at the EU-Turkey border and tried to make their way in to Greek territory. At the end of March, Greece had registered over 52,000 attempts of illegal border crossings. Many of the people at the border had spent significant time in Turkey and did not originate from Syria but rather from Afghanistan, Pakistan, Somalia and sub-Saharan Africa.<sup>99</sup>

During the events large groups of migrants together with Turkish border personnel violently attacked Greek policemen, border guards and military with projectiles and tear gas in attempt to create openings and weaken the resistance at the Greek side of the border.<sup>100</sup> Turkish authorities organized some of the migrants into groups giving them specific tasks. Some of the people were even transported to the border with the help of Turkish authorities and to further escalate the situation, a Turkish armored vehicle attempted to tear down part of the border fence. At the same time Turkish soldiers had been deployed on the border preventing migrants from returning to Turkish territory. Turkish state media launched open provocations, further trying to persuade migrants to the exact locations of land and sea routes towards EU territory.<sup>101</sup> On 2 March 2020, a government decree was passed by Greece to suspend the registration of asylum claims for a month for people entering the country irregularly from 1 March. This enabled the authorities to return the arrivals to their country of transit or origin without registering their asylum claims. The Office of the United Nations High Commissioner for Refugees (UNHCR) criticized the decision.<sup>102</sup>

Further Turkish instrumentalization attempts and a potential new European migration crisis were only prevented with immediate countermeasures at the Greek border. The case highlights the effectiveness of immediate measures and border control in preventing escalation of crises in situations of instrumentalization.

## CONCLUSIONS

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<sup>97</sup> Kotoulas, I. E., & Pusztai, W. (2020). Migration as a Weapon. Foreign Affairs Institute, Report No1. p.4.

<sup>98</sup> Interviews conducted by Amnesty International between 4.3 - 5.3.2020. Retrieved from: <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR0120772020ENGLISH.pdf>

<sup>99</sup> Kotoulas, I. E., & Pusztai, W. (2020). Migration as a Weapon. Foreign Affairs Institute, Report No1. p.6.-7.

<sup>100</sup> <https://www.reuters.com/article/us-syria-security-greece-idUSKBN2001EF>

<sup>101</sup> Ibid. p.7-8.

<sup>102</sup> Léonard, S., & Kaunert, C. (2021). De-Centring the securitisation of Asylum and migration in the European Union: Securitisation, vulnerability and the role of Turkey. Geopolitics. p.744.

It can be concluded that there exists a pattern of intent, violations of international law and criminal actions against the domestic law of the targeted country in cases exhibiting signs of instrumentalization of migration. The existing EU and international law treaties lack substance to deal with the complexity of hybrid border threats but the proposed amendments to the Schengen Borders Code and the proposed EU regulation addressing situations of instrumentalization are promising steps forward. As hybrid threats need hybrid solutions, it seems that countering instrumentalized migration is not *de facto* possible without temporarily derogating from the level of humanitarian principles commonly practiced in the EU.

As pointed out, the need for the evolution of the legal concept of state liability as perpetrators of migrant crises needs to be entertained further, as well as a working coherent mechanism, such as a general liability regime under international law.

The phenomenon of instrumentalization can evolve over time leading to more complex schemes as showcased in the opening chapters. As presented, instrumentalized migration in the example cases indicated limited use of force and coordinated efforts to disrupt the rule of law of the targeted countries. These could certainly constitute an interference in the internal affairs of another State. If such operations also include armed attacks reaching a certain threshold, then instrumentalized migration poses a major risk of acting as the starting point of international armed conflicts. In the 2022 European security environment this should be a great concern. The events have also shown that combating instrumentalized migration demands immediate and strong responses as hostile actors will often see tentative diplomatic efforts as a weakness and as a potential sign to extort more economic and political favors from the targeted countries.

Regarding EU's response contrasted with earlier policy decisions, the recent exceptional outcomes from the European Council entail a policy shift to the direction of building more resiliency against the phenomenon.

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