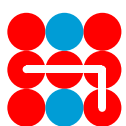


Instrumentalized migration and the Belarus crisis: Strategies of legal coercion



Hybrid CoE Papers are finalized pieces of analysis on a topic related to hybrid threats, based on one or several research questions. They may be either conceptual analyses or based on a concrete case study with empirical data.

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Contents

Summary	5
1. Introduction	7
2. Belarus and the EU: Politics, people, borders	8
The presidential election and its aftermath.....	8
The repression of protests.....	8
The Western response	9
The Ryanair incident	10
The migration crisis	11
Irregular crossings.....	11
The role of Belarus	12
3. Instrumentalized migration: Coercion and rights	14
Instrumentalized migration	14
Weaponization of migrants?	14
Features of instrumentalized migration	15
Costs: capacity swamping and political agitation	16
The role of law	17
Costs are inevitable	17
Legal asymmetries	18
The dilemma: countering coercion, whilst respecting rights	19
4. The legal position of Latvia, Lithuania and Poland	21
Territorial sovereignty and its implications	21
Admission of third-country nationals	21
Territorial integrity and political independence	22
Inviolability of frontiers	24
International refugee and human rights law	25
Non-refoulement of refugees	25
Risk of torture and ill-treatment	26
Collective expulsions	28

5. The international responsibility of Belarus	30
Respect for territorial sovereignty	30
Instigating and facilitating irregular border crossings	30
Use of violence	32
Bilateral agreements with Latvia, Lithuania and Poland	34
Respect for the rights of migrants	36
Torture, ill-treatment and the right to life	36
Trafficking and smuggling of migrants	37
Expulsion	38
6. Countering instrumentalized migration	40
Response options	40
Denial strategy: compliance with exceptions	41
Imposing costs: legal options	44
7. Conclusions	47
Author	51

Summary

This Hybrid CoE Paper presents a legal assessment of the instrumentalization of migration by the Government of Belarus against the EU and its Member States in 2021. The paper demonstrates that legal dynamics were at the heart of the incident, enabling Belarus to leverage the flow of migrants to achieve coercive effects. The Belarus migration crisis offers important lessons about responding to similar incidents in the future and illustrates how hostile actors exploit legal asymmetries and vulnerabilities to their strategic advantage.

Instrumentalized migration is characterized by three essential features: it involves the irregular movement of persons into the territory of one State in a manner that is deliberately instigated or exploited by another State as a means to coerce the former in pursuit of political, strategic or other benefits.

Instrumentalized migration achieves its coercive effects by threatening the targeted State with two types of costs. First, the irregular influx of migrants tests its ability to control its borders and cater to the needs of a potentially large number of persons seeking admission (“capacity swamping” costs). Second, the influx amplifies political and other divisions within the targeted State and may expose it to significant pressure at the international level (“political agitation” costs).

States, particularly liberal democracies, targeted by instrumentalized migration are unlikely to escape these costs due to their legal commitments. This is because international refugee and human rights law severely limit the options available to them to counter the instrumentalization of migrants through a denial strategy that seeks to neutralize the coercive effects of this tactic. In essence, the applicable rules preclude generalized expulsion, including pushbacks at the border, and may require the

admission of third-country nationals in substantial numbers pending a determination of their status. These constraints are further exacerbated in situations where the hostile State is not subject to the same legal obligations and is not exposed to comparable levels of legal accountability as the State it targets.

As the paper explains, international law does not ignore the coercive aspect of instrumentalized migration. The case of Belarus illustrates that States resorting to the instrumentalization of migrants typically do so in contravention of a range of international rules. In addition to violating the individual rights of the migrants caught up in the 2021 crisis, the actions of the Belarusian authorities infringed the sovereignty, territorial integrity and political independence of Latvia, Lithuania and Poland, the inviolability of their borders and the principle of non-intervention, among other applicable rules.

These violations of international law do not, however, lessen the obligations that international refugee and human rights law imposed on the three EU Member States targeted by Belarus. These two legal regimes thus fail to adequately account for the coercive aspect of instrumentalized migration and its strategic implications. States affected by this tactic must accordingly focus their efforts to neutralize the coercive effects of this tactic elsewhere, for example by turning to other regimes of international law.

While hostile States resorting to instrumentalized migration expose themselves to legal liability, holding them to account through legal processes is unlikely to impose costs upon them that are immediate and sufficiently severe to deter them from instrumentalizing the flow of migrants. Legal means and methods are therefore best employed as part of an integrated response to complement action in other domains and with an eye towards achieving outcomes over the longer term.

1. Introduction

The purpose of this paper is to assess the migrant crisis that unfolded at the EU's border with Belarus in 2021 from a legal perspective.¹ The crisis, including the legal questions it posed, has received much attention in the media and in public debate. While the paper inevitably covers some familiar ground, its purpose is to draw attention to the key role that legal constraints play in the instrumentalization of migration, clarify how instrumentalized migration leverages the law for coercive effect, and assess the implications for States and organizations targeted by this tactic.

Instrumentalized migration is not a new development. Although the paper focuses on the crisis instigated by Belarus, the underlying legal dynamics are not unique to this case. The analysis is therefore of interest beyond the specific circumstances of the Belarusian situation: it contributes to a better understanding of the legal aspects of instrumentalized migration more generally and offers lessons on how to

respond to future incidents of this kind. With this in mind, the paper forms part of Hybrid CoE's broader work on the legal dimension of hybrid threats.²

The paper begins by providing a brief account of the evolution of the 2021 crisis, before turning to identify the constituent elements of instrumentalized migration and the contribution that law and legal constraints make to this tactic. Building on this, the paper assesses the legal position of Latvia, Lithuania and Poland, the three EU Member States most directly affected by the crisis, distinguishing for these purposes between the coercive aspect and the rights aspect of the events. The subsequent section discusses the international responsibility of Belarus in order to determine which applicable rules of international law its conduct has violated and why. The paper then explores the implications of these findings for countering instrumentalized migration, before drawing some conclusions and general lessons.

- 1 The term "migrant" is used throughout this paper in a general sense to include asylum seekers and without any prejudice as to whether the third-country nationals seeking to enter the EU from Belarus benefitted from refugee status or not under the Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 and its Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.
- 2 For an overview of the relationship between law and hybrid threats, see Georgios Giannopoulos, Hanna Smith and Marianthi Theocharidou, *The Landscape of Hybrid Threats: A Conceptual Model (Public Version)* (Publications Office of the European Union, Luxembourg, 2021), p. 30. For a more detailed assessment, see Aurel Sari, *Hybrid Threats and the Law: Concepts, Trends and Implications*, Hybrid CoE Trend Report 3 (European Centre of Excellence for Countering Hybrid Threats, 2020). Recent work on selected legal questions includes Peter B.M.J. Pijpers, *Exploiting Cyberspace: International Legal Challenges and the New Tropes, Techniques and Tactics in the Russo-Ukraine War*, Hybrid CoE Paper 15 (European Centre of Excellence for Countering Hybrid Threats, 2022); Millicent McCreath and Valentin Schatz, *EEZ-adjacent Distant-Water Fishing as a Global Security Challenge: An International Law Perspective*, Hybrid CoE Working Paper 19 (European Centre of Excellence for Countering Hybrid Threats, 2022).

2. Belarus and the EU: Politics, people, borders

This section provides a brief account of the migration crisis of 2021, focusing on key events and the position of the main actors. It begins with the Belarusian presidential election of 2020 before outlining the main stages of the migration crisis itself. While most of these events are well known, it is worth recalling them to provide a general background and to highlight certain elements of the crisis that are key to its legal assessment.

The presidential election and its aftermath

On 9 August 2020, a presidential election took place in Belarus. Sitting President Alexander Lukashenko claimed to have been re-elected a sixth consecutive time by winning a decisive share of the vote. The election and its outcome were widely dismissed as a sham.³ The campaign was marred by the harassment of opposition candidates and the intimidation of the independent media, while the balloting itself was tainted by irregularities.⁴ Numerous foreign

governments and international organizations rejected the result.⁵ A rapporteur appointed by seventeen participating States of the Organization for Security and Cooperation in Europe (OSCE) to investigate the situation under its Moscow Mechanism found that there was “overwhelming evidence” that the election had been falsified.⁶

The repression of protests

Within days, anti-government protests broke out across Belarus.⁷ The security services responded with excessive force and mass arrests. The demonstrations continued for several months, but ultimately lost momentum and were quelled by the authorities, allowing President Lukashenko to retain his grip on power.⁸ The violent methods used to repress the protests, ranging from arbitrary detention and torture to denial of the right to freedom of expression, were firmly, though far from

- 3 BBC News, ‘Belarus Election: Opposition Disputes Lukashenko Landslide Win’, 10 August 2020 (<https://www.bbc.co.uk/news/world-europe-53721410>). [All links were last accessed on 14 March 2023, unless otherwise indicated.]
- 4 On the election generally, see Gábor Tóka, ‘The 2020 Belarusian Presidential Election’, *Romanian Political Science Review* 21, (2021): 211–230.
- 5 E.g. Statement by Rik Daems, President of the Parliamentary Assembly of the Council of Europe, 10 August 2020 (<https://www.coe.int/en/web/portal/-/presidential-election-in-belarus-statement-by-pace-president?inheritRedirect=true>); Foreign and Commonwealth Office, UK Statement: Belarusian Presidential Elections 2020, 10 August 2020 (<https://www.gov.uk/government/news/uk-statement-belarusian-presidential-elections-2020>); Declaration by the High Representative on behalf of the European Union on the Presidential Elections, 11 August 2020 (<https://www.consilium.europa.eu/en/press/press-releases/2020/08/11/belarus-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-presidential-elections/>).
- 6 Office for Democratic Institutions and Human Rights, *OSCE Rapporteur’s Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Note Verbale No 358/2020, 5 November 2020, p. 55.
- 7 Sofie Bedford, ‘The 2020 Presidential Election in Belarus: Erosion of Authoritarian Stability and Re-politicization of Society’, *Nationalities Papers* 49, (2021): 808–819.
- 8 For an explanation of regime survival, see Petra Stykow, ‘Making Sense of a Surprise: Perspectives on the 2020 “Belarusian Revolution”’, *Nationalities Papers*, (2022): 1–20.

universally, condemned in international fora as serious breaches of human rights.⁹

Throughout this period, the Russian Federation actively supported President Lukashenko in his bid to remain in office. Russian President Vladimir Putin welcomed the official election result, expressing his hope that it would facilitate the further development of ties between the two countries.¹⁰ Moscow subsequently provided vital support to the Belarusian authorities to suppress the demonstrations,¹¹ including by confirming its readiness to assist Belarus through the Collective Security Treaty Organization to ward off external pressure.¹² By contrib-

uting to Lukashenko's political survival, Russia deepened its influence over Belarus.¹³

The Western response

In stark contrast, Western governments and organizations responded to the election fraud and the ensuing events by imposing restrictive measures on the authorities in Minsk and providing support to the democratic opposition. Within weeks, Estonia, Latvia and Lithuania banned 30 Belarusian officials, including President Lukashenko, from entering their territories,¹⁴ while Poland and the United Kingdom promised aid to civil society.¹⁵ Together with

- 9 E.g. United Nations General Assembly, Human Rights Council, Resolution on the Situation of Human Rights in Belarus in the Run-up to the 2020 Presidential Election and in its Aftermath, 21 September 2020, UN Doc. A/HRC/RES/45/1, (note that the resolution was adopted by a vote of 23 to 2, with 22 abstentions). For a detailed assessment of the human rights violations, see United Nations High Commissioner for Human Rights, Situation of Human Rights in Belarus in the Context of the 2020 Presidential Election, 15 February 2021, UN Doc. A/HRC/46/4; and United Nations High Commissioner for Human Rights, Situation of Human Rights in Belarus in the Context of the 2020 Presidential Election, 4 March 2022, UN Doc. A/HRC/49/71.
- 10 President of Russia, Greetings to Alexander Lukashenko on Winning Presidential Election in Belarus, 10 August 2020 (<http://en.kremlin.ru/events/president/news/63872>).
- 11 This included dispatching a group of Russian journalists to aid them in their propaganda efforts. See Oleg Manaev, Natalie Rice and Maureen Taylor, 'The Evolution and Influence of Russian and Belarusian Propaganda during the Belarus Presidential Election and Ensuing Protests in 2020', *Canadian Slavonic Papers* 63, (2021): 371–402, p. 389.
- 12 President of Russia, Telephone Conversation with President of Belarus Alexander Lukashenko, 16 August 2010 (<http://en.kremlin.ru/events/president/news/63894>). See the Charter of the Collective Security Treaty Organization, 7 October 2002, 2235 UNTS 79. Article 7 of the Charter, as revised by the Protocol Amending the Charter of the Collective Security Treaty Organization, 10 December 2010, 3026 UNTS 263, directs the State parties to take joint measure to organize an "effective collective security system that ensures collective defence in the event of a threat to security, stability, territorial integrity or sovereignty or to the exercise of the right to collective defence".
- 13 Alla Leukavets, 'Russia's Game in Belarus: 2020 Presidential Elections as a Checkmate for Lukashenko?', *New Perspectives* 29, (2021): 90–101. See also Viktorija Rusinaite, *Russia's Policy towards Belarus: Controlling More, Giving Back Less*, Hybrid CoE Strategic Analysis 30 (European Centre of Excellence for Countering Hybrid Threats, 2021).
- 14 Liudas Dapkus, 'Baltic States Impose Sanctions against Belarus ahead of EU', Associated Press, 31 August 2020 (<https://apnews.com/article/europe-belarus-2f91603dcca6e6c88441680304a18db9>).
- 15 Kacper Pempel and Joanna Plucinska, 'Poland offers New Support for Belarus Civil Society, Media', Reuters, 4 August 2020 (<https://www.reuters.com/article/uk-belarus-election-poland-idUKKCN25A0X5>); Foreign, Commonwealth and Development Office, 'Foreign Secretary's statement on Belarus', 24 September 2020 (<https://www.gov.uk/government/speeches/foreign-secretary-statement-on-belarus-24-september-2020>).

Canada, the United Kingdom also imposed a travel ban and asset freeze on eight members of the Belarusian regime, including Alexander Lukashenko.¹⁶

The EU followed suit on 2 October 2021 by imposing its own travel ban and asset freeze on 40 Belarusian officials.¹⁷ In the following months, it extended these measures to another 15 officials, including President Lukashenko, approved a financial assistance package to support Belarusian civil society, and launched a third round of sanctions.¹⁸ In the United States, Congress adopted the Belarus Democracy, Human Rights, and Sovereignty Act to expand the President's authority to impose sanctions on Belarus to include the events surrounding the presidential election and to provide assistance to civil society.¹⁹

The Ryanair incident

In May 2021, the Belarusian authorities forced Ryanair Flight 4978 to divert from its scheduled

route between Athens and Vilnius and land in Minsk, claiming to have received information about a bomb on board the aircraft.²⁰ Once on the ground, they proceeded to arrest two passengers, opposition journalist Roman Protasevich and his partner Sofia Sapega. The bomb threat was dismissed by Western governments and organizations as a pretext and the aircraft's diversion condemned as a dangerous violation of the applicable international rules.²¹ Based on the outcome of a fact-finding investigation,²² the Council of the International Civil Aviation Organization later concluded that the bomb threat was deliberately false, that senior Belarusian government officials knowingly relayed the threat and that, consequently, Belarus had unlawfully interfered with the flight in a manner that endangered its safety and security.²³

The incident prompted the EU to adopt yet another round of restrictive measures, including a ban on Belarusian carriers entering EU airspace and accessing EU airports.²⁴ On 21 June

16 Foreign, Commonwealth and Development Office, 'Belarus: UK Sanctions 8 Members of Regime, including Alexander Lukashenko', 29 September 2020 (<https://www.gov.uk/government/news/belarus-uk-sanctions-eight-members-of-regime-including-alexander-lukashenko>).

17 Council Implementing Regulation (EU) 2020/1387 of 2 October 2020 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus [2020] OJ L 319/1.

18 See Council of the European Union, Timeline – EU Restrictive Measures against Belarus (<https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/belarus-timeline/>).

19 H.R.8438 – Belarus Democracy, Human Rights, and Sovereignty Act of 2020, 116th Congress (2019–2020).

20 James Shotter, Max Seddon and Richard Milne, 'Belarus Arrests Opposition Activist after Forcing Flight to Land in Minsk', *Financial Times* (London), 24 May 2021, p. 1.

21 Foreign, Commonwealth and Development Office, A Statement on Belarus by the Foreign Ministers of G7 Countries: Canada, France, Germany, Italy, Japan, the UK and the USA, and the High Representative of the EU, 27 May 2021. While intercepting and diverting a civilian flight under a bomb threat over national territory is not necessarily unlawful, doing so under false pretenses clearly is. See Mikko T. Huttunen, 'The Right of the Overflowed State to Divert or Intercept Civil Aircraft under a Bomb Threat: An Analysis with Regard to Ryanair Flight 4978', *Journal of Transportation Security* 14, (2021): 291–306.

22 Report of the ICAO Fact-Finding Investigation, *Event Involving Ryanair Flight FR4978 in Belarus Airspace on 23 May 2020*, July 2022.

23 Council, 226th Session, Sixteenth Meeting, C-DEC 226/16, 20 July 2021, pp. 1–3.

24 Council Implementing Regulation (EU) 2021/997 of 21 June 2021 implementing Article 8a(1) of Regulation

2021, Canada, the EU, the United Kingdom, and the United States announced further coordinated sanctions in response to the forced landing.²⁵

The migration crisis

It is against the background of the Belarusian presidential election, the Ryanair incident and the restrictive measures adopted in response that the migration crisis of 2021 unfolded. The Belarusian authorities retaliated against Western sanctions in several ways when they were first imposed, for instance by expelling Western diplomats.²⁶ They ramped up their response in the aftermath of the Ryanair incident. In a speech delivered to members of the Belarusian parliament and other officials in May 2021, President Lukashenko accused European governments of waging a “modern hybrid war” against Belarus by inciting an armed rebellion before attempting to strangle the country economically.²⁷ He promised to respond firmly to Western sanctions, attacks and provocations, warning that “We were stopping migrants and

drugs – now you will catch them and eat them yourself”.²⁸

Irregular crossings

From June 2021 onwards, the number of migrants seeking to cross from Belarus into the territory of neighbouring Latvia, Lithuania and Poland in an irregular manner increased dramatically. The precise number of successful and failed border crossings is difficult to establish with certainty, but at their peak the figures reached several thousand a month.

According to reports, the number of unauthorized attempts to enter Poland stood at 3,500 in August, rose to 7,700 in September and 17,300 in October 2021, before falling again in subsequent months.²⁹ The number of persons detained or denied entry into Lithuania and Latvia further illustrates the scale of the events. In the period between January 2021 and January 2022, the Lithuanian authorities detained 4,150 irregular migrants coming from Belarus, which represents an exponential increase compared to only 81 irregular migrants detained the year

(EC) No 765/2006 concerning Restrictive Measures in respect of Belarus [2021] OJ L 219/3; Council Implementing Regulation (EU) 2021/999 of 21 June 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning Restrictive Measures in respect of Belarus [2021] OJ L 219/55; Council Regulation (EU) 2021/907 of 4 June 2021 amending Regulation (EC) No 765/2006 concerning Restrictive Measures in respect of Belarus [2021] OJ L 197/3.

25 Belarus: Joint Statement by Canada, the European Union, United Kingdom, and United States, 21 June 2021 (https://www.eeas.europa.eu/eeas/belarus-joint-statement-canada-european-union-united-kingdom-and-united-states_en).

26 Foreign, Commonwealth and Development Office, UK expels Belarusian Diplomats in Clear Message to Lukashenko’s Regime, 10 November 2020 (<https://www.gov.uk/government/news/uk-expels-belarusian-diplomats-in-clear-message-to-lukashenkos-regime>).

27 Yuras Karmanau, ‘Defiant Belarus Leader slams EU Sanctions on Plane Diversion’, AP News, 26 May 2021 (<https://apnews.com/article/world-news-belarus-europe-business-government-and-politics-450f548007a8146114830ec05b926451>).

28 Ibid.

29 Statista, Number of Attempts to illegally Cross the Polish-Belarusian Border in Poland from August 2021 to December 2022, 2 January 2023 (<https://www.statista.com/statistics/1271292/poland-attempts-of-illegal-crossing-of-the-polish-belarusian-border/>).

before.³⁰ In addition, they prevented 8,245 persons from entering the country between August 2021 and January 2022. In Latvia, the overall numbers were lower, with 455 persons detained and 5,506 irregular entries prevented during this period, although these figures were also far higher compared to previous years.³¹

The migrants at the heart of the crisis travelled to Belarus from third countries, with the majority coming from Iraq and Afghanistan. A large proportion were children. Initially, the irregular border crossings were attempted mostly by individuals and smaller groups. As the crisis gathered momentum, both the frequency of attempted crossings and the size of the groups involved grew. At least initially, the authorities in Latvia, Lithuania and Poland struggled to accommodate the unexpectedly large number of persons entering their territories. At the same time, an increasing number of migrants found themselves stranded on the Belarusian side of the border, often without adequate shelter, provisions and medical care, after being denied entry into the EU and prevented from leaving the border area by the Belarusian uniformed services.

The humanitarian situation began to deteriorate over the summer months. Conditions grew particularly grim with the onset of the colder season, causing more than a dozen fatalities.³² While the majority of attempted crossings were not violent, several incidents took place at the Polish border which did involve violent clashes between groups of migrants and Polish security personnel. For example, on 24 October 2021, a group of approximately 60 persons armed with stones and sticks attempted to force their way into Poland from Belarus near the Polish village of Usnarz Górny, attacking and injuring several Polish border guards in the process.³³

The role of Belarus

A substantial body of evidence confirms that the crisis was deliberately generated and sustained by the Belarusian authorities.³⁴ The arrival of migrants from third countries to Belarus was actively encouraged and facilitated through official channels.³⁵ Speaking in October 2021, European Commissioner for Home Affairs, Ylva Johansson, accused the government in Minsk of “sourcing” would-be migrants to be brought to Belarus: “People come in trips organised by State tourist company

30 Giedrė Blažytė, et al., *Comparative Report on the Influx of Irregular Migrants Across the Border of Belarus: The Response by the Governments of Lithuania and Latvia* (Diversity Development Group and PROVIDUS, 2022), p. 6.

31 Ibid., p. 21.

32 Lorenzo Tondo, ‘One-year-old Syrian Child dies in Forest on Poland-Belarus Border’, *The Guardian*, 18 November 2021 (<https://www.theguardian.com/world/2021/nov/18/one-year-old-syrian-child-dies-in-forest-on-poland-belarus-border>).

33 Straż Graniczna, Migranci podjęli próbę siłowego przedarcia się do Polski [The migrants made an attempt to force their way to Poland], 25 October 2021 (<https://www.strazgraniczna.pl/pl/aktualnosci/9500,Migranci-podjeli-probe-silowego-przedarcia-sie-do-Polski.html>).

34 E.g. Grzegorz Baziur, ‘Operation “Sluice”: The So-called Migration Crisis at the Polish-Belarusian Border: an Example of Hybrid Actions Taken in the Second Half of 2021 as Documented in the Reports of the Polish Border Guard’, *Bezpieczeństwo: Teoria i Praktyka* 46, (2022): 133–150, pp. 136–140.

35 Rob Mudge, ‘From Iraq to Belarus – How Migrants get to Europe’, *Deutsche Welle*, 11 September 2021 (<https://www.dw.com/en/the-route-from-iraq-to-belarus-how-are-migrants-getting-to-europe/a-59636629>).

Centrurort, stay in State-approved hotels and pay deposits of many thousand dollars”, before they are “then transported towards the border in unmarked minivans, by men in unmarked uniforms”,³⁶

At the border itself, numerous instances have been recorded of Belarusian personnel assisting migrants in their efforts to enter Latvia, Lithuania and Poland, preventing them from leaving the border area and using intimidation, including the threat of force, to drive them into EU territory.³⁷ In addition, Belarusian personnel have repeatedly interfered with their EU counterparts, for example by using lasers and other dazzling lights during night-time standoffs.³⁸

All of this suggests that the migrant crisis was the result of a planned and systematic policy carried out by the Belarusian government. When confronted with this conclusion,

Belarusian officials repeatedly denied their involvement and instead blamed Western nations and organizations for the crisis,³⁹ a position echoed by Russian officials.⁴⁰ However, these denials must be seen in the light of the established facts and conflicting statements made by Belarusian officials. In addition to the threats he made in May 2021, President Lukashenko suggested in another speech that European leaders were insane to think that Belarus would assist them in combatting illegal migration while they were inflicting economic sanctions on the country.⁴¹ It is worth recalling in this context that Belarusian officials have issued similar statements in the past, including threats made in 2002 that they would no longer prevent illegal migrants from crossing into Western Europe and demands issued in 2004 for increased financial assistance to combat illegal immigration.⁴²

36 Ylva Johansson, Belarus: Speech on behalf of High Representative/Vice-President Josep Borrell at the EP Plenary, 5 October 2021 (https://www.eeas.europa.eu/eeas/belarus-speech-behalf-high-representativevice-president-josep-borrell-ep-plenary_en).

37 Samantha Berkhead, ‘Lithuania releases Video of Belarus Guards Pushing Migrants over Border’, *The Times*, 18 August 2021 (<https://www.thetimes.co.uk/article/lithuania-releases-video-of-belarus-guards-pushing-migrants-over-border-x3662zc78>).

38 E.g. Chancellery of the Prime Minister of Poland, Further Attacks on the Polish Border Repulsed, 30 November 2021 (<https://www.gov.pl/web/border/further-attacks-on-the-polish-border-repulsed>).

39 Ministry of Foreign Affairs of the Republic of Belarus, Press Secretary of the Foreign Ministry of Belarus A. Glaz Answers the Question of the News Agency BelTA about the EU Delegation’s Demarche, 9 September 2021 (https://www.mfa.gov.by/print/en/press/news_mfa/d578a53bb747d174.html); Matthew Chance, ‘Transcript: CNN interview with Belarus Leader Alexander Lukashenko’, CNN, 2 October 2021 (<https://edition.cnn.com/2021/10/02/europe/belarus-lukashenko-interview-transcript/index.html>).

40 Foreign Minister Sergey Lavrov’s Answers to Media Questions following the Joint Meeting of CSTO Foreign Ministers Council, Defence Ministers Council and Committee of Secretaries of Security Councils, Dushanbe, September 15, 2021, 15 September 2021 (https://mid.ru/en/foreign_policy/news/1777165/).

41 Alexander Lukashenko, Commemorative Meeting at Brest Hero Fortress, 22 June 2021 (<https://president.gov.by/en/events/uchastie-v-pamyatnyh-meropriyatnyh-v-memorialnom-komplekse-brestskaya-krepost-geroy>).

42 Robert Anderson, John Reed and Tom Warner, ‘NATO Closes Door to Unwelcome Guests’, *Financial Times* (London), 16 November 2002, p. 8; Stefan Wagstyl, ‘Belarus “could control illegal migrants better if EU eased up on Minsk”’, *Financial Times* (London), 16 June 2004, p. 8.

3. Instrumentalized migration: Coercion and rights

The role played by the Belarusian authorities in instigating the flow of migrants is one of the defining features of the crisis that unfolded at the border with the EU in 2021. Their role has prompted many in the West to accuse the government in Minsk of weaponizing or instrumentalizing migration. The present section suggests that the latter term is to be preferred, as it permits a more accurate assessment of the events. This section identifies three defining elements of instrumentalized migration and explains how legal asymmetries between the parties enhance its coercive effects.

Instrumentalized migration

Media reports and official statements have repeatedly described the crisis as a hybrid attack on the EU in which migrants were being used as weapons.⁴³ For example, in a joint statement issued in August 2021, the Prime Ministers of Poland, Lithuania, Latvia and Estonia declared

that the weaponization of refugees and immigrants threatened the regional security of the EU and that the efforts of Belarus to destabilize their countries through migration qualified as a hybrid attack.⁴⁴ The European Council also described the crisis as an “ongoing hybrid attack launched by the Belarusian regime”,⁴⁵ while NATO Secretary General Jens Stoltenberg styled the orchestrated flow of migrants as a “form of hybrid warfare”.⁴⁶

Weaponization of migrants?

The use of such war-like language has attracted strong objections.⁴⁷ According to its critics, the routine reference to weapons, attacks and warfare feeds into an unhelpful and dangerous narrative that portrays migration, a non-traditional security threat, as a military challenge. This not only risks dehumanizing the migrants caught up in the crisis by denying their agency and obscuring their rights, but also fosters a

43 E.g. Ben Hall, Sam Fleming and James Shotter, ‘How Migration became a Weapon in a “Hybrid War”’, *Financial Times* (London), 5 December 2021; Mark Galeotti, ‘How Migrants Got Weaponized: The EU Set the Stage for Belarus’s Cynical Ploy’, *Foreign Affairs*, 2 December 2021 (<https://www.foreignaffairs.com/belarus/how-migrants-got-weaponized>).

44 Chancellery of the Prime Minister of Poland, Statement of the Prime Ministers of Poland, Lithuania, Latvia and Estonia on the Hybrid Attack on our 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>).

45 European Council, Conclusion (21 and 22 October 2021), 21 October 2021, p. 6. See also European Commission, Statement by President von der Leyen on the situation at the border between Poland and Belarus, 8 November 2021 (https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5867).

46 North Atlantic Treaty Organization, Press conference by NATO Secretary General Jens Stoltenberg ahead of the Meetings of NATO Defence Ministers on 21 and 22 October at NATO Headquarters, 20 October 2021 (https://www.nato.int/cps/en/natohq/opinions_187622.htm?selectedLocale=en).

47 E.g. Statewatch, ‘The “Weaponised Migration” Discourse Dehumanises Asylum-seekers’, 10 November 2021 (<https://www.statewatch.org/news/2021/november/eu-the-weaponised-migration-discourse-dehumanises-asylum-seekers/>); Ayşe Bala Akal, ‘European Union-Belarus Border Crisis: Why the Narrative of “Hybrid Warfare” is Dangerous’, Refugee Law Initiative, 18 November 2021 (<https://rli.blogs.sas.ac.uk/2021/11/18/european-union-belarus-border-crisis-why-the-narrative-of-hybrid-warfare-is-dangerous/>); Grażyna Baranowska, Begüm Başdaş and Natalie Welfens, ‘The Dangerous Politics of Framing: The Situation at the Polish-Belarusian Border’, Border Criminologies Blog, 25 November 2021 (<https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/11/dangerous>).

sense of emergency that enables European governments to justify the adoption of exceptional measures more suitable to situations of real war.

These concerns are not without merit. Armed hostilities are the essence of war, as traditionally understood.⁴⁸ In the absence of hostilities, resorting to the terminology of war can only be understood in a metaphorical sense: it implies that the crisis faced by European nations *resembles* war in terms of its gravity, hostile nature and intensity. However, even metaphorically speaking, it may be questioned whether the analogy to real war is appropriate in the present case.⁴⁹ At the same time, to treat the crisis like other migratory flows without acknowledging its background and the role played by the Belarusian authorities fundamentally misrepresents its character. Such an approach not only overlooks the direct responsibility of the Belarusian government for causing the crisis, but also ignores the strategic and geopolitical significance of the events, including the involvement of Russia.

Features of instrumentalized migration

Based on the official statements and actions of the Belarusian authorities, it is safe to conclude that they generated the migrant crisis in retaliation against the restrictive measures adopted by the EU in the aftermath of the 2020 presidential election.⁵⁰ The crisis is therefore an example of instrumentalized migration, understood here to mean the deliberate generation of cross-border migratory flows as an instrument of coercion. There is a long tradition of using migration for coercive purposes in international relations.⁵¹ Individual cases differ, but there are three features of this practice that are of interest in the present context.

First, instrumentalized migration involves the cross-border movement of groups of persons into the territory of a State in an irregular manner without its consent. Second, this cross-border movement is deliberately generated, sustained or exploited by another State. Third, that State employs the migratory flows as a means to coerce the territorial State in pursuit of political, strategic or other gains.

48 Carl von Clausewitz, *On War* (Princeton University Press, Princeton, 1976), p. 605.

49 Without meaning to underplay either the humanitarian or the strategic implications of the crisis, the number of migrants involved in the 2021 crisis was still far lower, by some orders of magnitude, than the numbers seen on other migratory routes into Europe in previous years.

50 Cf. Parliamentary Assembly of the Council of Europe, Resolution 2404 (2021) on Instrumentalised Migration Pressure on the Borders of Latvia, Lithuania and Poland with Belarus, 30 September 2021 (“The Parliamentary Assembly is concerned by the unfolding situation of ‘hybrid attacks’ by the Belarusian authorities resulting in increased pressures relating to migration and asylum at the Belarus border with Latvia, Lithuania and Poland. This is all the more worrying as it has been orchestrated by the Belarusian authorities in response to European Union sanctions against Belarus, which were imposed for harsh violations of human rights. The Assembly condemns any instrumentalisation of migrants, refugees and asylum seekers by States for political purposes”).

51 E.g. Ali Hüseyinoğlu and Deniz Eroglu Utku, ‘Turkish-Greek Relations and Irregular Migration at the South-easternmost Borders of the EU: The 2020 Pazarkule Case’, *Migration Letters* 18, (2021): 659–674. For greater detail, see Kelly M. Greenhill, *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy* (Cornell University Press, Ithaca, 2010).

All three features of instrumentalized migration are reflected in the proposal put forward by the European Commission to update the Schengen Border Code in response to the Belarus crisis.⁵² The proposal defines the instrumentalization of migrants as referring to

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 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.⁵³

The first part of this definition incorporates the first two elements of instrumentalized migration: the cross-border movement of persons and the direct involvement of a third State. The second part features the coercive element, but defines this narrowly by requiring evidence of an intent to destabilize the EU or a Member State and by imposing a gravity threshold whereby the third State's action must be of

such a nature as to place at risk essential State functions of the targeted EU Member State.⁵⁴

Costs: capacity swamping and political agitation

The narrow approach to the coercive element adopted by the European Commission's proposal may be appropriate for the specific legislative purposes of the Schengen Border Code, but it stands in the way of a better understanding of the phenomenon of instrumentalized migration. Acts of coercion aim to alter the behaviour of another actor, compelling them to act in a certain way or deterring them from acting, by imposing costs upon them or by denying them the opportunity to achieve their goals.⁵⁵ The literature suggests that in the context of instrumentalized migration, costs typically take two forms: what has been called "capacity swamping" and "political agitation".⁵⁶

Capacity swamping involves generating migratory flows of such magnitude as to overwhelm the ability of the territorial State to deal effectively with the practical challenges posed by the influx of migrants, such as its financial or humanitarian implications. By contrast, political agitation imposes costs by using the influx as a means to amplify divisions and competing interests within the territorial State and among its international relations, thus fuelling political conflict and dissatisfaction as part of

52 European Commission, 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.

53 Ibid., p. 34.

54 Since the EU as an organization does not have essential *State* functions or *national* security (see Article 4(2), Treaty on European Union [2016] OJ C 202/1), destabilizing the Union would never meet this gravity threshold unless it was directed at destabilizing a Member State. This renders the reference to destabilizing the EU redundant.

55 For a classic study, see Thomas C. Schelling, *Arms and Influence* (Yale University Press, New Haven, 2008).

56 Kelly (n. 51), pp. 37–42.

a “wedge strategy”.⁵⁷ The impact of capacity swamping and political agitation in some cases may reach such elevated levels as to threaten essential State functions, as demanded by the European Commission’s proposal for revising the Schengen Border Code, but this is a relatively high threshold. A third State resorting to instrumentalized migration may achieve its coercive objectives even without this threshold being met.⁵⁸ Nor do the relevant rules of international law put the bar this high.⁵⁹ Accordingly, the threat posed by instrumentalized migration demands attention even where it does not endanger essential State functions.

The role of law

Imposing costs through political agitation is a particularly potent strategy when applied against liberal democracies committed to the rule of law, such as those that make up the EU. This is because the legal standards to which these nations have committed themselves significantly constrain their options to counter instrumentalized migration.

Since the success of instrumentalized migration depends for the most part on individuals moving across borders, one of the most obvious responses to this tactic is to prevent border crossings from taking place by block-

ing migrants from entering national territory.⁶⁰ However, international refugee law and international human rights law, and the corresponding norms enshrined in European Union law, limit the ability of EU Member States to prevent access to their territories, as discussed in more detail later.⁶¹ Moreover, as the Belarus crisis has shown, denying entry could leave the migrants stranded in precarious circumstances and hand hostile actors an opportunity to exploit their plight. In addition to exacerbating human suffering, this would almost certainly exert further pressure on the EU and its Member States.

Costs are inevitable

States targeted by instrumentalized migration thus find themselves caught between two options, neither of which is appealing. On the one hand, they could prevent the influx of migrants by denying them access to their territories. This approach is bound to run into considerable domestic and international opposition on humanitarian and legal grounds and thus carries political, legal and reputational costs.⁶² While it may prevent the hostile actor from succeeding with capacity swamping, it would not avoid political agitation. On the other hand, they could adopt a more receptive attitude and accommodate the influx of migrants on their

57 See Mikael Wigell, ‘Hybrid Interference as a Wedge Strategy: A Theory of External Interference in Liberal Democracy’, *International Affairs* 95, (2019): 255–275.

58 Nevertheless, at a minimum, a *deliberate intent* by the State resorting to instrumentalized migration to impose some costs on the target must be present with the aim of forcing it to change its behaviour, otherwise the situation would not amount to coercion. Since hostile actors may benefit from migratory flows in other ways, this intent cannot just be presumed: see J. G. Schoemaker, ‘Allegations of Russian Weaponized Migration Against the EU’, *Militaire Spectator* 188, (2019): 360–373.

59 See section 5 below.

60 On measures to limit access to national territory more generally, see David Scott FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press, Oxford, 2019).

61 See section 4 below.

62 For the situation in Poland, see Baziur (n. 34), pp. 140–143.

territories. However, this approach is bound to provoke domestic opposition from different directions and, importantly, would incur capacity swamping costs even if the influx of migrants did not overwhelm the territorial State's ability to respond.

Both outcomes may simply invite the hostile State to increase the pressure or to orchestrate another mass influx in the future. These dynamics strengthen the position of the hostile State: instrumentalized migration as a coercive tactic will most likely succeed in imposing at least some costs on the territorial State, and possibly achieve at least some of its strategic objectives, regardless of how the targeted State reacts.⁶³

Legal asymmetries

Legal asymmetries may tilt the odds even further in favour of the hostile State. In the present case, the EU Member States were bound by more demanding obligations than Belarus. Latvia, Lithuania and Poland are parties to the European Convention on Human Rights (ECHR),⁶⁴ while at the relevant time Belarus was the only European country not a signatory to the Convention.⁶⁵ This difference is significant not only because the two sides were subject to uneven normative expectations, but also because the EU Member States found themselves exposed to the risk of litigation before

the European Court of Human Rights, while Belarus did not.⁶⁶

Moreover, the two sides were exposed to reputational harm in different ways. The violent repression of the anti-government demonstrations in the aftermath of the 2020 presidential election showed that the government in Minsk was willing to tolerate significant international censure if the stakes were high enough. In any event, following the crackdown on the protests, its international reputation was at such a low point that additional condemnation of its human rights record had a more limited impact on its standing, while at home it faced no effective political opposition or independent institutions that could hold it to account for committing systematic human rights violations in the context of the migrant crisis. In contrast, the governments of Latvia, Lithuania and Poland were not only far more susceptible to normative pressure, but were also exposed to a wide range of formal and informal accountability mechanisms, including the independent media, non-governmental organizations, domestic political opposition and legal processes at the internal, European and international level.

This legal asymmetry – consisting of disparate obligations, different levels of readiness to comply with legal expectations and uneven exposure to accountability – is illustrated by

63 Cf. Kelly M. Greenhill, 'Migration as a Weapon in Theory and in Practice', *Military Review* 96, (2016): 23–36, p. 26.

64 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

65 Following its full-scale invasion of Ukraine, Russia was expelled from the Council of Europe. See Committee of Ministers, Resolution CM/Res(2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe, 16 March 2022. Russia decided to withdraw from the European Convention and ceased to be a party on 22 September 2022. See Council of Europe, Russia ceases to be Party to the European Convention on Human Rights, 16 September 2022 (<https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights>).

66 See the applications for interim measures in *R. A. and Others v. Poland*, Application No. 42120/21 and *H. M. M. and Others v. Latvia*, Application No. 42165/21.

a joint statement issued by over 100 European civil society and professional organizations in November 2021. While the opening passages of the statement “fully condemn the actions of Belarus”, apart from this line, the text is in its entirety devoted to rebuking the EU, its institutions and Member States for violating, in the eyes of its signatories, their legal commitments. Regardless of the merits of these criticisms, this is a one-sided approach to accountability, given the well-documented actions of the Belarusian authorities.

The dilemma: countering coercion, whilst respecting rights

Of course, none of this is to suggest that adherence to the rule of law in democratic societies is inappropriate in such circumstances – quite the opposite. Rather, there are three points to take away.

First, legal dynamics were an integral and essential element of the migration crisis.⁶⁷ Much of the leverage that Belarus was able to exert derived from exploiting the legal commitments of the EU Member States. The instrumentalization of migration therefore depends on an underlying instrumentalization of the law.⁶⁸

Second, Belarus was able to exert this leverage to great effect because the respective legal position of the parties was asymmetrical, rendering the EU Member States more vulnera-

ble to legal pressure and lowering the costs of non-compliance for Belarus.

Third, the instrumentalized nature of the crisis means that it cannot be reduced either to an exclusively humanitarian challenge or to a pure security problem. Such a binary choice between a rights-based and a security-based understanding is too simplistic, since it ignores the fact that the Belarusian reliance on the migrants’ rights for coercive purposes is one of the central features of the crisis. Accordingly, what denied the migrants their agency is not the language of weaponization adopted in the Western media and in official statements, although these terms are not helpful and are best avoided, but the fact that the migrants and their rights had been instrumentalized by a hostile actor to gain coercive leverage in the first place. The instrumentalization of the migrants does not render their rights irrelevant, but neither does the continued relevance of those rights somehow extinguish the strategic and geopolitical aspects of the situation.⁶⁹

On the contrary. As indicated earlier, admitting migrants onto national territory without restrictions in response to an instance of instrumentalized migration would allow at least some aspects of the hostile State’s coercive strategy to succeed, incentivizing the latter to escalate the situation and to use these tactics again in the future. Before long, a policy of unrestricted

67 See also Matthew Anderson, *Belarus’s Lawfare Against Latvia, Lithuania and Poland*, Lawfare, 25 October 2021 (<https://www.lawfareblog.com/belarus-lawfare-against-latvia-lithuania-and-poland>); Piotr Łubiński, ‘Hybrid Warfare or Hybrid Threat: The Weaponization of Migration as an Example of the Use of Lawfare – Case Study of Poland’, *Polish Political Science Yearbook* 51, (2022): 43–55, pp. 48–51.

68 In this sense, the legal commitments of the EU Member States created a vulnerability that was deliberately targeted by the Belarusian authorities. Cf. Georgios Giannopoulos, Hanna Smith and Marianthi Theocharidou, *The Landscape of Hybrid Threats: A Conceptual Model (Public Version)* (Publications Office of the European Union, Luxembourg, 2021), p. 9.

69 On the latter, see Anna Maria Dwyer, *The Border Crisis as an Example of Hybrid Warfare* (Polish Institute of International Affairs, Warsaw, 2022).

admission would almost certainly incur substantial costs and become untenable. For this reason, it is not possible for States targeted by instrumentalized migration to safeguard the migrants' rights without addressing the strategic aspects of the situation, nor can they counter the strategic threat without addressing the migrants' rights – both approaches would be counterproductive.⁷⁰ Moreover, in the present context, it should be remembered that Belarus resorted to coercion in an attempt to counter Western sanctions adopted in response to its prior human rights violations. Allowing this strategy to succeed undermines accountability for prior human rights abuses.

The dilemma that States targeted by instrumentalized migration face is to neutralize the coercive effects of this tactic, whilst still

respecting the rights of migrants. This does not boil down to a simple choice between safeguarding national security or complying with international obligations, that is a choice between competing policy imperatives and legal commitments. This is because international law protects both individual rights and the essential interests of States. Rather, the question is whether the law balances the competing values – individual rights and State interests – in a manner that enables States targeted by instrumentalized migration to effectively address the dilemma that the tactic presents. To answer this question, in the following section the paper examines the legal position of Latvia, Lithuania, and Poland, before turning to the international responsibility of Belarus.

⁷⁰ This point is not always appreciated in the debate over instrumentalized migration. See European Council on Refugees and Migrants, Joint Statement: Agreeing on the Instrumentalisation Regulation will be the Final Blow to a Common European Asylum System (CEAS) in Europe, 8 September 2022 (<https://ecre.org/joint-statement-ngos-call-on-member-states-agreeing-on-the-instrumentalisation-regulation-will-be-the-final-blow-to-a-common-european-asylum-system-ceas-in-europe/>).

4. The legal position of Latvia, Lithuania and Poland

The purpose of this section is to provide an overview of the legal position of Latvia, Lithuania and Poland with regard to the two competing aspects of the migration crisis of 2021: the coercive dimension and the individual rights dimension. The coercive aspect of instrumentalized migration revolves mostly around the principle of sovereignty and the various rights and privileges it confers on States in relation to their territories. The individual rights aspect consists principally of the obligations that flow from international refugee law and international human rights law, as well as the corresponding rules of European Union law. The passages below focus on the obligations that arise under international law.⁷¹

Territorial sovereignty and its implications

The modern international legal order is based on the sovereignty of States.⁷² Sovereignty describes the status that States enjoy under international law by virtue of their Statehood. One of the corollaries of sovereignty is the competence to exercise public authority.⁷³ This

competence is primarily territorial in nature, meaning that States are entitled to exercise their powers within their national territory to the exclusion, in principle, of all other States.⁷⁴

The territorial nature of sovereignty serves both as an enabling and as a limiting principle, permitting each State to administer its own territory and to exercise jurisdiction therein, whilst precluding it from exercising public powers in the territory of other States.⁷⁵ It follows that each State is entitled to independence in the exercise of its territorial functions and that other States must respect this independence by not intervening in its internal affairs.

Sovereignty and its corollaries are relevant in the present context for three main reasons.

Admission of third-country nationals

First, based on the principle of territorial sovereignty, States may exercise their authority over all persons and objects located within their territory and over all events occurring there, including by prescribing and enforcing rules of law.⁷⁶ This competence extends to persons and

71 The paper does not discuss the corresponding rules of EU law mainly for reasons of economy, but also because the Union's common asylum policy must respect the 1951 Refugee Convention and its 1967 Protocol, as well as other relevant treaties, as stipulated by Article 78(1), Treaty on the Functioning of the European Union [2012] OJ C 326/47. Accordingly, EU asylum law imposes an additional layer of legal obligations on the Member States on top of those that flow from international law, but it cannot absolve the Member States from their international commitments. Specifically, while EU law may entitle Member States targeted by instrumentalized migration to resort to exceptional asylum and return procedures, as outlined in the European Commission's proposal for amending the Schengen Borders Code (n. 52), such exceptional measures must still comply with the relevant international instruments.

72 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press, Oxford, 2019), p. 431.

73 See United Nations General Assembly, Declaration on Principles of International Law, Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625.

74 *Island of Palmas Case* (1928) 2 RIAA 829 (PCA), p. 838 ("Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.").

75 *S.S. Lotus (France v. Turkey)* (1927) PCIJ Series A, No 10, p. 18.

76 The exercise of this authority is subject to certain exceptions. For example, foreign officials acting on behalf of another State enjoy various immunities from local jurisdiction.

objects that do not hold the relevant State's nationality. In fact, the admission of foreign nationals is a matter that falls within the discretion of each individual State, unless it has entered into commitments to the contrary.⁷⁷ Accordingly, each State may decide freely, within certain limits,⁷⁸ whether to receive foreign nationals, to impose conditions upon their entry and presence or to exclude them from the country altogether.⁷⁹ As the United States Supreme Court put it in a classic passage:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe.⁸⁰

Under general international law, foreign nationals therefore do not enjoy the right to be admit-

ted into the territory of another State.⁸¹ Since the admission or exclusion of foreign nationals is a question that, in principle, falls within the domestic jurisdiction of each State,⁸² other States must respect its choices in these matters and not interfere with them in a manner prohibited by international law.

In the present context, this means that Latvia, Lithuania and Poland enjoyed the right to deny third-country nationals access to their territories from neighbouring Belarus, subject to other applicable rules of international law, above all those stemming from international refugee law and international human rights law. In addition, it also means that Belarus was under an obligation not to interfere with this right in a manner prohibited by international law.

Territorial integrity and political independence
Second, sovereignty entitles each State to demand respect for its territorial integrity and political independence. This principle is usually

77 Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law, New York, 1919), pp. 44–48.

78 The exercise of these powers is subject to any rights enjoyed by foreign nationals (e.g. Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Brill, The Hague, 2021)) or other States (e.g. *Right of Passage over Indian Territory (Portugal v. India)*, (Merits) (1960) ICJ Rep. 6).

79 *Attorney-General for Canada v. Cain* [1906] AC 542, 546 (“One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.”). See also *Khasanov and Rakhmanov v. Russia*, App. No. 28492/15 and 49975/15, Judgment, 29 April 2022, para. 93 (“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.”). Affirmed in European Court of Human Rights, 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.

80 *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), p. 659.

81 E.g. *Political Asylum Case* (1969), 72 ILR 582, 583; *R. v. Immigration Officer at Prague Airport and Another, ex parte European Roma Rights Centre and Others (Appellants)* [2004] UKHL 55, para. 12.

82 Gerassimos Fourlanos, *Sovereignty and the Ingress of Aliens* (Almqvist and Wiksell, Stockholm, 1986), pp. 55–58.

phrased in a negative fashion, prohibiting one State from infringing the territorial integrity and political independence of another State, for example as formulated in the prohibition to use force under Article 2(4) of the United Nations Charter. However, there can be little doubt that States enjoy a positive entitlement to territorial integrity and political independence. For example, sovereignty over national territory cannot pass from one State to another without its consent.⁸³ When threatened by armed attack, States may use armed force in self-defence to preserve their territorial integrity and political independence, including by expelling an invading army.⁸⁴

Attempts to seize another State's territory through forcible means are not compatible with the entitlement to territorial integrity. Nor can unauthorized incursions by foreign State agents be reconciled with the principle, even where these do not involve the seizure of national territory. Thus, States often denounce unau-

thorized overflights by foreign military aircraft as violations of their territorial integrity.⁸⁵ This means that the principle protects national territory not only from dismemberment, but also from unauthorized intrusions.⁸⁶ To this extent, territorial *integrity* must be understood as territorial *inviolability*.⁸⁷ By contrast, political independence entails the right of each State to conduct its internal and external affairs free from coercive or other prohibited intervention by other States.⁸⁸ Accordingly, the political independence of a State may be infringed by acts of intervention even where these do not involve a foreign incursion into its territory.

In the present case, Latvia, Lithuania and Poland were entitled to uphold the integrity of their national territories and their political independence against foreign encroachment, while Belarus was under an obligation to respect these principles.

83 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Judgment)* (2008) ICJ Rep. 12, para. 122.

84 Article 51, United Nations Charter. See Secretary of State for Foreign and Commonwealth Affairs, Falklands Islands, HC Deb, 7 April 1982, vol. 21 cc 959–960. See also Foreign Office Legal Adviser, 'Falkland Islands: Implications of a Declaration of War against Argentina', 2 April 1982, FCO73/520, p. 2 ("This right of self-defence clearly comprehends any military or naval action which might be necessary to repel or expel any invading force:").

85 E.g. Identical letters dated 15 March 2018 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, 22 March 2018, UN Doc. S/2018/228; Letter dated 9 August 2019 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, 13 August 2019, UN Doc. S/2019/652; Letter dated 15 August 2022 from the Chargé d'affaires a.i. of the Permanent Mission of Mali to the United Nations addressed to the President of the Security Council, 4 October 2022, UN Doc. S/2022/741.

86 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, (Merits) (1986) ICJ Rep. 14, para. 251. See also *Corfu Channel Case (Albania v. UK)*, (Merits) (1949) ICJ Rep. 4, p. 35.

87 Cf. Friendly Relations Declaration (n. 73) ("The territorial integrity and political independence of the State are *inviolable*:") (emphasis added). See also Lassa Oppenheim, *International Law: A Treatise*, Vol. 2: Disputes, War and Neutrality (edited by Hersch Lauterpacht, 7th edn, Longmans, London, 1952), §52a.

88 United Nations General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UN Doc. A/RES/20/2131.

Inviolability of frontiers

Third, territorial sovereignty has implications for State boundaries. The function of international boundaries is to demarcate the territory of States in a normative and a physical sense. By defining the geographical limits of the State, they determine the spatial extent of its territorial authority.⁸⁹ They also serve as physical barriers that enable governments to control the flow of persons and objects in and out of their territories.⁹⁰ For these reasons, international boundaries are a key instrument for maintaining order, providing security and implementing national policy.⁹¹

Due to their significance for international stability,⁹² international boundaries are subject to distinct rules of international law.⁹³ For example,

they enjoy a degree of permanence and remain in effect even if the treaty which originally created them ceases to be in force.⁹⁴ A number of international instruments also proclaim the inviolability of frontiers, most prominently the Helsinki Final Act of 1975.⁹⁵ The relevant provisions of the Helsinki Final Act address the non-use of force, the inviolability of borders and territorial integrity in succession.⁹⁶ This sequence was meant to indicate that the inviolability of frontiers is a facet of the non-use of force and thus aimed primarily at protecting sovereign territory from seizure by another State.⁹⁷ However, since the inviolability of frontiers is connected to the principle of territorial integrity, it follows that it also covers the non-forcible transgression of a boundary, such as unauthorized trespass.⁹⁸

89 *North Atlantic Coast Fisheries Case* (1910) 11 RIAA 173 (PCA), p. 180 (“One of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminous with the Sovereignty.”). See also K. D. Kristof Ladis, ‘The Nature of Frontiers and Boundaries’, *Annals of the Association of American Geographers* 49, (1959): 269–282, p. 275 (boundaries are “one of the spatial expressions of the given legal order”).

90 S. Whittemore Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (Columbia University Press, New York, 1940), p. 10.

91 Fiona B. Adamson, ‘Crossing Borders: International Migration and National Security’, *International Security* 31, (2006): 165–199, pp. 177–180. Specifically in the present context, see also Bernard Wiśniewski, ‘State Border Protection from the Perspective of the Tasks and Functions of the Border Guard and Border Checkpoints’, *Kultura Bezpieczeństwa* 34, (2019): 203–216.

92 See Kaiyan Homi Kaikobad, ‘Some Observations on the Doctrine of Continuity and Finality of Boundaries’, *British Yearbook of International Law* 54, (1984): 119–141.

93 The inviolability of frontiers is related to territorial integrity, but the two principles are not identical. See Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford University Press, Oxford, 1986), p. 181.

94 *Case concerning Territorial Dispute (Libya v. Chad)*, (1994) ICJ Rep. 6, paras 72–73.

95 Final Act of the Conference on Security and Co-operation in Europe, (1975) 14 ILM 1292

96 Articles 2 to 4, Helsinki Final Act.

97 Harold S. Russell, ‘The Helsinki Declaration: Brobdingnag or Lilliput’, *American Journal of International Law* 70, (1976): 242–272, pp. 251–253. See *Re Border Treaty*, Case No 2007–10–0102, 29 November 2007 (Latvia, Constitutional Court), para. 71 (adopting a narrow interpretation of the inviolability of frontiers that equates it with the prohibition to use force).

98 See A. Movchan, ‘Problems of Boundaries and Security in the Helsinki Declaration’, *Collected Courses of the Hague Academy of International Law* 154, (1977): 1–43, p. 24; Janusz Symonides, ‘The Inviolability of Frontiers and the Territorial Integrity in the Treaties between Poland and the GDR, between Poland and the FRG and

In line with these principles, Latvia, Lithuania and Poland were entitled to the inviolability of their borders, while Belarus was bound to respect this inviolability, both as a matter of general international law and as one of the signatories to the Helsinki Final Act.⁹⁹

International refugee and human rights law

Latvia, Lithuania and Poland are parties to key international agreements concluded for the protection of the individual, including the 1951 Refugee Convention and its 1967 Protocol, the ECHR and the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁰ The significance of these instruments in the present context is twofold: they curtail the discretion of State parties to prevent non-resident foreign nationals from entering their territories and require the competent authorities to take proactive steps to protect them from suffering certain forms of harm. The specific commitments undertaken by Latvia, Lithuania and Poland in the applicable refugee and human rights agreements thus prevail over their general freedom, derived from the principle of territorial sovereignty, to deny admission to third-country nationals.

As indicated earlier, it is these legal commitments that Belarus was able to exploit to its advantage by confronting the three EU Member States with a choice between tolerating the

unauthorized mass influx of migrants or securing their borders at the risk of contravening their legal obligations. Faced with this dilemma, the three Member States opted to prevent unauthorized mass crossings, as an emergency measure, by turning away large numbers of migrants at their borders. The purpose of this section is to assess in what way and to what extent the applicable rules constrained the three Member States in their efforts to counter the hostile instrumentalization of migrants.

Non-refoulement of refugees

The Refugee Convention of 1951 and its Protocol of 1967 confer a range of rights on refugees, defined for these purposes as persons who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside of their country of nationality and unable or unwilling to avail themselves of the protection of that country.¹⁰¹ One of the key protections afforded to refugees is the right of non-refoulement laid down in Article 33(1) of the Convention, which prevents a State party from expelling or returning a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.¹⁰²

in the Final Act of the Helsinki Conference’, *Polish Yearbook of International Law* 11, (1982): 25–42, pp. 41–42; Rovshan Sadigbayli, ‘Codification of the Inviolability of Frontiers Principle in the Helsinki Final Act: Its Purpose and Implications for Conflict Resolution’, *Security and Human Rights* 24, (2013): 392–417, pp. 400–403.

99 Belarus signed the Helsinki Final Act on 26 February 1992. See Organization for Security and Co-operation in Europe, *OSCE Handbook* (3rd edn, Vienna, 1999), p. 169.

100 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

101 Article 1, Refugee Convention.

102 Generally, see Walter Kälin, Martina Caroni and Lukas Heim, ‘Article 33, para. 1’, in Andreas Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011) 1326.

The principle of non-refoulement applies to all persons who hold a well-founded fear of persecution if returned to another country, not just to those who have been formally recognized as refugees.¹⁰³ The obligation of non-refoulement is therefore engaged when an individual presents an arguable claim for asylum. The principle applies not only to persons who are already present inside national territory and are threatened with removal, but also to individuals refused admission at its borders.¹⁰⁴ The fact that such individuals may have attempted to gain entry through irregular means does not, as such, affect their potential entitlement to refugee status.¹⁰⁵ Nor does the number of persons claiming asylum fundamentally affect the duty of non-refoulement. Finally, the principle also prohibits chain refoulement, that is returning refugees to otherwise safe countries where they may face the risk of being returned to another country that is not safe.

The principle of non-refoulement precluded Latvia, Lithuania and Poland, in principle, from turning away migrants at their borders with

Belarus who expressed a well-grounded fear of persecution if returned to their countries of origin by the Belarusian authorities. Implicit in this obligation not to turn such persons away is a duty to admit them onto national territory, pending a determination of their entitlement to refugee status.¹⁰⁶

Risk of torture and ill-treatment

Non-refoulement and related obligations also arise in connection with the prohibition of torture. The 1984 Convention Against Torture recognizes the principle in express terms by prohibiting the removal of persons to a country where there are substantial grounds for believing that they would be in danger of being tortured.¹⁰⁷ While neither the ECHR nor the ICCPR contain such express language, both recognize the principle of non-refoulement implicitly.¹⁰⁸ We will focus on the ECHR here.

Article 3 of the ECHR prohibits torture and inhuman or degrading treatment or punishment. The prohibition imposes a negative obligation on States not to inflict serious harm on persons

103 Executive Committee of the High Commissioner's Programme, General Conclusion on International Protection No. 79 (XLVII), 11 October 1996, para. (j).

104 Executive Committee of the High Commissioner's Programme, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV), 8 October 2004, para. (i).

105 In addition, Article 31 of the Refugee Convention directs the contracting parties not to impose penalties on refugees on account of their illegal entry or presence who, coming directly from a territory where their life or freedom was threatened, have entered or are present in their territory without authorization.

106 James C. Hathaway, *The Rights of Refugees under International Law* (2 edn, Cambridge University Press, Cambridge, 2021), p. 339; Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion', in Erika Feller, Frances Nicholson and Volker Türk (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 87, pp. 113–115.

107 Article 3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 112.

108 For the ICCPR, see Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 12.

within their jurisdiction.¹⁰⁹ In addition, it also imposes positive obligations on the authorities, for example to adopt specific measures to protect individuals against the risk of torture and inhuman or degrading treatment or punishment.¹¹⁰ This obligation is engaged in situations where a State party removes an alien from its territory and substantial grounds exist for believing that the person concerned would, if removed, face a real risk of being treated in a manner contrary to Article 3 of the Convention in the receiving country.¹¹¹

The principle applies not only to the summary removal of persons who have already entered national territory, but also to individuals who are denied entry or otherwise turned away at the border with a neighbouring third State.¹¹² In such a situation, Article 3 implies an obligation not to expel these persons if substantial grounds have been shown for believing that they face a real risk of torture in the neighbouring third State¹¹³ or for believing that there is no guarantee that the authorities of the neighbouring third State would seriously examine their application for asylum and thus prevent their return to a country of origin where they face the risk of treatment in contravention

of Article 3.¹¹⁴ The State party must allow such persons to remain within its jurisdiction, and cannot deny them access to its territory, until such time that their claims have been properly reviewed by a competent domestic authority.¹¹⁵ The asylum seekers concerned merely need to present an arguable claim that they face treatment in contravention of Article 3 on expulsion, without being required to express this claim in any particular form.¹¹⁶ In circumstances where the authorities knew or should have known that the individuals were exposed to harm in the receiving country, they may need to assess that risk ex officio should the vulnerable persons themselves have failed to request asylum or not communicated their request clearly.¹¹⁷

Applying these principles in the present context, the obligations implicit in Article 3 of the European Convention precluded Latvia, Lithuania and Poland, in principle, from denying access to their territories to migrants who made an arguable case that they faced a real risk of harm in their country of origin if returned there. This is so because in the context of instrumentalized migration, and in light of the deficiencies of the Belarusian asylum system noted in the case-law of the European Court of Human Rights,¹¹⁸

109 *Hristozov and Others v. Bulgaria*, App. No. 47039/11 and 358/12, Judgment, 13 November 2012 (2012), para. 111.

110 *X and Others v. Bulgaria*, App. No. 22457/16, Judgment, 2 February 2021 (2021), para. 178.

111 *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Judgment, 21 November 2019 (2019), paras 128–129.

112 *N.D. and N.T. v. Spain*, App. No. 8675/15 and 8697/15, Judgment, 13 February 2020 (2020), paras 173–187.

113 *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Judgment, 21 January 2011 (2011), paras 365–368.

114 *M.K. and Others v. Poland*, App. No. 40503/17, 42902/17 and 43643/17, Judgment, 23 July 2020 (2020), paras 168–172; *M.A. and Others v. Lithuania*, App. No. 59793/17, Judgment, 11 December 2018 (2018), para. 104.

115 *M.K. and Others v. Poland* (n. 117), paras 178–179; *D v. Bulgaria*, App. No. 29447/17, Judgment, 20 July 2021 (2021), para. 118.

116 *M.A. and Others v. Lithuania* (n. 117), para. 109; *D v. Bulgaria* (n. 118), paras 120–128.

117 *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, Judgment, 23 February 2012 (2012), para. 157; *D v. Bulgaria* (n. 118), para. 131.

118 *M.K. and Others v. Poland* (n. 117), paras 116–117; *M.A. and Others v. Lithuania* (n. 117), paras 64–65 and 105.

it could not be guaranteed that the Belarusian authorities would seriously consider any claims for asylum that these persons may lodge with them, thus creating a risk that they may be returned to their country of origin. Expelling migrants and pushing them back into Belarus was also precluded, in principle, by the risk of torture and inhuman or degrading treatment that such persons faced in Belarus itself. Several reports that migrants had suffered abuse at the hands of Belarusian officials had been published at the time of the events.¹¹⁹ In their joint statement issued in August 2021,¹²⁰ the Prime Ministers of Poland, Lithuania, Latvia and Estonia expressly referred to such abuses and underlined the need for Belarus to comply with its international obligations, including the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹²¹ In this respect, it should be noted that the sustained exposure of asylum seekers to destitute living conditions inside the border zone, as has been widely reported,¹²² may amount to degrading treatment.¹²³

Based on these factors, Belarus could not have been considered a safe country. Accordingly, in principle, migrants seeking asylum at the border should have been granted entry into Latvia, Lithuania and Poland while their claims were being processed, an obligation rendered

all the more important by the fact that Belarus is not a party to the ECHR.¹²⁴ Essentially, the more the migrants were threatened with mistreatment and denial of their rights in Belarus, the more the obligation on Latvia, Lithuania and Poland hardened to admit them into their national territory, thus enhancing the coercive effectiveness of the instrumentalization of migration.¹²⁵

Collective expulsions

Article 4 of Protocol No. 4 to the ECHR stipulates that the collective expulsion of aliens is prohibited. The purpose of this provision is to ensure that decisions to expel non-resident foreign nationals are based on an assessment of their individual circumstances and that the persons concerned are able to challenge the decisions taken against them. Article 4 thus prevents State parties from taking measures to compel aliens, as a group, to leave the country, unless those measures are taken on the basis of a reasonable and objective examination of the particular situation of each individual member of the group.¹²⁶ The notion of expulsion must be understood broadly for these purposes to refer not only to the removal of persons who are present in the territory of a State party, whether lawfully or unlawfully, but also to the interception of individuals on the high seas and

119 See n. 173 below.

120 Joint Statement (n. 44).

121 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 112.

122 See n. 173 below.

123 *M.S.S. v. Belgium and Greece* (n. 116), paras 263–264.

124 *Hirsi Jamaa and Others v. Italy* (n. 120), para. 147.

125 As noted earlier, legal asymmetry may create an incentive for the hostile State to escalate the situation as a way of increasing the pressure on the targeted State, including by exposing the migrants to harm.

126 *Georgia v. Russia (I)*, App. No. 13255/07, Judgment (Merits), 3 July 2014 (2014), para. 167; *Khlaifia and Others v. Italy*, App. No. 16483/12, Judgment, 15 December 2016 (2016), para. 237.

to the denial of entry at a land border.¹²⁷ The term therefore has the same meaning as in the context of Article 3 of the ECHR.

During the crisis of 2021, the prohibition of collective expulsions prevented Latvia, Lithuania and Poland, in principle, from denying admission to migrants seeking asylum, and from removing those who had already entered their territory, unless those measures were based on a “sufficiently individualised examination of the circumstances” of each individual person’s case.¹²⁸ Failing to carry out such an examination engages the prohibition of collective expulsions even in the case of groups consisting of only a few persons.¹²⁹ The prohibition is subject to significant exceptions, however.

In the case of *N.D. and N.T. v. Spain*, the European Court of Human Rights held that a State would not be in breach of Article 4 of Protocol No. 4 in situations where persons who crossed a land border in an unauthorized manner deliberately took advantage of their large numbers and used force, thereby creating a clearly disruptive situation which was difficult to control and endangered public safety.¹³⁰ In the subsequent

case of *A.A. and Others v. North Macedonia*, the Court went further and accepted that the prohibition of collective expulsion is not engaged where migrants attempt to gain illegal entry by taking advantage of large numbers even without using force or creating a situation that is difficult to control and endangers public safety.¹³¹ For these exceptions to apply, however, the State party must provide genuine and effective access to means of legal entry. The rationale for the decision in *A.A. and Others v. North Macedonia* is that persons, including potential asylum seekers, who seek to circumvent effective procedures for legal admission, especially by taking advantage of large numbers, may be prevented from unauthorized entry.¹³²

Based on these principles, whether or not the expulsion of groups of third-country nationals by Latvia, Lithuania and Poland was compatible with Article 4 of Protocol No. 4 to the ECHR depends, principally, on whether they provided genuine and effective access to means of legal entry which the persons concerned chose to circumvent.

127 *Hirsi Jamaa and Others v. Italy* (n. 120), paras 169–182; *Khlaifia and Others v. Italy* (n. 129), paras 243–244; *N.D. and N.T. v. Spain* (n. 115), paras 166–187.

128 *D.A. and Others v. Poland*, App. No. 51246/17, Judgment, 8 July 2021 (2021), para. 82.

129 See *M.H. and Others v. Croatia*, App. No. 15670/18 and 43115/18, Judgment, 18 November 2021 (2021).

130 *N.D. and N.T. v. Spain* (n. 115), paras 200–201.

131 *A.A. and Others v. North Macedonia*, App. No. 55798/16 and 4 others, Judgment, 5 April 2022 (2022), paras 114–115.

132 *Ibid.*, para. 114.

5. The international responsibility of Belarus

At first blush, instrumentalized migration does not seem compatible with either the duty to respect the sovereignty of the States targeted by this tactic or with the duty to respect the rights of the individual migrants exploited for these purposes. However, whether or not Belarus is responsible for violating international law in connection with the migrant crisis of 2021 depends on which activities related to the crisis are attributable to it and whether those activities constitute a breach of its international obligations.¹³³

As a general rule, a State is responsible only for conduct undertaken by its organs or persons acting on its behalf, but not the conduct of private persons carried out in a private capacity.¹³⁴ Accordingly, Belarus bears responsibility for acts carried out by its State organs and officials in violation of international law, but is responsible for the conduct of the migrants themselves only to the extent that they were acting on its behalf, rather than as private individuals. This point has particular relevance in connection with the unauthorized crossings of the border that took place during the crisis.

Respect for territorial sovereignty

The territorial nature of sovereignty makes it a coin of two sides: it confers certain rights and privileges on States in relation to their territories, but it also imposes obligations on other States to respect those territorial rights and privileges. In the present case, the entitlement of the three EU Member States to certain sovereign prerogatives meant that Belarus was under an obligation to refrain from interfering with the exercise of those prerogatives through coercive means and also to refrain from infringing

ing their territorial integrity and the inviolability of their borders. For the purposes of determining whether Belarus complied with these obligations, it is useful to distinguish between two sets of activities: the irregular border crossings and the use of violence.

Instigating and facilitating irregular border crossings

It is established beyond doubt that the government of Belarus instigated and facilitated the irregular influx of migrants into Latvia, Lithuania and Poland. Measures that were undertaken to this end deliberately and with the direct involvement of the State authorities are attributable to Belarus.

The steps taken by Belarusian officials to instigate and facilitate the entry of third-country nationals into Latvia, Lithuania and Poland in an irregular manner and without their consent denied the freedom of these three countries to control the admission of foreign nationals into their territories. The context and certain pronouncements made by the Belarusian authorities establish that they instigated and facilitated these irregular border crossings in direct retaliation against the restrictive measures adopted by the EU and its Member States in response to the 2020 presidential election. Whether the goal of this policy of retaliation was to compel the EU to abandon the sanctions already adopted or to deter it from enacting new ones is immaterial: what matters is that the irregular entry of migrants was designed to have a coercive effect by imposing costs on the EU Member States. This is a manifest breach of the principle of non-intervention.

¹³³ Article 1, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001) *Yearbook of the International Law Commission*, Vol II(2), p. 31.

¹³⁴ *Caire Claim* (1929) 5 RIAA 516 (France-Mexico Claims Commission), p. 531.

The principle of non-intervention prohibits coercive intervention into matters falling within the reserved domain of domestic jurisdiction of another State.¹³⁵ As we have seen, in principle, the admission of third-country nationals is a matter that falls within this sphere. Although Latvia, Lithuania and Poland were bound to exercise their domestic jurisdiction subject to their obligations under international refugee and human rights law, even so, they remained entitled to ensure that persons seeking to enter their territories, including individuals benefiting from a right to be admitted,¹³⁶ did so in an orderly fashion rather than in an uncontrolled manner.¹³⁷ Thus, by encouraging illegal entry, facilitating the circumvention of border controls, participating in the physical destruction of border infrastructure and hindering border guards and other personnel in carrying out their official functions, Belarus engaged in acts designed to prevent Latvia, Lithuania and Poland from exercising their discretion in a matter that falls essentially within the reserved domain of domestic jurisdiction, and did so in a coercive manner in breach of the principle of non-intervention.

In addition, the principle of territorial integrity and the inviolability of frontiers precludes unauthorized trespass even where it occurs without a coercive intent. Whether the influx of migrants violated these principles depends on whether their movements are attributable to Belarus. There is no evidence in the public domain to suggest that individual migrants or groups of migrants acted under the instructions, direction or control of Belarus in entering the territory of Latvia, Lithuania or Poland.¹³⁸ Without such evidence, the unauthorized border crossings by migrants cannot be attributed to Belarus and therefore do not violate its duty to respect the territorial integrity and the inviolability of frontiers of the three EU Member States.

There are some reports, however, which suggest that Belarusian officials themselves crossed the border on more than one occasion. On 17 August 2021, a dozen Belarusian officers dressed in riot gear entered Lithuania.¹³⁹ On 1 November 2021, Polish forces encountered three uniformed and armed men, believed to be Belarusian personnel, inside Polish territory.¹⁴⁰ The incident led the Polish Ministry of Foreign Affairs to summon the Chargé d'Affaires

135 *Nicaragua Case* (n. 86), para. 195.

136 E.g. Article 12(4), International Covenant on Civil and Political Rights, 999 UNTS 171.

137 Article 2, Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, as per Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

138 Article 8, Articles on State Responsibility (n. 136). See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (Judgment) (2007) ICJ Rep. 15, paras 396–407.

139 Baltic News Service, Border Incident clearly Proves Belarusian Regime's Crimes – Lithuanian President, 18 August. For an earlier incident, see Baltic News Service, Belarusian Border Guard Recorded entering Lithuania, 13 August 2021.

140 'Poland Protests to Belarus over "Intrusion" by Armed Forces', *The Independent*, 3 November 2021 (<https://www.independent.co.uk/news/poland-belarus-warsaw-european-union-alexander-lukashenko-b1950491.html>).

of Belarus and to issue an “emphatic protest” against the violation of the border.¹⁴¹ Assuming the individuals concerned were Belarusian service personnel, their presence in the context of the crisis must be treated as violations of the territorial integrity of Lithuania and Poland and an infringement of the inviolability of their frontiers.

Further, it is inconsistent with the inviolability of frontiers to damage or otherwise sabotage the operation of the infrastructure that protects them, such as fences and other equipment, or to hinder border guards from carrying out their duties. Such infrastructure and personnel are key in enabling the border to deliver one of its core functions, which is to serve as a physical barrier to control the ingress of people and objects.¹⁴² Deliberately undermining that function, as Belarusian officials did, contravenes the inviolability of the border even without foreign personnel trespassing upon it.¹⁴³ Accordingly, Belarus is responsible for violating the frontiers of Latvia, Lithuania or Poland on this ground too.

Use of violence

As indicated earlier, multiple incidents unfolded at the Polish border entailing the use of vio-

lence against Polish border guards and equipment. On 8 November 2021, several hundred migrants used wire-cutters and wooden logs to damage a section of the wire fence erected to protect the border.¹⁴⁴ On 17 November, a group of approximately 500 migrants attempted to forcibly enter Poland at Dubicze Cerkiewne, using a makeshift platform to get over the fence and throwing stones and fireworks.¹⁴⁵ More than 200 migrants managed to scramble across, supported by Belarusian officers using lasers and flashlights. On 29 November, a group of 70 persons attempted to enter Poland at Mielnik, throwing stones. The majority managed to enter the country. Belarusian officers again used lasers and strobe lights to blind Polish personnel.¹⁴⁶ Violent attempts to cross the border continued during the first week of December. They included attacks on Polish border guards with stones, branches and metal pipes. Lighting equipment erected to illuminate the border was fired upon from inside Belarus and partly disabled. Belarusian service personnel also damaged the wire fence and harassed Polish officials attempting to repair it.¹⁴⁷ Similar incidents took place later that month, including

141 Ministry of Foreign Affairs of Poland, Statement on Summoning Chargé d’Affaires of Republic of Belarus to Polish MFA, 3 November 2021 (<https://www.gov.pl/web/diplomacy/statement-on-summoning-charge-daffaires-of-republic-of-belarus-to-polish-mfa>).

142 See Beth A. Simmons, ‘Border Rules’, *International Studies Review* 21, (2019): 256–283, pp. 267–272 (identifying demarcation, providing security, and filtering as three core functions of international borders).

143 Cf. *Nicaragua Case* (n. 86), paras 213–214 (placing mines in ports interferes with maritime navigation and therefore prejudices the sovereignty of the coastal State and the right of free access enjoyed by foreign ships).

144 Anna Maria Dyner, ‘Crisis on Belarus-Poland Border Exacerbated’, 9 November 2021 (Polish Institute of International Affairs).

145 Chancellery of the Prime Minister of Poland, Several Attempts to forcibly Cross the Border, 18 November 2021 (<https://www.gov.pl/web/border/several-attempts-to-forcibly-cross-the-border>).

146 Chancellery of the Prime Minister of Poland, Further Attacks on the Polish Border Repulsed, 30 November 2021 (<https://www.gov.pl/web/border/further-attacks-on-the-polish-border-repulsed>).

147 Chancellery of the Prime Minister of Poland, Political Crisis initiated by the Regime of Alexander Lukashenka: Polish-Belarusian Border Brief – Update by 6 December, 7 December 2021 (<https://www.gov.pl/web/libya/>

a standoff on 13 December when Belarusian soldiers threw stones at Polish personnel and blinded them with lasers and flashlights.¹⁴⁸

International law prohibits the use of force by one State against another, as set out in Article 2(4) of the United Nations Charter. The application of this rule in the present context raises two questions: did the acts of violence at the border amount to “force” within the meaning of the prohibition and were these acts attributable to Belarus?

The prohibition against the use of force bans recourse to *armed force* capable of causing physical damage and injury, rather than other forms of coercion, such as diplomatic or economic pressure. The means through which force is employed are not relevant: the prohibition applies irrespective of the instruments used.¹⁴⁹ Despite their unsophisticated nature, throwing stones, wielding metal pipes and using bolt cutters are violent acts capable of causing material harm, as demonstrated in the present instance.¹⁵⁰ They are therefore comparable to conventional acts of force. However, given the relatively limited damage and injury they caused, it may be queried whether the intensity of the violence was sufficient to qualify as a use

of force for the purposes of the United Nations Charter. It has sometimes been suggested that “very small incidents” involving only limited material harm do not so qualify.¹⁵¹ However, it must be borne in mind that the acts of force at the border were not isolated, sporadic or small-scale. They involved hundreds of persons, caused considerable damage to infrastructure and required the deployment of thousands of uniformed personnel in response. Looking at their scale and effect, including their ongoing nature, a more compelling conclusion is that these acts of violence did cross the threshold of force within the meaning of Article 2(4) of the Charter.

Turning to attribution, there is nothing to suggest that the migrants engaged in these acts of violence as agents of Belarus. On the contrary, it is reasonable to assume that they were perfectly capable of adopting violent tactics by themselves, without having to be instructed to do so.¹⁵² In the absence of evidence to the contrary, the migrants did not use force on behalf of the Belarusian authorities and their actions are therefore not attributable to that State.

[political-crisis-initiated-by-the-regime-of-alexander-lukashenka-polish-belarusian-border-brief--6-december3](#)).

148 Chancellery of the Prime Minister of Poland, Political Crisis initiated by the Regime of Alexander Lukashenka: Polish-Belarusian Border Brief – Update by 20 December, 21 December 2021 (<https://www.gov.pl/web/libya/political-crisis-initiated-by-the-regime-of-alexander-lukashenka-polish-belarusian-border-brief4-20-december-2021>).

149 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep. 226, para. 39.

150 Also consider the clash between Indian and Chinese forces on 17 June 2020 along the Line of Actual Control in the Galwan Valley, which caused more than 20 fatalities and was fought exclusively with stones, iron rods, batons and other improvised weapons. See Srinivas Burra and Haris Jamil, *Is the China-India Violent Face-off Just a Bilateral Issue*, *Opinio Juris*, 29 June 2020 (<http://opiniojuris.org/2020/06/29/is-the-china-india-violent-face-off-just-a-bilateral-issue/>).

151 Independent International Fact-Finding Mission on the Conflict in Georgia, Report: Volume II (2009), p. 242, note 49.

152 *Nicaragua Case* (n. 86), para. 115.

This still leaves open two other possibilities. First, Belarusian service personnel themselves directly engaged in hostile activities. Some of these were violent in nature, such as cutting through the wire fence and throwing stones at Polish border guards. However, it appears that such direct acts of violence were sporadic. Other hostile activities, such as dazzling Polish personnel with bright lights, were more frequent, but not violent in nature, at least not in a conventional sense. When looked at individually and in isolation, these various activities do not manifestly cross the threshold of force. However, when considered as part of a series of hostile and violent acts, which were evidently intended to complement the forcible actions taken by the migrants, at least a plausible case can be made that they did amount to the use of force.¹⁵³

Second, international law also prohibits the indirect use of force. As stated in the Friendly Relations Declaration, every State must “refrain from organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State”.¹⁵⁴ Reports suggest that the Belarusian authorities transported migrants to the border, provided them with directions for bypassing official border crossings and provided them with tools, such as bolt cutters, to physically breach the border fence.¹⁵⁵ The Polish Government also

accused Belarus of equipping migrants with stun grenades. Although non-lethal in their effects, in the present circumstances it is reasonable to regard the use of such grenades against Polish border guards as an integral part of the violence. The Belarusian authorities thus organized groups of migrants for incursion into Poland and provided them with some of the equipment they used to carry out acts of violence. Provided this violence qualifies as a use of force, Belarus further contravened Article 2(4) of the Charter by using force indirectly.¹⁵⁶

Bilateral agreements with Latvia, Lithuania and Poland

Over the last three decades, Belarus has entered into a series of agreements with Latvia, Lithuania and Poland on good neighbourliness, cooperation and various frontier arrangements. The instrumentalization of migration by the Belarusian authorities is not compatible with the commitments undertaken in these agreements.

In their Agreement on Good Neighbourliness and Friendly Cooperation, signed on 23 June 1992, Poland and Belarus committed themselves to shaping their relationship as friendly States in a “spirit of mutual respect, good-neighbourliness and partnership”, guided amongst other things by the principles of the non-use of force, inviolability of borders, territorial integrity, and

153 See also Agata Kleczkowska, *What Does the ‘Hybrid Attack’ carried out by Belarus Against the EU Borders mean in Reality? An International Law Perspective*, EJIL:Talk, 13 December 2022 (<https://www.ejiltalk.org/what-does-the-hybrid-attack-carried-out-by-belarus-against-the-eu-borders-mean-in-reality-an-international-law-perspective/>).

154 Friendly Relations Declaration (n. 73).

155 Maria Wilczek, ‘Belarus accused of using Migrants to attack EU Frontier’, *The Times* (London), 9 November 2021, pp. 26–27; Jane Arraf and Elian Peltier, ‘Migrants Say Belarusians Took Them to E.U. Border and Supplied Wire Cutters’, *New York Times*, 13 November 2021.

156 See *Nicaragua Case* (n. 86), para. 228.

non-interference in internal affairs.¹⁵⁷ Generic references made in a treaty to “friendship” and similar concepts do not necessarily give rise to concrete legal obligations, but instead set an objective against which the other provisions of the treaty should be interpreted.¹⁵⁸ In the present case, other provisions of the Polish-Belarusian Agreement confirm the inviolability of the border between the two countries, renounce the use of force and provide for cooperation against illegal migration and acts directed against the security of civil aviation, amongst other things.¹⁵⁹ Whatever else good neighbourliness requires, it obviously cannot be reconciled with the Belarusian authorities facilitating and participating in unauthorized migration, the forcible crossing of the Polish border, damage to its infrastructure and acts of violence against Polish border guards. To the extent that these actions contravene the principle of non-intervention and the prohibition to use force, Belarus is in breach not only of the United Nations Charter and the principles set out in the Friendly Relations Declaration, but also the terms of the 1992 Agreement. In a bilateral agreement on cooperation in combatting crime, signed on 8 December 2003, Belarus and Poland also agreed to ensure cooperation between their competent authorities in combatting

“illegal crossing of state borders and organising illegal migration”, and to exchange information necessary to “prevent illegal crossing of state borders, including illegal migration and in particular on the organisers of such crimes”.¹⁶⁰ By engaging in acts it agreed to cooperate in preventing, Belarus is in material breach of these commitments.

Similar concerns arise under the Treaty between Lithuania and Belarus on Good-Neighbourliness and Cooperation, signed on 6 February 1995.¹⁶¹ Like the agreement with Poland, the Lithuanian-Belarusian Treaty calls for respect for the principle of the non-use of force, inviolability of borders and non-interference in each other’s internal affairs.¹⁶² It also commits the two parties to cooperate in order to combat illegal migration and acts directed against the security of travel on all forms of transport.¹⁶³ For the reasons mentioned earlier, the acts of the Belarusian authorities are not compatible with these obligations either. In addition, unlike the agreement with Poland, the Lithuanian-Belarusian Treaty also requires the parties to “take all the necessary measures to suppress activities in its territory of organizations, groups or individuals directed against the sovereignty, territorial integrity or State security and defence capacity of the other High Contracting Party”.¹⁶⁴ Since

157 Article 1, Agreement between the Government of the Republic of Poland and the Government of the Republic of Belarus on Good Neighbourliness and Friendly Cooperation, 23 June 1992, UNTS I-54547.

158 *Case Concerning Oil Platforms (Iran v. USA)*, (Preliminary Objections) (1996) ICJ Rep. 803, paras 27–28 and 52.

159 Articles 2, 7 and 24, Polish-Belarusian Agreement.

160 Treaty on Good Neighbourliness and Cooperation, 6 February 1995, 1951 UNTS 117.

161 Article 1, Lithuanian-Belarusian Treaty.

162 Article 21, Lithuanian-Belarusian Treaty.

163 Article 5(1), Lithuanian-Belarusian Treaty. The latter obligation has particular relevance, given the fact that the Ryanair flight forced to land in Minsk was bound for Vilnius.

164 Articles 1 and 7, Agreement between the Government of the Republic of Poland and the Government of the Republic of Belarus on Co-operation in Combating Crime, 8 December 2003, UNTS 57281.

facilitating and supporting the unlawful entry of persons into Lithuania is an act directed against its sovereignty and territorial integrity, Belarus has undertaken activities it has agreed to suppress.

Belarus has not entered into an international agreement of good neighbourliness and friendship with Latvia, although the two countries adopted a declaration on the subject in 1991. However, Latvia and Belarus have entered into an Agreement on Border Control Posts, signed on 18 August 1993.¹⁶⁵ The Agreement provides for the establishment and operation of border control posts and declares that passage across State frontiers other than through the regular control posts “shall be authorized in special cases”.¹⁶⁶ In the absence of seeking and receiving such an authorization from Latvia, the activities of the Belarusian authorities in facilitating and supporting persons attempting to cross its border with Latvia other than at regular border control posts is in violation of the Agreement.

Respect for the rights of migrants

Although Belarus is not a party to the ECHR, it is a signatory to other key agreements, including the 1951 Refugee Convention and its 1967 Protocol, the ICCPR, the Convention against

Torture and the Convention on the Rights of the Child.¹⁶⁷ The government in Minsk has repeatedly denied accusations that it has violated its obligations under these agreements in connection with the migrant crisis.¹⁶⁸ Bearing in mind the government-orchestrated repression of anti-government protests and other systematic breaches of human rights, such denials cannot be taken at face value.

It is worth noting in this context that the Belarusian authorities have repeatedly accused the EU and its Member States of violating the rights of the migrants, including in a report prepared by the Belarusian Ministry of Foreign Affairs to demonstrate that “Western society is facing a severe problem when it comes to upholding human rights”.¹⁶⁹ Putting to one side the merits of these claims, they display an awareness of the legal dynamics of instrumentalized migration, specifically the coercive leverage inherent in accusations of serious human rights violations.

Torture, ill-treatment and the right to life

Several reports suggest that migrants suffered beatings and other abuse at the hands of Belarusian government agents.¹⁷⁰ Other reports and video recordings appear to show Belarusian

165 Agreement between the Government of the Republic of Latvia and the Government of the Republic of Belarus on Border Control Posts, 18 August 1993, 2656 UNTS 69.

166 Article 6, Latvian-Belarusian Treaty.

167 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

168 E.g. Ministry of Foreign Affairs of the Republic of Belarus (n. 39).

169 Ministry of Foreign Affairs of the Republic of Belarus, *The Most Resonant Human Rights Violations in Certain Countries of the world* (Minsk, 2022), p. 3.

170 E.g. Office of the High Commissioner for Human Rights, Press Briefing Notes on Poland/Belarus Border, 21 December 2021 (<https://www.ohchr.org/en/2021/12/press-briefing-notes-polandbelarus-border>); Amnesty International, Belarus/EU: New Evidence of Brutal Violence from Belarusian Forces Against Asylum-seekers and Migrants facing Pushbacks from the EU, 20 December 2021 (<https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>); Lydia Gall, ‘Die Here or Go to Poland’: Belarus’ and Poland’s Shared Responsibility for Border Abuses (Human Rights Watch, 2021), pp. 17–23.

forces firing shots, most likely blanks, in the vicinity of distressed migrants.¹⁷¹ These acts could amount to torture or to cruel, inhuman or degrading treatment or punishment, as prohibited by the Torture Convention, Article 7 of the ICCPR, and Article 37(a) of the Convention on the Rights of the Child with respect to children. Whether the acts in question amount to torture depends on whether they meet the threshold requirements established in Article 1 of the Torture Convention, namely the intentional infliction of severe pain or suffering, physical or mental, for a defined purpose, such as intimidation or coercion, “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.¹⁷²

In at least some cases, the treatment of migrants by Belarusian personnel may have met this threshold. In other cases, their conduct may have amounted to ill-treatment under Article 16(1) of the Torture Convention. Compared to torture, ill-treatment differs in the severity of pain and suffering and does not require proof of impermissible purposes.¹⁷³ Moreover, omissions may count. Thus, a failure on the part of State authorities to intervene to prevent abuse may constitute consent or acquiescence to such acts within the meaning of Article 16 of the

Convention,¹⁷⁴ depending on the underlying facts.

The inadequate and at times life-threatening living conditions experienced by many migrants, especially during the colder months, engaged other positive obligations of Belarus under the applicable human rights agreements. Thus, Article 6(1) of the ICCPR recognizes the inherent right to life, while Article 6(1) of the Convention for the Rights of the Child does so specifically for children. As established by the Human Rights Committee, State parties to the ICCPR must not only respect the right to life and refrain from the arbitrary deprivation of life, but also ensure the right to life and take appropriate measures to address conditions posing a direct threat to it, including by ensuring access to essential goods and services, such as water, food, shelter, and healthcare.¹⁷⁵

Trafficking and smuggling of migrants

Belarus is also a party to the United Nations Convention against Transnational Organized Crime (2000),¹⁷⁶ including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and its Protocol against the Smuggling of Migrants by Land, Sea and Air.¹⁷⁷ Both of these Protocols require

171 Sky News, Belarus Migrants: ‘Two Groups cross Border into Poland as Forces accused of Firing Shots into the Air’, 12 November 2021 (<https://news.sky.com/story/belarus-migrants-two-groups-cross-border-into-poland-as-forces-accused-of-firing-shots-into-the-air-12465162>).

172 Article 1, Convention against Torture.

173 Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2, para. 10.

174 Committee Against Torture, Communication No. 261/2005, Osmani, 25 May 2009, UN Doc. CAT/C/42/D/261/2005, para. 10.5.

175 Human Rights Committee, General Comment No. 36: Article 6 (Right to Life), 3 September 2019, UN Doc. CCPR/C/GC/35, para 26.

176 United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209.

177 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237

Belarus to take a series of steps to criminalize and suppress the trafficking in persons and smuggling of migrants, including by cooperating with other State parties.

While the government in Minsk has been accused of State-sponsored trafficking,¹⁷⁸ the legal definition of human trafficking under the first Protocol is relatively narrow, as it requires trafficking to be undertaken for the purposes of exploitation, such as prostitution, forced labour or slavery.¹⁷⁹ It is not inconceivable that some migrants at the Belarus border found themselves in this situation, but this was most likely the exception, rather than the norm. However, the definition of exploitation in the Protocol is open-ended and has been interpreted broadly in some cases to mean, in essence, the “exercise of control over the victim”.¹⁸⁰ Such an interpretation could bring the instrumentalization of migrants within the scope of the definition.

By contrast, substantial numbers of migrants may have been smuggled, which is defined in the second Protocol to mean the procurement of illegal entry into the territory of a State party in order to obtain, directly or indirectly, a financial or other material benefit.¹⁸¹ The scope of the Protocol is limited to the prevention,

investigation and prosecution of smuggling that involves an organized criminal group.¹⁸²

This means that the Protocol does not apply to the acts of Belarusian officials in procuring the illegal entry of migrants into the EU unless their activities also involved an organized criminal group. Whether the Belarusian authorities acted in concert with organized criminal groups is not clear, but it is certain that criminal groups have been actively engaged in smuggling migrants during the crisis.¹⁸³ Their involvement in the crisis engaged the various obligations of the Belarusian authorities to suppress their smuggling activities, including by taking steps to prevent means of transport operated by commercial carriers from being used in the commission of the relevant offences.¹⁸⁴ The evidence suggests that the authorities failed to comply with these obligations.

Expulsion

As noted earlier, asylum seekers are entitled to the protections arising under the 1951 Refugee Convention and its 1967 Protocol even in the absence of a formal determination of their status. Considering the large number of persons involved in the 2021 crisis, their countries of

UNTS 319; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2241 UNTS 507.

178 Ministry of Foreign Affairs of Poland, MFA Statement on the UN Security Council Meeting on the EU-Belarus Border Crisis, 12 November 2021 (<https://www.gov.pl/web/diplomacy/mfa-statement-on-the-un-security-council-meeting-on-the-eu-belarus-border-crisis>); German Federal Government, Regierungspressekonferenz vom 10. November 2021, 10 November 2021 (<https://www.bundesregierung.de/breg-de/suche/regierungs-pressekonferenz-vom-10-november-2021-1980242>).

179 Article 3(a), Trafficking Protocol.

180 *Chu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 752, para. 25.

181 Article 3(a), Smuggling Protocol.

182 Article 4, Smuggling Protocol.

183 Europol, 61 Arrested so far for Smuggling Migrants to the EU via Belarus and Russia, 8 December 2022 (<https://www.europol.europa.eu/media-press/newsroom/news/61-arrested-so-far-for-smuggling-migrants-to-eu-belarus-and-russia>).

184 Article 11(2), Smuggling Protocol.

origin and their stated intention to claim asylum, it is reasonable to assume that at least some of them satisfied the Convention definition of refugee status, engaging the responsibility of the Belarusian authorities to treat them as such. The status of the migrants does not seem to have escaped the attention of the Belarusian government. For example, President Lukashenko repeatedly described the migrants as “refugees” and suggested that the Belarusian authorities had asked them to remain in Belarus, at least temporarily, for humanitarian reasons.¹⁸⁵

Since the migrants were present on Belarusian territory lawfully, having entered mostly on tourist visas, and given that some of them must be presumed to benefit from refugee status, measures taken by the Belarusian authorities to drive them across the border into the territory of Latvia, Lithuania and Poland engaged the duty under Article 32(1) of the Refugee Convention not to expel a “refugee lawfully in their territory save on grounds of national security

or public order”. Pursuant to Article 32(2), an expulsion may be affected “only in pursuance of a decision reached in accordance with due process of law”, requiring a formal decision by an administrative or judicial authority, rather than a mere executive act by, for example, uniformed personnel.¹⁸⁶ Accordingly, the intimidation and harassment of migrants by Belarusian personnel to encourage their movement across the border contravened these provisions.

In addition, Article 13 of the ICCPR provides that “an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law”. The purpose of this provision is to prevent arbitrary expulsions; it precludes collective expulsions and entitles aliens to challenge decisions taken against them before a competent authority.¹⁸⁷ The summary and collective expulsion of third-country nationals by the Belarusian authorities therefore most likely violated Article 13 of the ICCPR as well.

185 Chance (n. 39).

186 Ulrike Davy, ‘Article 32’, in Andreas Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011) 1277, p. 1307.

187 Human Rights Committee, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para. 10.

6. Countering instrumentalized migration

Countering instrumentalized migration is difficult due to the seemingly intractable challenges that this tactic poses for liberal democracies and the inherent advantages that hostile actors enjoy in this area. Liberal democracies may not be able to avoid all costs that instrumentalized migration imposes upon them, but several options are available to mitigate its impact.

At the most general level, States may counter instrumentalized migration either by adopting denial strategies, seeking to blunt the adverse effects of hostile action and thereby diminish its coercive leverage, or by inflicting costs to punish the hostile actor, attempting to alter its cost-benefit calculus and compel it to abandon its coercive campaign. These two strategies are not mutually exclusive, but it helps to distinguish one from the other.

Response options

As a preliminary point, it should be underlined that neither the direct nor the indirect use of force by Belarus against Latvia, Lithuania and Poland engaged their right of self-defence. The use of force in self-defence is permissible only in response to an armed attack. While government officials and commentators have repeatedly described the migrant crisis as a “hybrid attack”, the forcible actions attributable to Belarus did not rise to the level of an “armed attack” within the meaning of Article 51

of the United Nations Charter. This is because an armed attack requires a grave use of force, as measured against its scale and effects.¹⁸⁸ The extent and severity of the material harm that the Belarusian authorities caused in contravention of Article 2(4) of the Charter has not crossed that gravity threshold, a point reinforced by its context and the non-conventional nature of the means involved.¹⁸⁹ Any resort to lethal force by Latvian, Lithuanian or Polish personnel in connection with the crisis therefore had to remain within the bounds of personal self-defence and was governed by the standards of law enforcement.

This is reflected in some of the more guarded language used to describe the events. Compared to the copious references to hybrid attacks, it is notable that a joint statement delivered on behalf of Western members of the Security Council on 11 November 2021 speaks about “hybrid operations”,¹⁹⁰ while a statement issued by the North Atlantic Council the following day characterizes the Belarusian activities as “hybrid actions”.¹⁹¹ Presumably, these terms were carefully chosen to avoid the impression that the right of self-defence might be engaged. In any event, bearing in mind Russia’s role in the crisis and the assurances it gave to Minsk to assist it against external pressure within the framework of the Collective Security Treaty Organisation,¹⁹² the resort to force

188 *Nicaragua Case* (n. 86), para. 195.

189 Cf. Tom Ruys, *“Armed Attack” and Article 51 of the UN Charter: Customary Law and Practice* (Cambridge University Press, Cambridge, 2010), p. 157.

190 Foreign, Commonwealth and Development Office, Joint Statement on Belarusian Authorities’ Instrumentalisation of Migrants, 11 November 2021 (<https://www.gov.uk/government/speeches/joint-statement-on-belarusian-authorities-instrumentalisation-of-migrants>).

191 North Atlantic Treaty Organization, Statement by the North Atlantic Council on the Situation at the Poland-Belarus Border, 12 November 2021, Press Release (2021) 165 (https://www.nato.int/cps/en/natohq/news_188529.htm).

192 See n. 12.

against Belarus would have posed a real danger of military escalation. Besides, it is difficult to see what its practical utility might have been.

Turning to non-forcible responses, a State targeted by instrumentalized migration might adopt an *extreme denial strategy* to seal its border completely and block entry to all migrants. As noted earlier, this approach avoids capacity swamping, but will increase the costs of political agitation, as it is likely to aggravate the humanitarian situation and would almost certainly be impossible to reconcile with the targeted State's international obligations. As such, it is bound to be condemned widely and forcefully on political, humanitarian and legal grounds. Other than perhaps on a temporary basis, it is potentially counterproductive and not a viable policy option. A more *nuanced denial strategy* would aim to keep the costs associated with capacity swamping and political agitation to a minimum in a more balanced manner. The way for the targeted State to achieve this is to comply with its international commitments, but reduce their impact by relying, as far as possible, on relevant exceptions and limitations available under the applicable legal regimes. In both cases, targeted States may also pursue other measures to deter the flow of migrants, for example by closing down travel routes from their countries of origin.

Denial strategies might be complemented by punishment. The costs that may be inflicted on the hostile actor depend in large measure on its vulnerabilities. For the purposes of this paper, it is useful to distinguish between non-legal and legal methods. Non-legal methods consist of

practical measures that burden the hostile State in some way, such as the interruption of diplomatic relations, travel bans, freezing of assets or economic sanctions. Most of these measures require an appropriate legal basis, as illustrated by the Belarus Democracy, Human Rights, and Sovereignty Act adopted by the United States Congress or the various instruments enacted by the EU to sanction persons and entities associated with the repression of the democratic opposition in Belarus.¹⁹³ In all of these cases, the law is secondary: its role is merely to provide a basis for restrictive measures that achieve their primary effects in other domains, such as the diplomatic sphere or the economy. Legal methods, by contrast, involve activities that pursue normative outcomes, for example holding a hostile actor to account for violating its legal obligations in front of a court. The dividing line between non-legal and legal methods is somewhat fluid, given that sanctions and other restrictive measures always have a legal dimension, while normative outcomes typically also have consequences in other domains. However, the basic distinction is valid.

With this in mind, and building on the preceding analysis, the rest of this section will assess the options for a nuanced denial strategy, before turning to the options for punishment through legal means.

Denial strategy: compliance with exceptions

As discussed earlier, the principle of non-refoulement set out in Article 33(1) of the Refugee Convention precluded Latvia, Lithuania and Poland, in principle, from expelling migrants at

193 See n. 18 and n. 19.

the border if they voiced a well-grounded fear of persecution. The principle is not absolute, however. Pursuant to Article 33(2) of the Convention, the benefit of non-refoulement may not be claimed by a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is”.

States enjoy a measure of discretion in determining what constitutes a threat to their national security, as neither the Refugee Convention nor general international law define the term with binding effect. Examples given in the context of the Refugee Convention include espionage, acts of terrorism and sabotage.¹⁹⁴ More generically, dangers to national security are understood to include threats to the territorial integrity of a State party.¹⁹⁵ This brings the Belarus migrant crisis squarely within the scope of Article 33(2), given that the instrumentalization of migrants infringed both the territorial integrity of the three EU Member States and the inviolability of their frontiers. Nevertheless, since Article 33(2) is an exception to the general rule of non-refoulement, the danger to the security of the country must reach a certain level of intensity to justify lifting the protective umbrella of the rule.¹⁹⁶ The danger must be serious, in the sense of being substantial, rather than negligible.¹⁹⁷ Viewed as a whole, the migrant crisis of 2021 posed a substantial danger to the security of the three EU Member States both directly, in the form of large

numbers of foreign nationals attempting to gain unauthorized entry and prolonged interference with their border facilities and functions, as well as indirectly, in the form of providing Belarus with coercive leverage in contravention of the principle of non-intervention.

However, whether or not a refugee poses a danger to national security under Article 33(2) of the Convention must be assessed individually, on the basis of each person’s own conduct.¹⁹⁸ In other words, what matters for these purposes is not the danger posed by the migrant crisis as a whole, but by the persons involved, considered individually. Migrants who have physically attacked border guards or damaged infrastructure may meet the required standard of a serious threat. However, the vast majority of migrants will have made no other contribution to the overall danger than crossing the border in an irregular manner: it is the totality of the situation that presented a serious danger to national security, rather than the action of such persons taken individually. In the specific circumstances of the 2021 crisis, a general policy of non-refoulement therefore would not have been compatible with Article 33(2) of the Refugee Convention, at least not without an expansive interpretation that substitutes a collective assessment of the danger to national security for an individualized one.

The non-refoulement obligations that flow from the prohibition of torture and inhuman or degrading treatment or punishment are more

194 Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: (Articles 2–11, 13–37)* (UN High Commissioner for Refugees, New York, 1997), Article 33 (para. 8).

195 *Ibid.*

196 Lauterpacht and Bethlehem (n. 109), p. 136; Andreas Zimmermann and Philipp Wennholz, ‘Article 33, para. 2’, in Andreas Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011) 1397, p. 1417.

197 *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, p. 51.

198 Lauterpacht and Bethlehem (n. 109), pp. 136–137; Zimerman and Wennholz (n. 199), p. 1420.

straightforward to apply. The prohibition of torture and ill-treatment is absolute, in the sense that it is not subject to exceptions, and so is the duty of non-refoulement implicit in that prohibition.¹⁹⁹ Migrants facing a real risk of torture and other inhuman or degrading treatment either in their country of origin or in Belarus itself therefore could not be expelled on national security grounds. The absolute nature of the prohibition of non-refoulement implicit in Article 3 of the ECHR rendered a generalized policy of expulsion and non-admission at the border with Belarus difficult to sustain.

However, this conclusion is subject to the caveat that the relevant human rights obligations, and thus any implicit duty of non-refoulement, apply only to persons who are within the jurisdiction of a State party.²⁰⁰ Jurisdiction is normally territorial.²⁰¹ Migrants who are prevented from crossing a land border, either by physical obstacles such as a fence or by border guards, will almost invariably be subject to the territorial jurisdiction of the State concerned, since the infrastructure and guards that secure the border are normally located on its national territory.²⁰² For this reason, border fences typically do not prevent the applicability of the relevant human rights instruments by excluding migrants from territorial jurisdiction. They may, however, physically prevent asylum seekers from communicating their request for protec-

tion, including fears of persecution, torture and ill-treatment, to the competent national authorities, unless the latter are present at the fence. To this extent, border fences may avoid engaging non-refoulement obligations by, essentially, silencing asylum seekers. If tested before human rights bodies, there is no guarantee that a deliberate policy to this effect will be upheld.²⁰³ In any event, erecting fences is unlikely to be a feasible option for States blessed with long borders.

Finally, the most recent case-law of the European Court of Human Rights on the matter of collective expulsions can be read as an attempt to reconcile the sovereign prerogatives of States to control admission into their territories with the rights of asylum seekers and other vulnerable persons present at their borders: persons who seek to circumvent effective procedures for protection, in particular by relying on their large numbers, may be denied entry.²⁰⁴ A generalized policy of expulsion on these grounds is permissible. However, the legality of such a policy depends on the States targeted by instrumentalized migration offering genuine and effective routes for legal entry. While maintaining such routes enables the States concerned to admit migrants in a controlled manner, it does not prevent mass influx and capacity swamping. Moreover, the permissibility of preventing irregular entry in such cases is without prejudice

199 *Chahal v. the United Kingdom*, App. No. 22414/93, Judgment, 15 November 1996 (1996), paras 79–80.

200 Article 1, ECHR.

201 *Banković and Others v. Belgium*, App. No. 52207/99, Judgment, 12 December 2001 (2007) 44 EHRR SE5, para. 59.

202 *N.D. and N.T. v. Spain* (n. 115), paras 104–105. See also *Shahzad v. Hungary*, App. No. 12625/17, Judgment, 8 July 2021 (2021), para. 17.

203 Cf. *Shahzad v. Hungary* (n. 205), paras 48–52. See also Moria Paz, 'The Law of Walls' (2017) 28 *European Journal of International Law* 601–624.

204 *A.A. and Others v. North Macedonia* (n. 134), paras 114–115.

to the non-refoulement obligation arising from the prohibition of torture and ill-treatment.²⁰⁵ Accordingly, persons claiming to face a real risk of torture and ill-treatment must have their status assessed individually, even if they circumvent genuine and effective procedures for legal entry.

Imposing costs: legal options

A range of avenues are available for imposing costs on Belarus through legal means in response to its role in the migrant crisis. It is useful to distinguish between formal and informal processes and between opportunities residing at the domestic and at the international level.

Formal processes of accountability include legal actions brought against Belarus or persons acting on its behalf before courts and other judicial bodies. Since there is no doubt that Belarusian officials who contributed to the crisis did so in the exercise of their duties, legal actions against them at the domestic level are hampered by the functional immunity that foreign State officials enjoy before the courts of another State for acts carried out in their official capacity.²⁰⁶ However, today, functional

immunity is no longer accorded in cases where foreign officials are accused of international crimes, including torture.²⁰⁷ In principle, this renders Belarusian officials liable to domestic accountability mechanisms abroad, but only in relation to charges for the most serious international crimes. Potential crimes of lesser gravity, for instance in relation to the diversion of Ryanair Flight 4978,²⁰⁸ still attract functional immunity. Also, the exception for international crimes does not impact the personal immunity enjoyed by serving heads of State, heads of government and foreign ministers before foreign domestic courts,²⁰⁹ meaning that President Lukashenko benefits from continued personal immunity, at least whilst in office.

At the international level, Belarus is open to claims invoking its international responsibility for violating the United Nations Charter, various human rights agreements, its bilateral agreements with Latvia, Lithuania and Poland and relevant rules of customary international law, such as the principle of non-intervention. Recognizing this, the European Parliament has called for proceedings to be considered against Belarus before the International Court of Justice on the basis of contraventions of the Chicago

205 Ibid., para. 114.

206 See Rosanne van Alebeek, 'Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts', in Luca Ferro, Nicolas Angelet and Tom Ruys (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, Cambridge, 2019) 496.

207 Aziz Epik, 'No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice', *Journal of International Criminal Justice* 19, (2021): 1263–1281.

208 E.g. United State Department of Justice, U.S. Attorney's Office, Southern District of New York, Belarusian Government Officials Charged With Aircraft Piracy For Diverting Ryanair Flight 4978 To Arrest Dissident Journalist In May 2021, 20 January 2022 (<https://www.justice.gov/usao-sdny/pr/belarusian-government-officials-charged-aircraft-piracy-diverting-ryanair-flight-4978>).

209 See Muriel Ubéda-Saillard, 'Foreign Officials Entitled to (Absolute) Personal Immunity during Their Time in Office', in Luca Ferro, Nicolas Angelet and Tom Ruys (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, Cambridge, 2019) 481.

Convention on International Civil Aviation,²¹⁰ the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation²¹¹ and the Convention against Torture.²¹² Like other international judicial bodies, the International Court of Justice does not have automatic jurisdiction, but may exercise its authority over Belarus only if and to the extent that the latter has consented to it. Belarus has not accepted the Court's jurisdiction under the optional clause of its Statute and has entered a reservation to its jurisdiction to deal with disputes under the Montreal Convention. However, it has not entered a reservation to the compulsory dispute settlement mechanism under the Chicago Convention,²¹³ which opens it up to potential claims that it endangered the safety of Ryanair Flight 4978 in violation of Article 3bis of the Convention.²¹⁴

Belarus has also accepted the dispute settlement arrangements, which provide a role for the International Court of Justice, under the Convention against Torture,²¹⁵ having withdrawn an earlier reservation, as well as the Trafficking and Smuggling Protocols to the Convention against Transnational Organized Crime.²¹⁶ In addition, Belarus has recognized the competence of the Committee on Human Rights established under the ICCPR to consider communications by other

State parties alleging that it is not fulfilling its obligations under the Covenant.²¹⁷

By contrast, the various bilateral agreements concluded with Latvia, Lithuania and Poland direct their parties to settle any disputes arising between them under these agreements through negotiation and do not provide for binding settlement mechanisms. This does not prevent the three EU Member States from invoking the international responsibility of Belarus through diplomatic channels. In addition, Belarus is open to informal accountability and supervisory mechanisms, such as the Moscow Mechanisms of the OSCE or the duty to submit periodic reports under the Convention on the Rights of the Child.²¹⁸

While the range of formal and informal accountability mechanisms is impressive, how effective these and other legal methods are in countering the coercive tactics adopted by Belarus in the present case is open to question. Most of the international processes concerned lack effective enforcement mechanisms. Due to their thematic focus, violations of key norms, such as the principle of non-intervention, are unlikely to be considered before them. Seeing the proceedings through to completion may take years, which makes most of them unsuitable for achieving effects in real time. Overall,

210 European Parliament, Resolution of 7 October 2021 on the Situation in Belarus after one Year of Protests and their Violent Repression, 7 October 2021, 2021/2881(RSP), para. 33.

211 Convention on International Civil Aviation, 7 December 1944, 15 UNTS 297.

212 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177.

213 Article 84, Chicago Convention.

214 Article 3bis addresses the interception and landing of civil aircraft. There is some uncertainty as to whether Ryanair Flight 4978 was in fact intercepted by a Belarusian military aircraft.

215 Article 30, Convention against Torture.

216 Article 15, Trafficking in Persons Protocol; Article 20, Smuggling of Migrants Protocol.

217 Article 41, ICCPR.

218 Article 44, Convention on the Rights of the Child.

the direct costs that legal methods may inflict are modest, slow to take effect and more reputational than material in their impact. They may, however, impose substantial indirect costs on Belarus, in particular by confirming that it has acted in violation of its obligations and by vindicating the legal position of the EU, its Member States and international partners. In addition to their political effects, such an outcome may also provide a basis for further restrictive actions, for example in the form of countermeasures.²¹⁹

219 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001) *Yearbook of the International Law Commission*, Vol II(2), p. 128 (describing countermeasures as “measures that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation”).

7. Conclusions

Several important lessons may be drawn from the legal assessment of the Belarus migration crisis presented in this paper. Coercion is at the heart of instrumentalized migration. The tactic involves a State exploiting the movement of migrants as a means to impose costs on another State in an attempt to influence its conduct and to limit its freedom of choice. The coercive effect of instrumentalized migration depends in large measure on the legal commitments that States targeted by this tactic have undertaken. This is because international refugee and human rights law, above all the principle of non-refoulement, severely limit the policy options available to such States to effectively counter the instrumentalization of migrants. These constraints are exacerbated by the legal asymmetry that often characterizes such incidents, which hands hostile actors a significant advantage over liberal democracies.

In essence, the dilemma that States targeted by instrumentalized migration face is to neutralize its coercive effects, whilst still respecting the rights of migrants. This dilemma cannot be resolved in any obvious way without incurring at least some costs, which is what makes instrumentalized migration an effective coercive strategy.

The paper has shown that legal considerations are relevant to both aspects of the dilemma. International law not only confers certain individual rights on migrants, but it also governs the coercive aspects of instrumentalized migration. Specifically, sovereignty and its corollaries entitle States to respect for their territorial integrity and political independence, including their right to be free from coercive

interference by other States. Instrumentalized migration contravenes these principles. Faced with two competing sets of values that both deserve protection – the individual rights of instrumentalized migrants and the sovereign prerogatives of the targeted State – the question is whether international law is able to reconcile them in a meaningful manner.

International refugee and human rights law is not averse to balancing competing values. However, the exceptions that exist for these purposes have their limits. Certain core rules, such as the prohibition of torture, are absolute in nature, which prevents a graduated application of the principle of non-refoulement where the risk of torture and ill-treatment is present. Other exceptions are focused on the relationship between individual persons and the State in whose jurisdiction they find themselves. Thus, the 1951 Refugee Convention entitles a State to deny the benefits of non-refoulement to migrants who pose a danger to its national security, but this requires an individualized assessment of the threat presented by each person. The individualized focus of this exception means that the overall threat created by instrumentalized migration, and the involvement of a hostile third actor, remains unaccounted for. While the preamble to the Refugee Convention expresses the hope that States will “do everything within their power” to prevent the “problem of refugees” from becoming a cause of tension between them, it offers no real answer to situations where States stoke such tensions deliberately by exploiting the commitments undertaken by other States in the Convention.

The priority that international refugee and human rights instruments accord to the rights of instrumentalized migrants constrains the ability of targeted States to respond to such situations through denial strategies. Preventing the influx of migrants through generalized expulsion policies is difficult to reconcile with the applicable rules, while compliance with those rules renders it virtually impossible to distinguish persons entitled to special protection from those who are not, without having to admit large numbers of third-country nationals at least on a temporary basis. This threatens targeted States with capacity swamping and political agitation costs. By contrast, responding to instrumentalized migration through a strategy of punishment by imposing costs on the hostile State faces fewer legal obstacles, especially as the coercive nature of instrumentalization implies that the hostile State is in breach of its international obligations and thus exposed to legal claims, as the case of Belarus illustrates. However, while plenty of avenues for legal accountability exist at the domestic and international level, most of these are not backed by effective enforcement and are too slow to have an immediate effect on any ongoing crisis.

Strategies that rely on legal measures to mitigate the impact of instrumentalized migration through denial and deterrence thus face an uphill battle, largely because international refugee and human rights law does not adequately account for the coercive dimension of

instrumentalized migration. Short of seeking to revise the existing international instruments, States targeted by such tactics may consider other options under general international law to regain the initiative. These include recourse to countermeasures and pleas of necessity under the law of State responsibility.²²⁰

In this context, establishing that primary responsibility for the situation lies with the hostile actor, rather than the States targeted by its actions, is key. While describing instrumentalized migration as a “hybrid attack” is a message that may resonate with some audiences, in the highly legalized discourse on migration, greater emphasis should be placed on the legal principles violated by the hostile State, such as the rule of non-intervention. This is to underline that the coercive aspect of instrumentalized migration contravenes basic norms of international law and that failing to deter this tactic creates incentives for its repeated and more intense use, thereby prolonging and deepening the exploitation of migrants and their rights by the hostile State.

In addition, legal means and methods complement action taken in other domains and for this reason are best employed as part of a more integrated response. Legal measures may enable or facilitate non-legal methods for imposing costs on the hostile State, for example by providing justifications and legal bases for sanctions. Legal measures therefore should not be dismissed as ineffective, but used in an integrated fashion with other, non-legal means.

220 It should be noted, however, that countermeasures may not affect obligations for the protection of fundamental human rights, as provided by Article 50(1)(b), Articles on State Responsibility (n. 136). This means that targeted States may not rely on violations of international law committed by the State resorting to instrumentalized migration as a justification for not performing their obligations under international refugee and human rights law instruments. However, they may rely on those violations as a justification for not performing other obligations owed to the hostile State in order to induce it to cease the violations.

In this respect, close coordination and cooperation among the EU, its Member States and international partners is vital for developing a coherent response that makes complementary use of the different legal levers available to individual nations and organizations, such as bilateral agreements or standing before relevant international judicial bodies.

Finally, from a more principled perspective, holding hostile States to account through appropriate legal processes is critical for defending the different international norms implicated by instrumentalized migration and, ultimately, the resilience of the international rule of law.²²¹ This is an important objective in its own right, even if it does not produce direct and immediate deterrent effects.

221 Cf. Aurel Sari, *Hybrid Threats and the Law: Building Legal Resilience*, Hybrid CoE Research Report 3 (European Centre of Excellence for Countering Hybrid Threats, Helsinki, 2021), p. 41.

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