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The Power of Opacity: EU Responses to Weaponised Migration

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Summary

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Orchestrating migration pressure has long been an instrument used by a variety of actors to create leverage, extract concessions, inflict damage on reputations or pursue other hostile intentions. The EU has faced several such attempts. These provide opportunities for comparison and analysis. The events organised by the Lukashenka regime in Belarus in 2021, by Türkiye in early 2020 and by Morocco in May 2021 are the most notable.

This policy brief argues that the EU has handled recent situations of migration coercion rather well and has the potential to handle them even better in the future. Recognising the reasons for this success and its limitations is necessary for defining a reliable toolbox, as the tools available currently are poorly understood and used inconsistently. This apparent inconsistency and fluidity of EU action is often subject to criticism in the media, a cause of exasperation for national and EU officials, and perceived as a serious deficiency to be remedied. However, the same policy and operational opacity has significant advantages: it makes the EU an unpredictable target for migration instrumentalisation, presenting adversaries with planning challenges.

Commenting on existing Commission proposals, the paper analyses both the added value they offer and their deficiencies and risks. Coherent EU-wide action that enhances the tools currently available would be preferable to individual national action. However, recent experience suggests that the continued unpredictability of EU responses, albeit based on an imperfect legislative status quo, is preferable to EU laws that might constrain the bloc's room for manoeuvre. Also, decreasing the leverage available to hostile neighbours appears to require a controlled weakening of the link between a person and his or her rights.

Keywords Migration – Instrumentalisation – Weaponisation – EU – Borders – Security – Asylum – Hostile actors



Introduction

Migration is notoriously one of the more difficult subjects in EU policymaking, due to deep divisions between the member states. Whether the issue relates to border protection, the allocation of asylum seekers within the EU, secondary movements or other related matters, migrants—or potential migrants—themselves are usually beyond reproach. They tend to be conceptualised as bearers of rights and entitlements who come to European borders propelled by impersonal forces or persecution, war, lack of economic opportunity or, increasingly, climate change. From a practical perspective, they are also assumed to be ready to come in potentially almost limitless numbers. As the difficulties within the EU stem mostly from member states' different positions with regard to prevailing migration patterns, one of the few reliable ways of creating unity is to formulate a joint position vis-à-vis the external actors, that is, the non-EU countries of origin or transit, which are not beyond reproach.

On several occasions in the recent and more distant past, the picture has been blackened by clear indications that external actors are targeting member states and, more or less directly, the EU as a whole through deliberate and consciously hostile action, cynically using migrants as instruments of pressure. In 2021 the term 'instrumentalisation of migration' entered wider circulation to denote this phenomenon. The US academic Kelly M. Greenhill is generally credited with outlining the conceptual boundaries of the idea, if not the term itself, by defining 'coercive engineered migration' as 'those cross-border population movements that are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or states'.¹

Most available writing builds on the conceptual elements defined by Greenhill in her seminal study, *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy*.² Some experts have tended to focus on a partial element of the phenomenon,³ classify it according to its intentions and

¹ K. M. Greenhill, 'Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion', *Strategic Insights* 9/1 (2010), 116.

² K. M. Greenhill, *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy* (Ithaca: Cornell University Press, 2010).

³ E.g. A. Fakhry, R. Parks and A. Rácz, *Migration Instrumentalization: A Taxonomy for an Efficient Response*, Hybrid CoE Working Paper 14 (March 2022).



objectives,⁴ or analyse its role within a larger framework, such as geopolitics.⁵ In the same vein, this paper intends to contribute to the ongoing conversation by exploring the phenomenon specifically from the perspective of the EU as a target of instrumentalisation. The objective is to present an analysis of the recent experiences of the EU when faced with hostile orchestrated mass migration by (a) looking at the specific vulnerabilities of the EU; (b) attempting to see the EU through the eyes of an adversary; and (c) defining the key elements that constitute migration instrumentalisation as a threat to the EU. The paper suggests that the best option for the EU is not necessarily to legislate for occasions of migration coercion but to apply its existing tools.

For its empirical basis this paper relies on the most recent examples of hostile orchestrated migration events, namely by Türkiye at the Greek land border in February and March 2020, by Morocco at the land borders of the North African enclaves of Spain in May 2021 and by the Lukashenka regime at the western borders of Belarus in the second half of 2021. Like others,⁶ we have decided not to include the mass exodus of Ukrainians that started after Russian aggression against Ukraine escalated on 24 February 2022. Causing difficulties to the EU by displacing a large number of Ukrainians, that is, those unwilling to live under Russian occupation, is very likely to have been an objective of the Russian leadership. However, causing difficulties and promoting internal strife in the EU is also very probably a corollary to the core objective of carving out a zone of control by violent means. In fact, it has been noted that as early as 2015, similar Russian actions in Syria were intended to put migration pressure on Europe.⁷

Becoming less of a target

A brief overview of the available literature reveals that the instrumentalisation of migration is overwhelmingly a European concern. It is difficult to find a comparably extensive discourse in other major democratic jurisdictions, and the reason is hardly to be found in the lack of migration pressure. The southern border of the US has been under severe strain for years and the UK is under at

⁴ S. Başer, 'The Most Insidious Weapon of the Changing World: Migration', *Bilge Strateji* 13/24 (2022), 167–85.

⁵ M. Sie Dhian Ho and M. Wijnkoop, *The Instrumentalization of Migration: A Geopolitical Perspective and Toolbox*, Clingendael Report (December 2022).

⁶ G. Luke, T. T. Molander and P. Webinger, 'Instrumentalisierung von Migration', in C. Filzwieser and L. Kasper (eds.), *Asyl- und Fremdenrecht. Jahrbuch 2022* (Vienna: Verlag Österreich, 2022).

⁷ General Philip Breedlove, quoted in Sie Dhian Ho and Wijnkoop, *The Instrumentalization of Migration*, 5.



least as much migration pressure as the EU itself. Australia, a frequent subject and object of debate on migration management issues, seems to lack a debate on this issue entirely. Even more remarkably, if one focuses on policy initiatives rather than academic writing, it can be said that major democratic jurisdictions, such as the US and Australia, positively see no need to address this phenomenon.⁸ In contrast, the EU has not only recognised this concept at the highest level,⁹ but has also started legislative deliberations to address it systematically.¹⁰

Physical geography is often held to be a key determinant of the exposure the EU has to migration flows. Indeed, the EU has long land borders with openly hostile neighbours and a long coast-line in a narrow sea shared with fragile, indifferent or unengaged actors. These geographic realities are immutable, but on several occasions, the European Council has called for substantial investment to fundamentally change the intentions and motivations of those who share this geography with us.¹¹ Put simply, the objective has been to make the countries of origin interested in migration that is regulated in line with EU interests. In the context of instrumentalisation, what makes physical geography a risk factor is the intent to abuse it. One can clearly see that the UK is geographically much closer to the EU than many other counterparts and that irregular migration has increased in intensity in the English Channel too, yet few mainstream voices accuse the EU of using migration in a coercive way to extort the UK. Close and multifaceted relations that include a military alliance also explain the relative lack of interest in instrumentalised migration in the UK. The EU simply lacks the necessary hostile posture.

Being faced with hostile political intent in a geographic position of vulnerability may lead the EU to a few alternative conclusions. The EU is exposed by land borders and easily navigable seas to assertive neighbours who are tempted to leverage migration. Does this mean that the EU is condemned to just simply meet the conditions that its neighbours set, to ensure that they refrain from

⁸ Ibid, 2.

⁹ European Council, 'Special Meeting of the European Council (9 February 2023) – Conclusions', EUCO 1/23, para. 24.

¹⁰ European Parliament and Council, 'Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum', COM (2021) 890 final (14 December 2021); European Parliament and Council, '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).

¹¹ E.g. European Council, 'European Council Meeting (28 June 2016) – Conclusions', EUCO 26/16; European Council, 'Special Meeting of the European Council'.



abusing the EU's geographical position? A history of transactional relationships, including the 2016 EU–Türkiye deal,¹² seems to support this conclusion.

A number of unsettling implications have, however, stimulated thinking about the possibility of increased EU self-reliance to counter the obvious downsides of submitting to outside actors. Is it necessary for the EU to turn itself into a hard target, assuming its neighbourhood to be an essentially hostile environment? Is Europe to turn itself into a fortress, always ready for confrontation with its surroundings, albeit one with generous and illuminated doors for those migrants qualified to enter? In the broad public discourse, a convincing demonstration is missing of why submitting to external migration pressure and reinforcing the borders would be mutually exclusive. Because they are options indicating the extremes of a continuum, rather than usable policy approaches, they seem to reinforce each other. In fact, an increase in the EU's own resilience is likely to decrease the leverage available to others, lower the transactional costs of relations with them and, significantly, discourage hostile action.

The EU is, importantly, a community of law, and as Europeans, we conceptualise society as an environment of law. Coercive migration both exploits this European attitude and puts it into stark contrast with the attitudes of other major democratic jurisdictions, such as the US. Legally, the EU has created a set of legal entitlements for migrants that are conditional upon nothing other than the mere fact of physically reaching EU territory. Attempts by some political forces, including leftist political groups in the European Parliament, to extend asylum rights to those not yet in the EU's territory have not, as yet, been successful.¹³ Even after it has been established, in due process of law, that a person is obliged to leave EU territory, the enforcement of that obligation is contingent on a series of conditions, many of which depend on actors other than the EU. Returning people to jurisdictions that do not cooperate is, essentially, impossible. While the political resistance to readmission cooperation is being addressed, there is also an ongoing legislative conversation¹⁴ taking place on how to make the EU's own rules less of an obstacle.

¹² On the EU side, the EU–Turkey statement was signed by the 28 individual member states rather than by the EU. Legally speaking, this has placed some of the agreed actions outside of EU jurisdiction. European Council, 'EU–Turkey Statement' (18 March 2016).

¹³ Court of Justice of the European Union, Case C-638/16 PPU (X and X), Judgment [7 March 2017], text rectified by order of 24 March 2017.

¹⁴ European Parliament and Council, 'Proposal for a Directive on common standards and procedures in member states for returning illegally staying third-country nationals (recast). A contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018', COM (2018) 634 final (12 September 2018).



Legally speaking, denying entry into EU territory to people not entitled to entry is an obligation of the member states.¹⁵ However, in contrast to most other major democratic jurisdictions, such as the US, Canada or Australia, EU law nullifies this rule as soon as the border crosser in question voices an asylum claim. Therefore, closing official border crossing points as a means of limiting access to the asylum procedure is of no practical consequence for those arriving irregularly at the bloc's external border. Under EU rules, the interest in lodging an asylum claim can be expressed anywhere and at any time, not just at a border crossing point.

Faced with a hostile adversary, this element of law is a clear vulnerability that can be targeted. This obvious exception to all border protection measures is, however, not without limit. In 2020, the European Court of Human Rights upheld¹⁶ the immediate arrest and expulsion of two migrants who had scaled the border fence at the land border with Morocco. Among numerous other considerations, the Court considered it relevant that the migrants, instead of seeking to lodge an application at a border crossing point, had used force to cross the border irregularly.

One could argue that, as a consequence of this ruling, the jurisprudence of the Court provides an additional incentive for erecting infrastructure that can be overcome only by force. In the end, there seems to be a solid legal basis for denying entry at land borders to irregular migrants applying force to overcome barriers in their way. And, without a doubt, it is legally possible for a member state to close border crossing points at exposed parts of the land border. In fact, EU law does not limit the freedom of member states to establish or close border crossing points in any circumstances.¹⁷

A major contribution to the ongoing conversation is the package of legislative proposals submitted by the Commission in 2021.¹⁸ Meant to introduce derogations from the usual rules, these proposals can hardly be understood without reference to the whole volume of EU law. According to the Commission's proposal,

¹⁵ European Parliament and Council Regulation (EU) no. 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L77 (23 March 2016), art. 14(1).

¹⁶ European Court of Human Rights, Application nos. 8675/15 and 8697/15, *N.D. and N.T. v Spain* [13 February 2020].

¹⁷ European Parliament and Council Regulation (EU) no. 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), arts. 2(8) and 39(1)(b).

¹⁸ European Parliament and Council, 'Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum'; European Parliament and Council, 'Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders'.



‘instrumentalisation of migrants’ refers 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.¹⁹

As a result of determining the existence of such a situation, a member state may apply to be allowed to derogate from specific provisions of asylum law.

In the EU context, one should be particularly mindful of the division of roles between the member states and the EU, which in these matters is blurry and can only be defined in certain situations. For instance, despite the stated shared responsibility of member states and Frontex for integrated border management, it is up to member states to ‘ensure the management of their external borders’, all of which is stated in one legislative clause.²⁰ As a general rule, though, all applicable procedures rely on coordination and complementarity between the member states and EU bodies. The Commission’s proposals also include, in addition to the implied limitations, certain explicit limitations in comparison to current rules. For instance, the member states would no longer have unrestrained freedom to close border crossing points.²¹ Some of the more general effects if the proposals are adopted will have, however, a more profound impact on the options available to member states.

By implication, the proposals would make it illegal for the member states to engage in additional derogations. Applying derogations recognised as legitimate would be made conditional on a Council decision. Importantly, the Commission would first have to agree to table the corresponding proposal to even enable the Council to take such a decision. Such a role for the Commission has in the past proven to be a hurdle that has prevented the use of some instruments, such

¹⁹ European Parliament and Council, ‘Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders’, art. 1(1).

²⁰ The shared responsibility and the member state competence are both mentioned in one legislative article. See European Parliament and Council Regulation (EU) no. 2016/1624 on the European Border and Coast Guard and amending Regulation (EU) no. 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) no. 863/2007, Council Regulation (EC) no. 2007/2004 and Council Decision 2005/267/EC, OJ L251 (16 September 2016), art. 5(2).

²¹ European Parliament and Council, ‘Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders’, art. 1(2).



as the Temporary Protection Directive.²² The Commission's proposal aims to place significant restraints on member state action in situations that are defined in extremely serious terms, such as when a third country deliberately creates a situation 'liable to put at risk' the most basic interests of a member state including its 'essential . . . functions'.²³ This language describes a scenario of extreme danger for the most basic security interests of a member state. Making a member state's action in such a scenario conditional on a decision by EU institutions would be at the very outer limits of EU competence, if not beyond them. Even in purely legal terms, according to the Treaties, the EU not only 'shall respect'²⁴ some of the security interests referred to explicitly in the proposal, but also reserves national security to the sole responsibility of each member state. From a more practical perspective, political leaders normally disregard any constraints on their actions if they feel serious interests are at stake and often resort to extra-legal responses.²⁵

In comparison with the current state of affairs, the members states are in effect invited to accept substantial and procedural constraints on their actions in exceptionally serious situations. In exchange, the political and legal predictability of emergency measures in the shared Schengen Area is supposed to be the main benefit. The added value and proportionality of such a trade-off is open to assessment, particularly from the perspective of member states.

These proposals do, however, show that the EU is aiming to remedy a long-standing gap in its legal edifice. The very ambition of the EU legislator to fill this gap is commendable. Indeed, it would be worthy of criticism if the EU legislator did not feel compelled to action. The EU in general, and the Schengen Area in particular, currently differ from all national jurisdictions by not including any exceptional rules for a state of emergency. The very purpose of these rules is to limit the exercise of individual freedoms and this exceptional limitation is subject to particularly strict conditions, rules and procedures. The need for such limitations became manifest during the Covid-19 pandemic, when the Council agreed to limit the circulation of people, while keeping open avenues for the circulation of goods. Despite the political consensus existing at that point, the EU's legal mechanisms

²² Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L212 (7 August 2001), 12.

²³ European Parliament and Council, 'Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders', Explanatory Memorandum, 2.

²⁴ Art. 4(2), Treaty on European Union.

²⁵ E.g. European Council, 'EU-Turkey Statement'.



did not allow for a regulation, but only a simple recommendation.²⁶ Whether this peculiarity is sustainable now that large-scale interstate war has again become a part of European reality is highly doubtful and the Commission is essentially proposing to address this deficiency. Yet while the legal vacuum remains in place, it is the member states, not the EU, that regulate for such situations. Whether this is a source of fragility or resilience needs to be carefully examined.

Even more strikingly, the EU legislation currently in force does not distinguish between normal times and conditions of war or conflict. The EU has been spectacularly successful in creating lasting peace, but only among the member states. In simple terms, the EU has been constructed on the assumption that even if there is war, the common market would be protected from its impact²⁷ and member states' activities that have military or defence implications would be conducted outside of the EU's regulation. Lacking more specific rules, general international law has to be examined to provide applicable ones, as it contains a well-defined set of rules that is binding on belligerents (*ius in bello*). These rules address many individual situations that states may encounter in conditions of war, including the treatment of individuals, and have been developed over centuries and entirely outside of the EU's legal framework. The Court of Justice would need to address the extent to and conditions, if any, under which this venerable corpus of law could provide derogations from EU rules. The jurisprudence of the European Court of Human Rights is not conclusive either. It does, in general, recognise military expediency as a legitimate interest, but has in numerous cases²⁸ found that the belligerent with territorial control assumes additional responsibility for individual rights. In any case, *ius in bello* assumes that war is a distinct situation with known actors who assume distinct obligations, and where combatants are distinct from non-combatants.

This legalistic approach has always been a difficult fit with the realities of war and is, arguably, even less consistent with irregular and hybrid warfare, where every hostile action is part of a continuum.²⁹ Migration that is instrumentalised against the EU relies in no small measure on the fact that every person is seen as a subject that has rights. In effect, European law is weaponised against EU member states as much as, or even more than, the physical fact of migration. Decreasing the leverage available to hostile neighbours therefore requires a

²⁶ Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic (Text with EEA relevance), OJ L337 (14 October 2020), 3.

²⁷ Art. 347, Treaty on the Functioning of the European Union.

²⁸ European Court of Human Rights, Press Unit, *Armed Conflicts. Factsheet* (August 2022).

²⁹ Qiao L. and Wang X., *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House, 1999).



controlled weakening of the link between the migration of a person and his or her rights, given a defined and recognised situation of emergency. The more we recognise the security implications of specific migration events, the less the absolutism of a rights-based approach appears sustainable. The idea of ‘ring-fencing’ access to asylum under all circumstances therefore cannot be justified.

Ensuring that instrumentalisation backfires

The available writing on the weaponisation of migration has, understandably, focused on how to define and counter the phenomenon, and has left out tactical considerations on the use of migration as coercion. Few people seem interested in putting themselves in the shoes of those who weaponise migration.

To be fair, in her seminal study Greenhill does dedicate attention to the success rate of using migration as a form of coercion. Her thorough analysis, comparing intentions and outcomes in several dozen cases, relies, however, on a definition that links instrumentalised migration to an intention ‘ . . . to induce political, military and/or economic concessions from a target state or states’. While the EU has experienced cases of migration pressure engineered in direct and clear connection to a dispute, as in the situation around the Spanish enclave of Ceuta, bordering Morocco, in May 2021, there are also other, less clear-cut cases. In autumn 2021, the Lukashenka regime acted in ways that were clearly hostile to the EU, yet it remains unclear what ‘concessions’ were being pursued. At that time, the Lukashenka regime was not recognised by the EU as a legitimate counterpart, so recognition might conceivably have been an objective. However, if it was the objective, it is difficult to explain the simultaneous actions by the regime that clearly undermined its achievement, such as the expulsion of the French ambassador in October 2021. Aside from the intrinsic importance of France, the French EU Council Presidency was incoming at that time. The migration pressure orchestrated by Türkiye in 2020 was also not clearly connected to specific objectives, for instance, the implementation of the 2016 EU–Turkey agreement. On the other hand, the incidents involving the Moroccan approach to managing migration to the Spanish coastal enclaves were quite clearly linked to displeasure at specific steps taken in relation to the issue of Western Sahara. The transactional link there is quite clear.



Staying away from a debate on whether or not the engineering of migration is always driven by transactional interest, one can, instead, look at the tactics of it. It seems useful to give some attention to the advantages and disadvantages from the viewpoint of an adversary and to understand the place such a tactic may have in the adversary's toolbox. Focusing on the immediate realities related to the EU, the bloc's response should essentially be shaped in a way that makes disadvantages prevail and discourages the use of such tools.

Some advantages of instrumentalising migration immediately meet the eye. As globally a large number of people are interested in irregular migration into the EU, providing a geographic platform by bringing them close to the European border is rather easy. Enabling migration that relies on pre-existing motivations does not require coercion by the hostile actor. Once the individuals arrive in the territory of the targeted state, they remain there for an indefinite period of time and, potentially, accumulate, creating a significant burden. Secondary benefits to the organiser include the income received from those travelling. However, it is doubtful whether the act of organising such migration creates a positive element in relations with the country of origin. While the migrants themselves may appreciate the opportunity, the governments of the originating countries might find the new situation irritating.

The mechanism of coercion relies, according to Greenhill, on 'capacity swamping' and 'political agitating'.³⁰ In a society where migration is a divisive issue, additional migrants might become a political difficulty, as well as becoming a burden on reception capacities. Also, a response from the targeted state aimed at denying access to the territory may be advertised as a hypocritical contrast to its professed humanitarian values, inflicting further reputational cost. In contrast, there seem to be no considerable risks or downsides for the adversary. In the final calculation, instrumentalising migration might appear to be a low-cost, low-risk approach to creating leverage against the targeted state.

An obvious response that defuses the adversary's intention is to accept all migrants arriving at the border. This presupposes, however, the organisational and political readiness to receive as much inward migration as the adversary can organise. This is essentially the approach chosen in March 2022 with the activation of the Temporary Protection Directive to host the people displaced

³⁰ Greenhill, 'Weapons of Mass Migration', 123.



by the war in Ukraine.³¹ In general, though, this approach is not reflective of the political realities of the EU and leaves unresolved the need to counteract instrumentalised migration. Ukraine is, quite unusually, a major source of displaced persons located immediately on the EU's borders, and the outrage at the obviously illegal aggression against the country is also exceptional. Both elements made it expedient and politically acceptable to dispense with the usual concerns.

Once a migration flow is in motion, the adversary needs to keep it moving. As the attempt by Belarus in 2021 demonstrated, if the adversary cannot make the weaponised migrants leave its territory, the result might quickly turn into a problem for the adversary itself. If the migrants who are being instrumentalised are ethnically and culturally different from the local population, any extended stay in the territory of the adversary is likely to be improvised and temporary. Remaining may, ironically, create the same capacity swamping and even political agitation issues that the adversary had envisaged causing elsewhere. Such negative consequences only seem to multiply in countries where the regime derives its legitimacy from an emphasis on order and control, such as Russia or Belarus. While political polarisation in such countries hardly works in the same way as in liberal countries, authoritarian regimes are not immune to the dissatisfaction of the population. Irregular migrants might even be especially unpopular among the sectors of society that the regime relies on for support.

Time is of the essence here. To be functional for the adversary, onward migration needs to be as fluid as physically possible and if difficulties with it arise, the resulting problems tend to accumulate quickly. The whole process relies on momentum, and is therefore sensitive to well-timed disruptive countermeasures. Access-limiting measures, such as the closing of border crossing points, therefore have the potential to create negative momentum for the adversary. The extent and duration of these measures is important, of course, but timing seems to be essential to maximise the disruptive effect.

This assessment seems to correspond with the experience of the migration pressure created in early 2020 at the Greek border with Türkiye, and also with that orchestrated by the Lukashenka regime in autumn 2021. In both cases, the time that elapsed between the increase of migration over the EU border and the deployment of countermeasures, such as the enforcement of the refusal of entry by the Greek authorities, was extremely short. At the Polish–Belarusian border,

³¹ Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L71 (4 March 2022), 1.



a sustained increase in irregular crossings was detected in mid-August 2021 and a state of emergency declared on 2 September, in spite of August hardly being a convenient time for large-scale organisational efforts. The escalation at the Turkish–Greek border, that occurred on 28 February 2020, was dealt with even more swiftly, with the Greek government changing the applicable procedures on 1 March, which included not accepting asylum claims from migrants who had crossed the border illegally. An extraordinary meeting of the Council of the European Union on the situation on 4 March agreed to deploy rapid intervention teams and EU civil protection assets, as well as other technical assets,³² including bilateral support from numerous member states. As a result, massive reinforcements of personnel and hardware were deployed, both to survey the border and to directly physically interdict attempts to cross it. In both cases, the swift deployment of measures was followed by a reduction of inward migration, without creating a protracted situation at the border. It would certainly be interesting to learn about the assessment of the ‘success or failure’ of these events by those orchestrating the migration to the EU, which is, obviously, unavailable. There seem to have been no noticeable concessions extracted from the EU in the process.

With the mention of access-limiting measures, one can hardly avoid the issue of fences and other physical barriers. They are rather controversial politically, but not regularly present in the example situations described. The countermeasures described above were deployed much faster than any new fences or similar structures could have been built. Attempted irregular border crossings from Belarus into Lithuania, Latvia and Poland started to increase in mid-August 2021, returning to normal levels by late November. Significant new fences were only built in 2022. The Spanish enclaves in North Africa had been fenced long before the events of May 2021 and the same applies to some parts of the Greek land border. From a political perspective, fences and other such barriers also seem to stay in place once they have been erected and there are no known instances of fences at external borders being removed in recent decades.³³ Similar to largely symbolic internal border checks, it seems difficult to summon the political will for their removal even after they are no longer needed. Fences are not a standalone solution and only work in conjunction with a significant deployment of forces, essentially acting as a force multiplier. From the perspective of an adversary, seeing a fence being built seems to be bad news. It represents not

³² Council of the European Union, ‘Outcome of the Council Meeting, 3759th Council Meeting, Justice and Home Affairs, Home Affairs Issues’ (Brussels, 4 March 2020).

³³ C. Dumbrava, *Walls and Fences at EU Borders*, European Parliamentary Research Service Briefing PE 733.692 (October 2022).



only a major obstacle to the initially low-cost tactic of ‘just walk over there’, but also a commitment to further reinforced attention and resources for denying irregular border crossings at that location.

The EU is notoriously reluctant to finance fences or other such barriers at external borders, even though such expenditure would appear eligible for EU funding in principle.³⁴ On the other hand, measures such as border surveillance and equipment (vehicles, cameras and drones) of roughly equivalent impact are eligible for EU financing. As a result, building a fence using national funding and financing most other measures via EU funds appears to be entirely viable.

There are also other measures that may or may not be relevant to countering the instrumentalisation of migration. The more remote from the remit of border policy these are, the more firmly these measures may fall within EU competence. Reinforced regulatory oversight of air and sea carriers, engagement with countries of origin, financial incentives, and various types of restrictive measures targeting financing and insurance all come into consideration. Despite its sluggishness and all the usual shortcomings, the political process centred on achieving agreement between member states in the Coreper³⁵ seems to have a rather good track record in consolidating all diverging tools to address such situations.

As a result, the EU can be considered to be an opaque and unpredictable target for migration instrumentalisation. There is a plethora of possible measures available to counteract such behaviour, decided on at different levels, and most of them are far from certain to materialise in any given situation. This is often subject to criticism in the media, a cause of exasperation among national and EU officials, and perceived as a serious deficiency. Yet, from the perspective of the adversary, the same opacity can be considered a major planning challenge, as it makes it impossible to estimate the reaction from the EU with any reliability. Few observers, for instance, could have predicted the activation of the Temporary Protection Directive in March 2022, an instrument unused for 20 years and proposed for abolition. Despite the concurrent difficulties, there is an element of advantage and dissuasion in the opacity and unpredictability of the EU. One would be well advised not to shape the future response blueprints in ways that would make them too predictable and inflexible.

³⁴ European Parliament and Council Regulation (EU) no. 2021/1148 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy, OJ L251 (15 July 2021), Annex III, art. 1(a).

³⁵ Committee of the Permanent Representatives of the Governments of the Member States to the European Union.



While instrumentalising migration might appear to be a low-cost and low-risk tactic, a closer look at the experiences of the EU since 2020 indicates that timely and focused countermeasures have consistently been productive. These experiences have also shown that in order to achieve success, it is critical to know when to act and when not to act.

Identifying the culprit

Large-scale spontaneous arrivals of people, including asylum seekers, have long been a political problem for most EU governments. In most member states, there seems to be a threshold for immigration, beyond which the matter acquires an outsized importance, displacing many other political priorities.³⁶ That being said, regulation of entry via visas, border checks and so on is a legitimate public interest and, in fact, one of the key objectives of the EU.³⁷ At the same time, the rights-based approach the EU has adopted makes it exceptionally important to target migration while focusing on actors other than the migrants themselves. Indeed, Greenhill dedicates a lot of attention to analysing the various modes of participation, ranging from the ‘active manipulators’ to the ‘passive exploiters’.³⁸

The reality is often more complex than Greenhill’s theoretical classification, however. Unless migrants arrive from areas that are geographically close or linked to the EU by regular commercial transportation options in the vicinity, there is usually an element of facilitation or organisation. Despite individual cases of exceptional courage, stamina and luck, it is highly improbable that an individual migrant would cross thousands of kilometres of territory in decidedly non-liberal countries without some sort of assistance from local actors, formal or informal. Lawless areas without a formally defined authority are also routinely the most difficult and most expensive, rather than easiest, to cross.

This reality was the basis for EU law in this area, which since 2002 has provided a common definition³⁹ for the facilitation of unauthorised entry, transit and residence, along with minimum sanctions for such facilitation.⁴⁰ Such

³⁶ E.g. European Commission, DG COMM, *Public Opinion in the European Union. Standard Eurobarometer. Autumn 2018* (2018).

³⁷ Art. 3, Treaty on European Union.

³⁸ Greenhill, *Weapons of Mass Migration*, 23–37.

³⁹ Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, OJ L328 (5 December 2002), 17.

⁴⁰ Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L328 (5 December 2002), 1.



facilitation by private individuals is an act of a purely criminal nature. As such, the sanctions can only apply to persons subject to criminal jurisdiction and the result can only be a criminal or quasi-criminal penalty. The Facilitators package recognises the often-organised nature of this crime, but if the legislator ever considered the possibility that the facilitation of illegal migration could be a manifestation of government policy, no trace of this was left in law.

While it is immediately obvious that criminal prosecution might be a good supplement to targeting those involved, it is far from sufficient or even practically useful for countering an adversary who is beyond the reach of criminal law. Sovereign immunity immediately comes to mind as a barrier to criminal prosecution. Another source of de facto immunity may be a stated humanitarian purpose, as is often invoked by non-governmental organisations engaging in ‘humanitarian vigilantism’ that actually closely corresponds to the legal definition of facilitation. In practical terms, sovereign immunity may be less of a protection than expected, as the legal or practical inability to target sovereign actors through criminal prosecution may be outweighed by the ability to impose sanctions by political decision.

There are also more specific issues related to assigning responsibility. There is the question of to what extent a migration flow may be imputed to a territorial authority that does not have comprehensive control over the territory in question, be it due to an ongoing dispute about authority, or to a lack of resources. One could use Libya as an example of such a situation. The ‘deliberate creation or manipulation’⁴¹ of migratory flows that Greenhill refers to frequently gives rise to long-winded controversies on the practical manifestations of such creation, support, manipulation and so on. Despite the manifold contributions to theoretical analysis, some elements of the debate lead to issues remote from practical policy. Another question is to what degree does the entity in question, in order to be considered an adversary, have to engage actively in organising migration where migration would not have existed otherwise. Or, alternatively, is it sufficient for the actor to passively suffer such migration taking place from its territory? Does the entity have to be a state or even an organisation aspiring to becoming a state?

In her study, Greenhill offers a cautionary approach to this analysis, sometimes labelled in the public discourse as the ‘weaponisation of the weaponisation of migration’. This is a phenomenon distinct from mere fatigue, political aversion or institutional paranoia. This catchy term refers to the tendency to overuse the concept of instrumentalisation to address outwardly similar, yet different situations, thereby inviting punitive countermeasures against countries which

⁴¹ Greenhill, *Weapons of Mass Migration*, 24.



do not deserve to be ranked with deliberately hostile actors. There seems to be a pronounced worry that Greenhill's conceptual work should not be used to victimise weak and fragile countries that lack the resources to manage migration on their own.⁴² This approach seems to be rooted in the fundamental view of instrumentalisation as a transactional tool used ' . . . in order to induce political, military and/or economic concessions from a target . . . ' .⁴³

To derive actionable policy directives, one should look at these elements through the realities of the early 2020s in Europe. The hostile actor we are dealing with may not be interested in inducing concessions at all. Or, rather, instrumentalised migration may be only a supportive element in a wide continuum of tools aimed at nothing less than destruction or subjugation, as in the Russian displacement of people from Ukraine. The reality of war has reluctantly become understood in Europe since February 2022, but sometimes it seems that the reality of warlike aggressive intention against Europe has not. As already suggested above, from a practical perspective, 'deliberate creation or manipulation' represents one extreme end of a broad continuum, with passive, opportunistic exploitation being the other extreme. Between these polar positions there is enough ambiguity and lack of clarity to make nuances close to meaningless. It also seems quite impractical to rely on an adversary to present its intentions or to present enough indication of the structure of its intentions for us to assess. To expect such clarity to exist is not sufficient and, by itself, the focus on assessing intentions offers ample means of manipulation for an adversary intent on using it.

How, therefore, can one usefully identify the actor using instrumentalised migration? Instead of looking for elements of a theoretical construction, one could adopt the negative approach of looking for indications to the contrary. A potential adversary may lack the effective authority to counter irregular migration through its territory. Alternatively, while exercising the necessary authority, it may lack the resources to tackle the phenomenon. In either case, there is no barrier to the EU showing goodwill by being open to cooperation and capacity building. In contrast, an actor fully capable of managing certain migration movements, for example inward migration, should not be believed when stating its professed inability to manage other forms of migration, such as transit migration. From this perspective, diplomacy can be as much a way of offering incentives and cooperation as a means of testing the reaction to these offers in order to identify genuine intentions.

⁴² *E-International Relations*, 'Interview – Kelly Greenhill' (5 February 2023).

⁴³ Greenhill, 'Weapons of Mass Migration', 116.



Identifying intentions by relying on behavioural analysis also makes it rather irrelevant as to whether the potential adversary is a state, a ‘wannabe state’⁴⁴ or a non-state actor. In any of these situations, the ultimate driving force may be remote and different from outward appearances, so the identity of the adversary may be shifting along a continuum, rather than conforming to legalistic categories of statehood. Decidedly non-state actors may be and have successfully been engaged with offers of cooperation, agreed protocols and communication. If these offers are factually declined, imputing a hostile intention is the only reasonable analysis. When imposing sanctions (restrictive measures), the EU already does not hesitate to target those driving hostile action regardless of their legal status. An entity does not have to be recognised as a state actor to be targeted by these measures, and there are few reasons for drivers of instrumentalised migration to be treated any differently.

Conclusion

There are a few key concepts that form the axis of this paper’s argument. The adversary is any organisation with sufficient control over a defined territory to allow it to organise or exclude migration from or through that territory. It is unimportant whether the adversary is a state or a non-state actor and it is fully immaterial whether or not that organisation is in any way recognised by the EU. Interaction with that adversary may be anywhere along the continuum between cooperation and conflict.

Instrumentalisation of migration by the adversary is any hostile use of that control over migration that causes harm to the EU’s interests, even if not more than the very general interest of maintaining the integrity of the external border. Given the political sensitivity, and indeed legal importance of this, it is enough. The Commission’s proposal for an instrumentalisation regulation requires an exceptionally serious threat to trigger the response reserved for instrumentalisation. This could, paradoxically, serve as an incentive for geographically limited or less serious incidents, leading adversaries to develop expertise using the tool. Contrary to Greenhill, this paper has found little value in analysing instrumentalisation as a ‘conversation by force’ and as part of the negotiation continuum. Sometimes, hostility is its own motivation and being recognised as a legitimate partner for negotiation is the adversary’s actual objective.

In relation to the definition proposed by the Commission, I suggest enhancing the definition of the organising entity and defining it clearly as an adversary.

⁴⁴ E.g. D. Lynch, *Engaging Eurasia’s Separatist States* (Washington, DC: USIP Press, 2004).



Once the identity of such an actor has been established, there should be a very strong implication of consequences to be pursued in the shape of sanctions or other punitive measures. Aside from this, the EU should remain as opaque as possible, keeping a wide array of options available for flexible use, and, no less importantly, should remain difficult to predict. Any attempt to define the toolbox available for such cases is contrary to this interest.

The idea of such opacity is unlikely to be popular with many, yet it is critical for countering unpredictable hybrid threats. Even considering the wide variety of possible adversaries makes it difficult to plan for every contingency. Some adversaries may have limited exposure to the EU's response or be impervious to (additional) sanctions, but it is far from impossible that the adversary might have very close relations with the EU in some areas, be it as a critical trade partner or even a candidate country.

Identifying the adversary and taking action are essentially political judgements that need to be reserved to a very senior political forum that can assimilate many interacting factors. As suggested above, legislative action can hardly define the elements of the situation or the rules for defined action. The hostile intention needs to be recognised for what it is and countered in ways that maximise cost for the adversary. The legal framework should limit itself to setting the criteria for an emergency situation and defining derogations from the usual rules to be made available for such a case. In fact, any attempt or ambition to go into more detail is hardly consistent with the current realities of geopolitics and hybrid instruments of pressure. In broader terms, the EU as a political actor needs to adapt to an environment of the long-term management of diverging interests and even conflicts in its neighbourhood, rather than striving for the ideal objective of values-based consensus and common institutions. It needs to recognise the circumstances and adapt to them, limit its own vulnerabilities and inflict costs on adversaries. I am aware that given the existing institutional habits of thinking, such an ambition is almost revolutionary.

As frustrating as it is for those used to legislative blueprints for action, I argue that recent years have shown how the EU can act decisively, flexibly and quite successfully when facing emergencies. Both some of the cases of instrumentalised migration mentioned above and the mobility crisis brought about by the Covid-19 pandemic have forced Brussels into becoming a place of invention, resolve and adaptability. A common European approach needs to remove the barriers to this resolve and stimulate, not stifle, invention. If the European approach proves not to be up to that ambition, national perspectives are likely to prevail, with all the inefficiencies this would entail.



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