

**THE INSTRUMENTALIZATION OF MIGRATION:
THE EU'S EASTERN BORDER**

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ABSTRACT

In the contemporary landscape of international migration, this thesis critically engages with the multifaceted challenges stemming from the introduction of the concept of the “instrumentalization of migration” within the European Union (hereinafter – “EU”), with a particular emphasis on its practical effects at the EU’s eastern border. Amidst the global trend of increasing border closures, this research delves into the complex interplay of legislative responses, geopolitical strategies, and their implications for the adherence to the fundamental principle of international law.

The structure of the thesis is designed to address key research questions, including the nuanced definition of instrumentalization, the practical application of EU legislation in addressing this phenomenon (with emphasis on Finland-Russia border tensions in 2023), and distinctions between refugees and instrumentalized migrants in terms of human rights entitlements. Additionally, the study explores potential alternative options for addressing the challenges posed by the instrumentalization of migration.

Methodologically, the research employs a socio-legal approach, with a primary focus on a doctrinal analysis. Document analysis serves as the principal method, encompassing examination of relevant legislation, case law, legal literature, academic discourse on migration, asylum, and related legal frameworks, as well as policy documents and media analyses.

The thesis contributes to the ongoing scholarly discourse on migration policies, border security, and human rights protection. The findings provide a nuanced understanding of the concept of “instrumentalization of migration,” offering insights that may inform future legislative developments and international cooperation efforts in addressing the multifaceted challenges associated with migration at the EU border.

Keywords: migration, asylum, pushbacks, instrumentalization, hybrid attacks

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INTRODUCTION

Seventy years have passed since the 1951 Refugee Convention came into force, recognizing the right to seek an asylum and the principle of non-refoulement. Today, these fundamental rights and principles face challenges as nations increasingly close their borders and forcibly push back refugees, especially irregular migrants.¹ Countries like the USA (e.g., Texas Border Bill 2023, criminalizing illegal entry from Mexico and allowing to expel irregular migrants),² Australia,³ and EU countries (e.g., Poland, Lithuania, and Finland)⁴ have built border walls and fences. Thus, for instance, according to the European Parliament brief, by the end of 2022, the aggregate length of border fences had grown to 2048 km, constituting approximately 13% of the length of the EU's external borders.⁵ This data may be interpreted as follows: the proliferation of fences and other border barriers along the EU borders makes the process of seeking asylum difficult and risky, forcing individuals to resort to dangerous methods and giving rise to significant humanitarian problems.⁶

¹ Izabella Majcher, Recommendation by the Council of Europe Commissioner for Human Rights “Pushed beyond the Limits Four Areas for Urgent Action to End Human Rights Violations at Europe’s Borders,” Council of Europe, April 2022; “Note on Migration and the Principle of Non-Refoulement,” *International Review of the Red Cross* 99, no. 904 (1 April 2017): 345–57, <https://doi.org/10.1017/s1816383118000152>.

² “Governor Abbott Signs Historic Border Security Measures in Brownsville,” Office of the Texas Governor | Greg Abbott, 18 December 2023, <https://gov.texas.gov/news/post/governor-abbott-signs-historic-border-security-measures-in-brownsville>; Rosa Flores, and Sara Weisfeldt, “GOP Gov. Abbott signs border bill that makes entering Texas illegally a state crime,” *CNN*, 18 December 2023, <https://edition.cnn.com/2023/12/18/politics/texas-border-bill-abbott/index.html>.

³ Emilie McDonnell, “What Happened Here Should Have Been a Warning, Not an Inspiration,” *Human Rights Watch*, 20 December 2023, <https://www.hrw.org/news/2023/12/20/what-happened-here-should-have-been-warning-not-inspiration>.

⁴ Stephen Phillips, “Finland’s Recent Eastern Border Closure Follows a Predictable Pattern of Responses to Unwanted Migration,” *Refugee Law Initiative Blog*, 7 December 2023, <https://rli.blogs.sas.ac.uk/2023/12/07/finlands-recent-eastern-border-closure-follows-a-predictable-pattern-of-responses-to-unwanted-migration/>; “Behind the Border Wall Is a Strip of Polish Territory – New Judgment on Humanitarian Aid Helsinki Foundation For Human Rights,” *Helsinki Foundation for Human Rights*, 22 November 2023, <https://hfhr.pl/en/news/behind-the-border-wall-is-a-strip-of-polish-territory--new-judgment-on-humanitarian-aid->.

⁵ Costica Dumbrava, “Walls and fences at EU borders,” *European Parliamentary Research Service* PE 733.692, October 2022, p. 2.

⁶ Julia Black, “A decade of documenting migrant deaths: Data analysis and reflection on deaths during migration documented by IOM’s Missing Migrants Project, 2014–2023,” *International Organization for Migration, Global Migration Data Analysis Centre*, 2024, https://missingmigrants.iom.int/sites/g/files/tmzbd1601/files/publication/file/A%20decade%20of%20documentin%20migrant%20deaths_0.pdf; “Yearly irregular arrivals and fatalities (2014-2024),” Infographics, Official website of the Council of the EU and the European Council, 2024, <https://www.consilium.europa.eu/en/infographics/yearly-irregular-arrivals-and-fatalities/>.

Moreover, state authorities, seeking to legitimize pushback actions, resort to stigmatizing terms like “illegal immigrants,”⁷ “threats to national security,”⁸ and even “invasion.”⁹ This alarming trend is further entrenched through the adoption of legislation that dehumanizes refugees and, therefore, allows to circumvent fundamental right to seek asylum and the principle of non-refoulement. In the context of the EU, following the Belarus migration crisis in 2021, the European Commission introduced the concept of “instrumentalization of migration” and proposed corresponding legislative measures to address this phenomenon. The issue with the concept of instrumentalization of migration is that it allows significant derogations from EU Member States’ obligations under refugee law during situations where third countries use migration as a tool to destabilize the EU. This represents a significant shift in the EU’s approach to irregular migration at the border, transforming pushbacks into a new legal framework. A recent case illustrating this phenomenon, which also contributed to the final adoption of the EU legislation on instrumentalization of migration, is the migration crisis between Finland and Russia that began in November 2023.¹⁰ This situation prompted the closure of all Finland-Russia border crossing points from 30 November 2023 until the current time (at the time of writing the thesis), as well as the commencement of the construction of border fences. While the utilization of migration (or so called “weaponized migration”) as a strategic geopolitical

⁷ “Putin Says Russia Needs to Get Tough on Illegal Migration,” *TASS*, 17 February 2022, <https://tass.com/politics/1405417>; Sertan Sanderson, “In the Face of Suffering Setbacks, Hungary’s Orban Remains Defiant on Migration,” *InfoMigrants*, 28 June 2023, <https://www.infomigrants.net/en/post/50002/in-the-face-of-suffering-setbacks-hungarys-orban-remains-defiant-on-migration>.

⁸ Margit Fauser, “Transnational Migration - a National Security Risk? Securitization of Migration Policies in Germany, Spain and the United Kingdom Centrum,” *Centrum Stosunków Międzynarodowych (Center for International Relations)*, 2006, http://pdc.ceu.hu/archive/00004804/01/rap_i_an_0206a.pdf.

⁹ Erum Salam, “Texas’s Use of ‘Invasion’ Clause against Immigrants Is Racist and Dangerous, Rights Groups Say,” *The Guardian*, 29 May 2023, <https://www.theguardian.com/us-news/2023/may/29/texas-invasion-clause-migrants-racist-dangerous>.

¹⁰ Felix Peerboom, “Rising Tensions at the EU’s External Borders with Russia: The Unwanted Return of Instrumentalized Migration and Problematic Responses,” *Blog of the European Journal of International Law EJIL: Talk!*, 8 December 2023, <https://www.ejiltalk.org/rising-tensions-at-the-eus-external-borders-with-russia-the-unwanted-return-of-instrumentalised-migration-and-problematic-responses/>.

tool is not a novel occurrence,¹¹ the current landscape reveals an escalating threat of “legally justified” violations of the right to seek an asylum and the principle of non-refoulement.

The main goal of this thesis is to contribute a more detailed analysis to the ongoing discussions surrounding the phenomenon of the instrumentalization of migration at the EU border, with a particular focus on the eastern border. Before delving into the research questions, it is important to acknowledge special considerations that shape the approach and focus of this thesis.

- Definition of “refugee”:

This thesis uses “refugee” in its broadest sense.¹² It includes refugees, asylum seekers, and individuals in refugee-like situations who need safety and international protection. This definition extends beyond the 1951 Refugee Convention to include those needing subsidiary protection under the EU Qualification Directive 2011/95/EU.

- Focus on the 2023 Finland-Russia border crisis:

This thesis emphasizes the 2023 Finland-Russia border crisis within the context of instrumentalized migration, addressing a gap in scholarly research compared to the well-studied 2021 Belarus migration crisis. The intent is to contribute to the filling a gap in existing literature and understanding of the little-studied aspects of Russia’s alleged involvement in instrumentalized migration, recognizing its importance within the broader thematic discourse. Simultaneously, to overcome potential limitations in accessible information regarding the discussion on refugees’ rights, the thesis extends beyond Russia’s example and incorporates relevant data from the 2021 Belarus-EU border situation.

In order to achieve the thesis goal, I aim to answer the following research questions:

¹¹ Kelly M. Greenhill, “Strategic Engineered Migration as a Weapon of War,” *Civil Wars* 10, no. 1 (2008): 6–21. <http://doi.org/10.1080/13698240701835425>, (“Greenhill, “Strategic Engineered Migration””); Kelly M. Greenhill, “Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion,” *Strategic Insights*, v. 9, issue 1 (Spring-Summer 2010): 116-159, (“Greenhill, “Weapons of Mass Migration””).

¹² Serena Parekh, “Who Is a Refugee?” *Oxford University Press eBooks*, 27–49, October 2020, <https://doi.org/10.1093/oso/9780197507995.003.0002>, p. 35.

- What are the legal dimensions and practical examples that contribute to the current state of understanding the “instrumentalization of migration”?
- What is the multifaceted definition of the “instrumentalization of migration”?
- How are the criteria that define the “instrumentalization of migration” applied in real-world scenarios? Are they specific and clearly formulated?
- How do distinctions between a “refugee” and an “instrumentalized migrant” in terms of human rights play out?
- Are there alternative options available to address the concept of “instrumentalization of migration?” If so, what are they, and how can potential solutions be explored to alleviate the challenges faced by refugees?

The structure of the thesis is designed to address the aforementioned questions and will be as follows: 1) the first chapter aims to present an overview of the understanding of the concept of instrumentalization and its current state within the context of the EU; 2) the second chapter delves into the key criteria for defining the “instrumentalization of migration” and examines how it can be determined and manifested in reality, based on the example of the 2023 Finland-Russia border crisis; 3) the third chapter addresses the violation of human rights of refugees as a result of measures imposed, justified by the situation of instrumentalization; as well as the chapter provides an analysis of whether legislation on the instrumentalization of migration can indicate the situation of instrumentalization of refugee law; 4) the final fourth chapter delves into alternative options to the offered derogation measures in response to the “instrumentalization of migration,” shifting the responsibility from refugees to states accused of instrumentalization.

METHODOLOGY

This thesis employs a qualitative methodology, making use of both primary and secondary sources. The primary sources include EU legislation and case-law, statistical data on migration flows, and official documents and records related to migration. Secondary sources comprise legal encyclopedias, academic books and articles, and media sources. Secondary sources have a significant role in this research as it primarily relies on data that has already been published. However, the emphasis on legislation gives this thesis its doctrinal approach. Therefore, this thesis can be classified as desk-based doctrinal research or documentary research. The quality of this research type is heavily influenced by the quality of its sources. Data that is invalid, biased, or unreliable may distort the research findings. Another limitation of desk-based research is that it does not introduce new information or data, but rather reflects on existing sources, giving them new form, substance, or perspectives. Recognizing these limitations, I strive to mitigate them by obtaining cross-verified information from multiple sources and using primary data whenever possible.

The primary method employed in this thesis is document analysis, involving a comprehensive review of various textual sources. This includes:

- Archival research

Retrieval and analysis of historical data, connecting with the first chapter's emphasis on a historical analysis of the multifaceted definition of instrumentalization. This includes sources that provide insight into the roots and historical context of the instrumentalization of migration, linking the past to the current state.

- Legal research:

Examination of the relevant EU's legislation on instrumentalization of migration (revised Schengen Borders Code, Regulation addressing situations of instrumentalization in the field of migration and asylum, Regulation addressing situations of Crisis and Force Majeure, etc.),

case-law (*M.A. v Valstybės sienos apsaugos tarnyba, European Commission v. Hungary*, etc.), and legal literature pertaining to the instrumentalization of migration.

- Literature review:

Exploration of existing academic literature that addresses the broader context of migration, asylum, and related legal frameworks.

- Media analysis

Investigation into media representations, discourse, and narratives surrounding the alleged instrumentalization of migration in the cases of Belarus in 2021 and Russia in 2023. This analysis aims to provide insights into public perceptions, political discourse, and potential framing biases that might influence the understanding of the issue. Due to technological development and convenience in accessibility, online media are used for this research. The analyzed online media sources predominantly include the online news sites of different countries (e.g., BBC News, Reuters, Bloomberg, POLITICO, etc.) for gathering information on important political statements during press conferences, exclusive information on diplomatic communications, and interviews with politicians. Another additional online media source used in this research is posts of politicians and other state official representatives posted on social networking sites (e.g., X (formerly Twitter)). While conducting this research, I acknowledge that the limitation of media validity, such as the interpretation of information, may be influenced by subjective judgments. I recognize that in such a sensitive topic concerning irregular migration and refugees, media bias (e.g., ideological) may arise from different online media news outlets that pursue their goals depending on their political discourse. To mitigate any influence from potential media bias and enhance validity, a systematic approach is employed, and findings are triangulated with other data sources where possible.

1. UNDERSTANDING THE INSTRUMENTALIZATION OF MIGRATION

1.1. Different concepts in literature

The concept of instrumentalization of migration is not a newly invented phenomenon; it has evolved gradually over time, taking different forms of verbal formulation. In 1984, Michael S. Teitelbaum introduced the concept of “international migrations as tools of foreign policies.”¹³ What sets this piece apart from subsequent articles by other authors (including this thesis) is that Teitelbaum not only covers the spectrum of a sending state using migration outflows with the purpose “to destabilize or embarrass foreign-policy adversaries” but also discusses a receiving state that might encourage people movements as a tool “to embarrass and discredit adversary nations,” particularly when those nations fail to protect and guarantee fundamental human rights.¹⁴ While the intention of a receiving state to create migration flows may have merit, it is not common phenomenon nowadays. In practice, it is more common for a sending state to be interested in the instrumentalization of migration. Indeed, confirmation of this statement can be found more than twenty years later in the work of Kelly M. Greenhill (2008), who developed the concept further with “strategic engineered migration.”¹⁵ According to Greenhill’s concept, strategic engineered migration involves intentional generation or manipulation of “in- or out-migrations” by states or non-state actors to gain political or military advantages by increasing, reducing, or altering the population within a certain territory.¹⁶ This concept serves as an umbrella for four different forms of engineered migration, which were classified by the author based on the various aims of a challenger state: 1) dispossessive (elimination of groups perceived as a threat to ethno-political or economic dominance); 2) exportive (elimination of a domestic political opposition or destabilization of a foreign

¹³ Michael S. Teitelbaum, “Immigration, Refugees, and Foreign Policy,” *International Organization* 38, no. 3 (1984): 429–50, p. 437–441.

¹⁴ *Ibid.*, pp. 438–439.

¹⁵ Greenhill, “Strategic Engineered Migration.”

¹⁶ *Ibid.*, p. 7.

government); 3) militarized (achievement of military advantages during a conflict); 4) coercive (change of the political behavior of targets or receipt of financial benefits from them).¹⁷ The latter form, coercive engineered migration, was thoroughly investigated by Greenhill in a subsequent article in 2010¹⁸ and served as a foundation for the modern understanding of the instrumentalization of migration.

Another concept frequently encountered in literature, which overlaps with the notion of the instrumentalization of migration, is the utilization of migration as a form of hybrid (or unconventional) warfare threat.¹⁹ For instance, Sascha-Dominik Dov Bachmann and Anthony Paphiti, in their article titled “Mass Migration as a Hybrid Threat? - A Legal Perspective,” provide the following definition of mass migration as a hybrid threat: it “is a strategic mechanism effected where the state deploying the threat will place pressure upon the targeted government to take some course of action – or not – which is to the advantage of the state making the threat and to the disadvantage of the targeted state.”²⁰ In essence, this resembles the concept of strategic engineered migration earlier introduced by Greenhill. However, the authors do not specify any particular purpose behind using migration as a hybrid threat, only referring to its “strategic purpose” and listing potential objectives such as military goals, political leverage, or economic gains. The perception of migration as a hybrid warfare threat can be also observed in NATO’s policies. This viewpoint traces back to speeches delivered by NATO Secretary General Mr. Manfred Wörner in 1993, wherein he highlighted mass migration as a new threat.²¹ This perspective was formally incorporated into NATO’s strategic framework

¹⁷ Ibid, p. 8.

¹⁸ Greenhill, “Weapons of Mass Migration.”

¹⁹ Sascha-Dominik Dov Bachmann, and Anthony Paphiti, “Mass Migration as a Hybrid Threat? - A Legal Perspective,” *Polish Political Science Yearbook* 50, no. 1 (March 2021): 119-145.

²⁰ Ibid, p. 120.

²¹ North Atlantic Treaty Organization, “SPEECH BY THE SECRETARY GENERAL OF NATO MR MANFRED WÖRNER TO THE IISS IN BRUSSELS,” NATO, Brussels, Belgium, 10 September 1993, https://www.nato.int/cps/en/natohq/opinions_24174.htm?selectedLocale=en; North Atlantic Treaty Organization, ““NATO: A Changing Alliance for a Changing World” - Speech by NATO Secretary General, Mr. Manfred Wörner at the Foreign Policy Association” NATO, New York, U.S.A., 7 October 1993, https://www.nato.int/cps/en/natohq/opinions_24170.htm?selectedLocale=en.

with the introduction of hybrid threats in the Bi-Strategic Command Capstone Concept in 2010.²² More recently, the Strategic Concept of 2022 further solidified this stance by acknowledging the instrumentalization of migration as a strategic concern.²³ Since the concept of mass migration as a hybrid threat is primarily applicable in the context of warfare, I aim to distinguish between the intentional use of mass migration for military purposes and migration crises as a consequence of military conflict. According to Greenhill, mass migration can be employed for military objectives such as gaining advantages or enhancing force structure. Examples of such actions provided by the author include the “disruption or destruction of an opponent’s command and control, logistics, or movement capabilities, ... acquiring additional manpower and resources, ... “regroupment camps,” ... “strategic hamlets.”²⁴ Therefore, it can be inferred that such actions are carried out with the intent of using migration as a tool to improve the military situation, or in opportunistic cases, at least with the full knowledge and understanding of using mass migration for the challenger state’s own benefit. Some scholars argue that migration crises resulting from military conflicts are also examples of hybrid warfare.²⁵ However, I contend that to classify engineered migration as a hybrid warfare threat, the intent to achieve specific purposes should be demonstrated, primarily linked to actions causing mass migration flows. Therefore, in the context of instrumentalization of migration or hybrid threats, mass migration is a tool and not an ultimate goal (although it may be considered a desired cumulative consequence by a challenger state).

²² North Atlantic Treaty Organization, BI-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats, NATO, 25 August 2010, p. 3, https://web.archive.org/web/20221006051905/https://act.nato.int/images/stories/events/2010/20100826_bi-sc_cht.pdf.

²³ North Atlantic Treaty Organization, NATO 2022 Strategic concept, 29 June 2022, p. 3, <https://www.nato.int/strategic-concept>.

²⁴ Greenhill, “Strategic Engineered Migration,” p. 9.

²⁵ Viljar Veebel, “Is the European Migration Crisis Caused by Russian Hybrid Warfare?,” *Journal of Politics and Law* 13, no. 2 (2020): 44-53; Alia Fakhry, Roderick Parkes, and András Rácz, “If Russia Uses Migration as a Weapon, Europeans Should Respond in Kind,” *DGAP Policy Brief No. 6* (2022): 2, <https://www.ssoar.info/ssoar/handle/document/78001>.

1.2. The EU context

According to Greenhill's article on coercive engineered migration (a subset of strategic engineered migration aimed at altering political behavior or gaining financial benefits), the first unsuccessful attempt to employ engineered migration as a political tool against the EU occurred in 2002 with Belarus President Alexander Lukashenko's threats.²⁶ His public statements were the following: "The Europeans will not just come to Belarus, but will crawl and ask for cooperation in the fight against drug trafficking and illegal migration," and "if the Europeans do not pay, then we will not protect Europe from these flows."²⁷ These threats stemmed from Lukashenko's frustration over the Czech Republic's refusal to issue him a visa for the NATO Summit taking place in Prague in 2002. Tensions between Europe and Belarus had escalated due to the OSCE's and the Parliamentary Troika's recognition of the 2001 Belarus presidential elections as "not free and fair" because of numerous violations, as well as the oppression of opposition and independent media.²⁸ Another attempt made by Lukashenko occurred two years later in 2004 when he asked the EU for payment amounting to "dozens of millions of dollars" in order to combat "illegal migration."²⁹ The EU responded to Lukashenko's statements by deciding to allocate 400 million euros to increase border security and establish the European Border and Coast Guard Agency (Frontex) in 2004.³⁰ Thus, as Greenhill indicated, Lukashenko's attempts to regain legitimacy for his regime and lift sanctions failed. Despite

²⁶ Greenhill, "Weapons of Mass Migration," p. 118, 121.

²⁷ Петр Вайль, "Почему президенту Белоруссии Александру Лукашенко отказано в праве въезда не только в Чехию, но и в страны Евросоюза?," [Why is Belarusian President Alexander Lukashenko denied the right to enter not only the Czech Republic, but also the EU countries?], *Радио Свобода*, 16 November 2002, <https://www.svoboda.org/a/24193637.html>; Susan B. Glasser, "Belarusian Barred From Summit," *Washington Post*, 16 November 2002, <https://www.washingtonpost.com/archive/politics/2002/11/16/belarusian-barred-from-summit/7dec0eb9-f38d-4dfe-9c13-c2fd654d2b5f/>.

²⁸ OSCE Office for Democratic Institutions and Human Rights, "REPUBLIC OF BELARUS PRESIDENTIAL ELECTION," Report, OSCE/ODIHR Limited Election Observation Mission, 4 October 2001, <https://www.osce.org/files/f/documents/9/e/14459.pdf>; Pedro Marset Campos, "Report on Relations Between the European Union and Belarus: Towards a Future Partnership," Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, A5-0024/2003, European Parliament, 29 January 2003, https://www.europarl.europa.eu/doceo/document/A-5-2003-0024_EN.html.

²⁹ Daniel McLaughlin, "EU Asked for Payment to Stop Refugees," *The Irish Times*, 27 May 2004, <https://www.irishtimes.com/news/eu-asked-for-payment-to-stop-refugees-1.1142200>.

³⁰ Greenhill, "Weapons of Mass Migration," p. 144.

this, Belarus still received financial support from the EU to maintain the Belarus-EU border. According to the Belsat article, Belarus received approximately 47.5 million euros for the purposes of integrated border management between 2001 and 2012, along with an additional 21 million euros for regional projects to upgrade infrastructure and equipment at the border.³¹ Lukashenko's threats materialized into real actions 17 years later, in 2021, when the situation on the Belarus-EU border deteriorated significantly. However, prior to this, it is important to examine the events involving Turkey, which significantly influenced the EU's cautious attitude towards using migration as a political tool. It should be noted here that the situation with Turkey is slightly different from the 2021 Belarus-EU border crisis. While there is evidence that Belarusian authorities were actively facilitating the movement of irregular migrants from countries with which Belarus does not share a land border, Turkey only allowed the passage of irregular migrants from neighboring countries or those in close proximity. Therefore, Turkey's situation differs in that it does not actively facilitate or encourage migration flows but rather allows these flows to pass through its territory.

In an effort to mitigate and slow down the migration crisis of 2015-2016, the EU reached two agreements with Turkey, which served as a primary route for approximately million Syrian refugees seeking entry into the EU at that time: the EU-Turkey Joint Action Plan in October 2015, and the EU-Turkey statement in March 2016.³² The EU-Turkey deal allowed for the return of refugees who had entered the EU from Turkey back to Turkey as the first country of asylum. In exchange, Turkey received financial aid totaling 6 billion euros (by the end of 2019)

³¹“Забытые Миллионы. Сколько Денег Беларусь Получила От Евросоюза На Укрепление Границы?,” [Forgotten Millions. How Much Money Has Belarus Received From The European Union To Strengthen The Border?], Belsat, 9 July 2021, <https://belsat.eu/ru/news/09-07-2021-zabytye-milliony-skolko-deneg-belarus-poluchila-ot-evrosoyuza-na-ukreplenie-granitsy>.

³² Linda Peters, Peter-Jan Engelen, and Danny Cassimon, “Explaining Refugee Flows. Understanding the 2015 European Refugee Crisis Through a Real Options Lens,” *PloS One* 18, no. 4 (20 April 2023): e0284390, <https://doi.org/10.1371/journal.pone.0284390>; European Commission, “EU-Turkey joint action plan,” European Commission, 15 October 2015, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860; “EU-Turkey Statement, 18 March 2016,” Official website of the Council of the EU and the European Council, 18 March 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

under the Facility for Refugees, which encompasses both humanitarian and non-humanitarian assistance for Syrian refugees residing in Turkey.³³ Additionally, for every Syrian returned to Turkey under the deal, one other Syrian refugee from Turkey was resettled in EU member states.³⁴ However, this agreement has been heavily criticized, particularly from a human rights perspective³⁵ and regarding its practical implementation.³⁶ Instead of fostering closer cooperation, as originally intended, the EU-Turkey agreement opened the door for Turkey's government to manipulate the EU by using migration as a threat. For example, in autumn 2019, Turkish President Recep Tayyip Erdogan repeatedly made statements in September, October, and November, threatening to "open the doors and send 3.6 million migrants" to Europe with the aim of receiving financial support.³⁷ On 28 February 2020, Erdogan acted on his threats by opening the border, resulting in a gathering of approximately 12,000 to 25,000 individuals at Turkey's western border, intending to enter the EU through this route.³⁸ Despite these challenges, the EU continued to support Turkey financially under the Facility for Refugees, with the final transfer of the full operational budget of the Facility (6 billion euros in total)

³³ Kemal Kirişci, "As EU-Turkey Migration Agreement Reaches the Five-year Mark, Add a Job Creation Element," *Brookings*, 17 March 2021, <https://www.brookings.edu/articles/as-eu-turkey-migration-agreement-reaches-the-five-year-mark-add-a-job-creation-element/>; "Q&A: Why the EU-Turkey Migration Deal Is No Blueprint," *Human Rights Watch*, 28 October 2020, <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint>.

³⁴ *Ibid.*

³⁵ "The EU-Turkey Deal: Europe's Year of Shame," *Amnesty International*, 11 October 2021, <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>.

³⁶ Oğuz Kaan Özalp, "A FAILED NEGOTIATION?: A CLOSER LOOK ON THE EU-TURKEY DEAL OF 2016," *Journal of International Relations and Political Science Studies* 2: 5-20, 2021, p. 14.

³⁷ "Turkey's Erdogan Threatens to 'open the Gates' for Migrants to Europe," *Euronews*, 5 September 2019, <https://www.euronews.com/2019/09/05/turkey-s-erdogan-threatens-to-open-the-gates-for-migrants-to-europe>; "Turkish President threatens Europe with an influx of migrants," *The Brussels Times*, 10 October 2019, <https://www.brusselstimes.com/72747/if-criticized-erdogan-threatens-europe-with-a-flow-of-migrants>; "Turkey's Erdogan Threatens to Let Refugees Into Europe if More Aid Not Given," *RadioFreeEurope/RadioLiberty*, 7 November 2019, <https://www.rferl.org/a/turkey-erdogan-threatens-to-let-refugees-into-europe-if-more-aid-not-given/30258718.html>.

³⁸ UN High Commissioner for Refugees, "UNHCR TURKEY March Operational Update," UNHCR, March 2020, <https://www.unhcr.org/tr/wp-content/uploads/sites/14/2020/05/UNHCR-Turkey-Operational-Update-March-2020.pdf>; "EU Chief says Greece is Europe's shield in migrant crisis," *BBC News*, 3 March 2020, <https://www.bbc.com/news/world-europe-51721356>.

committed in November 2019, additional support of 535 million euros in 2020, and further funding of 3 billion euros for the 2021-2023 period.³⁹

One year after Erdogan's threats, in September 2020, the EU Commission introduced one of its ambitious reforms: the New Pact on Migration and Asylum.⁴⁰ In its initial stage, the Pact suggested, among other things, resuming the discussion on the Schengen Border Code proposal of 2017 and included the proposal of Regulation addressing situations of Crisis and Force Majeure. However, these initial drafts did not incorporate any provisions related to the instrumentalization of migration at that time; the concept of instrumentalization of migration was introduced in these documents much later, in 2021 and 2023, respectively. The pivotal moment for incorporating the concept of instrumentalization into the New Pact on Migration and Asylum arose during the migration crisis at the Belarus-EU border in 2021, which was labeled a 'hybrid attack' by the President of the European Commission, Ursula von der Leyen.⁴¹ According to Frontex, there were approximately 8,000 irregular border crossings reported,⁴² though national authorities provided much higher figures: Polish authorities claimed to have prevented 33,000 attempts to cross their border irregularly, and Lithuanian authorities reported about 4,200 attempts.⁴³ This crisis stemmed from a deterioration in

³⁹ European Commission, "The EU continues to provide much needed assistance to refugees and host communities in Türkiye," European Commission - Press corner, 27 September 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4521.

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609, final, 23 September 2020, https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF.

⁴¹ "Speech by President Von Der Leyen at the EP Plenary on the Conclusions of the October European Council and the Situation in Belarus and at Its Border With the EU," European Neighbourhood Policy and Enlargement Negotiations (DG NEAR), 23 November 2021, https://neighbourhood-enlargement.ec.europa.eu/news/speech-president-von-der-leyen-ep-plenary-conclusions-october-european-council-and-situation-belarus-2021-11-23_en.

⁴² "EU External Borders in 2021: Arrivals Above Pre-pandemic Levels," FRONTEX, 11 January 2022, <https://www.frontex.europa.eu/media-centre/news/news-release/eu-external-borders-in-2021-arrivals-above-pre-pandemic-levels-CxVMNN>.

⁴³ Reality Check, "Belarus Border Crisis: How Are Migrants Getting There?" *BBC News*, 22 November 2021, <https://www.bbc.com/news/59233244>; "Belarus Increases Number of Flights From Iraq," *Voice of Belarus*, 27 December 2022, <https://www.voiceofbelarus.org/belarus-news/belarus-increases-the-number-of-flights-from-iraq/>.

Belarus-EU relations, exacerbated by the EU's imposition of economic sanctions against Belarus following the 2020 Belarusian election and the 2020–2021 protests, culminating in the forced landing of a Ryanair flight by the Belarusian government to apprehend Belarusian opposition journalist Roman Protasevich on 23 May 2021. In response, Lukashenko issued several statements in May, June, and July 2021, threatening the EU with increased migrant flows if sanctions against Belarus were not lifted.⁴⁴ The statements were supported by actions of the Belarusian government to simplify visa requirements for several countries, as well as increase the number of flights from Iraq to Belarus.⁴⁵

In response to the Belarus crisis and following a request from the European Council in October 2021, the EU Commission proposed amendments to the EU's legal framework in December 2021. The proposals included the Regulation addressing situations of instrumentalization in the field of migration and asylum (hereinafter – “Instrumentalization Regulation”) and the Regulation amending Regulation on a Union Code on the rules governing the movement of persons across borders (hereinafter – “Regulation amending the SBC”), which introduced the new concept of instrumentalization of migration. Although the Instrumentalization Regulation was rejected by the Council in December 2022, the Council, nonetheless, proceeded with its own approach to addressing instrumentalized migration in the updated Regulation dealing with situations of Crisis and Force Majeure (hereinafter – “Crisis Regulation”), with an agreement

⁴⁴ “Встреча с парламентариями, членами Конституционной комиссии и представителями органов государственного управления,” [Meeting with parliamentarians, members of the Constitutional Commission and representatives of public administration bodies], Официальный Интернет-портал Президента Республики Беларусь, 26 May 2021, <https://president.gov.by/ru/media/details/vstrecha-s-parlamentariyami>; “Участие в памятных мероприятиях в мемориальном комплексе “Брестская крепость-герой,” [Participation in commemorative events at the Brest Hero Fortress Memorial Complex], Официальный Интернет-портал Президента Республики Беларусь, 22 June 2021, <https://president.gov.by/ru/media/details/ceremoniya-vozlozheniya-venkov-v-memorialnom-komplekse-brestskaya-krepost-geroy>; “Торжественное собрание в честь Дня Независимости,” [A solemn meeting in honor of Independence Day], Официальный Интернет-портал Президента Республики Беларусь, 2 July 2021, <https://president.gov.by/ru/media/details/torzhestvennoe-sobranie-v-chest-dnya-nezavisimosti>.

⁴⁵ “Зеркальный ответ. К чему могут привести санкции Евросоюза против “Аэрофлота,” [The mirror response. What can the EU sanctions against Aeroflot lead to?], *BBC News Русская служба*, 11 November 2021, <https://www.bbc.com/russian/news-59237207>; Maria Margarita Mentzelopoulou, “Instrumentalisation in the Field of Migration and Asylum,” Report, European Parliamentary Research Service, 14 December 2021. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739204/EPRS_BRI\(2022\)739204_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739204/EPRS_BRI(2022)739204_EN.pdf).

reached by the Member States on 4 October 2023.⁴⁶ As of June 2024, the Crisis Regulation is adopted by the Council on 14 May 2024.⁴⁷

Despite the fading of the 2021 Belarus crisis, attributed to the construction of border fences by Poland and Lithuania, along with a decrease in border crossings, the EU did not abandon its idea of incorporating the concept of instrumentalization into its legal framework. On the contrary, the concept of instrumentalization gained more support and traction within the EU due to the tensions along the Finland-Russia border, which escalated in November 2023 and were seen as an alleged situation of instrumentalized migration.⁴⁸ This Russian tactic was seen as a response to Finland's entry into NATO, which in turn was a response to Russia's full-scale invasion of Ukraine on 24 February 2022.

All of these events led to the incorporation of the concept of instrumentalization in the EU legal framework through the adoption of the Crisis Regulation in May 2024. However, the concept of instrumentalization of migration raises many questions regarding its essence, practical application, and impact on refugees' rights and situations. Therefore, in the following chapters, I will examine the ambiguous elements of the definition of instrumentalization of migration, the practical application of this definition in the context of the 2023 Finland-Russia crisis, the effect of the concept on the human rights of refugees and asylum seekers, and possible solutions to shift the focus of punishment from refugees to the challenging states.

⁴⁶ “ECRE Reaction: No Majority for Instrumentalization Regulation,” European Council on Refugees and Exiles, 8 December 2022, <https://ecre.org/ecre-reaction-no-majority-for-instrumentalisation-regulation> (“**ECRE Reaction**”); European Commission, “Statement on the political agreement in the Council on the Crisis Proposal - New Pact on Migration and Asylum,” European Commission - Press corner, 4 October 2023, https://ec.europa.eu/commission/presscorner/detail/en/statement_23_4761.

⁴⁷ European Commission, “Delivering on the EU Pact on Migration and Asylum,” European Commission, April 2024, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life/migration-and-asylum/pact-migration-and-asylum/delivering-eu-pact-migration-and-asylum_en; “EU Council Formally Adopts Update of Schengen Border Code,” *European Migration Network*, 24 May 2024, <https://www.emnbelgium.be/news/eu-council-formally-adopts-update-schengen-border-code>.

⁴⁸ Ursula von der Leyen (@vonderleyen), “I had a call with PM @PetteriOrpo who informed me about the situation at the border with Russia. Russia's instrumentalisation of migrants is shameful,” X (Formerly Twitter), 16 November 2023, <https://x.com/vonderleyen/status/1725179881632227641> (“**Ursula von der Leyen (@vonderleyen), “Russia's instrumentalisation of migrants is shameful”**”).

2. EU LEGAL FRAMEWORK

2.1. Legal definition and characteristics of the concept

On 1 December 2021, the European Commission presented its proposal for a Council Decision on interim emergency measures for Latvia, Lithuania and Poland (was rejected in February 2022).⁴⁹ This proposal introduced a new concept of instrumentalization of migration, including response measures such as extending the time limits for registering asylum applications and the extensive application of border procedures. Two weeks later, on 14 December, the Commission introduced two legal proposals: the Instrumentalization Regulation and the Regulation amending the SBC.⁵⁰ Despite the logical expectation that the Instrumentalization Regulation would fully introduce the legal concept of instrumentalization due to its specific subject matter and scope, it mostly focused on derogation and solidarity measures, as well as the procedure to authorize such measures, with a reference to the definition of instrumentalized migration provided in the initial version of amended Article 2(27) of the Regulation amending the SBC.⁵¹ Although these proposals were fundamental and groundbreaking for the concept of instrumentalization, they are no longer valid today in terms of determining the definition and scope of the concept:

⁴⁹ Proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752, final, 1 December 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0752>.

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890, final, 14 December 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A890%3AFIN> (**“Instrumentalization Regulation”**); Proposal for a Regulation of the European Parliament and of the Council 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A891%3AFIN&qid=1639608649722> (**“Initial Regulation amending the SBC”**); Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders - Outcome of the European Parliament's first reading (Strasbourg, 22 to 25 April 2024), 9156/24, 29 April 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9156_2024_INIT (**“Final version of Regulation amending the SBC”**).

⁵¹ Initial Regulation amending the SBC, art. 2(27).

1) The Instrumentalization Regulation was rejected by the Council on 8 December 2022 due to the absence of a common position on this issue within Member States.⁵² However, the idea of including the concept of instrumentalization into EU legislation was not abandoned by the Commission, which proposed to incorporate provisions on instrumentalization into the Crisis Regulation in its communication on 12 January 2023.⁵³

2) The final version of the Regulation amending the SBC excluded the definition of the instrumentalization of migration. Provisions concerning instrumentalization were removed during the first reading by the European Parliament at the end of September 2023, with the justification that these provisions “serve a geopolitical goal with limited relevance for the rules governing the good functioning of the Schengen area, and, on the other hand, the Commission has made a separate, specific proposal for a Regulation on this subject, which should address all elements linked to that concept”.⁵⁴ Thus, the final version of the Regulation amending the SBC contains only a reference to instrumentalization as defined in the Crisis Regulation, in order to allow activation of responsive measures such as limitation of opening hours or closure of specific border crossing points.⁵⁵

Therefore, the central and main role in determining the definition and scope of the instrumentalization of migration is taken by the Crisis Regulation, which as of June 2024 is

⁵² ECRE Reaction; Costica Dumbrava et al., “EU Pact on Migration and Asylum,” Report, *EPRS | European Parliamentary Research Service*, February 2024, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739247/EPRS_BRI\(2022\)739247_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739247/EPRS_BRI(2022)739247_EN.pdf); Information from the Presidency on current legislative proposals, 6838/23, JAI 220, COMIX 99, 3 March 2023, <https://data.consilium.europa.eu/doc/document/ST-6838-2023-INIT/en/pdf>.

⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum, C(2023) 219, final, 12 January 2023, <https://commission.europa.eu/system/files/2023-01/report-migration-asylum-2022.pdf>; Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, 22 May 2024, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1359> (“**Crisis Regulation**”).

⁵⁴ Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021)0891 – C9-0473/2021 – 2021/0428(COD), 27 September 2023, https://www.europarl.europa.eu/doceo/document/A-9-2023-0280_EN.html.

⁵⁵ Final version of Regulation amending the SBC.

adopted by the Council on 14 May 2024, with the prior adoption of the text of the Regulation by the Parliament on 10 April 2024.⁵⁶ The definition of instrumentalization contained in the Crisis Regulation was slightly changed in wording from that introduced in the initial version of the Regulation amending the SBC, while keeping the essence, and reads as follows: “a situation of instrumentalisation where a third country or hostile non-state actor encourages or facilitates the movement of third country nationals and stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security.”⁵⁷

The understanding of which situations can be defined as the instrumentalization of migration under the Crisis Regulation requires analyzing the key elements of the definition:

1) A third country against the Union or a Member State

According to the definition of instrumentalization, a challenger state can only be a third country or a hostile non-state actor,⁵⁸ meaning states or non-state actors outside of the EU.

Given that the Schengen Border Code encompasses non-EU states (Switzerland, Liechtenstein, Norway, and Iceland), these nations have the potential to address the issue of instrumentalized migration by implementing measures like adjusting opening hours or temporarily closing specific border crossing points in accordance with the final version of the revised Schengen Border Code.⁵⁹ It is important to note that the derogation and solidarity provisions outlined in the Crisis Regulation will not impact these countries. Consequently, the establishment of similar mechanisms will be left to the discretion of the national legislators in these non-EU countries.

⁵⁶ Crisis and force majeure Regulation, 2020/0277(COD), Legislative Observatory, European Parliament, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020%2F0277\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020%2F0277(COD)&l=en).

⁵⁷ Crisis Regulation, art. 1(4)(b).

⁵⁸ Ibid.

⁵⁹ Final version of Regulation amending the SBC, amendments to art. 5.

2) Encouraging or facilitating migratory flows

A challenger state, whether a third country or a hostile non-state actor, must play an active role in encouraging or facilitating migration movements. Regarding migratory flows, the definition of instrumentalization does not include the criterion of “mass influx.” The Crisis Regulation indeed distinguishes between two distinct crisis situations: “a situation of mass arrivals” and “a situation of instrumentalisation.”⁶⁰ The rejected Instrumentalization Regulation, in its explanatory memorandum, also distinguished these situations as two different scenarios.⁶¹ The lack of dependence of instrumentalization on the size of migratory flows can be attributed to Greenhill’s argument that “perpetrators generally prefer minimal or limited outflows to massive outflows” because they cannot control the intensity, size, or duration of migration movements.⁶² Therefore, a high number of arrivals as a criterion is not necessary for a situation to be characterized as a case of instrumentalization.

However, the most crucial aspect of this element of definition that needs observation lies in the causal link between a third country’s actions and migratory flows. Herein lies the problem, as there is a general lack of clarity regarding where to draw the line indicating the interconnectedness of a third country’s actions and migration movements, and how the former serves as an impetus for the latter. This issue resonates with the challenge of establishing causality in international law, where the International Court of Justice and other international tribunals have not consistently applied a clear test of factual causation.⁶³ At first glance, establishing the fact of change in migration movements immediately following a third country’s actions, while excluding other contributory factors or sources, may seem like a straightforward task. However, the practical burden of proving this allegation at an evidentiary

⁶⁰ Crisis Regulation, article 1(4).

⁶¹ Instrumentalization Regulation, Explanatory Memorandum.

⁶² Greenhill, “Strategic Engineered Migration,” p. 10.

⁶³ Ilias Plakokefalos, Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity, *European Journal of International Law*, Volume 26, Issue 2, May 2015, Pages 471–492, <https://doi.org/10.1093/ejil/chv023>.

level makes it nearly impossible to establish conclusively. Therefore, the inability to establish a causal link may lead to simplification of this process, with the situation being merely proclaimed as a case of instrumentalization. This, in turn, could lead to the potential abuse of the concept by politicians of Member States and contribute to the securitization of the migration.⁶⁴

3) Intention to destabilize the EU or a Member State

The actions of a challenger state aimed at encouraging or facilitating migratory flows must be accompanied by the intention to destabilize the EU or a Member State. R.J. Rummel, in their work “Understanding Conflict and War,” defines intention and its role as “the active desire to achieve some future goal through some specific behavior in a particular circumstance.”⁶⁵ Therefore, the intention element is a primary cause for a challenger state’s behavior that is manifested in specific act and actions. However, as John J. Mearsheimer and Sebastian Rosato point out in their book “How States Think: The Rationality of Foreign Policy,” the challenging aspect of a state’s intention is that it is hardly perceivable by others, since behavior can be interpreted differently by various people, and states usually tend to “conceal or misrepresent their capabilities and thinking”.⁶⁶ Nonetheless, statements of politicians (especially heads of states) are generally perceived as a primary source for understanding the intentions of states. More or less clear examples of intentions to use migration as a tool against the EU can be found in statements by leaders such as Lukashenko and Erdogan, where they have threatened to flood the EU with migrants. However, difficulties arise when there are no oral or written statements on behalf of a state, leaving intentions subject to speculation. Therefore, the element of

⁶⁴ Johannes von Rosen, “The Securitization of Migration as a Threat to Liberal, Democratic Societies,” *Sicherheit Und Frieden (S+F) / Security and Peace* 37, no. 1 (2019): 35–40, <https://www.jstor.org/stable/26679776>.

⁶⁵ Rudolph Joseph Rummel, “Intentions, Attitudes, And Interests,” in *Understanding Conflict and War* (Beverly Hills, California: Sage Publications, 1976), vol. 2; Rudolph Joseph Rummel, “International Behavior Space-Time,” in *Understanding Conflict and War* (Beverly Hills, California: Sage Publications, 1976), vol. 4.

⁶⁶ John J. Mearsheimer and Sebastian Rosato, “STRATEGIC RATIONALITY AND UNCERTAINTY,” In *How States Think: The Rationality of Foreign Policy*, Yale University Press, 2023, 19–36, <https://doi.org/10.2307/jj.5666733.5>.

intention is quite challenging to measure, raising concerns about its determination in recognizing a situation as the instrumentalization of migration.

4) Essential state functions at risk

The last key element of the definition of instrumentalization is essential state functions at risk as a result of a challenger state's actions to encourage or facilitate migratory flows. According to Article 4(2) of the Treaty on European Union, essential state functions include, but are not limited to, "ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security."⁶⁷ As Terezie Boková points out in their article dedicated to the concept of essential state functions, the list of these functions is, indeed, not exhaustive and can include, for instance, the protection of minors, as established by the Court of Justice of the European Union (hereinafter – "CJEU") in the case of *Sindicatul Familia Constanța*.⁶⁸ Furthermore, the element of essential state functions such as national security, often mentioned alongside Article 72 of the Treaty on the Functioning of the European Union (hereinafter – "TFEU"), is typically viewed by EU member states as a possible means to derogate from EU law obligations.⁶⁹ Indeed, for instance, in *M.A. v Valstybės sienos apsaugos tarnyba*, the Lithuanian government unsuccessfully attempted to justify measures that prohibited irregular migrants from applying for asylum during the state of emergency due to the 2021 Belarus crisis, citing Article 72 TFEU. The CJEU stated that "the placing of reliance, generally, on threats to public order or internal security caused by the mass influx of third-country nationals provides no justification, by reference to Article 72 TFEU," requiring the Lithuanian government to provide sufficient evidence that without the imposed measure, the maintenance of public order

⁶⁷ Treaty on European Union, signed in Maastricht on 7 February 1992, Official Journal of the European Union - EUR-Lex, 29 July 1992, no. 191, 1-112, art. 4(2).

⁶⁸ Terezie Boková, "Exploring the Concept of Essential State Functions on the Basis of the CJEU's Decision on the Temporary Relocation Mechanism," *DOAJ (DOAJ: Directory of Open Access Journals)*, 1 November 2022, <https://doi.org/10.15166/2499-8249/599>, ("Terezie Boková, "Essential State Functions"), p. 785-786.

⁶⁹ Terezie Boková, "Essential State Functions, p. 777, 785; Salvatore F. Nicolosi, "Addressing a Crisis Through Law: EU Emergency Legislation and Its Limits in the Field of Asylum," *Utrecht Law Review* 17 (4): 19–30. <https://doi.org/10.36633/ulr.776>.

and the safeguarding of internal security would be at risk.⁷⁰ Thus, the Court established a high threshold to prove that essential state functions are at risk in situations of crisis. However, under the Crisis Regulation, the obligation to prove the existence of risk will be shifted to the European Commission, since a state affected by a crisis situation must receive the Commission's approval to derogate from its obligations.⁷¹ It is not entirely clear whether the Commission's decisions will be subject to scrutiny by the CJEU.

Analyzing a situation through the prism of instrumentalization's definition plays an important role in determining whether a member state is facing a crisis, particularly instrumentalization. This aids in implementing response measures, such as solidarity mechanisms and derogations from rules. According to Article 3 of the Crisis Regulation, the European Commission, in consultation with UNHCR and IOM, plays the primary role in assessing whether a situation qualifies as a crisis. Within two weeks of a member state's request, the Commission presents an implementing decision to the Council.⁷² The Council, in turn, has two weeks to decide whether to authorize the application of solidarity and derogation measures.⁷³

The Crisis Regulation imposes a maximum duration of 12 months, including all possible extensions, for the application of responsive measures.⁷⁴ The responsive measures enable derogation from the obligations and rules outlined in the Asylum Procedure Regulation (a revised version of the Asylum Procedures Directive) and the Asylum and Migration Management Regulation (intended to replace the Dublin Regulation).⁷⁵ These measures

⁷⁰ M.A. v. Valstybės sienos apsaugos tarnyba, C-72/22 PPU, ECLI:EU:C:2022:505, Judgment, 30 June 2022, (“M.A. v. Valstybės sienos apsaugos tarnyba”), para 72-72.

⁷¹ Crisis Regulation, art. 2-3.

⁷² Crisis Regulation, art. 3-4.

⁷³ Ibid.

⁷⁴ Crisis Regulation, art. 5(3).

⁷⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2016/0467, final, 6375/24, 9 February 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6375_2024_INIT (“Asylum Procedure Regulation”); Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610, final, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/0279\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/0279(COD)).

include extending time limits for registering asylum applications, prioritizing the registration of well-founded applications, more extensive application of border procedures with prolonged maximum duration, and extending time limits for take charge requests, take back notifications, and transfers.⁷⁶

In light of the serious impact on refugees' rights resulting from the activation of derogations, it is crucial to carefully determine a situation as one of instrumentalization under the Crisis Regulation, considering the vagueness and uncertainty surrounding some elements of the definition of instrumentalization. Consequently, there is a risk of political discretion intervening, potentially resulting in the misuse of the concept of instrumentalization. For instance, Dr. Meltem Ineli-Ciger, in their article titled "Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards," examines how the political will of the Commission and the Council significantly influenced the activation and application of the provisions of the Temporary Protection Directive in 2022, depending on several factors within the EU's sphere of interest.⁷⁷ There is a factor that should be considered when seeking reasoning or rationale behind the Commission's decisions to establish situations of instrumentalization in the future.

2.2. Case study: Finland-Russia border crisis in 2023

The recent example of alleged instrumentalization of migration at the EU's external border occurred at the Finland-Russia land border in the end of 2023. This event was characterized by Ursula von der Leyen, the President of the European Commission, as "Russia's instrumentalization of migrants is shameful," supporting the responsive measures taken by the Finnish government.⁷⁸ The Finland-Russia situation is interesting to examine as it represents

⁷⁶ Crisis Regulation, art. 10-13.

⁷⁷ Dr Meltem Ineli-Ciger, "Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards," in *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, ed. Sergio Carrera and Meltem Ineli-Ciger (Italy: European University Institute, 2023), p. 59-85.

⁷⁸ Ursula von der Leyen (@vonderleyen), "Russia's instrumentalisation of migrants is shameful."

the first example of alleged instrumentalization following the 2021 Belarus crisis, a recognition made by both the Commission and Finnish authorities. Moreover, the 2023 Finland-Russia crisis provides an opportunity to scrutinize the application of key elements defining instrumentalization in a real-world context. In this scenario, the facts of the situation may not be immediately apparent, compounded by the lack of oral or written statements from the Russian government indicating an intention to destabilize the EU. Additionally, it is worth analyzing whether Finland's essential state functions were at risk and whether the Finnish government's response complied with current EU legislation, considering that the Crisis Regulation had not been adopted at that time.

Three months after the invasion of Ukraine by Russian military forces, the Finnish government announced its plans to construct a border fence with Russia in June 2022 due to the escalation and complexity of the geopolitical situation.⁷⁹ This decision was influenced by fears of potential instrumentalized migration by the Russian government. Finland's concerns were not entirely unfounded, as there were some allegations within EU countries about Russia's possible involvement in the 2021 Belarus migration crisis.⁸⁰ Nonetheless, as of 2022, according to information provided by the Finnish Border Guard, only 30 irregular crossings were detected on the Finland-Russia border,⁸¹ while the number of asylum applications more than doubled

⁷⁹ "Finland plans to build barriers on its border with Russia," *Reuters*, 9 June 2022, <https://www.reuters.com/world/europe/finland-plans-build-barriers-its-border-with-russia-2022-06-09/>; RAJA Finnish Border Guard, "The Finnish Border Guard's plan for the fence on the eastern border has been completed," Press release, Finnish Border Guard, 27 September 2022, <https://raja.fi/en/-/the-finnish-border-guard-s-plan-for-the-fence-on-the-eastern-border-has-been-completed>; Ministry of the Interior of Finland, "Amendments to Border Guard Act help prepare for incidents," Press release, Ministry of the Interior, 8 July 2022, <https://intermin.fi/en/-/amendments-to-border-guard-act-help-prepare-for-incidents>.

⁸⁰ Aliaksandr Kudrytski, John Follain, and Patrick Donahue, "Putin Brushes Off Merkel Appeal on Belarus; EU Readies Sanctions," *Bloomberg*, 10 November 2021, <https://www.bloomberg.com/news/articles/2021-11-10/poland-seeks-emergency-eu-summit-on-belarus-border-crisis>; Sejm RP (@KancelariaSejmu), "Neoimperialna polityka Rosji postępuje. Obserwujemy te kroki. Ostatni atak Łukaszenki, który ma swojego mocodawcę w Moskwie...", X (Formerly Twitter), 9 November 2021, <https://twitter.com/KancelariaSejmu/status/1458115619459682314>; Sarah Anne Aarup, Jakob Hanke Vela, and Jacopo Barigazzi, "EU Preps New Belarus Sanctions to Quell Surging Migrant Crisis," *POLITICO*, 10 November 2021, <https://www.politico.eu/article/eu-preps-new-belarus-sanctions-to-quell-surging-migrant-crisis/>.

⁸¹ Anne Kauranen, "Finland starts fence on Russian border amid migration, security concerns," *Reuters*, 14 April 2023, <https://www.reuters.com/world/europe/finland-starts-fence-russian-border-amid-migration-security-concerns-2023-04-14/>.

compared to 2021, reaching 5,827, due to the ongoing Russo-Ukrainian war.⁸² The situation shifted on 9 November 2023, when Finland prohibited entry into its territory from Russia by bicycles, citing the detection of an abnormal number of irregular migrants at the Finland-Russia border since August 2023 (with 91 irregular border crossing cases detected as of 12 November 2023).⁸³ By 17 November 2023, the situation escalated further, with the Finnish Border Guard registering 415 cases of irregular border crossings at the Finland-Russia border.⁸⁴ In response to the sudden increase in irregular migrant arrivals, four border crossing points out of nine were closed from 18 November 2023.⁸⁵ This progressed to a temporary closure of the Finland-Russia border from 30 November 2023 to 13 December 2023, and ultimately to a complete permanent closure from 16 December 2023 (during the two days of reopening, 329 asylum seekers arrived at the Vaalimaa and Niirala border crossing points).⁸⁶ Although the high number of irregular migrants in November 2023 significantly impacted the statistics of irregular border crossings, resulting in 1,205 asylum applications, the overall statistics of asylum applications in 2023 compared to 2022 remained almost at the same level, totaling 5,372 asylum applications.⁸⁷

⁸² Finnish Immigration Service, Statistics on Asylum Applications, <https://statistics.migri.fi/#applications/23330/49?start=624&end=635> (“**Finnish Statistics on Asylum Applications**”).

⁸³ RAJA Finnish Border Guard, “More asylum seekers than usual have arrived at the border of Southeast Finland without required travel documents,” Press release, Finnish Border Guard, 12 November 2023, <https://raja.fi/en/-/more-asylum-seekers-than-usual-have-arrived-at-the-border-of-southeast-finland-without-required-travel-documents>.

⁸⁴ RAJA Finnish Border Guard, “Phenomenon of illegal entry in the area of Southeast Finland Border Guard District,” Press release, Finnish Border Guard, 18 November 2023, <https://raja.fi/en/-/phenomenon-of-illegal-entry-in-the-area-of-southeast-finland-border-guard-district>.

⁸⁵ Finnish Government, Government decision on temporary closure of border crossings and centralisation of applications for international protection, SM/2023/4, 16 November 2023, <https://valtioneuvosto.fi/paatokset/paatokset?decisionId=95> (“**Finnish Government decision on temporary closure of border crossings**”).

⁸⁶ Finnish Government, “Finland’s entire eastern border to be closed,” Press release, Government Communications Department, Ministry of the Interior, 28 November 2023, <https://valtioneuvosto.fi/en/-/1410869/finland-s-entire-eastern-border-to-be-closed>; Matti Pitkaniitty (@MPitkaniitty), “Situation 14.12.2023 at 20:00 hours. Today Vaalimaa and Niirala border crossing points were opened after being closed in November...,” X (Formerly Twitter), 14 December 2023, <https://x.com/MPitkaniitty/status/1735376432455369012>; Matti Pitkaniitty (@MPitkaniitty), “Situation 15.12.2023 at 21:00 hours. Today was second day when Vaalimaa and Niirala border crossing points were open. 124 persons sought asylum in Vaalimaa and 84 in Niirala...,” X (Formerly Twitter), 15 December 2023, <https://x.com/MPitkaniitty/status/173575799113118148>; Ministry of the Interior of Finland, “Finland’s eastern border to remain closed until further notice,” Press release, Ministry of the Interior, 4 April 2024, <https://intermin.fi/en/-/finland-s-eastern-border-to-remain-closed-until-further-notice>.

⁸⁷ Finnish Statistics on Asylum Applications.

Although the Crisis Regulation had not been adopted at that time, considering the statements made by Finnish authorities that the 2023 Finland-Russia crisis involves the instrumentalization of migration, it is worth considering whether this situation fits the definition of instrumentalization under the Crisis Regulation and its key elements.

In the absence of threatening statements from the Russian government indicating its intention to open its borders with the EU to irregular migrants, it is challenging to confidently assert that the Russian authorities intended to destabilize the EU or Finland by using migratory flows as a means to an end. Finnish authorities, as well as the President of the European Commission, rely on and infer such intentions from several statements made by Russia regarding Finland's accession to NATO, which the Russian government perceives as a threat to national security:⁸⁸

1) On 16 May 2022, Vladimir Putin, the President of Russia, stated that the Russian authorities would react to the expansion of military infrastructure in Finnish territory due to the threats it would pose to Russia.⁸⁹

2) On 4 April 2023, the Ministry of Foreign Affairs of the Russian Federation, on the day of Finland's official joining of NATO, stated: "As we have warned on multiple occasions, the Russian Federation will have to respond with military-technical, as well as other measures in order to address national security threats arising from Finland joining NATO."⁹⁰

Putin's statements following the 2023 Finland-Russia crisis were silent about the migration situation at the Finland-Russia border and primarily focused on military response measures

⁸⁸ "В Кремле признали угрозу для России от вступления Финляндии в НАТО," [The Kremlin recognized the threat to Russia from Finland's accession to NATO], *Интерфакс*, 12 May 2022, <https://www.interfax.ru/russia/840428>.

⁸⁹ "Путин: вступление в НАТО Финляндии и Швеции не создает непосредственной угрозы России," [Putin: Finland and Sweden joining NATO does not pose an immediate threat to Russia], *ТАСС*, 16 May 2022, <https://tass.ru/politika/14636203>.

⁹⁰ The Ministry of Foreign Affairs of the Russian Federation, "Foreign Ministry Statement on Finland completing the process to join NATO," the Russian Ministry of Foreign Affairs, 4 April 2023, https://mid.ru/en/foreign_policy/news/1861613/?lang=en.

regarding the strengthening of the military grouping in the western direction after Sweden and Finland's involvement in NATO.⁹¹

Therefore, as discussed in the preceding section regarding the element of intention, it is difficult to conclude the Russian government's intention in the absence of a clear statement. Nonetheless, the behavior of the Russian authorities in some ways may reflect the Russian government's intentions, as intentions serve as an engine for subsequent actions. In case of instrumentalization, these actions should be directly connected to facilitating or encouraging migratory flows to the Finland-Russia border by the Russian authorities, excluding any other contributory factors. According to The Insider's investigation, smugglers involved in the 2021 Belarus crisis were contacted by Russian "officers" concerning the opportunity for migrants to cross the Finland-Russia border in the early November.⁹² These smugglers claimed that Russian border guards, for a fee of 500 US dollars, assisted irregular migrants in crossing the border, even providing bicycles. It remains unclear whether the alleged actions of Russian border guards, allowing irregular migrants to cross the border for the fee, were motivated by personal gain or carried out under direct instructions from authorities. Without this evidence, establishing intent to destabilize the EU or Finland becomes challenging. Regarding the potential scenario of the Russian government turning a blind eye to the smuggling activities of its border guards, it is also difficult to determine whether it was an opportunistic move to exploit the situation to weaken the EU – a proof intent – or simply indifference and negligence. Thus, this situation reaffirms the near impossibility of establishing the element of intent due to uncertainty and a lack of evidence.

⁹¹ "Путин заявил, что у России «не было проблем» с Финляндией до ее вступления в НАТО. «Теперь будут», — добавил он," [Putin said that Russia had "no problems" with Finland before its accession to NATO. "Now they will," he added], *Meduza*, 17 December 2023, <https://meduza.io/news/2023/12/17/putin-zayavil-chto-u-rossii-ne-bylo-problem-s-finlyandiei-do-ee-vstupleniya-v-nato-teper-budut-dobavil-on>; "Presidential Address to the Federal Assembly," Presidential Executive Office, 29 February 2024, <http://en.kremlin.ru/events/president/news/73585>.

⁹² Михаил Калинин, "Офицеры без границ. Как ФСБ организует наплыв беженцев в Финляндию," [Officers without borders. How the FSB organizes the influx of refugees to Finland], *The Insider*, 26 December 2023, <https://theins.ru/politika/267830>.

Regarding the imposition of restrictive measures, the Finnish government responded to the 2023 Finland-Russia crisis by completely and permanently closing its border with Russia (until a special decision) and introducing amendments to the Aliens Act that allows application of a border procedure. In this regard, it is important to highlight that although the Crisis Regulation had not been adopted during the 2023 Finland-Russia crisis, the concept of instrumentalization has taken root. It serves as a justification for the relatively easy introduction of restrictive measures, which do not encounter much resistance in society and do not require external assessment of the situation, as prescribed by the Crisis Regulation, where the Commission and the Council assess a situation and authorize derogatory measures. Nonetheless, any imposition of restrictive measures should still comply with current EU law and international obligations. The current version of the Schengen Border Code does not provide for the closure of border crossing points or limitations on their opening hours. However, such measures will be legally accepted according to the Regulation amending the SBC in its final version. Although this version of the SBC mentions “specific border crossing points,” logically may imply that some border crossing points should remain open. The absence of any specified border crossing points puts the right to asylum under Article 18 of the Charter of Fundamental Rights of the European Union (hereinafter – “Charter” or “CFR”) in a situation where it cannot be guaranteed. The CJEU in *European Commission v. Hungary* stated that Member States should recognize the right to make an asylum application, including at the borders, even in cases of irregular entry and “irrespective of the prospects of success of such a claim.”⁹³ Furthermore, as it was established in *M.A. v Valstybės sienos apsaugos tarnyba*, depriving an asylum seeker of the possibility to make and lodge an asylum application prevents effective enjoyment of the right to asylum.⁹⁴ Therefore, it is uncertain how the closure of borders can guarantee access to

⁹³ European Commission v. Hungary, C-823/21, ECLI:EU:C:2023:504, Judgment, 22 June 2023, (“**European Commission v. Hungary**”), para 43.

⁹⁴ M.A. v. Valstybės sienos apsaugos tarnyba, para 61-63.

asylum procedures. The Finnish government's decision to close the Finland-Russia border is also criticized by local non-governmental organisations, such as the Finnish Refugee Advice Center, which questions the de facto permanent closure of the border relying on the statement of the Constitutional Law Committee regarding the possibility of short-term full closure in very exceptional circumstances.⁹⁵ The Finnish authorities consider lifting the border closure measure upon the successful adoption of amendments to the Alien Act, which, inter alia, introduces a border procedure and expands grounds for accelerated procedures.⁹⁶ Though the Finnish government claims that this proposal complies with EU legislation, it significantly reduces the protection and guarantees provided to refugees and asylum seekers under current Finnish legislation. This criticism is echoed in a joint statement from UNHCR Nordic and Baltic Countries, the Finnish Red Cross, the Finnish Refugee Council, and the UN Association of Finland, as well as observations from UN High Commissioner for Refugees.⁹⁷

These measures (closure of the border and amendments to the Alien Act) were introduced under the justification that irregular migration originating from Russia may pose a risk to public order and national security, as indicated, for instance, in the Finnish government's decision on the temporary closure of border crossings on 16 November 2023.⁹⁸ Despite the fact that the Crisis Regulation had not been adopted at that time, as previously mentioned, invoking

⁹⁵ "EU Eastern Borders: Finland Closes its Border with Russia Indefinitely Despite Criticism — Hungary, Poland, and Slovakia Oppose Implementation of New EU Migration Pact While Lithuania Prefers to Pay — Northern Latvia's New Asylum Centre Receives Support from Local Community," European Council on Refugees and Exiles, 19 April 2024, <https://ecre.org/eu-eastern-borders-finland-closes-its-border-with-russia-indefinitely-despite-criticism---hungary-poland-and-slovakia-oppose-implementation-of-new-eu-migration-pact-while-lithuania-prefers/>.

⁹⁶ Legislative project on the introduction of the border procedure and the extension of the criteria for the accelerated procedure, SM033: 00/2023, Ministry of the Interior of Finland, <https://intermin.fi/hankkeet/hankesivu?tunnus=SM033:00/2023>.

⁹⁷ UN High Commissioner for Refugees, "Finland Should Not Violate International Agreements by Restricting the Rights of People in Need of Protection," Joint statement from UNHCR Nordic and Baltic Countries, the Finnish Red Cross, the Finnish Refugee Council, and the UN Association of Finland, UNHCR Europe, 27 March 2024, <https://www.unhcr.org/europe/news/press-releases/finland-should-not-violate-international-agreements-restricting-rights-people>; UN High Commissioner for Refugees, "UNHCR Observations on the proposal to amend the Finnish Aliens Act and related laws," UNHCR, February 2024, <https://www.refworld.org/policy/natlegcomments/unhcr/2024/en/147673>.

⁹⁸ Finnish Government decision on temporary closure of border crossings.

derogations based on public order and national security requires sufficient evidence that without the imposed measures the state functions would be at risk.

Thus, the example of the 2023 Finland-Russia crisis only highlights the ambiguity of elements of the definition of instrumentalization, such as intention and actions facilitating and encouraging migration movements, which cannot serve as clear criteria for determining the situation as instrumentalization. Relying on the instrumentalization justification, especially in the absence of a mechanism for assessing a situation by EU institutions, creates the precedence of popularization of this concept, threatening the rule of law and compliance with human rights standards.

3. HUMAN RIGHTS PERSPECTIVE

3.1. A refugee and an “instrumentalized migrant”: difference in rights

One of the reasons why the concept of the instrumentalization of migration entails relatively easy application of restrictive measures, encountering minimal resistance in both society and among state officials, is that irregular migrants are not perceived as possible genuine refugees, but rather as “instrumentalized migrants.” An “instrumentalized migrant” is viewed as a weapon or tool of a third country to destabilize the EU or a Member State; therefore, they are not seen as ordinary humans but as abstract enemies that should be treated accordingly. This approach significantly contributes to the dehumanization of refugees and asylum seekers, who are intentionally alienated and deprived of human characteristics, resulting in a different attitude towards them and posing a danger of lowering the level of their human rights.⁹⁹

The Crisis Regulation permits the treatment of “instrumentalized migrants” to be less favorable than that of ordinary asylum seekers, through the following derogations from their rights:

1) Extension of time limits for registering asylum applications

According to Article 10 of the Crisis Regulation, a Member State has the possibility to register asylum applications “no later than within four weeks after they are made.” This represents a significant extension of time limits compared to current rules, and even compared to the proposed new legislation. Under the Asylum Procedures Directive, the time limit stands at 3 working days,¹⁰⁰ while in the latest version of the Asylum Procedure Regulation (a revised

⁹⁹ Amanda Warnock, “The Dehumanization of Immigrants and Refugees: A Comparison of Dehumanizing Rhetoric by All Candidates in Three U.S. Presidential Elections,” *Journal of Purdue Undergraduate Research* 9 (2019): 49-59, <https://doi.org/10.5703/1288284316932>; “Refugees, Migrants Branded ‘Threats’, Dehumanized in Campaigns Seeking Political Gain, High Commissioner Tells Third Committee, Appealing for Return to Dignity,” United Nations General Assembly, Third Committee, Seventy-third session, 41st meeting (PM), GA/SHC/4247, 31 October 2018, <https://press.un.org/en/2017/gashc4247.doc.htm>; Sverre Varvin, “Our Relations to Refugees: Between Compassion and Dehumanization,” *The American Journal of Psychoanalysis* 77 (2017): 359-377, <https://doi.org/10.1057/s11231-017-9119-0>, p. 363-364.

¹⁰⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Official Journal of the European Union L 180/60, 29 June 2013, p. 60–95, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032>, (“**Asylum Procedures Directive**”), art. 6.

version of the Asylum Procedures Directive that has been adopted by the Council on 14 May 2024), the time limit is 5 days.¹⁰¹

Furthermore, a Member State may, at its own discretion, activate extended time limits for registering asylum applications even before receiving authorization from the Council. This can be done for a period of 10 days, provided that the Commission is notified about this measure and provided with justification when submitting the request to activate derogation measures aimed at addressing the situation of instrumentalization.¹⁰²

The significant extension of time limits for registering asylum applications is concerning. The delay in registration directly impacts asylum seekers and the entire asylum process, precluding asylum seekers from accessing basic rights and services, including material reception conditions and health care. Additionally, it exposes them to a higher risk of deportation due to the lack of legal recognition of their status.

2) Extensive application of the border procedure

Article 11 of the Crisis Regulation extends the time limit for the asylum border procedure to a possible total of 18 weeks. It is important to note that, under the current Asylum Procedures Directive, the border procedure is optional and should not exceed 4 weeks.¹⁰³ However, the Asylum Procedure Regulation will require the implementation of the border procedure within a 12-week timeframe, exempting minors under the age of 12, their family members, persons with special procedural or special reception needs.¹⁰⁴

As a result of the extension of time limits for registering asylum applications (4 weeks under Article 10 of the Crisis Regulation) and implementing border procedures (18 weeks under Article 11 of the Crisis Regulation), the maximum duration of keeping an asylum seeker at the EU border will amount to 22 weeks. This translates to nearly 6 months of de facto detention

¹⁰¹ Asylum Procedure Regulation, art. 28.

¹⁰² Crisis Regulation, art. 10(6).

¹⁰³ Asylum Procedures Directive, art. 43.

¹⁰⁴ Asylum Procedure Regulation, art. 52.

for asylum seekers, directly impeding their right to liberty and putting their effective enjoyment of the right to asylum at risk.¹⁰⁵

The CJEU, in its June 2023 judgment in *European Commission v. Hungary* and other cases, declared that Member States must allow asylum seekers to remain within their territory once an application for international protection is made.¹⁰⁶ As highlighted by Galina Cornelisse in the article “Territory, Procedures and Rights: Border Procedures in European Asylum Law,” “the right to remain, however, was defined ... as a right to remain in the territory, *including at the border or in transit zones of a Member State*,”¹⁰⁷ according to Article 2(p) of the Asylum Procedures Directive (which is also transferred to Article 4(r) of the Asylum Procedure Regulation). Therefore, the border procedure is regarded as part of the right to remain. At the same time, Member States in practice do not legally authorize and recognize the entry of an irregular asylum seeker into their territory, despite the asylum seeker’s physical presence within an EU country’s territory. This legal concept, known as the “fiction of non-entry,” creates, according to Kelly Soderstrom, “a legal space where states claim greater power to control migrant mobility and rights access.”¹⁰⁸

Since the border procedure implies de facto detention, it can only be implemented in certain cases specified by the Asylum Procedures Directive (or Asylum Procedure Regulation upon its enactment).¹⁰⁹ The Asylum Procedure Regulation also introduces a new obligation into the EU legal framework, requiring member states to conduct the mandatory border procedure in cases

¹⁰⁵ Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326/391, 26 October 2012, p. 391–407, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>, art. 6, 18.

¹⁰⁶ *European Commission v. Hungary*, para 45; *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, C-534/11, ECLI:EU:C:2013:343, Judgment, 30 May 2013, para 48.

¹⁰⁷ Galina Cornelisse, “Territory, Procedures and Rights: Border Procedures in European Asylum Law,” *Refugee Survey Quarterly* 35, no. 1 (2 February 2016): 74–90, <https://doi.org/10.1093/rsq/hdv023>, p. 78.

¹⁰⁸ Kelly Soderstrom, “AN ANALYSIS OF THE FICTION OF NON-ENTRY AS APPEARS IN THE SCREENING REGULATION,” *European Council on Refugees and Exiles*, ECRE COMMENTARY, September 2022, <https://ecre.org/wp-content/uploads/2022/09/ECRE-Commentary-Fiction-of-Non-Entry-September-2022.pdf>, p. 2.

¹⁰⁹ Asylum Procedures Directive, art. 43; Asylum Procedure Regulation, art. 43-44.

involving misleading state authorities, intentional destruction of identity or travel documents, considering an applicant a danger to national security or public order, or belonging to a nationality with an EU recognition rate of 20% or lower.¹¹⁰ Although the list of cases where the border procedure applies is exhaustive, according to the CJEU case-law on detention, since detention is an exceptional measure of last resort, its application must meet certain conditions, namely:

1) Necessity and proportionality

In *FMS and others*, the CJEU stated that the necessity and proportionality condition requires “an individual assessment of each case” and consideration of “other less coercive alternative measures.”¹¹¹ According to Article 8(4) of the Reception Conditions Directive (or Article 10(5) of the new Reception Conditions Directive), alternatives to detention are “regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place.”¹¹² However, as the International Detention Coalition points out in its analysis of alternatives to detention under the New Pact on Migration and Asylum, the application of alternative measures to detention would contradict the “fiction of non-entry.”¹¹³ This is because, as they question, “how can states place migrants within the community if they do not acknowledge their legal presence in the country?”¹¹⁴

2) Limited duration

¹¹⁰ Asylum Procedure Regulation, art. 46.

¹¹¹ *FMS and others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, Judgment, 14 May 2020, (“**FMS and others**”), para 248, 258, 262.

¹¹² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Official Journal of the European Union L 180/96, 26 June 2013, p. 96–116, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0033>, art. 8(4); Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection, Official Journal of the European Union L series, 22 May 2024, <https://eur-lex.europa.eu/eli/dir/2024/1346/oj>, art. 10(5).

¹¹³ “Alternatives as Fiction? What the EU Pact on Migration and Asylum Means for Alternatives to Detention,” *International Detention Coalition* (blog), 23 February 2024, <https://idcoalition.org/alternatives-as-fiction-what-the-eu-pact-on-migration-and-asylum-means-for-alternatives-to-detention/>.

¹¹⁴ *FMS and others*, para 248, 258, 262.

The condition of limited detention time, in turn, mandates that detention measures only apply for the period when the legal grounds for detention remain relevant.¹¹⁵

Furthermore, as evidenced in *M.A. v Valstybės sienos apsaugos tarnyba*, justifying detention based solely on irregular entry, as done by Lithuanian authorities during the 2021 Belarus crisis, is unlawful since irregular entry alone does not constitute a threat to national security and public order.¹¹⁶ Thus, the CJEU establishes a high threshold for implementing measures involving detention, even in situations recognized by the EU as instances of instrumentalization. However, with the significant extension of the border procedure duration from 4 weeks to 12 weeks in regular situations under the Asylum Procedure Regulation, as well as during crises (including instrumentalization) under the Crisis Regulation, Member States must ensure compliance with the conditions established by the CJEU for implementing detention-related measures, as the deprivation of liberty of asylum seekers becomes more severe. In these situations, EU law mandates that Member States authorize detention-related measures through national judicial or administrative decisions with the requirement of judicial review.¹¹⁷ Nevertheless, the CJEU remains the final supervisor of the lawfulness and absence of arbitrariness of such measures, albeit obtaining a CJEU ruling may require considerable time and resources. Overall, the effectiveness of extending time limits for registering asylum applications and the extensive application of the border procedure is questionable, while the negative impact on asylum seekers' rights is irreparable, posing a threat to the effective enjoyment of the right to asylum.

3.2. Instrumentalization of migration vs. instrumentalization of refugee law

The concept of instrumental view (or instrumentalism) is universal and applicable to almost everything, meaning the perception and treatment of something as an instrument to achieve

¹¹⁵ Ibid.

¹¹⁶ *M.A. v. Valstybės sienos apsaugos tarnyba*, para 84, 89-90.

¹¹⁷ *FMS and others*, para 259-261.

specific goals. Law is no exception; it is utilized as a tool by various actors (e.g., states, right-holders, legislators, lawyers, judges) to accomplish different objectives, which may carry positive or negative implications.¹¹⁸ In their editorial article titled “Editorial Instrumentalisation in the realm of (European) Migration Law,” Marie-Claire Foblets and Dirk Vanheule emphasize the type of instrumentalization of law by legislators, which “in the long term, weakens the legal protection granted to foreigners, migrants and asylum-seekers: for instance, withdrawal of social rights, withdrawal of legal protection in lawsuits, etc.”¹¹⁹ Although these concerns about the instrumentalization of refugee law, among other issues, were raised by the authors over 15 years ago, they still remain relevant. It is particularly crucial to examine whether the proposed legal concept of instrumentalization of migration may itself serve as a tool to erode the rights of asylum-seekers and dissuade them from seeking asylum in the EU.

The basis for this concern stems from the main issue with the concept of instrumentalization under the proposed EU legislation: the responsive measures are directed and targeted not against the alleged challenger state but against refugees and asylum seekers, who are the true victims in a migration crisis.¹²⁰ This “shift of responsibility” from a challenger state to refugees can be attributed to the fact that there is no obligations under customary international law for a challenger state to control its exit border crossings or prohibit irregular departure. The absence of such obligations is connected to the state’s obligation to ensure enjoyment of the human right to leave any country, as prescribed by Article 12(2) of the International Covenant on Civil and Political Rights and other international treaties.¹²¹ The right applies not only to nationals

¹¹⁸ Brian Z. Tamanaha, “The Tension Between Legal Instrumentalism And The Rule of Law,” *Syracuse Journal of International Law and Commerce* 33, No. 1, Article 11, 2005, <https://surface.syr.edu/jilc/vol33/iss1/11>.

¹¹⁹ Marie-Claire Foblets, and Dirk Vanheule, “Editorial - Editorial Instrumentalisation in the realm of (European) Migration Law,” *European Journal of Migration and Law* 9, 3 (2007): 283-286, <https://doi.org/10.1163/138836407X225678>.

¹²⁰ Greenhill, “Strategic Engineered Migration,” p. 12.

¹²¹ UN General Assembly, International Covenant on Civil and Political Rights, *United Nations Treaty Series* 999, p. 171, 16 December 1966, (“**ICCPR**”), art. 12; Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than

of the country but also to foreigners, regardless of their regular or irregular presence in the country and their purpose for leaving.¹²² However, a state may impose some restrictions on the right to leave its territory.¹²³ These restrictions must meet the following requirements: they must be provided by law, be necessary and proportional, and aim to protect national security, public order, public health or morals, and the rights and freedoms of others.¹²⁴ For instance, in the case of *Stamose v. Bulgaria*, which concerns a prohibition on leaving Bulgaria imposed on a Bulgarian national due to breaches of the immigration laws of another state, a measure introduced to allay the EU's fears regarding irregular migration from Bulgaria, the European Court of Human Rights stated that the automatic application of the Bulgarian law on travel bans does not meet the necessity requirement.¹²⁵ The Court emphasized the need for a case-by-case assessment, asserting that the automatic imposition of such bans impairs the right to leave a country. Thus, to summarize, imposing restrictions on the right to leave a country to control exit border crossings is a state's limited right based on its discretion, not an obligation. In the absence of international obligations to control exit border crossings or prohibit irregular departure, no wrongful act can be attributed to a state's actions to open its borders and facilitate the movement of asylum seekers, including irregular migrants, to the external borders of the EU.¹²⁶ Therefore, a state cannot be held accountable for the instrumentalization of migration under international law. In this regard, it is logically explainable that the only leverage left to the EU to prevent and combat the instrumentalization of migration is to deter refugees and asylum seekers from leaving their countries with the intention of reaching the EU by derogating

those already included in the Convention and in the First Protocol thereto, ETS 46, 16 September 1963, art. 2(2); Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, art. 22(2).

¹²² UN Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 2 November 1999, ("**General Comment No. 27**"), para 8.

¹²³ ICCPR, art. 12(3).

¹²⁴ General Comment No. 27, para 11.

¹²⁵ *Stamose v. Bulgaria*, no. 29713/05, ECtHR, 27 November 2012, para 36.

¹²⁶ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1, November 2001, ("**ARSIWA**"), art. 2, 28.

from their rights and limiting their ability to enter the EU. Iris Goldner Lang and Boldizsár Nagy, in their work “External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement,” explore the application of deterrence techniques by the EU Member States. These techniques mostly manifest in “non-entrée” (e.g., pushbacks) and “non-admission practices” (e.g., accelerated or border procedures).¹²⁷ The authors indicate several reasons for the implementation of these deterrence practices despite their contradiction to EU legislation: 1) tension between the EU’s human rights goals and migration deterrence policies; 2) lack of a binding responsibility-sharing mechanism among member states, which reduces the burden on geographically most exposed Member States; 3) populist, anti-migrant sentiments fueled by security concerns and xenophobia; 4) EU institutions’ failure to address these practices, implicitly allowing them.¹²⁸ Most importantly, Iris Goldner Lang and Boldizsár Nagy argue that the New Pact on Migration and Asylum, which includes the Crisis Regulation, will, after its enactment, contribute to the growing gap between “the EU’s constitutional, normative expectations and member states’ [deterrence] practices” through screening procedures coupled with border procedures.¹²⁹ In this context, the concept of the instrumentalization of migration serves as a convenient cover and justification for using deterrence practices.

Indeed, during the 2021 Belarus crisis, Poland, Lithuania, and Latvia declared states of emergency, using varied terminology such as “instrumental game”, “hybrid attacks”, and “hybrid warfare operation.”¹³⁰ Despite the differing wording, all three countries cited the need

¹²⁷ Goldner Lang, Iris, and Boldizsár Nagy, “External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement,” *European Constitutional Law Review* 17, no. 3 (2021): 442–70. <https://doi.org/10.1017/S1574019621000249>, p. 449.

¹²⁸ Ibid, p. 451.

¹²⁹ Ibid, p. 465-469.

¹³⁰ The Chancellery of the Prime Minister of the Republic of Poland, “The safety of Poland comes first – state of emergency near the border with Belarus,” Website of the Republic of Poland, 3 September 2021, <https://www.gov.pl/web/primeminister/the-safety-of-poland-comes-first--state-of-emergency-near-the-border-with-belarus>; Lietuvos Respublikos Seimas, “The Seimas declares a state of emergency due to the threat posed by the mass influx of migrants,” Press release, Office of the Seimas of the Republic of Lithuania, 9 November 2021, https://www.lrs.lt/sip/portal.show?p_r=35403&p_k=2&p_t=278831; Iekšlietu ministrija, “Government Declares

to address the instrumentalization of migration initiated and organized by Lukashenko's regime. This declaration allowed national authorities to derogate from human rights, leading to the pushbacks of asylum seekers to Belarus in violation of the principle of non-refoulement, as, according to Amnesty International, Belarus could not be considered a safe country due to its own practices of pushbacks, tortures, and inhuman and degrading treatment of returned asylum seekers.¹³¹ According to reports by Amnesty International, Poland, Lithuania, and Latvia actively prevented asylum seekers from entering their territories by pushing them back to the Belarus border (e.g., as of 11 June 2022, the Lithuanian Border Guard Service recorded more than 10,000 pushbacks).¹³² These countries also practiced the automatic detention of asylum seekers who managed to enter their territory based on their irregular entry (e.g., interviews conducted by Amnesty International revealed that Latvian authorities held asylum seekers in detention in tents in the forest under conditions that forced them to "voluntarily" return to their countries of origin).¹³³

The implementation of pushback practices at the border has led to the legalization of deterrence practices in national laws. The Polish government adopted the Parliamentary act (entered into force in October 2021) allowing the pushback of irregular migrants based solely on their irregular entry into Polish territory, with an exception for asylum seekers coming directly from a country where they faced persecution or serious harm and could present credible reasons for

State of Emergency on the Latvia-Belarus Border," Press information, Ministry of the Interior of the Republic of Latvia, 11 August 2021, <https://www.iem.gov.lv/en/article/government-declares-state-emergency-latvia-belarus-border>.

¹³¹ "Lithuania: forced out or locked up," Report EUR53/5735/2022, Amnesty International, 2022, https://www.amnesty.at/media/9920/amnesty-report_litauen_asylwesen_forced-out-or-locked-up_juni-2022.pdf, (**"Lithuania: forced out or locked up"**), p. 17-18.

¹³² "Per Parą Pasieniečiai Į Lietuvą Neįleido 25 Migrantų, Iš Viso Jau Apgręžta 10 Tūkst. Atėjūnų," [Border guards did not allow 25 migrants to enter Lithuania, a total of 10,000 have already been turned away], *lrt.lt*, 11 June 2022, <https://www.lrt.lt/naujienos/lietuvoje/2/1716809/per-para-pasienieciai-i-lietuva-neileido-25-migrantu-is-viso-jau-apgrezta-10-tukst-atejunu>; Lithuania: forced out or locked up; "Latvia: return home or never leave the woods," Report EUR 52/5913/2022, Amnesty International, 2022, https://www.amnesty.at/media/10188/amnesty_report_latvia-return-home-or-never-leave-the-woods_lettland-gewalt-gegen-gefluechtete_oktober-2022.pdf; "Poland: Cruelty Not Compassion, at Europe's Other Borders," EUR 37/5460/2022, Amnesty International, 2022, <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>.

¹³³ Ibid.

their irregular entry.¹³⁴ In Lithuania, several amendments to the Law on the Legal Status of Foreigners were introduced in 2021, permitting the detention of irregular migrants and depriving them of the opportunity to apply for asylum based on their irregular entry.¹³⁵ Latvia also allowed the practice of pushbacks of irregular migrants using physical force under Cabinet of Ministers Order No. 518, adopted on 10 August 2021.¹³⁶ Although the CJEU declared in June 2022, in the case of *M.A. v Valstybės sienos apsaugos tarnyba*, that such laws would contradict EU law (Lithuania indeed removed its amendments from the Law on the Legal Status of Foreigners after this decision),¹³⁷ the tendency to legalize deterrence practices in national laws remains. For instance, in July 2023, the Latvian government adopted amendments to the State Border Guard Law and the Law on the State Border, allowing the use of force to prevent irregular entry.¹³⁸ Furthermore, despite no recorded pushbacks by Finnish authorities during the 2023 Finland-Russia crisis, Finland also chose to amend its legislation in response to the instrumentalized migration (in addition to the amendments to the Alien Act, discussed in the second chapter), allowing restriction of the reception of applications for international protection in a limited area on the national border, preventing entry into Finnish territory (if adopted, this will be in force for one year).¹³⁹

¹³⁴ Ustawa z dnia 14 października 2021 r. o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw, [Act of 14 October 2021 amending the act on foreigners and certain other acts], Dz.U. 2021 poz. 1918, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001918>; Grażyna Baranowska, “Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021,” *Polish Yearbook of International Law* 41 (2021): 193-211, <https://doi.org/10.24425/PYIL.2022.142346>, p. 200-201.

¹³⁵ “Lithuania: forced out or locked up,” p. 14.

¹³⁶ Cabinet Order No. 518 Regarding the Declaration of Emergency Situation, Cabinet of Ministers of the Republic of Latvia, 10 August 2021, <https://www.mk.gov.lv/en/article/regarding-declaration-emergency-situation-1>.

¹³⁷ Lietuvos Respublikos įstatymas dėl užsieniečių teisinės padėties, [Law of the Republic of Lithuania on the Legal Status of Foreigners], No IX-2206, 29 April 2004, Valstybės žinios, 2004-04-30, Nr. 73-2539, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.232378/asr>.

¹³⁸ Iekšlietu ministrija, “The government announces a reinforced border security regime from 11 August,” Press information, Ministry of the Interior of the Republic of Latvia, 10 August 2023, <https://www.iem.gov.lv/en/article/government-announces-reinforced-border-security-regime-11-august>.

¹³⁹ Ministry of the Interior of Finland, “Government proposal for a border security act submitted to Parliament,” Press release, Ministry of the Interior, 21 May 2024, <https://intermin.fi/en/-/government-proposal-for-a-border-security-act-submitted-to-parliament>.

It is important to note, as emphasized by Sarah Ganty, Aleksandra Ancite-Jepifánova, and Dimitry Kochenov in their article “EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by ‘Instrumentalisation’,” it appears that the European Commission has not demonstrated sufficient resistance in condemning practices related to the instrumentalization of migration.¹⁴⁰ Indeed, the President of the Commission, Ursula von der Leyen, expressed approval of Finnish actions during her visit to Finland in April 2024, stating: “We have a lot to learn from Finland and from the model of Finnish preparedness across all levels of society... the European Union is there to support you in your efforts.”¹⁴¹

Therefore, the legalization of the concept of instrumentalized migration via the Crisis Regulation will only lead to more flexibility and leeway in the application of already existing national deterrence practices, particularly through the extensive application of border procedures. In this regard, the adoption of the Crisis Regulation constitutes a manifestation of instrumentalization of refugee law, which aims to discourage asylum seekers from coming to the EU to seek refuge or, at least, to get them to give up more quickly.

¹⁴⁰ Sarah Ganty, Aleksandra Ancite-Jepifánova, and Dimitry Kochenov, “EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by ‘Instrumentalisation’,” *MOBILE Working Paper Series*, no. 18, University of Copenhagen (10 December 2023): 32, <http://dx.doi.org/10.2139/ssrn.4660096>, p. 27-31.

¹⁴¹ European Commission, “Statement by President von der Leyen at the joint press conference with Finnish Prime Minister Orpo,” European Commission - Press corner, 19 April 2024, https://ec.europa.eu/commission/presscorner/detail/en/statement_24_2161.

4. CHALLENGES AND ALTERNATIVES

The establishment that a state has committed an internationally wrongful act entails the responsibility of that state and involves legal consequences: an injured state can claim cessation and non-repetition of the wrongful act, as well as reparation for the damage caused by the act, in the forms of restitution, compensation, or satisfaction.¹⁴² Therefore, examining whether a challenger state may be accountable for its actions involving instrumentalized migration can help find a solution to avoid shifting responsibility from the challenger state to refugees and asylum seekers.

The instrumentalization of migration, as established in the last section of the previous chapter, is not a responsive mechanism to a wrongful act by a third state. While a challenger may intentionally facilitate migration movements to destabilize the EU, this does not violate international law due to the absence of a customary obligation to control exit borders. However, some scholars suggest other international obligations that could be invoked in the context of instrumentalized migration. For instance, Aurel Sari, in their work “Instrumentalized Migration and the Belarus Crisis: Strategies of Legal Coercion,” raises the issue of Belarus violating the obligation to respect territorial sovereignty during the migration crisis in 2021. Sari argues that Belarusian authorities, through actions such as “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,” coercively intervened in the domestic jurisdiction matters of Poland, Lithuania and Latvia regarding the admission of third-country nationals.¹⁴³ Moreover, the author refers to Belarus’s failure to comply with its duty to cooperate under bilateral agreements on border

¹⁴² ARSIWA, art. 28, 30-31.

¹⁴³ Aurel Sari et al., “Instrumentalized Migration and the Belarus Crisis: Strategies of Legal Coercion,” ed. Nidaa Iqbal, *Hybrid CoE Paper*, 2023, <https://www.hybridcoe.fi/wp-content/uploads/2023/04/20230425-Hybrid-CoE-Paper-17-Instrumentalized-migration-and-Belarus-WEB.pdf>, p. 30-36.

crossing matters with Poland, Lithuania and Latvia.¹⁴⁴ However, these allegations require robust evidentiary analysis and a clear attribution of state actions to the resulting damage. In the absence of a clear obligation such as the control of exit border crossings, and as discussed in the second chapter of this thesis, proving a violation of an EU Member State's territorial integrity by demonstrating a challenger state's intention to destabilize the EU and actions directed at facilitating or encouraging migration flows to the EU's external borders is challenging and relies heavily on indirect causal links. Other authors, such as Barbara Bazanth and Gabor Kajtar in their article "The Duty to Compensate for Expenses Occurring as a Result of Mass Migration in International Law," suggest that the responsibility of states for migration crisis can be established due to their actions in creating "outflow through human rights violating policies."¹⁴⁵ According to their article, compensation for subsequent damage can be claimed by a non-refouling state from a state generating a migration crisis. However, even if this argument is valid, state responsibility would only apply to the state of origin of refugees. Transit countries (e.g., Belarus, Russia), which allegedly use migratory flows for their own benefit but do not initially cause these flows, would be outside the scope of international state responsibility. Thus, it is evident that there is no versatile approach to hold a state accountable for instrumentalized migration under international law. The only methods left to address this instrumentalization are non-legal instruments of international politics, which are employed through military, economic, diplomatic, and informational influence activities.¹⁴⁶ Emily Meierding and Rachel Sigman, in their work "Understanding the Mechanisms of International

¹⁴⁴ Ibid.

¹⁴⁵ Barbara Bazanth, and Gábor Kajtár, "The Duty to Compensate for Expenses Occurring as a Result of Mass Migration in International Law," *Hungarian Yearbook of International Law and European Law*, 2017: 43-59, <https://doi.org/10.5553/HYIEL/266627012017005001003>, p. 47-51.

¹⁴⁶ William V. O'Brien, "Instruments of International Politics: Can We Discover Ethical Strictures in the Practical, Political Order?," *Worldview* 6, no. 5 (1963): 2-6, <https://doi.org/10.1017/S0084255900006501>; Emily Meierding, and Rachel Sigman, "Understanding the Mechanisms of International Influence in an Era of Great Power Competition," *Journal of Global Security Studies* 6, Issue 4, December 2021, <https://doi.org/10.1093/jogss/ogab011>, ("Meierding, Sigman, "Mechanisms of International Influence"), p. 5.

Influence in an Era of Great Power Competition,” distinguish the following power mechanisms as “the bridge between a state’s influence activities and actual influence”: “leverage mechanisms (reward and punishment) and affective mechanisms (expertise, attractiveness, and recognition).”¹⁴⁷ In regard to the concept of instrumentalization of migration, affective mechanisms and reward as part of leverage mechanism can act as preventive mechanisms. They may be effectively used before the instrumentalization of migration occurred to establish close and tight relationships with other states that might potentially become challenger states. This includes various exchange programs, cultural connections, military and other types of aid, and trade agreements.

However, when a state threatens to or is already engaging in the instrumentalization of migration, punishment as a leverage mechanism can be employed to compel the challenger state to stop. This can be done, for instance, through threats to impose or actual imposition of economic and other sanctions, as well as by reducing diplomatic relations and presence in the challenger state. Emily Meierding and Rachel Sigman point out that the use of multiple power mechanisms is more effective in achieving the desired state behavior. However, even the application of multiple mechanisms cannot guarantee their effectiveness, as the final decision to change its behavior rests with the state experiencing influence.¹⁴⁸ Therefore, alternative strategies may be employed against the instrumentalization of migration, such as preserving the status quo by refusing to accept the legal concept of instrumentalized migration and upholding international obligations, especially in the area of international refugee law. This can be achieved, as indicated by Greenhill, by “shifting domestic perceptions of the expected costs or benefits associated with a particular influx” (i.e. redefining refugees and asylum seekers as friends rather than enemies).¹⁴⁹ An example of this can be seen in the response to

¹⁴⁷ Meierding, Sigman, “Mechanisms of International Influence,” p. 6.

¹⁴⁸ Ibid, p. 6-8.

¹⁴⁹ Greenhill, “Weapons of Mass Migration,” p. 135.

the mass arrival of Ukrainian refugees due to the ongoing Russo-Ukrainian war that started in 2022. The EU Member States, instead of seeking ways to derogate from their obligations under asylum law, focused their efforts on welcoming and protecting more than 4 million Ukrainians.¹⁵⁰ Additionally, arguments against the legal concept of the instrumentalization of migration find support in the weak and vague justification for its necessity. The European Parliamentary Research Service highlighted in its substitute impact assessment that there was no evaluation of the existing EU legal framework's effectiveness in dealing with a migration crisis.¹⁵¹ Moreover, the European Commission did not provide clear and concise justification for introducing the concept with additional derogations.¹⁵² The current legal mechanisms to address crises are workable and do not require any additional special derogations, as reaffirmed by the CJEU in *M.A. v Valstybės sienos apsaugos tarnyba*, which stated that cases of instrumentalized migration can be addressed within the existing EU legal framework.¹⁵³ Furthermore, attention should be directed at the core issue of migration crises, which Myron Weiner addresses in the article "Bad Neighbors, Bad Neighborhoods: An Inquiry into the Causes of Refugee Flows": "what can be done to provide protection to a threatened people within their own country so they need not cross international borders?"¹⁵⁴ Finding answers and solutions to this complex question will help countries live peacefully and avoid dealing with various hybrid threats, such as the instrumentalization of migration.

¹⁵⁰ "Migration Management: Welcoming Refugees From Ukraine," Directorate-General for Migration and Home Affairs, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/migration-management-welcoming-refugees-ukraine_en.

¹⁵¹ "Proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum," European Parliamentary Research Service, Ex-Ante Impact Assessment Unit PE 753.156, October 2023, [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753156/EPRS_STU\(2023\)753156_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753156/EPRS_STU(2023)753156_EN.pdf), p. 14.

¹⁵² Ibid.

¹⁵³ "Derogating from EU asylum law in the name of "emergencies": The legal limits under EU law," the European Council on Refugees and Exile, June 2020, https://ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf.

¹⁵⁴ Myron Weiner, "Bad Neighbors, Bad Neighborhoods: An Inquiry into the Causes of Refugee Flows," *International Security* 21 (1) (1996): 5–42, <https://doi.org/10.1162/isec.21.1.5>, p. 42.

CONCLUSION

Since the adoption of the Crisis Regulation on 14 May 2024, the concept of the instrumentalization of migration has been incorporated into the EU legal framework. This entails the possibility to categorize almost any situation at the EU external border as instrumentalized migration due to the vagueness and ambiguity of key elements of the definition of instrumentalization, such as “intention to destabilize the EU or a Member State,” “encouraging or facilitation migratory flows,” and “essential state functions at risk.” An example of insufficient attention to the definition of instrumentalization can be seen in the 2023 Finland-Russia border crisis, where the Commission effectively endorsed the Finnish government’s declaration of the situation as instrumentalization of migration by the Russian Federation, thus granting full discretion to national authorities. A careful approach to defining situations as instruments of migration would not play a significant role unless such recognition would entail serious consequences, such as the infringement of the rights of refugees and asylum seekers. Despite the adoption of the Crisis Regulation, there remains hope, though the process of assessment is yet unknown and undefined, that the Commission will properly and carefully examine every situation of an alleged case of instrumentalized migration, ensuring compliance with all elements of the definition. Nonetheless, once the situation of instrumentalization is established, the concept of instrumentalization draws a clear distinction between a “refugee” and an “instrumentalized migrant,” allowing for the de facto detention of the latter at the border. This undermines the essence of the right to seek asylum and increases the likelihood of violating the principle of non-refoulement during return procedures. Shifting responsibility from states accused of instrumentalization to refugees is not a fair solution to combat the so-called instrumentalization of migration. Instead, multiple power mechanisms against hostile states can be employed. Another solution, which brings up the significant question of whether the legal concept of instrumentalization of migration is necessary, is to

repeal or, at least, refrain from resorting to new amendments regarding instrumentalization. Instead, it is advisable to adhere to general obligations, including international ones, outlined in asylum and refugee law.

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