

# The instrumentalization of migration

A geopolitical perspective and toolbox

Clingendael Report

Monika Sie Dhian Ho  
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Cover photo: Belarusian President Alexander Lukashenko arrives to visit the transport and logistics centre Bruzgi where migrants are gathering, on the Belarusian-Polish border, in the Grodno region, Belarus November 26, 2021. © REUTERS

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## **About the context**

This report was written in the context of the Intergovernmental Consultations on Migration, Asylum and Refugees (IGC), requested under the 2022 Dutch Chairmanship. The IGC is an informal, non-decision-making forum for intergovernmental information exchange and policy debate among civil servants on all issues of relevance to the management of international migratory flows.

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# Executive summary

The aim of this paper is to use a geopolitical perspective to better understand the phenomenon of instrumentalization of migration. Instrumentalization of migration refers to those instances in which a perpetrating actor attempts to exert power by strategically creating or exploiting migration outflows, threatening to overwhelm the capacity of the target state to accommodate the inflow and to destabilize the target state. The instrumentalization of migration crisis created by Belarus at the EU external border in 2021 has been a game changer in the European mindset, although the phenomenon is not new.

A geopolitical perspective is helpful to analyze the points of vulnerability of the target countries, and to initiate a discussion about possible strategic responses to prevent, deter and combat its use. These insights could contribute to more resilience of potential target countries and better protection of potential victims. Key to such a geopolitical understanding of the phenomenon is a focus on the dimensions power, territory and collective identity.

**Power.** A geopolitical perspective on migration means that the economic and legalistic perspectives on migration are giving way to a power perspective. Rather than seeing migrants as people with economic motives or refugees with rights, migrants are used by a perpetrating actor as instruments of power. In times of (irregular) migration pressure on key borders surrounding target states, and intense polarization within target societies regarding migration issues, the power balance is shifting in the direction of third countries that can deploy migration as an instrument in their arsenal.

**Territory.** The vulnerability of target countries for instrumentalization of migration is determined by characteristics of the borders and characteristics of the bordering countries, as well as by the duties that countries have accepted to protect fundamental rights as part of their border management.

**Collective identity.** In a geopolitical perspective, it is not only power and geography that matter, but also the collective identity and collective will of the people in the target country (and of its allies) to deal with external challenges 'as one' and mobilize internal (and international) solidarity.

This conceptualization of instrumentalized migration points in three directions for a toolbox to deal with the phenomenon (see Table 1).

An important question when considering specific responses to instrumentalized migration, is where the threshold lies to qualify a situation as an instance of instrumentalized migration. On the one hand there are cases we could identify as ‘belligerent scenarios’, in which there is a clear malign intent of a perpetrating actor to destabilize target states and a deliberate orchestration of a migration inflow into the target state. The 2021 Belarus crisis is the most recent example and has been a game changer in Europe in the discussion on instrumentalized migration.

On the other hand, there are instances of diplomatic pressure and coercion in the context of international negotiations that we could identify as ‘negotiation scenarios’ or ‘third country management scenarios’. Not every case of exerting pressure at the negotiation table can be characterized as instrumentalization of migration. Destination countries have themselves used positive and negative levers for years in the context of migration diplomacy to get what they want from third countries. Nonetheless, such a negotiation scenario might escalate into an instrumentalized migration crisis.

In between the belligerent and negotiation scenarios, there are situations of for instance serious neglect by a neighboring state. Hybrid scenarios complicate matters further. Here the intent of a perpetrator is to destabilize target countries while remaining below any threshold that could trigger specific countervailing measures. Another specific case might arise if the perpetrator is a non-state actor.

Because of the variety of scenarios and problems of demarcations, a first key question is whether it is expedient and feasible to have a separate definition of instances of instrumentalized migration at all, to be distinguished from the more general challenge of high irregular migration pressure on key borders, human smuggling, and instances of force majeure. State actors like the United States and Australia feel no direct need for separate legislation for instances of instrumentalized migration. The geographical and legal contexts of the US and Australia are however different from the EU. Several legal experts and NGOs have expressed great concern that distinct legislation for cases of instrumentalized migration will be the final blow to a common European asylum system in Europe. The second key question is how broad a definition of instrumentalized migration should be, considering the wide range of possible scenarios that have been sketched above.

The European Commission has decided to address these two questions by coming up with a definition of instrumentalization of migration – be it a rather restrictive one – as well as with proposals for specific regulation for these instances. The Czech Presidency of the EU has been working on a ‘toolbox’ for preventing and countering the instrumentalization of migrants and forcibly displaced people at the EU’s external border. Many of the measures discussed in this context are relevant for effective border management in all circumstances, like early warning systems and enforcing border management. Some of the measures, however, imply that migrants that are

'instrumentalized' will be treated differently than others that try to cross borders irregularly. The most heated debates focus on those instances where human rights and refugee rights standards are lowered, justified by the exceptional situation of an acute instrumentalization crisis of migrants.

Throughout the (legal) proposals to deal with instrumentalization of migration, reference is made to the importance of upholding the right to asylum, the prohibition of refoulement and the rule of law, as well as the emergency and temporary nature of the measures. To stick to that, it is important to focus on procedural rights and to prevent that exceptionality becomes a sliding scale.

Starting from that premise, a geopolitical perspective on migration means more conscientiously developing sustainable migration partnerships with third countries focused on a common interest in controlled migration, to further operationalize the toolbox for instances of instrumentalized migration, to find ways in which border management and protection of external borders go hand-in-hand with respect of human rights, and to have cool-headed public debates about the responsibility for refugee protection and openness for legal economic migration in dark times. Or in other words: to find the collective will to conceptualize, build and defend fortresses *with gates*.



**Table 1** Toolbox for preventing and countering the instrumentalization of migrants

	Negotiation context versus Belligerent context	Applicable to all irregular migrants versus specific procedures for instrumentalized migrants (IM)	Preventive versus countervailing
<b>A. Power, partnership &amp; people</b>			
1. More balanced migration partnerships	Negotiation context	All	Preventive
2. Early warning systems	Negotiation and belligerent contexts	All	Preventive
3. Informing potential victims	Negotiation and belligerent contexts	All	Preventive
4. Humanitarian support and reception capacity	Negotiation and belligerent contexts	All	Preventive and countervailing
5. Negative leverages	Negotiation and belligerent contexts	All	Countervailing
<b>B. Territory</b>			
1. Reinforcing border management	Negotiation and belligerent contexts	All	Preventive and countervailing
2. Legal measures to prevent migrants from accessing the border	Negotiation and belligerent contexts	All	Preventive and countervailing
3. Accelerated border procedures and border detention	Negotiation and belligerent contexts	All	Preventive and countervailing
4. National emergency legislation	Belligerent contexts	Specific for IM	Countervailing
5. Legislative proposals at regional level	Belligerent contexts	Specific for IM	Preventive and countervailing
6. Reinforcing return and repatriation capacity	Negotiation and belligerent contexts	All	Preventive and countervailing
7. Externalization of asylum processing	Belligerent contexts	In Australia: all. Suggestion by Luke c.s. (2022) for EU: only IM	Preventive and countervailing
<b>C. Collective will and narrative power</b>			
1. Raising public awareness	Negotiation and belligerent contexts	All	Preventive and countervailing
2. Collective will and narrative power	Negotiation and belligerent contexts	All	Preventive and countervailing
3. Countering disinformation	Negotiation and belligerent contexts	All	Countervailing
4. Mobilizing international allies for collective condemnation and support	Negotiation and belligerent contexts	All	Preventive and countervailing

# Introduction

As armies and weapons cross borders, geopolitics re-enters the western mindset. With his full-scale invasion of Ukraine President Putin attempts to redraw the borders in Europe, and carve out a Russian sphere of influence. Whereas his armies' achievements on the battlefield fall short of Putin's initial expectations, they did succeed in making his fears relevant. They more tightly united the West, increased support for further enlargement of NATO, convinced Europeans that massive defence investments make sense and energy dependency is a strategic mistake. This is a geopolitical turn that was deemed impossible only one year ago. After the COVID-19 shock, the Russia-shock has made western countries realize in full that economic globalization and interdependence create vulnerabilities (e.g. dependence from medical masks imported from China, and gas imported from Russia). Adversary states can use these economic vulnerabilities as geopolitical weapons.

The growing awareness and scrutiny of our vulnerabilities extends to the field of migration as well. As Ukraine is fighting back, millions flee to Europe. UNHCR has counted almost 4.8 million refugees from Ukraine that have registered for Temporary Protection or similar national protection schemes in Europe<sup>1</sup> as a direct consequence of Putin's geopolitical aspirations. The indiscriminate bombing of civilians in Ukraine reminds one of the Russian strategy in the war in Syria. NATO's top commander in Europe, General Philip Breedlove, warned back then that Putin and Assad were trying to create a massive displacement of people.<sup>2</sup> He suggested that refugees *are* the war, and the target of this destabilisation strategy was Europe. That interpretation of the indiscriminate bombing is deemed farfetched by some, but recent examples of the instrumentalization of migration abound. Libya used it against EU Member States, Morocco against Spain, Turkey against Greece, and Belarus against EU Member States. In this context there is an increased interest in understanding the phenomenon of the instrumentalization of migration.

The aim of this paper is to use a geopolitical perspective to better understand the phenomenon of instrumentalization of migration. Such a perspective is helpful to analyse the points of vulnerability of target countries, and to initiate a discussion about possible strategic responses to prevent, deter and combat its use. These insights could contribute to more resilience of potential target countries and better protection of potential victims.

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1 See <https://data.unhcr.org/en/situations/ukraine>. Last updated: 29 November 2022.

2 See <https://www.dw.com/en/nato-commander-russia-uses-syrian-refugees-as-weapon-against-west/a-19086285>.

The first part of the paper briefly deals with the conceptualization of geopolitics. That conceptual frame is then used, in the second part, to identify the vulnerabilities of the countries that are targets of instrumentalized migration. In the third part, it is used to propose and discuss possible policy responses.



**Hundreds of migrants camp at the Belarus side of the border with Poland near Kuznica Bialostocka, Poland, in this photograph released by the Polish Defence Ministry, November 10, 2021. (REUTERS)**

# 1 A geopolitical perspective<sup>3</sup>: power, territory and collective identity

Geopolitics is *power politics*. Power comes in many guises, and the specific form that is used, depends on circumstances and opportunities. The use of military power and warfare are part of a large arsenal of possibilities such as control over markets, over financial means, and key technologies. From a geopolitical perspective, the focus is on the use of power between sovereign states, and on the instrumentalization of interdependencies between them. The use of power presupposes the capacity to make authoritative decisions and effectively coordinate activities within the state.

As the 'Geo' suggests, geopolitics is more than the exercise of power. It is also a matter of *geography and territory*, of the capacity to draw, control and defend borders, and to strategically use one's location and connectivity. A geopolitical perspective highlights the strategic relevance of rivers and oceans, mountain chains and deserts, and the value of access to natural resources and sources of energy. Geopolitics therefore presupposes a geographical self-awareness, the capacity to use one's geographical position, and to strategically deal with the vulnerabilities of one's borders and location.

Geopolitics also presupposes *identity*. Territory and borders are little more than empty words if they are not constitutive of a community of people sufficiently united to be able to act and use its power and resources. A geopolitical player has a better hand if acting on behalf of a community united by common values, practices, and a way of life. Becoming a significant geopolitical actor therefore requires that efforts are not only oriented towards the outside, but also towards the creation of a sense of collective identity, community, and shared destiny.

The three components of geopolitics – power, territory and identity – can be and are developed in very different ways by different countries. Civilizations vary in how they deal with power, territory, and identity. But a country that neglects one of those dimensions cannot pretend to be a geopolitical actor. Any serious pretender to geopolitical adulthood will invest in its power arsenal, develop geographical

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3 This conceptualization of geopolitics was developed in Monika Sie Dhian Ho, Luuk van Middelaar and Frans-Paul van der Putten, '[Speler of speelbal? Nederland en de wending naar Europese geopolitiek](#)', in *De Groene Amsterdammer*, 3 February 2021.

self-awareness and a collective will and narrative that creates a sense of where 'we' come from, where 'we' stand, where 'we' are heading, and in that way, constitutes a community of which it is the expression and protector.

# 2 The geopolitics of migration

## 2.1 Power – migration as an instrument

A geopolitical perspective on migration means that the economic and legal perspectives on migration give way to a *power perspective*. Rather than seeing migrants as people with economic motives or refugees with rights, migrants are used by a perpetrating actor as instruments of power.

We will use *instrumentalization of migration* as our key concept, defining it as the attempts of a perpetrating actor to exert power by strategically creating or exploiting migration outflows, threatening to overwhelm the capacity of the target state to accommodate the inflow and to destabilize the target state.

By strategically creating these migration outflows, the perpetrating actor aims to weaken and destabilize the target country, to create unrest and popular dissatisfaction, and erode the power base of the target government.<sup>4</sup> These instances of instrumentalized migration are to be distinguished, on the one hand, from migration that is a result of migrants' and refugees' own decisions to leave (in contrast with outflows being engineered by a perpetrating actor), and on the other hand, from migration that is the result of non-strategic actions that have little to do with exercising power by the actor that produces the outflow (in contrast with strategic actions by the perpetrating actor).

Obviously, in times of generally high migration, and migration pressure on certain key borders, it is *not always easy to make a clearcut distinction* between high migration pressure and the instrumentalization of migration. Moreover, the fact that an outflow is clearly orchestrated by a perpetrating actor does not mean that migrants do not have agency and chose to use this option. NGO's might play a role as *agents provocateurs*, by lobbying and publicizing about a migration crisis, or even encouraging outflows.<sup>5</sup> And potential destination countries that want to wall off their territory might be tempted to use the frame of instrumentalization to declare a situation of high inflow as a crisis requiring a special response. Critics express concerns that these concepts

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4 Kelly M. Greenhill, *Weapons of Mass Migration. Forced Displacement Coercion, and Foreign Policy*, Ithaca and London: Cornell University Press, 2010: 38.

5 Greenhill, 23-28.

tend to 'securitize' the migration domain beyond the relatively rare instances of instrumentalization.<sup>6</sup>

In this paper, *the focus is on the target state* and the objectives that the perpetrator wants to realize in its relationship with the target state. That distinguishes it from instances of strategically engineered migration in which the focus is on the migrating group, their territory or property (e.g., ethnic cleansing) or the survival of the perpetrating state regime (e.g., by expelling dissidents).

Concepts borrowed from the military power domain – like the *weaponization of migration*, *migration as a weapon* and *demographic bombs* – might have been functional in attracting academic and political attention to this phenomenon, especially since the seminal 2010 study by Kelly Greenhill *Weapons of mass migration*. Now that these events have the full attention of academics, politicians, and the public, we have opted for the more serrated 'instrumentalization of migration' as our central concept.<sup>7</sup> Precisely because migrants are not weapons. You do not try to destroy them as if they were incoming rockets, they have rights to enter your territory, and they elicit a humanitarian response by at least a part of the target society. These characteristics point at specific vulnerabilities of target countries as well as of the migrants themselves linked to issues of human dignity and suffering, that as such require analytical attention.

Migrants can be instrumentalized as a means of coercion or to destabilize or weaken a target country. In the academic literature, the focus has been on coercion. Kelly Greenhill defines *coercive engineered migrations (or migration-driven coercion)* as '...those cross-border population movements that are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or states.'<sup>8</sup> In her thorough empirical study, Greenhill identified at least fifty-six discrete attempts at coercive engineered migration in the period 1951 – 2006, that is at least one per year.<sup>9</sup> The number of migrants instrumentalized in these attempts have varied from several thousand up to many millions. The instrumentalized people have been co-nationals of the perpetrator or migrants and asylum seekers from other

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6 See for instance the remarks of one IGC state, that expressed concerns about the potential negative impact on vulnerable populations of using the terms 'instrumentalization' and 'weaponization' when talking about refugees and migrants.

7 Several IGC states have indicated that they reject the term 'warfare' in this context. They consider that this term only applies when a conflict has reached a very high level of intensity, for example a situation of armed conflict.

8 Greenhill, 2010: 13. Greenhill sees coercive engineered migration as '... a subset of a broader class of events that all rely on the creation and exploitation of such crises as means to political and military ends – a phenomenon I call strategic engineered migration'.

9 Greenhill, 2010: 11-20 and 22.

countries. These migrants and asylum seekers are sometimes coming from (refugee camps in) the perpetrating country or are intentionally lured into the perpetrating country to be used as an instrument of power.

In this paper we focus on instrumentalized migration instances where a perpetrating actor attempts to exert power by strategically creating or exploiting *large-scale migration outflows*. However, this is obviously only one – extreme – way in which migration can be used to put pressure on another country. Third countries that host large refugee populations can for instance base claims for more financial assistance on the fact that they bear the burden of protecting refugees that would otherwise move to the target country.<sup>10</sup> More in general, third countries that have accepted over the years to play a role in the externalization of border controls of potential target countries, have by doing so developed considerable leverage over these target countries that they can use as an instrument of blackmail if they chose to. Another example of instrumentalization of migration is the refusal to cooperate in the field of return policies, if certain conditions are not met.<sup>11</sup> The other way around, countries of destination have used ‘more for more, less for less’- and ‘carrot and stick’-strategies for a long time in their negotiations with third countries, instrumentalizing financial assistance and visa policies to exert power.<sup>12</sup> The reason why the ‘instrumentalization of migration’ is getting more attention over the last decade might be precisely because the power balance is shifting, and third countries – with their hand on the button of irregular migration – turn out to have the biggest stick in this bargaining game.

Perpetrating actors do not always intend to alter the political behavior of the target state, or to extract concessions from it. In this paper we include in our concept of instrumentalized migration also instances of *hybrid* instrumentalized migration, that is *those instances in which migration is instrumentalized to deliberately undermine,*

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10 E.g., one IGC state noted that third countries (for instance, Iran and Turkey) have during bilateral talks sometimes pointed to migration in their rhetoric to get financial assistance or to push for the conclusion of agreements in other domains of interest to them.

11 The same IGC state mentions that the improvement of cooperation in the field of return is used as a bargaining chip to achieve political objectives (e.g. regarding the Western Sahara in the case of Morocco) or visa liberalization (exemption of diplomatic or service passports). It has also been noted that Turkey links the implementation of the EU-Turkey Readmission Agreement to visa liberalization. Another IGC state also describes an instance in which a country refused to return foreign national offenders and failed asylum seekers until it had extracted certain visa concessions from that country.

12 E.g., the [decision of the Council of the European Union](#) to temporarily suspend the application of certain provisions in the visa code to nationals of The Gambia, due to the country's lack of cooperation on readmission of third-country nationals illegally staying in the EU, 28 September 2021.



*destabilize or weaken the target state.*<sup>13</sup> Putin's cynical strategy to cause a food crisis in countries surrounding Europe and with that a new irregular migration crisis for Europe, is of a different nature than concrete coercive actions by a perpetrator to get something concrete from a target country. Greenhill excludes these cases from her study, probably for the sake of a thorough understanding of coercive instrumentalized migration. Being in the position to build on the insights of her work, and because of the academic and policy relevance of understanding all forms of instrumentalized migration focused on target states, we conceptualize instrumentalized migration as including both coercive instrumentalized migration as well as hybrid instrumentalized migration.

Compared to more conventional instruments of power like military instruments or economic sanctions (that often hurt at home as well), the *costs of instrumentalized migration are relatively low and they are relatively successful*. Costs lie in the (often inhumane) instrumentalization of people and the reputational costs thereof. Because of these characteristics of instrumentalized migration, historically, most of the perpetrators have been undemocratic actors that don't shy away from norm violation and that were relatively weak compared to their targets.<sup>14</sup> Moreover, Greenhill found that despite the power imbalance, perpetrators have been relatively successful (57 to 73% depending on the strictness of the criteria) in achieving their objectives.<sup>15</sup>

Instrumentalized migration seems to be a rather blunt instrument, that is *rarely used as first resort* – because the perpetrator can lose control over it with destabilizing effects in the perpetrating country itself. Migrants that are flown in from a third country might remain in the perpetrating state, if the target state effectively closes its borders. However, the attractiveness of the instrument lies in the vulnerability of otherwise strong states disinclined to accede to the demands of the perpetrator under normal circumstances, and its potential to destabilize and weaken these powerful states.<sup>16</sup>

The reason why (especially democratic) states are vulnerable for this form of exercise of power, has everything to do with the dimensions *territory* and *collective identity* of our geopolitical perspective.

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13 We follow the comment of one IGC state in this conceptualization, that only uses the term 'hybrid threat', when instances of instrumentalization of migration constitute a *special* danger to the state and society. This is the case when a hybrid actor combines different, targeted measures that are *seriously* detrimental to social cohesion or the political system in the target country and are a real potential threat to the target country.

14 Greenhill, 2010, 28-30.

15 Greenhill, 2010, 32.

16 Greenhill, 2010, 37.

## 2.2 Territory – protector unprotected

The vulnerability of target countries for instrumentalization of migration is determined by characteristics of the borders and characteristics of the bordering countries, as well as by duties that countries have accepted to respect and protect fundamental rights in their border management.

### Vulnerable on principle – human rights obligations of target states

To start with the latter: the right to control and deny the entry of non-nationals into their territory is a sovereign right of states. While exercising border control, however, states are bound by human rights obligations laid down in international and regional conventions to which these states are signatories, such as the prohibition of *refoulement* and of collective expulsion. These obligations have been interpreted differently in legislation and case law by countries like the United States, Canada and Australia and Member States of the EU. These differences have consequences for the respective vulnerability of these states, in case of instrumentalized migration crises. In other words, countries differ in terms of how ‘unprotected’ they are in the face of an instrumentalized migration crisis, because of differences in their refugee protection regimes.

The cornerstone of international refugee law and human rights law is the principle of *non-refoulement*, as laid down in Article 33 of the 1951 Refugee Convention, as well as in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and impliedly from Articles 6 and 7 of the International Covenant on Civil and Political Rights. The prohibition of *refoulement* obliges states not to return anyone to a situation where he or she would be persecuted or runs a real risk of torture, inhuman or degrading treatment. To prevent *refoulement*, it is not per se required to admit a person to the territory of a state, if sending him or her back does not lead to a situation where the person would be persecuted or runs a real risk of torture, inhuman or degrading treatment.<sup>17</sup> However, from a practical perspective it would be rather difficult to know whether someone has an arguable claim of a real risk of *refoulement* or not without assessing the individual case. So, ensuring effective access to an asylum procedure is a precondition to ensure the principle of *non-refoulement*.

Article 33(2) of the Geneva Convention makes an exception for allowing the return of a refugee when there are reasonable grounds for regarding him as a danger to the security of the country in which he is, or when he constitutes a danger to the community of that country, having been convicted by a final judgment of a particular serious crime.

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17 D. Thym, *Muddy Waters: A guide to the legal questions surrounding ‘pushbacks’ at the external borders at sea and at land*, 6 July 2021.

This ‘concession to national sovereignty’<sup>18</sup> has been used by states to justify derogation from the *non-refoulement* principle, e.g., by Turkey in case of a mass inflow of Kurdish refugees in the 1980s.<sup>19</sup>

‘Threat against the sovereignty’ of the United States was also a frame used in 2018 by US President Trump, when a Central American migrant caravan (‘an invasion’) was heading towards the southern US border. His words resonated with terminology used in situations of violation of *the prohibition of the threat and use of force* in Art. 2(4) UN Charter, that would trigger the right to self-defense under Art. 51 UN Charter.<sup>20</sup> Does instrumentalized migration amount to the use of force? Dov-Bachmann and Paphiti have analyzed this question, referring to the case of *1986 Nicaragua v. United States*, that stated that customary international law prohibits one state from intervening in the affairs of another state, in addition to the prohibition of the threat and use of force. The court decided that ‘... it will be necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms.’ Only in case of an ‘armed attack’ can states invoke the self-defense provision of Art. 51 of the UN Charter. Bachmann and Paphiti conclude that as the threshold is quite high and necessary intent is difficult to prove, it is difficult to see that, in isolation, instrumentalized mass migration would amount to an armed attack, that is a grave use of force, in the *jus ad bellum*<sup>21</sup> sense.<sup>22</sup>

The scope of the protection against *refoulement* in the European Convention of Human Rights, as interpreted by the European Court of Human Rights (ECtHR), is broader than under the Geneva Convention.<sup>23</sup> Art. 2 (Right to life) and Art. 3 (Prohibition of torture) have been interpreted in case law of the ECtHR to apply to refugees who are victims of individual persecution within the meaning of the Geneva Convention, as well as to persons fleeing the consequences of armed conflict and natural disaster (non-individualized violence), and individuals who run a real risk because of mere membership of a group.<sup>24</sup> Any return of an individual who would face a real risk of being

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18 Thomas Gammeltoft-Hansen, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge: Cambridge University Press, 2013, 55.

19 Lena Riemer, *The Prohibition of Collective Expulsion in Public International Law*, Inaugural-Dissertation, Freien Universität Berlin, 2020, 235. There is no such explicit exception in the European Convention on Human Rights, which implies a more absolute regime for EU Member States (see hereunder).

20 Riemer, 236.

21 The lawful reasons that justify a state going to war.

22 Sacha-Dominic Dov Bachmann and Anthony Paphiti, ‘Mass Migration as a Hybrid Threat? – A Legal Perspective’, in: *Polish Political Science Yearbook*, vol. 50(1), 2021, 119-145.

23 Vladimír Simoňák and Harald Christian Scheu, *Back to Geneva. Reinterpreting Asylum in the EU*. Wilfried Martens Centre for European Studies, 2021, 20.

24 ECtHR, *Salah Sheekh v. The Netherlands*, 1948/04, 11 January 2007; ECtHR, *NA v UK*, No. 25904/07, 17 July 2008.

subjected to treatment contrary to these articles is prohibited. Moreover, protection against the treatment prohibited by Art. 3 ECHR has been considered more absolute in several Court rulings.<sup>25</sup> Art. 4 of Protocol No. 4 to the ECHR and Art. 19(1) prohibit collective expulsion. The prohibition of collective expulsion requires that there is a reasonable and objective examination of the specific case of each individual.<sup>26</sup> States are liable for breaches of their obligations enshrined in the ECHR.<sup>27</sup> If international obligations are violated while controlling and protecting the external borders, states can be held accountable for an 'internationally wrongful act' by the ones whose rights have been violated.<sup>28</sup>

If a country has jurisdiction,<sup>29</sup> there is an obligation to respect and guarantee the human rights enshrined in the applicable international legislation. There is a remarkable difference in interpretation by European and American courts regarding the extension of jurisdiction to ships at sea. In Europe, the extent to which migrants actually arrived on the targeted territory and/or the manner in which (formally or irregularly) is not relevant for determining responsibility. States cannot exempt from human rights obligations by denominating border areas as non-territory or transit zones or use the term 'non-entry' and building of fences: ability determining factor remains whether or not there is

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25 *Chahal v. United Kingdom*, ECtHR judgment of 15 November 1996, paras. 76 and 79, referring to *Soering v. United Kingdom*, ECtHR judgment of 7 July 1989, para. 88, *Ahmed v. Austria*, ECtHR judgment of 17 December 1996, *Ramzy v. Netherlands*, ECtHR judgment of 27 May 2007, para. 100, *Saadi v. Italy*, ECtHR judgment of 28 February 2008, para. 137. See Jens Vedsted-Hansen: European non-refoulement revisited, in: *Scandinavian Studies in Law, 1999-2015*, 272, Simoňák and Scheu, 39, and European Union Agency for Fundamental Rights, 7.

26 European Agency for Fundamental Rights, 6. ECtHR, *Hirsi Jamaa v. Italy*, no. 27765/09, 23 February 2012. See also the Rule 39 measures issued by the ECtHR in August and September 2021 in order to stop the expedited (collective) expulsions of Iraqi's and Afghans stuck at the Latvian, Lithuanian and Polish borders (ECtHR Press Releases of 21 August 2021 and 8 September 2021).

27 ECtHR, *M.A. v. France*, No. 9373/15, 1 February 2018; ECtHR, *Salah Sheekh v. the Netherlands*, No. 194/04, 11 January 2007, para. 135; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991. See European Union Agency for Fundamental Rights, [Fundamental rights of refugees, asylum applicants and migrants at the European borders](#), 2020, 6.

28 International Law Commission, *Draft Articles on State Responsibility*, Official Records of the General Assembly, Fifth-sixth Session (A/56/10), article 2.

29 In general jurisdiction is determined territorially. EHRM, *Soering v. United Kingdom*. No 14/038/88, 7 July 1989 EHRM, *Banković a.o. v. Belgium a.o.*, No. 52207/99, 21 December 2001; Hoge Raad, *IS women v. the Government of the Netherlands*, 26 June 2020, ECLI:NL:HR:20201148, r.o. 4.16-4.18). However, jurisdiction can also be extra-territorial, i.e. if there is effective (territorial, personal or functional) control over another territory or over individuals who have carried out the act or omission on that territory. See also M. den Heijer, *Europe and Extraterritorial Asylum*, 2012; L.M. Klomp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights*, 2020; A. Pijnenburg, *At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration*, 2021.

jurisdiction, either/and through de jure or de facto control by the authorities.<sup>30</sup> In the *Hirsi v. Italy* case, the ECtHR found that a group of migrants who left Libya with the aim of reaching the Italian coast, and that were intercepted by ships from the Italian Revenue Police and the Coastguard and returned to Libya, were within the jurisdiction of Italy. According to the ECtHR a vessel sailing on the high seas is subject to the 'exclusive jurisdiction of the state of the flag it is flying'.<sup>31</sup> The US Supreme Court came to the opposite conclusion in a similar case, where ships carrying migrants from Haiti were intercepted by the US Coast Guard and returned to Haiti without admitting asylum requests. The US Supreme Court ruled that the Immigration and Nationality Act did not apply beyond the geographic borders of the US and that the returning of intercepted migrants at sea was *not* subject to domestic or international human rights obligations.<sup>32</sup> In other words: an Italian border guard vessel is considered a place of Italian jurisdiction, whereas a US coast guard vessel is not considered a place of US jurisdiction. In case of a potential instrumentalized boat crisis, this difference would leave migrants heading to the EU relatively protected, but the targeted European protector rather unprotected. This vulnerability for instrumentalized migration is underlined by the conclusion of the European Court of Auditors that the 'effective return rate' of foreign nationals that have been ordered to leave the EU because they had entered it, or were staying, without authorization, has dropped below 20% for returns to countries outside the European continent.<sup>33</sup> It can however not be concluded that international legal obligations prevent states from any effective border and migration management. The 1951 Refugee Convention states that refugees must be protected, but does in itself not stand in the way of states negotiating cooperation agreements on where that protection is provided for.

The ECtHR has drawn a line in case of the use of force by a large group to enter the territory of the European Union. In its judgment in the case of *N.D. and N.T. v. Spain* it concluded that Spain did not breach the ECHR in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave, 'taking advantage of the group's large numbers and using force'. The Court reasoned that because the group had not made use of the entry procedures available at the official border posts, the lack of an individualized procedure for their removal had been a consequence of their own conduct.<sup>34</sup> In other words, the line of argumentation in *N.D. and N.T. v. Spain* does require

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30 S. Carrera, *Walling of Responsibility*, CEPS Policy Insights, nr. 2021-18, November 2021, p. 12.

31 ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09.

32 US Supreme Court, Case No. 92-344, *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v Haitian Centers Council, Incl, et al*, 21 June 1993.

33 European Court of Auditors, [EU readmission cooperation with third countries: relevant actions yielded limited results](#), 2021, 7.

34 ECtHR, *N.D. and N.T. v. Spain*, Nos. 8675/15 and 8697/15, 13 February 2020.

states to deploy effective legal options and means for access to protection for third country nationals, however not in case of these 'hot returns'.

### **Geographical luck and bad luck**

Vulnerability in case of instrumentalized migration attempts also depends on geography and characteristics of neighboring countries. Instrumentalized migration crises can however affect several countries in the region, because of *secondary movements*. In times of migration crises, concepts like 'geographical bad luck'<sup>35</sup> become relative because migrants often move from the country in which they first arrived to seek protection or a place to settle elsewhere. In the EU, the Dublin Regulation aims to share responsibility for the assessment of asylum claims and avoid secondary movement of applicants for international protection between Member States. Nonetheless, during the migration crisis at the Greek-Turkish land border from February 28<sup>th</sup> 2020 until March 26<sup>th</sup> 2020, most arriving migrants were intending to move onto various countries in Central and Northern Europe. Likewise in the case of the migration crisis orchestrated by Belarus as from August 2021, many migrants had Germany as their destination, rather than the EU-countries that they initially entered.<sup>36</sup>

Vulnerability of potential target countries is also determined by characteristics of neighboring countries like whether it can be considered a 'safe country' or 'safe third country', where in the event of an instrumentalized migration crisis, irregular migrants can be returned to.

## **2.3 Collective identity – vulnerability in times of polarization**

From a geopolitical perspective, it is not only power and geography that matter, but also the collective identity and collective will of the people to deal with external challenges 'as one' and mobilize internal solidarity.

Public surveys show that migration has become a highly politically salient issue in potential target countries. In the *Clingendael Foreign Affairs Barometer* survey in March 2021, irregular migration pressure on the external borders of the European Union scored highest in terms of concerns of the Dutch population regarding international

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35 In 2011, Dutch prime minister Mark Rutte referred to asylum-seekers arriving in southern EU Member States as a problem of 'geographic location', saying '...that is just bad luck for them. Countries have benefits and disadvantages because of their geographical location.'

36 E.g. since May 2021, some 12.000 persons were documented as having entered Germany unlawfully via Poland and Belarus.

developments<sup>37</sup>. Although deliberately overwhelming the capacity of a target state with a substantial migration outflow in a context where control over migration has become *chef sache* for governments can already be a powerful instrument, the vulnerability of many target countries is further enhanced because of the polarization regarding migration within their societies. In the same *Clingendael Foreign Affairs Barometer* survey, irregular migration pressure was one of the most polarized issues.

It is exactly the existence of *competing groups within society whose visions and interests are difficult to reconcile*, that make Western democracies extra vulnerable for instrumentalized migration crises. Perpetrating actors exploit these societal tensions, by instrumentalizing the migration outflow and by fueling antagonism by disinformation campaigns aimed at the various camps within the targeted society. Governments are confronted by on the one hand demands for humanitarian admission of migrants and access to asylum procedures, and on the other hand pleas for closure of the border, border walls, pushbacks and detention of migrants in closed facilities.

Influencing public opinion and destabilizing society are not side effects but rather central objectives of the perpetrating actor, in cases of instrumentalized migration crises. *Democracies with freedom of speech, free media and a free and open internet, are particularly vulnerable* to foreign disinformation strategies. Russia in particular has taken advantage of this vulnerability by spreading and fueling the narrative of an 'Islamization of Europe'. German-language media sponsored by the Russian government, such as RT DE, are likely to have played a role in anti-democratic protests in this context.

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37 Christopher Houtkamp, Bob Deen en Monika Sie Dhian Ho, [Nederlanders bezorgd over het buitenland in de aanloop naar de verkiezingen. Polarisatie over migratie en klimaat, consensus over China](#), Clingendael Netherlands Institute of International Relations, Barometer Alert, February 2021.



**Migrants hold signs as they protest against repatriation outside the transport and logistics centre Bruzgi on the Belarusian-Polish border, in the Grodno region, Belarus November 25, 2021. (REUTERS)**



### 3 Responses to instrumentalized migration – a toolbox for target states

Alarmed by recent crises with third countries in which migration was instrumentalized, especially European states have embarked on discussions about 'a toolbox' to deal with instrumentalization of migration.

An important question when considering specific responses to instrumentalized migration, is where the threshold lies to qualify a situation as an instance of instrumentalized migration? On the one hand there are cases we could identify as 'belligerent scenarios', in which there is a clear malign intent of a perpetrator to destabilize target states and a deliberate orchestration of a migration inflow into the target state. The 2021 Belarus crisis is the most recent example here and has been a game changer in Europe in the discussion on instrumentalized migration. President Lukashenko first threatened to facilitate entry of migrants and drugs to Europe, then liberalized visa regimes with 73 countries, recruited migrants in third countries including through the official tourist office (*Centrekurort*), and organized their entry into Belarus as well as accommodation and transport to EU borders.<sup>38</sup>

On the other hand, there are instances of diplomatic pressure and coercion in the context of international negotiations, that we could identify as 'negotiation scenarios'. Not every case of exerting pressure at the negotiation table can be characterized as instrumentalization of migration. Destination countries have themselves used positive and negative leverages for years as part of their migration diplomacy, promising visa liberalization or threatening with visa restrictions to get what they want from third countries. Nonetheless, such a negotiation or third country management scenario might escalate into an instrumentalized migration crisis.

In between the belligerent and negotiation scenarios, there are situations of for instance serious neglect by a neighboring state. Some EU-countries identify the reluctance of Serbia to align its visa arrangements with those of EU Member States as a case of instrumentalization of migration. Hybrid scenarios complicate matters further. Here the entire idea of a perpetrator is to destabilize target countries while remaining below

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38 Georg Luke, Tobias T. Molander and Peter Webinger, Instrumentalisierung von Migration, in: Christian Filzwieser and Lioba Kasper (ed), *Jahrbuch 2022 Asyl- und Fremdenrecht*, pp. 327-350.

any threshold that could trigger specific countervailing measures. The systematic Russian bombing of critical infrastructure in Ukraine – causing the outflow of millions of Ukrainian displaced people into Europe, with potential destabilizing effects – could be considered as hybrid instrumentalized migration. Another specific case might arise if the perpetrator is a non-state actor. It could be NGOs that try to exert pressure on target states to open their borders by organizing global media attention for Latin American migrant caravans. Or militias in third countries might decide to put pressure on European states, by releasing migrants from detention centers and passively or actively supporting them to migrate irregularly to Europe. Even terrorist organizations could use human smuggling and trafficking to destabilize target states with large numbers of irregular migrants.

Because of the variety of scenarios and problems of demarcation, a first key question is whether it is expedient and feasible to have a separate definition of instances of instrumentalized migration at all, to be distinguished from the more general challenge of high irregular migration pressure on key borders, human smuggling, and instances of force majeure. On the one hand, in the United States and Australia, no direct need is felt for separate legislation for instances of instrumentalized migration, although Kelly Greenhill did identify cases of instrumentalized migration in which the U.S. and Australia were involved in her historical overview.<sup>39</sup> The geographical and legal contexts of Australia and the U.S. are however different from the EU (see above regarding different interpretations of jurisdiction, and hereunder in the sections on externalization of asylum processing). On the other hand, from the side of European legal experts and NGOs there is great concern that distinct legislation for cases of instrumentalized migration ‘...will be the final blow to a common European asylum system in Europe’.<sup>40</sup>

The second key question is how broad a definition of instrumentalized migration should be? Some argue that the definition should be restricted and reserved for those instances in which there is a perpetrating state with a clear malign intent that orchestrates an inflow of migrants into the target state to destabilize that target country. Others plead for a broader definition, stating that there might be scenarios that are more hybrid in nature or involve non-state actors.

The European Commission has decided to address these two key questions by indeed coming up with a definition of instrumentalization of migration –be it a rather restrictive one– as well as with proposals for specific regulation for these instances. In the context of the proposal for the amended Schengen Borders Code, the European Commission defines instrumentalization of migration as: ‘...a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating

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39 Ibid Kelly Greenhill, 2010: 11-20.

40 ECRE, [Joint NGO Statement on Instrumentalisation Regulation](#), 8 September 2022.

the movement of third-country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilize the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.<sup>41</sup> This implies the definition is restricted to situations where the perpetrator is a state actor, where there is a clear malign intent, an active movement of migrants, and essential functions of the target state are at risk.

The Czech Presidency of the EU has been working on a ‘toolbox’ for preventing and countering the instrumentalization of migrants and forcibly displaced people at the EU’s external border. Many of the measures discussed in this context are relevant for effective border management in all circumstances, like early warning systems and enforcing border management. Some of the measures, however, imply that migrants that are ‘instrumentalized’ will be treated differently than others that try to cross borders irregularly. The most heated debates focus on those instances where human rights and refugee rights standards are lowered, justified by an acute instrumentalization crisis.

In this section we discuss measures and ideas put forward to deal with instrumentalized migration, along the dimensions that have been identified as key aspects of a geopolitical perspective on instrumentalized migration: power, control over territory, and mobilizing a collective identity. Focusing on these dimensions contributes to the development of a toolbox built on a thorough understanding of what has made instrumentalized migration a historically relatively successful and cost-effective weapon for perpetrators, preventing target states from overlooking blind spots and vulnerabilities, and promoting a horizontal integrated approach that is required to deal with the phenomenon.

Other possible categorizations of measures could be preventive versus countervailing ones; measures particularly aimed at state actors versus those that are relevant in all contexts; measures that are more appropriate in negotiation scenarios versus actions in case of a belligerent scenario; or measures that are applicable to all irregular migrants versus specific legislation that provides the basis for a specific procedure and different rights for instrumentalized migrants. This section is concluded with an overview table of all instruments (the ‘toolbox’), indicating how various measures score in these categories.

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41 [COM\(2021\) 891 final](#) (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), 14 December 2021, p. 25.

Finally, measures differ in terms of costs and impact, that are often context specific. Sanctioning Belarus, with which the EU has relatively little economic relations, is something else in terms of costs and impact than sanctioning a neighboring country with which significant trade and investment relations exist, and that is an important partner in the migration management of the EU.

### **3.1 Power, partnership and people**

A first group of measures is directed at the (power) relations with (potential) challenging actors and at the people that are used as weapons. They involve exerting power or brokering partnerships or counteracting the exercise of power by the perpetrator by way of instrumentalizing people. This can be done by (1) investing more in balanced migration partnerships with third countries; (2) developing early warning systems to signal looming intent and potential of possible perpetrators; (3) informing people that could become a victim of instrumentalization of migration; (4) investing in the capacity to provide humanitarian support to affected people and reception capacity; and (5) developing a toolbox of negative leverages that can be used against perpetrators and their helpers.

#### **3.1.1 More balanced migration partnerships with third countries**

In times of (irregular) migration pressure on key borders surrounding target states, and intense polarization within target societies regarding migration issues, the power balance is shifting in the direction of third countries that have control over migration outflows as an instrument in their arsenal. Against this background, potential destination countries' no regret strategy is to invest in good relations with countries of origin and transit. By developing migration partnerships that better serve the interests of countries of origin and transit, a more positive and trustful framework will be created in which partner countries are more likely to refrain from seeing migrants as potential weapons. The implementation of partnerships can be monitored periodically, to ensure that programs result in positive outcomes for both parties and a degradation of the relationship resulting in coercive migration negotiation strategies is avoided. Regional organizations such as the EU can play a coordinating role in this respect.

European countries better acknowledge that their coercive migration discourse promising 'more for more, less for less' and the usage of 'carrots and sticks' can be easily turned around in situations of mutual dependence, and switch to a discourse of partnership among equals. More balanced migration partnerships, in which e.g. European countries would do more to keep their side of the promises made at the Valletta Summit on Migration in 2015, might prevent some instances in which third countries could use instrumentalized migration as a last resort, for instance because they suffer politically from the burden of large-scale refugee populations on their

territory, or have to explain time and again to domestic constituencies why they are cooperating with European countries in combatting irregular migration. Frugal and restrictive potential destination countries might contemplate that sometimes it is better to ‘make the deal earlier’<sup>42</sup> with neighboring countries – before matters escalate – especially if border and migration management tasks have been outsourced to them or if they protect substantial numbers of refugees in the region.



**Spanish Prime Minister Pedro Sanchez and his Moroccan counterpart Saad Eddine el-Othmani give a joint press conference in Rabat on their migration cooperation, on November 19, 2018. (REUTERS)**

Sustainable (migration) partnerships conscientiously aimed at common interests in controlled migration include: cooperation in preventing irregular migration and in return policies, cooperation in countering migrant smuggling, substantial financial support for refugee protection in the region and humanitarian and development assistance, as well as legal pathways for refugees and for study and work. The seasonal circular migration programs between France and Tunisia, and Spain and Morocco have been successful examples of the latter for decades. Partnerships can be fostered beyond the migration and development cooperation domain as well, into other areas of common interest like

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42 Kelly Greenhill, at Vienna Migration Conference, ICMPD, 12 October 2022.

offshoring in the digital sector<sup>43</sup>, trade, countering organized crime or the fight against terrorism.

### 3.1.2 Early warning systems

The best way to respond to crises is to be prepared. Early warning systems, intelligence and common understanding are key in this respect. Early warning systems identify critical factors and should operationalize instrumentalized migration into a non-exhaustive list of key indicators around intent of the aggressor, potential migration movements, and territorial and political vulnerabilities of the potential target country or countries.

With *intent* we mean the reasons or motives of third countries to engage in instrumentalized migration, as well as actions or omissions which express these reasons or motives. Possible (sub)indicators relating to intent would for example be pre-existing disagreements or conflicts in geopolitical relations between potentially perpetrating and target states and corresponding narratives; increase or decrease of certain consular contacts; new/unexpected partnerships with countries of origin and/or disinformation campaigns in countries of origin and transit countries; and/or military movements. The foresight of intent is one of the most challenging parts of an early warning system regarding instrumentalized migration.

*Potential* relates to the 'availability' of migrants who could be 'forced' to go to the target states. In this case it could be relevant to assess changing contexts in third countries such as possible changes in visa policies, issuance of travel documents to individuals from several countries of origin, possible driving factors such as conflict or famine in those countries, activity of low-cost transporters from certain destinations towards the potentially perpetrating state, large scale reception of migrants, unusual/sudden concentration of migrants at the border, etc.

*Territorial vulnerabilities* deal with the extent to which there are migratory routes towards and (legal) access to the territory of potential target states. Relevant indicators among others are geographical location, type, and length of borders (sea or land borders), border crossings and management, legal system flaws or vulnerabilities, governance of migration management and reception across the territory, activity of smugglers and use of existing migratory routes, existence, and use of legal migration channels.

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43 See Monika Sie Dhian Ho, Nienke van Heukelingen, Nadia van de Weem, Anne van Mulligen and Romain Depla, [Gedeeld belang bij circulaire migratie. Naar duurzame partnerschappen](#), 23 June 2021.

*Political vulnerability* of target countries to instrumentalized migration refers to the collective identity and political will of their societies and governments. If irregular migration is highly politically salient, and if there are significant differences in public opinion and among political actors regarding how to deal with instances of instrumentalized migration, early warning signals should emerge as well.

The European Union has invested significantly in situational awareness using among others (satellite, social media and big) data provided by the EU agencies (EUAA, Frontex) and periodical Integrated Situation Awareness and Analysis Reports (ISAA) and Intelligence Analysis and Reporting (INTCEN) of the EU External Action Service and Member States. Critical to the endeavor of early warning is to develop a common understanding and interpretation of what is going on. The EU mechanism for preparedness and management of crises related to migration, the so-called Blueprint network<sup>44</sup>, convenes regularly and can be activated immediately, as was the case during the 2021 instrumentalization of migration crisis caused by Belarus at the EU external border. The Presidency of the Council can also convene meetings of the Integrated Political Crisis Response (ICPR), that supports rapid and coordinated decision-making by the EU for major and complex crises. Individual states like Germany and Greece have also invested in early warning systems based on whole-of-government cooperation and partnerships with private actors. Key challenges are to ensure that sensitive information is shared across main stakeholders and that alerts are effectively turned into decisions and actions.

### **3.1.3 Informing people that could become a victim of instrumentalization**

To prevent people from being instrumentalized by perpetrating countries, it is important to invest in information campaigns and other preventative community measures. These campaigns can raise awareness among potential migrants that they should be suspicious of promises of perpetrators that they can help them enter the target country and inform them that institutions to deal with instrumentalization of migration are in place and effective. The end of the Belarus instrumentalized migration crisis has been an important case in point.

When a perpetrator starts spreading disinformation and orchestrating migration outflows, a dedicated unit within the government and/or at European level as well as embassies of the target country could react to false narratives with social media campaigns and inform migrants in countries of origin and transit, to reduce further movement. Social media monitoring, big data, and data mining, as well as interviews with migrants upon arrival at the border can contribute to situational awareness.

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44 See [Commission Recommendation \(EU\) 2020/1366](#) on an EU mechanism for preparedness and management of crises related to migration, 23 September 2020.

### 3.1.4 Capacity to provide humanitarian support to affected people

Instrumentalization crises can result in acute humanitarian needs of migrants, with shortages of shelter, food and water, and strain on the reception capacity of the target state. Humanitarian assistance and access to basic needs must be guaranteed upon arrival, including specific measures for vulnerable groups and people at risk. Preparedness and contingency planning are essential in that regard. Potential target states can organize exercises to scale up the national asylum reception capacity and mobilize additional financial and human resources quickly, involving cooperation between central authorities, regional and local governments, and private actors, contributing to resilience.

Besides local humanitarian assistance, EU agencies and international humanitarian organizations such as IOM and UNHCR can support target states. The latter organizations are also key to providing humanitarian assistance on the other side of the border in case migrants are stranded there. In the 2021 Belarus crisis, for instance, the European Commission was able to provide humanitarian assistance to migrants that were stranded in the border region of Belarus by cooperating with the United Nations.

### 3.1.5 Negative leverages

The price of using migration as an instrument can be increased through negative leverages<sup>45</sup>, including sanctions, removal of visa privileges, trade restrictions, and even a military response. The UK has for instance introduced a program of wide-ranging immigration reform in 2022 under the Nationality and Borders Act including a new visa penalties regime. In the case of the instrumentalized migration crisis caused by Belarus, the EU and US activated sanctions against the Lukashenko regime. These were combined with well-coordinated diplomatic talks and negotiations with countries of origin and transit to stop flights to Belarus. Negative leverages can also be directed at transport operators, e.g. by threatening carriers to deny overflight or landing rights.

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45 Hugo Brady, [Europe's sharper edges: EU migration policy after Lukashenko](#), International Centre for Migration Policy Development, 15 December 2021.



## 3.2 Territory

In reaction to the instrumentalization of migration, states invest further in border management and undertake various legal strategies in relation to their territory and asylum procedures. These involve: (1) reinforcing border management and cooperation in border protection; (2) legal measures to prevent migrants from accessing the border; (3) (accelerated) border procedures and use of border detention; (4) national emergency legislation; (5) legislative proposals at regional level; (6) reinforcing return and repatriation capacity; and (7) externalization of asylum processing.



**Lithuania has completed a wall stretching along the border with Belarus. (REUTERS)**

### 3.2.1 Reinforcing border management and cooperation in border protection

A first territorial response to instrumentalized migration is to significantly reinforce border protection. States are increasing visible border controls and patrols by border guards, building border fences and barriers. They are designating a limited number of border crossing points where reception facilities are available and where an asylum application can be processed. Reinforcing borders also includes monitoring of the situation at the border and upstream, and anticipating movements by using technology such as satellites and drones.

States also cooperate and provide bilateral operational support to target states in case of instrumentalized migration crises. In the EU, the European Border and Coast Guard Agency Frontex helps affected EU Member States, if they allow it on its territory (which Poland did not during the Belarus crisis). Border surveillance and border checks support can help to avoid huge lines as well as a disruption of the normal movement at the border crossing points.

### 3.2.2 Legal measures to prevent migrants from accessing the border

When addressing situations of instrumentalization of migration, states can resort to legal measures to prevent migrants from (physically) accessing the border.

*Stricter visa policies* constitute a clear form of pre-frontier control measures that directly restrict the possibility for migrants to leave their country of origin or transit and prevent access to EU territory. Most of the so-called 'refugee-producing' countries, such as Syria and Iraq are for instance already on the EU 'black visa list'. One of the key elements of the EU-Turkey Statement entails the prerequisite that Turkey would introduce and/or strengthen visa requirements for nationals from surrounding countries. Furthermore, EU Member States can temporarily (re)introduce visa requirements in case of an emergency which is linked to sudden increases in the number of asylum applications.<sup>46</sup>

An effective way of preventing migrants from accessing the border has been the *penal sanctioning of carriers*, both at the national as well as the EU level. See for example the Commission Proposal for a regulation to prevent and restrict the activities of transport operators that engage in or facilitate smuggling or trafficking of people into the EU, addressing the flight operators in response to the Belarus border situation.<sup>47</sup>

Furthermore, various *anti-smuggling* plans have been implemented. A recent development relevant in this context is the accusation that search and rescue operations of NGOs are in fact acts of human smuggling. Italy has initiated legal proceedings against the German captain of the *Seawatch 3*, Carola Rackete in June 2019. In January 2020 the Italian High Court eventually dismissed the appeal against her earlier release and claimed that she acted in due course of the duty to rescue people at sea. Currently in Greece several cases are pending against humanitarian workers who face charges of human trafficking, money laundering, fraud, and espionage due to their involvement in search and rescue programs on the Greek islands.<sup>48</sup>

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46 ECRE Policy Note, [Protection in Europe. Safe and Legal Access Channels](#), January 2017, pp. 7-8.

47 [COM\(2021\) 753 final](#), 23 November 2021.

48 See MEP open statement on supporting humanitarian workers at the EU's external border, 15 November 2021; UN Special Rapporteur on the situation of human rights defenders, Statement d.d. 18 November 2021; NGO Campaign [FreeHumanitarians](#).

### 3.2.3 Accelerated border procedures and use of border detention

Another legal strategy in relation to territory refers to the (extended) use of border procedures, including border detention, to deal with the instrumentalization of migration. This can be seen as part of a more general trend in which states try to gain more control over migration by the application of accelerated and border procedures. Amongst the legislative proposals within the EU Pact on Migration and Asylum of 23 September 2020 are the introduction of a pre-screening procedure at the external border<sup>49</sup> and a proposal to make more efficient and flexible use of border procedures by changing the proposal for an Asylum Procedures Regulation.<sup>50</sup> Currently only some EU Member States apply the border procedure in law and/or fact. Among those that do, national practices diverge widely when it comes to scope, time limits, use of detention and procedural guarantees accorded to applicants.<sup>51</sup>

The idea of making more use of border procedures relies on the application of the concept of *safe country of origin* as well as *safe third country*. According to the proposal to amend the proposed Asylum Procedure Regulation (COM (2020) 611 final), the accelerated border procedure is applied<sup>52</sup> if the applicant originates from a country of which the average eligibility rate lies under 20% (and is thus *prima facie* considered a safe country). Asylum procedures can also be accelerated with limited procedural guarantees if there is a safe third country where the applicant could be sent to (see article 38 Asylum Procedure Directive). Presently, this provision requires a connection between the applicant and the third country concerned on the basis of which it would be considered reasonable for that person to go to that country. The arrangement under the EU-Turkey Statement whereby asylum seekers would be returned from the Greek islands to Turkey is an example in which the concept of safe third country plays a role.

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49 [COM \(2020\) 612 final](#), 23 September 2020.

50 [COM \(2020\) 611 final](#), 23 September 2020.

51 European Parliamentary Research Service, [Asylum procedures at the border. European Implementation Assessment](#), November 2020. The quality and fundamental rights compliance of decisions taken in those Member States which have seen a high influx of applicants has been particularly criticized. See for example: J. Vedsted-Hansen, [Border Procedure: Efficient examination or restricted access to protection?](#) 18 December 2020; S. Carrera, [Who's Pact. The cognitive dimensions of the EU Pact on Migration and Asylum](#), CEPS, 25 September 2020.

52 For this reason, it is important that international standards are observed when drawing up and applying such a list. In particular, the right of the asylum seeker to appeal against the presumption of 'safe country' must be guaranteed to prevent *refoulement*. There is no EU list (yet), only EU criteria based on which Member States can draw up national lists of safe countries. This has to do with the political sensitivities surrounding the designation of countries as safe or unsafe. The Commission has made a proposal for EU lists of safe countries through a Proposal for a Regulation establishing a common EU list of safe countries of origin ([COM \(2015\) 452 final](#)). National lists may (in addition) continue to exist in the proposal for a new Procedural Regulation.

Since September 2020, the negotiations on these aspects of the Pact have not made significant progress due to the different interests, preconditions and priorities among EU Member States and the interdependent relationships between solidarity measures and investments in well-functioning border procedures.

### 3.2.4 National emergency legislation

Several states directly confronted with situations of instrumentalization of migration at their borders have sought recourse to national emergency legislation to prevent migrants from crossing their borders. These states have declared the situation a national security issue, bringing actions to the national domain, and doing whatever it takes to protect their borders.

In a context of rising tensions between Greece and Turkey at the beginning of 2020 and the opening of the borders by Turkey in February 2020, the Greek government stated that cross-border movements were considered a threat to the country's national security, justifying the execution of an Emergency Legislative Order in March 2020. This emergency legislation suspended the possibility of the lodging of asylum applications for one month. The act makes reference to 'The extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical threat to the national security, which prevails over the reasoning for applying the rules of EU law and international law on asylum procedures.'<sup>53</sup>

Following the Belarus instrumentalized migration crisis in the fall of 2021 also Lithuania declared an 'extraordinary situation'<sup>54</sup> and the government of Latvia<sup>55</sup> and Poland<sup>56</sup> a 'state of emergency'. The respective authorities then introduced new (exceptional) legal measures and national laws which they considered suited to address the situation. Amongst others they deal with accelerating asylum applications, border detention of all asylum seekers, restrictions to appeal procedures and restrictions on reception conditions.<sup>57</sup>

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53 [Act of Legislative Content, Suspension of the submission of asylum applications](#), 2 March 2020.

54 [Resolution No 517 of the Government of the Republic of Lithuania](#), 2 July 2021.

55 Cabinet of the Ministers of Latvia, [Order No 518 of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation](#), 10 August 2021.

56 DW, ['Polish President declares state of emergency at Belarus border'](#), 2 July 2021.

57 See for comments on these laws and legislative proposals inter alia ECRE Legal Note 11: [Extraordinary Responses: Legislative Changes in Lithuania](#), 3 September 2021; UN High Commissioner for Refugees (UNHCR), [UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland \(UD265\)](#), 16 September 2021.

The most extensive changes in law are made in Poland, with amendments to the Act on Foreigners, the Act on Granting Foreigners Protection on the Territory of the Republic of Poland and the Act on Protection of the State Border. They entail the following measures: a regulation introducing state of emergency in border areas; passing of a law on construction of a barrier and criminalizing destroying border infrastructure; orders to leave the country after apprehension after an unauthorized border crossing and a temporary entry ban. Extensive changes to legislation and new legislation have been adopted in Finland as well, as preventive measures.

Part of the new state of emergency legislation is also the provision to leave applications for international protection unprocessed, unless the migrant arrives directly from the territory in which his life or freedom was threatened by the danger of persecution or the risk of serious harm, presented credible reasons for illegal entry into Poland and applied for international protection immediately after crossing the border.<sup>58</sup> In this context references can also be made to the Danish ‘emergency brake’ provision to, in exceptional circumstances, refuse entry to asylum seekers arriving from states covered by the Dublin Regulation. Similarly, we mention the Trump-era Migration Protection Protocols (MPP)<sup>59</sup>, also called the ‘Remain in Mexico’ policy of 2019, whereby asylum seekers were denied access to territorial asylum as they have travelled via a third country before reaching the US and were sent back to wait there (in Mexico).<sup>60</sup>

Again, the concept of safe countries is crucial here. With respect to a particular aspect of the new Polish legislation, namely the prerequisite that a person should arrive directly from a country in which he is persecuted, his life is threatened or in which he runs a real risk of serious harm, reference should be made to the case of *D.A. and others v. Poland*.<sup>61</sup> In this ruling the ECtHR states that the Member States, according to article 31(1) Refugee Convention are bound to follow ECHR standards irrespective of whether people looking for international protection and who are seeking to irregularly enter EU territory come from a transit country and not directly from their country of origin. In the same line of reasoning the CJEU stated that national legislation that considers transit through a third country as a key connecting factor for automatically rejecting an application for international protection violates Union law.

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58 The new legislation has been criticized for being in violation with the prohibition of *refoulement* and right to asylum by civil society organizations and UNHCR. See i.a. ECRE, [Joint NGO Statement](#), 26 November 2021; UNHCR (Ibid).

59 Section 235(b)(2)(C) of the U.S. Immigration and Nationality Act.

60 See further under ‘Externalization of asylum processing’.

61 ECtHR, *D.A. and Others v. Poland*, No. 51246/17, 8 July 2021.

### 3.2.5 Legislative proposals at regional level

Also at EU level, legislative measures with respect to specific asylum processing have been proposed for instances of instrumentalized migration. In October 2021, twelve EU Member States requested the European Commission to adapt the existing framework to enable states to adequately address attempts of instrumentalization, and to reform the Schengen rules from the perspective of doing everything possible to protect the external borders with a maximum of security. Such measures would allow the EU and the Member States to act swift and united in case of a subsequent ‘crisis’.<sup>62</sup>

On 23 November 2021, a Joint Communication Responding to state-sponsored instrumentalization of migrants at the EU external border was published, announcing legislative proposals on the basis of article 78(3) TFEU:<sup>63</sup> ‘In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament’.

On the 1<sup>st</sup> of December 2021 the Commission came forward with a Proposal for a Council Decision on provisional (and temporary) emergency measures for the benefit of Latvia, Lithuania and Poland.<sup>64</sup> This was promptly followed, and evidently replaced, by a Commission proposal for a Regulation for a more permanent framework in order to deal with possible future situations of instrumentalization of migration.<sup>65</sup> The proposal for an instrumentalization regulation entails substantially similar proposals and builds on the earlier proposals for border procedures within the EU Pact: the possibility to appoint specific registration points for lodging asylum applications; the possibility to extend the time limit for registration of the asylum application to the maximum of four weeks; the possibility to apply border procedures to all asylum applications with a time limit of sixteen weeks from the moment of registration for processing the application; basic material and reception support;<sup>66</sup> and the option to directly execute return orders.<sup>67</sup>

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62 EU Ministers of Interior, Letter to Margaritis Schinás and Ylva Johansson, European Commission, 7 October 2021.

63 EC Communication [JOIN\(32\) final](#), 23 November 2021.

64 [COM \(2021\) 753 final](#), 1 December 2021.

65 [COM \(2021\) 890 final](#), 14 December 2021.

66 This is complementary to the existing exception clause of article 17(9) of the recast proposal of the Reception Directive.

67 Member States will receive the option not to apply the return border procedure and the EU Return Directive (the exception clause ex article 2 Return Directive).

These Commission proposals received many criticisms by legal experts and civil society organizations, foremost with respect to the extension of time limits (of the duration of detention, of the maximum period for registration of the application), the limitations with respect to material rights to basic needs, which will amount to problems if the situation prolongs, and the restrictions on the use of effective remedies.<sup>68</sup>

The current state of play for the proposed Regulation is that the Czech Presidency aims to adopt a common Council position in December 2022 as there seems to be broad support among Member States, making it one of the fastest evolving legislative proposals on asylum within the Council. In the European Parliament the rapporteur has been appointed (Mr. Jaki from Poland, ECR) but the report has yet to be presented to the LIBE committee. Time is pressing, as also the European Parliament wishes to make progress on legislative proposals outside the so-called 'package deal' (the idea that all current proposed asylum legislation should be negotiated and decided upon as an 'all or nothing' package).

In December 2021, the European Commission also presented a legislative proposal to improve the functioning of the Schengen area, which should be considered in conjunction with the proposed Regulation on instrumentalization.<sup>69</sup> As said, affected Member States requested further preventive measures in the context of the Schengen border reform discussion to address the rules and actions that states are entitled to implement in case of a 'hybrid attack', in order to prevent irregular border crossings, as they consider mere border surveillance not sufficient. The proposal mainly contains an amendment to the Schengen Borders Code.<sup>70</sup> The amendments relate to (1) the management of the external borders, hence increased border surveillance aimed at preventing irregular entry of third country nationals; (2) the rules for exceptionally reintroducing checks at the internal borders; and (3) the exercise of public powers as an alternative to the reintroduction of border controls. A common Council position was reached in June 2022,<sup>71</sup> and the proposal is currently under consideration in the European Parliament.

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68 See i.a. [ECRE Editorial](#), 3 December 2021; [ECRE News](#), 21 January 2022; [ECRE Joint NGO Statement](#), 8 September 2022; DW, '[EU criticized for move to restrict asylum rights at Belarus border](#)' 4 December 2021; Euromedrights, '[New Commission Proposal on Migrants at EU-Belarus border sets dangerous precedent](#)', 9 December 2021; [Renew Europe Group News](#), 1 December 2021; [S&D Group News](#), 1 December 2021.

69 Commission Proposal Amending the Schengen Borders Code [COM \(2021\) 891 final](#), 1 December 2021. The Instrumentalization Regulation and Schengen Border Code reform are not included in the package approach supported by European Parliament, which in that case means that these two proposals would be dealt with separately; their progression would not be condition on any other proposal also moving forward.

70 There is also a proposed amendment of the Return Directive.

71 Council of the European Union, *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 – General approach*, 9713/22, 9 June 2022.





**Press conference of EC Vice-President for Promoting our European Way of Life, Margaritis Schinas and European Commissioner for Home Affairs, Ylva Johansson on exceptional measures during the Belarus crisis, December 2021. (REUTERS)**

From the perspective of the European Parliament, amending the Borders Code cannot be considered separately from the development of the Regulation on instrumentalization, as the provisions are quite interlinked. The main issue seems to be the reluctance of large political groups such as the Progressive Alliance of Socialists and Democrats to agree on legislation on external border management while leaving solidarity mechanisms and improvement of asylum and reception provisions undecided. In their eyes this results in unbalanced progress in the reform of the Common European Asylum System.

### **3.2.6 Reinforcing return and repatriation capacity**

Potential target countries are reinforcing their return and repatriation capacity, both from their territories and from countries and hubs along potential routes, in accordance with international law and in respect of fundamental rights. Migration partnerships with and diplomatic outreach to countries of origin should ensure the readmission of returnees. Voluntary return and reintegration assistance programs can be applied to instrumentalized migrants. European and international organizations like Frontex and IOM can provide support to target countries and third countries along the route.



### 3.2.7 Externalization of asylum processing

Lastly, occasionally states have reacted to instrumentalized migration crises – as well as to high migration pressure at the border – by partially or completely outsourcing the asylum procedure to the territory of other states. A well-known example is Australia's offshore processing capability whereby irregular migrants, including asylum seekers, seeking to reach Australia were taken instead to Nauru and to Papua New Guinea (PNG) to have their protection claims assessed by the authorities of those countries. Despite criticism regarding this policy – amongst others because of the poor living conditions and mental health of migrants removed to those regional processing countries – this externalization framework has been upheld by the Australian High Court. After a dismantlement of this practice and closing of the facilities in 2008 (on Manus Island already in 2004)<sup>72</sup> on political grounds, the government focused its efforts on cooperation with Indonesia through a Regional Cooperation Arrangement under which Indonesian authorities intercept migrants and asylum seekers suspected of travelling irregularly to Australia.<sup>73</sup> Over the years, Australia has invested in strong collaborative relationships with regional partners to deter and disrupt maritime smuggling ventures before they result in boats in the water.<sup>74</sup> In 2012 the externalization agreements with Nauru and PNG were resumed, following a spike in maritime arrivals and deaths at sea in the years before. From 2013 onwards, everyone arriving by boat without a valid visa will be sent to a regional processing country, to have their protection claims assessed.<sup>75</sup> The only way to be permitted to legally settle in Australia is through legal routes requiring visa, or via resettlement programs concluded on 31 December 2021.

The US offshoring practices focused in the past on intercepting boat migrants from Haiti and Cuba, who were then housed at a US naval camp at Guantanamo Bay.<sup>76</sup> In more recent years, the focus shifted to the land border with Mexico following an increase of migrants and asylum seekers, among which many unaccompanied minors from El

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72 Except for Christmas Island, which is part of Australian territory and therefore a national immigration detention center.

73 A. Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control?' in: *Human Rights Law Review*, 3 June 2020, pp. 306-332, 312. A policy proposal with respect to an Australia-Malaysia 'deal', comparable to the EU-Turkey one-for-one deal was declared unlawful by the High Court, *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.

74 According to an Australian government representative, between 18 September 2013 and 31 October 2022, close cooperation with regional partners has resulted in foreign law enforcement disruptions of 101 maritime people smuggling ventures and 3332 potential irregular immigrants.

75 Australian Government, Migration Amendment (Unauthorized Maritime Arrivals and Other Measures) Act 2013, no. 35.

76 *Plaintiff M70/2011 v Minister for Immigration and Citizenship*. See also A. Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control?' in: *Human Rights Law Review*, 3 June 2020: 306-332, 312.

Salvador, Guatemala and Honduras.<sup>77</sup> In 2019, the US implemented the so-called ‘Remain in Mexico’ policy or Migration Protection Protocols: asylum seekers are returned to Mexico to await the outcome of their procedure and have to wait in line before being allowed to enter the US due to restricted access to the territory. The Biden Administration overturned this policy,<sup>78</sup> as promised in the presidential campaign.<sup>79</sup> Recently however, plans for lifting the bar for access to asylum procedures for persons arriving over land (so-called Title 42 immigration enforcement measures) were (partly) reversed for Venezuelans arriving at the U.S.-Mexico border without authorization. This expulsion policy is paired with a (small) humanitarian program as alternative legal pathway.<sup>80</sup>

Recent examples of externalization attempts in Europe are not directly linked to situations of instrumentalization of migration, but rather a historically founded conceptual approach from the states involved. In the summer of 2021, Denmark passed a legislative amendment allowing for the transfer of asylum seekers to a third state outside the EU for processing the asylum claim (and protection in that state or return from there to the country of origin).<sup>81</sup> On the 9th of September 2022, Denmark issued together with Rwanda a joint cooperation statement which includes the ambition to outsource asylum processing and protection from Denmark to Rwanda.<sup>82</sup>

Earlier this year the UK established a more concrete deal with Rwanda along the same lines, namely the United Kingdom – Rwanda Asylum Partnership Agreement (APA). This is a non-binding memorandum of understanding for the forcible transfer (phase 2) of asylum seekers who arrive irregularly to the UK to Rwanda (phase 1), who will then be responsible for the asylum procedure (phase 3), protection of recognized refugees and return of persons not to be in need of protection (phase 4). It will run for five years, with the possibility of renewal and includes resettlement of refugees from Rwanda to the UK

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77 See for a comprehensive overview of the various migration cooperation programs between the US and Mexico: A. Pijnenburg, *Ibid*, 313.

78 US State Department of Homeland Security Statement, 8 august 2022.

79 This has been legally challenged. Texas and Missouri went to court, and a federal Texas district court judge ordered the federal government to restart the program. The Biden administration has tried multiple times to end the policy, including by asking the US Supreme Court to block the order on an emergency basis but the Court declined to do so by a verdict on 24 August 2021 (US Supreme Court, Biden, President of U.S., et al, v. Texas, et al, 21A21, 24 August 2021). The Biden administration has been forced to resume the policy while litigation continues.

80 Migration Policy Institute, [Amid record Venezuelan arrivals Biden Administration embraces border expulsion policy](#), 27 October 2022.

81 See for a comprehensive legal assessment of this legislation: N. Tan and J. Vedsted-Hansen, [Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law](#), 15 November 2021, N. Tan, ['Visions of the Realistic? Denmark's legal basis for extraterritorial asylum'](#), *Nordic Journal of International Law* (forthcoming).

82 Danish Foreign Affairs Ministry, [Joint Statement on Bilateral Cooperation](#), 9 September 2022.

(the number is not specified).<sup>83</sup> The first transfers of asylum seekers from the UK to Rwanda planned for June 2022 were cancelled due to a Rule 39 provision of the ECtHR. Currently the outsourcing scheme is challenged before the UK High Court by several NGO's.<sup>84</sup>

It is no coincidence that these externalization efforts have been conducted by European states not bound by the EU asylum acquis. As stated earlier (paragraph 3 on accelerated procedures), the current EU legislation on asylum procedures demands a previously established link ('connection criterium') between the asylum seeker and the country to which he/she could be returned within the context of applying the 'safe third country' concept. This restricts the possibility of 'transferring' an asylum seeker to a particular third country with which an externalization agreement would be concluded. Being part of the European negotiations on the Asylum Procedures Regulation (that don't progress much), it is no secret that several EU Member States are strongly aiming for deletion of this connection criterium.<sup>85</sup> Currently it seems to be on the table as an extra strategy for dealing with instrumentalization of migration: the connection criterium could be cancelled in order to effectively implement transfer mechanisms in specific defined situations of instrumentalization. However, amending both primary (art 78(3) TEU) and secondary law is a necessary precondition for this strategy.<sup>86</sup>

### 3.3 Collective identity – collective will and narrative power

An effective response of potential target states requires, finally, a collective identity, involving: (1) raising public awareness; (2) collective will and narrative power; (3) countering disinformation; and (4) mobilizing international allies.

#### 3.3.1 Raising public awareness

What contributes to the resilience of potentially targeted countries, is public awareness that migration might be used as an instrument of power in combination with attempts to fuel polarization between different groups within targeted societies. The *Clingendael Foreign Affairs Barometer Survey of 2022*<sup>87</sup> shows that Lukashenko's instrumentalized migration crisis in the fall of 2021 has significantly contributed to that awareness and

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83 N. Tan, [Externalization of asylum in Europa: Unpacking the UK-Rwanda Asylum Agreement](#), 17 May 2022.

84 See ECRE [News](#), 21 October 2022.

85 Proposed article 45: COM(2016) 476, 13 July 2016 and recast proposal COM(2020) 611, 23 September 2020.

See also ECRE [Comments on the Commission Proposal for an Asylum Procedures Regulation](#), November 2016, p. 55 ff.

86 G. Luke, T. Molander & P. Webinger, *Instrumentalisierung von Migration*, Austrian Yearbook for migration and asylum law 2022, p. 327-350.

87 To be published in December 2022.

resilience. When asked which international developments threaten the Netherlands most, the Dutch public scored instrumentalized migration highest among all migration-related developments. Disinformation campaigns and pitting domestic groups against each other by foreign actors scored 4<sup>th</sup> in the international threat hierarchy. So there is no lack of mental readiness among the wider public.

### **3.3.2 Collective will and narrative power**

Recent migration dramas in Europe have shown that it is not so much heterogeneity of opinions that make destination countries vulnerable for instrumentalization of migration, but rather the political capacity to find a common denominator and a convincing political narrative. At one end of the spectrum, in the case of the Belarus instrumentalized migration crisis, the refusal to be blackmailed turned out to be the common denominator. The introduction of special border procedures in instances of instrumentalized migration crises has turned out to be an overwhelming majority position among the European public – and the basis for new European crisis arrangements that are now at the negotiation table – rather than a source of division in these societies. At the other end of the spectrum the Ukraine refugee crisis since the 24<sup>th</sup> of February 2022 has shown that the common denominator can also be temporary openness to millions of displaced people who are provided the opportunity to work and can send their children to school. Effective efforts aimed at participation of displaced people in host societies and support for host communities are critical for social cohesion and sustainability of this strategy of openness.

In both the Belarus and Ukraine case, it has been collective will and narrative power that has been critical for Europe's resilience.

### **3.3.3 Countering disinformation**

Resilience in the context of instrumentalized migration crises involves the capacity to counter disinformation by the perpetrator, which is fed into various digital bubbles on the internet and international news television networks. The strategic message is key, that the target state has effective structures that can handle instrumentalized migration crises while respecting fundamental rights, and that there is a collective will to deal with the crisis. Common messaging of political leaders, diaspora leaders, and social media campaigns can convey this.

### **3.3.4 Mobilizing international allies for collective condemnation and support**

Collective will also refers to the mobilization of regional groupings (formal and informal – migration or security related) and international allies of the target state, to have a swift collective condemnation by relevant allies and in international fora of the crisis that has been orchestrated by the perpetrating state. Diplomatic outreach to achieve a united international front can also lay the basis for common implementation of the negative levers mentioned above and a common narrative.

**Table 1** Toolbox for preventing and countering the instrumentalization of migrants

	Negotiation context versus Belligerent context	Applicable to all irregular migrants versus specific procedures for instrumentalized migrants (IM)	Preventive versus countervailing
<b>A. Power, partnership &amp; people</b>			
1. More balanced migration partnerships	Negotiation context	All	Preventive
2. Early warning systems	Negotiation and belligerent contexts	All	Preventive
3. Informing potential victims	Negotiation and belligerent contexts	All	Preventive
4. Humanitarian support and reception capacity	Negotiation and belligerent contexts	All	Preventive and countervailing
5. Negative leverages	Negotiation and belligerent contexts	All	Countervailing
<b>B. Territory</b>			
1. Reinforcing border management	Negotiation and belligerent contexts	All	Preventive and countervailing
2. Legal measures to prevent migrants from accessing the border	Negotiation and belligerent contexts	All	Preventive and countervailing
3. Accelerated border procedures and border detention	Negotiation and belligerent contexts	All	Preventive and countervailing
4. National emergency legislation	Belligerent contexts	Specific for IM	Countervailing
5. Legislative proposals at regional level	Belligerent contexts	Specific for IM	Preventive and countervailing
6. Reinforcing return and repatriation capacity	Negotiation and belligerent contexts	All	Preventive and countervailing
7. Externalization of asylum processing	Belligerent contexts	In Australia: all. Suggestion by Luke c.s. (2022) for EU: only IM	Preventive and countervailing
<b>C. Collective will and narrative power</b>			
1. Raising public awareness	Negotiation and belligerent contexts	All	Preventive and countervailing
2. Collective will and narrative power	Negotiation and belligerent contexts	All	Preventive and countervailing
3. Countering disinformation	Negotiation and belligerent contexts	All	Countervailing
4. Mobilizing international allies for collective condemnation and support	Negotiation and belligerent contexts	All	Preventive and countervailing

## 4 A geopolitical perspective on migration in dark times

The resilience of destination countries will be tested to the limit in the tough times ahead. Migration pressure on key borders will rise as a consequence of post COVID-19 lockdown economic aftershocks and instability in the immediate surroundings of Europe. The realization is beginning to dawn that the apotheosis of hybrid instrumentalized migration might be in the making: the food and migration crisis triggered by Putin's war in the granary of the world.

In this context, a geopolitical perspective on migration will be key. Possible measures in the toolbox of targeted states dealt with above have a more preventive character (like early warning systems, reinforcing border management) versus countervailing character (e.g. negative leverages), are more appropriate in negotiation scenarios (investing in more balanced migration partnerships) versus actions in case of a belligerent scenario (national emergency legislation), and differ in terms of being applicable to all irregular migrants (e.g. informing people that could become a victim) versus frameworks for a specific procedure and different rights for instrumentalized migrants (like the EC proposal for dealing with situations of instrumentalization of migration). Table 1 provides an overview of all these instruments.

Throughout the (legal) proposals to deal with instrumentalization of migration, reference is made to the importance of upholding the right to asylum, the prohibition of refoulement and the rule of law, as well as the emergency and temporary nature of the measures. To stick to that, it is important to keep a focus on procedural rights and to prevent that exceptionality becomes a sliding scale.

Starting from that premise, a geopolitical perspective on migration means more conscientiously developing sustainable migration partnerships with third countries focused on a common interest in controlled migration, further operationalizing the toolbox for instances of instrumentalized migration, finding ways in which border management and protection of external borders go hand-in-hand with respect of human rights, and having cool-headed public debates about the responsibility for refugee protection and openness for legal economic migration in dark times. Or in other words: to find the collective will to conceptualize, build and defend fortresses *with gates*.