

The weaponization of migrants: a case of hybrid threat against the EU A legal perspective

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Introduction

The present thesis project aims at analysing the phenomenon of the instrumentalization of migration used as a ‘hybrid tool’ against the European Union. Hybrid threats are now at the top of the Western security agenda, the notion is hard to grasp however it can be articulated as sophisticated methods for undermining a political adversary. According to the European Union’s statement, they are ‘multidimensional, combining coercive and subversive measures, using both conventional and unconventional tools and tactics (diplomatic, military, economic, and technological) to destabilize the adversary’. They are designed to be difficult to detect or attribute, and can be used by both state and non-state actors. For as much as it might seem more of a flawed description, these *phenomena* are a priority in today’s geopolitical perspective. Hybrid tools cover a wide spectrum of events and circumstances, they can amount in fact to some well-known strategies, such as cybersecurity or terroristic attacks, or exploiting different modalities, *inter alia*, migration and border pressure and disinformation.

For the purposes of this thesis, after a brief introduction of the wide and complex concept of hybrid threats and their recognition into a normative framework of law, the focus will be over the misuse of mass migration and its instrumentalization. This circumstance occurs whenever migration crisis is not only triggered by “push factors”², such as war, famine or drought, but also, because of its roots into a bigger framework, usually a political one. Indeed, the migratory phenomenon has been considered as a hybrid threat by different scholars, especially it is a strategic mechanism in the context of hybrid warfare³. In this specific political environment, there is room for different actors pursuing radically different goals, here we are not referring to the people that migrates but also to policymakers and, moreover both the States of destination and States of transit⁴.

Nowadays, Europe has been experiencing mass migration in different forms. In recent years especially, migration has been more and more used as a political tool; it is the subject of interests oscillating between instrumental dramatization and reduction to a secondary topic. In general, European Union border policies sharpen strategies and technological tools to manage migrants and refugees, often pursuant to legally controversial acts. This is accomplished in the wake of tensions

²Within the ‘push-pull’ migration model, the factors that initiate and influence the decision to migrate are defined as follows: push factors are those that in countries of origin push people to leave their country and pull factors are those that in destination countries attract them.

³BACHMANN, PAPHITI, *Mass Migration as a Hybrid Treat? – A legal Perspective*, Polish Political Science Yearbook, vol. 50 (1), 2021, pp. 119-145.

⁴‘Any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence’, under Art. 6(c), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

between European states, at the same time trying new ways to cope with the issue, for instance using bilateral agreements with neighbouring countries. It appears logic though, that these countries have started to use migration to put pressure on EU, perhaps seeking to reach other kind of agreements, such as financial ones. Moreover, the instrumentalization of migration is the use of human beings by some countries with the aim of pressuring or destabilising other states, it is a recurrent tactic, as it does not involve an open threat or declaration of war. It is therefore used with the aim of getting away with it, avoiding large-scale consequences such as conflict or direct war. This trend is considered alarming and triggering for Europe's security environment and defence of its borders. As the influx of migrants increases exponentially, the “adversaries” pose a hybrid threat.

Thus, this thesis seeks to depict the concept of the weaponization of migrants from a legal point of view within the environment of the European Union, aiming at providing a clearer picture of the main legal provisions and tools which can be applied in this framework, for regulating and contrasting the misuse of migration. The workload is divided in 3 main chapters. The dissertation starts from the definition of hybrid threat, as the use of this terminology is mostly recent, it seems fundamental to enshrine the core features of this concept to better understand it. The first chapter is an introduction to the concept of hybrid threat and mass migration, also analysing the ‘legal voids’ that these tools may use and the engagement of military and defensive force in this environment. The second chapter focuses on the EU context, providing for a solid legal pattern of Migration Law and of the widespread practices of using a variety of tools that also amount to the Common Security Defence Policy context. Lastly, the chapter enshrines a set of provisions and instruments that can be used in order to contrast such circumstances of weaponization of migrants. Though, there is no single piece of legislation containing EU tools to counter hybrid threats, it is hard to provide for a specific framework. Eventually, EU may resort to some measures linked to different legal framework and policies, for instance imposing restrictive measures on the adversaries. Ultimately, the last chapter of the present work aims at clarifying the concept of the instrumentalization of migration, examining a practical case in order to eviscerate the European Union’s reaction and the use of its legal tools: the Belarus migration crisis occurring during 2021. This event has been identified by the European institution as a hybrid threat, more specifically as an instrumentalization of migration. The Belarusian government started carrying out actions that many have referred to be hybrid warfare aggression. Mostly, migrants from the Middle East and North Africa were transported through Belarus to the borders with Lithuania, Latvia, and Poland. There are a number of reasons why the scenario has been alarming. In the first place, it has threatened the multilateral international legal order, as well as refugee protection and human rights protection; in the second, it presents all the ingredients necessary for disinformation and public opinion manipulation; and, in the third, it occasionally provides justification for further

escalating conflict, such as border violence, the use of state armed forces and paramilitaries, and promoting the trade in illicit substances.

This occasion is great for reflecting on a variety of topics important for the future of the European Union: first of all, the management of migration and a hopeful new agreement between the Member States; second of all, a more precise and defined pattern of contrasting such hybrid actors and instruments, especially insofar as the geopolitical background is instable and alarming in many aspects.

Chapter 1. Hybrid threats and the use of migration as a hybrid threat

For the purposes of this chapter, the concept of a hybrid threat will be addressed to provide a more specific context in order to understand its features. The chapter will first clarify the terminology that has developed over the past decades and is still evolving. It has mainly been described from a military perspective, and the main challenge has been to elucidate the tools to counter such hybrid warfare. Scholars have suggested various solutions, with one of them being the use of "lawfare" as a crucial strategy to tackle these issues. Therefore, the following paragraphs are dedicated to the study of this term from a legal perspective, particularly from an international viewpoint, to explain why the issue is complex and cannot be confined to a single legal provision. This complexity makes it challenging to legally condemn it and cope with it. Since this work's primary focus is migration used as a hybrid threat, this chapter also investigates why migration could be used as an instrument to threaten or attack other actors.

Finally, the focus will shift to the specific field of European Union law and its tools, as many new forms of hybrid attacks have recently been directed against it. The work aims to provide the framework in which the EU has encapsulated the concept in close cooperation with NATO and the main legal provisions theoretically triggered by such actions. To address these topics, the text will analyse specific norms that scholars have suggested to use in countering hybrid threats. The hybrid modality now represents one of the Union's primary concerns, to the extent that cooperation with NATO has been expanded specifically to prevent and combat it.

1.1 Introducing hybrid threats

To gain a comprehensive understanding of the concept of a hybrid threat, this paragraph will focus on studying the notion and distinguishing between hybrid threats and hybrid warfare. The description of these notions appears essential to address the issue from every kind of perspectives, especially the legal one. In fact, the meaning is not immediately understandable without a precise context. This paragraph thus, depicts the analysis provided by scholars specialised in military and strategic studies which are the primary field of application of this issue. It represents the precondition for any analysis of the phenomenon of "hybrid threat or warfare" and how to counter it. Therefore, the legal challenges require initially some degrees of clarity.

The term *hybrid* is usually implied when referring to a “mixture of two very different things”⁵. When applied to international security, this indicates a blend of military and non-military challenges⁶. However, as yet, no official definition of “hybrid threat” exists.

The term hybrid threat refers to an action conducted by state or non-state actors, with the goal of undermining or harming a target by influencing decision-making at the local, regional, or institutional levels⁷. These actions utilize a wide range of means and are designed to stay below the threshold of detection and attribution. Usually, the preferable targets are democratic states and institutions, which can be affected in various domains; such as the political, economic, military, civil or informational ones. Generally, it is challenging to depict hybrid threats because of their ambiguity caused by the blended use of both conventional and unconventional means and an asymmetric use of military means and warfare. It’s not clear which kind of activities can be included in a hypothetical list, but according to NATO, there could be mentioned: conventional weaponry, chemical, biological, radiological and nuclear materials, terrorism, espionage, cyber-attack and criminality, supported by information operations and legitimate business organisations⁸. By using these tools in concert, hybrid actors hide their action under vagueness and ambiguity, complicating attribution and response. The use of different intermediaries supports the achievement of these goals. Hybrid action is able to turn vulnerabilities of the target into a direct strength for the hybrid actor and this makes it more difficult to prevent or respond to them. For these reasons, there is no definition of the term, at least not an unambiguous one.

The origins of this concept dates back to 2010, when the Capstone Concept “Military contribution to countering hybrid threats” was published by NATO⁹. The study outlined the main aspects and areas of defence for the future, identifying these threats as “those posed by adversaries, with the ability to simultaneously employ conventional and nonconventional means adaptively in pursuit of their objectives”¹⁰. Moreover, experts had already emphasised these new forms of threats a few years

⁵<https://dictionary.cambridge.org/dictionary/english/hybrid>.

⁶ZANDEE SICO, VAN DER MEER, STOETMAN, *Countering Hybrid Threats. Steps for Improving EU-NATO Cooperation*, Clingendael Report, October 2021, <https://www.clingendael.org/pub/2021/countering-hybrid-threats/2-hybrid-threats-searching-for-a-definition/>.

⁷*The European Centre of Excellence for Countering Hybrid Threats*, <https://www.hybridcoe.fi/hybrid-threats-as-a-phenomenon/>.

⁸*North Atlantic Treaty Organization, Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats*, 25 August, 2010. https://www.act.nato.int/images/stories/events/2010/20100826_bi-sc_cht.pdf, p. 5.

⁹ *Ibidem*.

¹⁰ *Ivi*, p. 6.

earlier, highlighting the change in modern conflicts¹¹. The analysts focused on this blended typology of wars in combinations of increasing frequency and lethality, which could imply the employment of all forms of wars, including criminal behaviour, perhaps simultaneously¹². In particular, Frank Hoffman of the Centre for Emerging Threats and Opportunities at Quantico has largely contributed to the analysis of these forms and modes of warfare spreading against the U.S. military power¹³. The main researches focus on the distinct concepts of hybrid warfare and hybrid threat which will be addressed below.

The concept of hybrid threats encompasses a broad range of non-violent methods to exploit societal vulnerabilities with the goal of gradually creating disunity. Hoffman was one of the first to use the term. The latter puts together different tactics that seek to blur and exploit the Western society's legal gaps. In a sense, the actors take advantage of the "grey areas" under which the states can't react immediately. In such conflicts, adversaries (states, state-sponsored groups, or self-funded actors) exploit access to modern military capabilities including for instance encrypted command systems, man-portable surface-to-air missiles, and other modern lethal systems.

On the other hand, hybrid warfare is a challenge that is likely to persist¹⁴. The term was probably first used in 1998 by Robert G. Walker, who defined it as comprising special and conventional operations¹⁵. The concept was then incorporated into various approaches to international security strategy as a wide conception which presents a strategic environment with an array of new more cost-effective means to employ combination. Briefly, the term is used to describe a change in the character of warfare with an increasing complexity of armed conflict, where the adversaries may combine types of warfare and non-military means to neutralize conventional military power, such as economic pressure, diplomatic means, disinformation or cyberattacks.

There are many examples of hybrid warfare in history¹⁶. The first one ever mentioned is probably the American support to the insurgent group "Contras" in Nicaragua during the 80's¹⁷. When the U.S. military forces in posing menaces from Honduras, aimed at causing damages in Nicaragua. Another

¹¹HOFFMAN, *Hybrid Threats: Reconceptualizing the Evolving Character of Modern Conflict*, in *Strategic Forum*, No. 240, 2009, <https://www.files.ethz.ch/isn/98862/SF240.pdf>.

¹²MONAGHAN, *Countering Hybrid Warfare*, in *PRISM*, Vol. 8, No. 2, 2019, pp. 82-99.

¹³HOFFMAN, *op. cit.*

¹⁴MONAGHAN, *op. cit.*, p. 84.

¹⁵KARSKI, MIELNICZEK, *The notion of hybrid warfare in international law and its importance for NATO*, in "NATO Legal Gazette", Issue 39, 2019.

¹⁶JACOBS, LASCONJARIAS, *NATO's Hybrid Flanks. Handling Unconventional Warfare in the South and the East*, NATO Defense College Research Paper No. 112, 2015.

¹⁷ICG, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports, 1986.

current example of hybrid warfare is the Russian military intervention in Ukraine¹⁸; not only the occupation of Crimea but also the attack on Donbass¹⁹. In these cases, the hybrid model of warfare uses the military tools in ambiguous way, often hidden; and economic tools to allow pressure to be brought upon economies and on energy.

The different conception of hybrid threat and warfare also engages two different kinds of strategies to respond to, as they present different kind of targets. Hybrid threats mainly target the “will of the people” and the decision-making policies while hybrid warfare damages mostly the effectiveness of the military to conduct successful operations²⁰.

To sum up, the diversity of hybrid tactics masks the order behind the spectrum of tools used and the effects being achieved²¹. Hybrid actors most likely do not just seek to inflict damage or death on regions, nations or organisations. They are rather striving to achieve political goals and objectives. To this end they will attempt to influence their target society's collective mind-set so that their values and principles become challenged, their resolve weakened and consequently political objectives are abandoned or modified.

The absence of a definition of the term, and the consequent identification of hybrid threats through certain typical characteristics is therefore understandable in the light of the result of a precise choice. A single definition under the spectre of hybrid threats of a heterogeneous set of threats, would make it difficult to identify, as will be highlighted in the following paragraphs, a unified and effective legal regime to deal with these new challenges in the legal framework of the states.

1.2 The international legal framework applicable to hybrid threats

The observations regarding conceptual ambiguity eventually lead to an exploration of the legal implications of these hybrid models from the international perspective. Indeed, a comprehensive approach to contrast hybrid threats implies focusing not mainly on military deterrence and reassurance but also on improving political, media and, overall, legal resilience²². In a legal sense, assuming that hybrid threat is only a threat, not limited to a single form and dimension of warfare,

¹⁸KÄIHKÖ, "The Evolution of Hybrid Warfare: Implications for Strategy and the Military Profession," *Parameters* 51, no. 3 (2021), pp. 115-127.

¹⁹KARSKI, MIELNICZEK, op. cit. pp. 68-71.

²⁰*Ivi*, pp. 68-70.

²¹D'AGNONE, *Migrazioni di massa e minacce "ibride" alla sicurezza degli Stati membri dell'Unione europea*, in *Federalismi*, ISSN 1826-3534, n. 1/2018.

²²FOGT, *Legal Challenges or "gaps" by Countering Hybrid Warfare – building resilience in Jus Ante Bellum*, in *Southwestern Journal of International Law*, Vol. XXVII:1, 2020.

would hardly bear any legal usefulness²³. For these reasons establishing a proper legal definition is mostly impossible. Numerous legal areas of uncertainty exist in international law and international humanitarian law, especially in the context of hybrid threat and warfare as described and depicted above.

In general, these well-known legal “gray zones” are characterized by unclear and/or disputed issues to which there are either two or more well-founded or plausible solutions²⁴.

Firstly, it appears useful to analyse the different actors perpetrating the actions, to have a clearer view over the possible scenarios. We can discern those hybrid actions driven by States and those operated by different entities (such as non-state actors). The first situation is often composed by strong states or a regional power, that decide to intervene in the internal affairs of a weaker state, but due to various material and political costs, cannot afford to enter an open war²⁵. The second case happens when a weaker entity aims to influence (an)other state(s) to an extent unreachable without employing coercion, while being completely or predominately incapable of facing an open war. Especially in the first category, one of the purposes of employing hybrid methods is to overcome the law and bring into question its applicability. Meanwhile, the actors falling within the second category often demonstrate disregard for international law, hiding behind the sovereignty of the state and exploiting the lack of possibility to wage a conventional war against them²⁶.

Those states acting illegally or non-state actors usually target democratic countries, especially their legal vulnerabilities²⁷. These “attacking” agents or non-state actors using the hybrid tool and methods are often autocratic states or illegally acting non-states parties, where activities and conduct in violation of human rights law and international law. For these states, the rule of law in society, a free press, compliance with Human Rights Law and the rights of individuals are far less important. The principal focus by such states acting as hybrid threat or warfare aggressors is either to conceal their “illegal” operations or justify these as legitimate reactions or humanitarian interventions for the better good of the people concerned. Instead, the “victim” states of hybrid campaigns are often based on a fundamental rule of law in society, a free press and compliance with international and human rights law²⁸. From a legal point of view, the means used in hybrid warfare may resulting various violations with different degrees of gravity of domestic law, Human Rights Law and international law. The instruments at stakes of the different doctrines will be shortly investigated below.

²³KARSKI, MIELNICZEK, op. cit., p. 70.

²⁴FOGT, op. cit. p. 60.

²⁵KARSKI, MIELNICZEK, op. cit., p. 70

²⁶*Ibidem.*

²⁷FOGT, op. cit., pp. 53-58.

²⁸*Ibidem.*

Hybrid threats seek to exploit legal loopholes; for example, the blurred line between intervention, use of force, armed attack or between situations of internal unrest and tensions, non-international armed conflicts or international armed conflicts²⁹. This has the consequence of exposing the international law's structural weaknesses, overall, the problem of distinguishing between war and peace. In legal terms this is translated in the distinction between *jus in bello* and *jus ad bellum*: the first one refers to international humanitarian law that is applicable during a conflict while the second one is known as the law of the recourse to war³⁰.

There are many legal areas of uncertainty in international law and international humanitarian law. The *jus ad bellum* comprehends issues as, *inter alia*: the right to individual or collective state self-defense as codified in Article 51 of the UN Charter, the conditions for invoking collective self-defense by alliance states, the use of force under a mandate of the United Nation Security Council under Chapter VII of the UN Charter, and the existence of a right to use force outside the scope of state self-defense and without the existence of the UNSC mandate. For the purpose of an analysis of the legal challenges and gaps by hybrid warfare, there are multiple issues within the *jus ad bellum* regime, which are both complex and unclear³¹.

It seems also necessary to mention Article 5 of the Treaty of Washington, that instituted the NATO, wherein the Parties “agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all”. The notion of “armed attack” can be analysed in light of Article 2(4) of the UN Charter, “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence if any state, or in any other manner inconsistent with the Purposes of the UN” and Art. 51 of the UN Charter, according to which “Nothing (...) shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. The two articles pursue different shades of meaning that do not always collide; the use of force prohibited in Art. 2(4) does not necessarily coincide with the attack which allows self- defence under Article 51. In *Nicaragua Case*³² the ICJ has pointed out that only acts of certain scale and effects may constitute armed attacks while in different decisions, the Court has supported the “accumulation of events” doctrine, according to which a series of acts, none of which *per se* amounts to an armed attack for

²⁹SARI, *op. cit.*

³⁰FOCARELLI, *International Law*, Edward Elgar Pub, Northampton, Massachusetts, 28 June 2019, pp.542- 562.

³¹FOGT, *op. cit.*, pp. 62-67.

³²ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986.

self-defence purposes, may justify a reaction in self-defence when considered altogether³³. There are indeed many different interpretations of the application of the concept of “armed attack”. In general, the term is employed as a kind of threshold under which hybrid warfare has to remain in order to reach a political and military reaction, at least under Article 5 of the North Atlantic Treaty³⁴.

Another unsolved aspect concerns whether self-defence is permitted also against non-state actors. After the 9/11 attacks, the implication of article 51 of the UN Charter is no longer exclusively attributed to attacks by States³⁵. As a basis, the UN Security Council Resolutions 1368 and 1373 of 2001³⁶ affirmed the legality of invoking Art.5 of the North Atlantic Treaty in conjunction with Art. 51 of the UN Charter against non-state actors committing acts of international terrorism. A vision generally acclaimed is that States can’t take actions against a non-state actors perpetrating an attack on the territory (or jurisdiction) of another state, without the express or implied consent of that State, unless there is an applicable resolution of the UN Security Council authorizing the use of armed force under Chapter VII of the Charter or other relevant and applicable legal provision of similar effect. Hence, armed attacks can come from actors other than states, but acts of self- defence within the jurisdiction of another state requires balancing the right to self-defence with the principle of territorial sovereignty and the prohibition of the use of force³⁷.

When armed hostilities arise, the applicable law will change from peacetime or crisis law to an automatic activation of the Law of Armed Conflicts in case of an International Armed Conflict (IAC) or a Non-International Armed Conflict (NIAC)³⁸, those issues are relevant for the purposes of *jus in bello*. A state responding in a proportionate and necessary manner in self-defense can only use force against persons and objects if the conditions of the *jus in bello* are fulfilled; an object is a legitimate target if it constitutes a military objective and if the use of force against this target is proportionate and conducted with lawful methods, means and precautions have been taken³⁹. In the cases relevant to hybrid threat and warfare, which operates in the grey zones of armed conflict, there are two issues to clarify. The first one is linked to the conditions for the existence of an armed conflict at non international level. Generally, a non-international (or "internal") armed conflict refers to a situation

³³FOCARELLI, op. cit.

³⁴SARI, op. cit.

³⁵ *Ibidem*.

³⁶Resolution 1368 (2001) / adopted by the Security Council at its 4370th meeting, on 12 September 2001, <<https://digitallibrary.un.org/record/448051>>, Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001, <https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf>.

³⁷KARSKI, MIELNICZEK, op. cit.

³⁸BETTATI, *Droit humanitaire*, Dalloz, Paris, 2012, pp. 26- 61.

³⁹ICG, *Iran v. U.S.*, 2003 at 187, (quoting ‘[t]he United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence’).

of violence involving protracted armed confrontations between government forces and one or more organized armed groups, or between such groups themselves, arising on the territory of a State⁴⁰, the criteria for the conditions is summoned in Article 3 of the Geneva Convention⁴¹.

Around the threshold for a non-international armed conflict, a hybrid campaign could create severe legal challenges and, thus, potential legal “gaps” in and between the different phases (peace- crisis- conflict- peace)⁴². Another issue is related to the distinction between an International armed Conflict and Non international Armed conflict in a hybrid warfare and the consequent state attribution that would create difficulties at political level. Pursuant to a widely accepted general definition of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, ‘*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*’⁴³. In other words, there is an international armed conflict whenever there is a resort to armed force between states, regardless of the intensity of such force. In contrast, for a non-international armed conflict two cumulative criteria must be fulfilled: a ‘protracted armed violence’ in the sense that a certain threshold of armed violence that has been reached in terms of intensity, and at least one side to the conflict is an organized armed group. The distinction between international and non-international armed conflict is based on the structure and status of the parties involved which is different. This differentiation in a hybrid warfare setting will depend on evidence of state attribution, which will be a difficult and highly political issue.

The characteristics of hybrid threats, as interpreted by some academics, appear to pertain to the *jus in bello* rather than the *jus ad bellum*.⁴⁴ Such threats would not be capable of justifying recourse to the

⁴⁰FOGT, op. cit. pp. 73-76.

⁴¹“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.(2) The wounded and sick shall be collected and cared for”

⁴²FOGT, op. cit. pp. 73-76.

⁴³ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory, Appeal on Jurisdiction.

⁴⁴D’AGNONE, *L’Unione europea e le risposte alle ‘minacce ibride’*, in Osservatorio Europeo, Giappichelli, Editore, 2016.

use of force (permitted under the *jus ad bellum*) by the offended state, or by the other states acting in collective self-defence; rather, they would constitute a method by which violent conduct against the security of one or more states can be carried out⁴⁵. If the 'attacks' do not qualify as 'armed attacks', they are not capable of legitimising the recourse to the use of force in self-defence. The concept of a hybrid threat thus, seems to allude exclusively to the means by which a violent action against a state can be conducted (*jus in bello*), without legitimising the recourse to the use of force in self-defence (*jus ad bellum*)⁴⁶.

Ultimately, “modern” hybrid warfare not only presents challenges to international peace and security, but also undermines current national and international legal frameworks by questioning the validity of existing public international law rules applicable in international relations in both peace war times⁴⁷. The most problematic issue arises from the challenge of defining a hybrid conflict, which hinders its characterization within the conventional international legal framework.

As above stated, the difficulty for defining a hybrid conflict impedes its legal characterization. In this context, the role of law is fundamentally implied as an instrument used to contrast the hybrid challenges. Many scholars have stressed the relevant role played by lawfare. The definition of this term was coined by Dunlap and refers to “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective”⁴⁸. Lawfare is implied as a method of war, just like others intent to influence the adversaries⁴⁹. However, often, the authors demur the existence of an absolute definition of the concept of lawfare. In general, law may be implied in the warfare context as a weapon and this use may occur either in a malicious or affirmative way⁵⁰. Traditionally, lawfare has been associated with negative connotations, involving the adversary's use of law rather than leveraging it as a means of their own warfare capabilities. However, the term can also be applied in an affirmative manner to achieve military and political objectives⁵¹. According to Kittrie, lawfare can be implied in different ways: the actors can use law to create the same or similar effects as those traditionally sought from conventional military actions and, one of the actor's motivations is to weaken or destroy an adversary against which the lawfare is been deployed⁵².

⁴⁵*Ibidem*.

⁴⁶*Ivi*, p.4.

⁴⁷BACHMANN, MUNOZ, *Lawfare in Hybrid Wars: The 21st Century Warfare*. *Journal of International Humanitarian Legal Studies* 7, 2016, pp. 63-87.

⁴⁸DUNLAP, ‘*Lawfare Today: A Perspective*’, *Yale Journal of International Affairs*, 2008, p. 146.

⁴⁹BACHMANN, MUNOZ, *op. cit.*, pp. 63-87.

⁵⁰*Ibidem*.

⁵¹*Ibidem*.

⁵²KITTRIE, *Lawfare: Law as a Weapon of War*, (2015).

1.3 Hybrid threats in the European context

In 2016 the EU Commission and the High Commissioner of the Union for Foreign Affairs and Security released the Joint Framework on Countering Hybrid Threats⁵³ describing a spectre of hypothetical reactions that the EU could take to overcome the phenomenon of hybrid threats and analysing the concept and the nature of hybrid threat. The latter is defined as “multidimensional, combining coercive and subversive measures, using both conventional and unconventional tools and tactics (diplomatic, military, economic, and technological) to destabilise the adversary, (...) designed to be difficult to detect or attribute and can be used by both state and non-state actors”⁵⁴.

The framework lists among the activities to counter hybrid threats: strategic communication to counter the systematic spread of disinformation; protecting critical infrastructures (e.g., energy supply chains, transport) from unconventional attacks (which in the description includes very broad policy goals such as further diversifying the EU's energy sources, suppliers and routes, transport and supply chain security, but also protecting infrastructure in space from hybrid threats, as well as increasing defence capabilities in general); protecting public health and food security (including protection against CBRN threats⁵⁵); enhancing cyber security (with a special focus on industry, energy, financial and transport systems); targeting hybrid threat financing; and building resilience against radicalisation and violent extremism⁵⁶.

The Union's external action under this framework is guided by the principles set out in Article 21 of the Treaty of European Union (TEU), which include democracy, the rule of law, the universality and indivisibility of human rights and respect for the principles of the United Nations Charter and international law⁵⁷.

Within the 2016 Communication⁵⁸, EU offered a general approach to improve the common way to deal with the challenges posed by hybrid threats. This approach involves assessing the crucial role of Member States that retain the primary responsibility as most national vulnerabilities are country-specific. However, many Member States face common threats that can be more effectively addressed

⁵³European Commission, Joint Communication to the European Parliament and the Council, *Joint Framework on countering hybrid threats a European Union response*, JOIN/2016/018 final.

⁵⁴European Commission, JOIN/2016/018, p.1.

⁵⁵Chemical, Biological, Radiological and Nuclear materials or weapons.

⁵⁶The EEAS also includes cyber threats within the scope of hybrid threats, and adds that “Chemical, Biological, Radiological and Nuclear (CBRN) threats delivered by non-conventional means fall within a category of their own” while still including them within the category of hybrid threats.

⁵⁷European Commission, JOIN/2016/018, op. cit.

⁵⁸*Ibidem*.

at the EU level⁵⁹. The document suggests to use EU as a platform to boost national efforts and, through its regulatory capacity, establish common benchmarks that can help raise the level of protection and resilience across the EU.

Moreover, the Joint Framework brings together all relevant actors, policies and instruments to both counter and mitigate the impact of hybrid threats in a more coordinated manner: introducing “dedicated mechanisms to exchange information with Member States and to coordinate the EU’s capacity to deliver strategic communications” in order to raise awareness. For example, the Hybrid Fusion Cell within the Eu Intelligence and Situation Centre (EU INTCEN) which serves an exclusive civilian intelligence function of the European Union. EU INTCEN's main goal is to provide intelligence analyses, early warning and situational awareness to the High Representative of the European Union for Foreign Affairs and Security Policy and European External Action Service (EEAS). Indeed, it is a Directorate of the latter, and it is composed of two divisions: the Analysis Division and General and External Relations Division. Primarily, EU INTCEN conducts its analytical work based on information provided by the security and intelligence services of Member States. Additionally, it gathers information from media, websites, blogs, diplomatic reports, consular warden networks, international organizations, and NGOs.⁶⁰

Another critical operational action is enhancing resilience through the implementation of agreed-upon strategies by both the EU and Member States. This involves the full implementation of existing legislation by Member States. Therefore, in order to counter hybrid threats the EU has pushed for a defined policy framework, but, on the contrary, the legal action appears fragmented⁶¹. One of the pillars for the framework is “preventing, responding to crisis and recovering by defining effective procedures to follow, but also by examining the feasibility of applying the Solidarity Clause (Article 222 TFEU) and the mutual defence clause (Art. 42(7) TEU), in case a wide-ranging and serious hybrid attack occurs”. These specific issues will be addressed in the following paragraph.

1.4 Countering hybrid threats pursuant to EU legal provisions

The absence of a single legal instrument or legal framework for addressing hybrid threats within the EU can be attributed to several factors. One key reason is that these threats are challenging to classify in a strictly legal manner. Nevertheless, there are two legal mechanisms available for defensive

⁵⁹D’AGNONE, *Migrazioni di massa e minacce “ibride” alla sicurezza degli Stati membri dell’Unione europea*, op. cit.

⁶⁰European Commission, JOIN/2016/018, op. cit.

⁶¹LONARDO, *EU Law against hybrid threats: a first assessment*, European Papers, Vol 6, 2021, No 2. pp. 1075-1096.

purposes: the solidarity clause (Art. 222 TFEU) and the "mutual assistance clause" in Article 42(7) TEU. The solidarity clause (Art. 222 TFEU) allows for an effort by both the European Union and its Member States when a Member State becomes the target of a terrorist attack or is affected by a natural or man-made disaster. This clause promotes joint efforts and solidarity in addressing such crises. The "mutual assistance clause" contained in Article 42(7) TEU specifies that if a Member State experiences armed aggression on its territory, other Member States are obliged to provide it with aid and assistance. These legal provisions offer avenues for responding to hybrid threats, which may encompass various forms of aggression and unconventional attacks. While there may not be a dedicated single legal framework for hybrid threats, these existing mechanisms can be adapted to address specific situations as needed.

Originally, as the issue above new threats such as terrorism and weapons of mass destruction was getting more and more on the agenda, many discussions over the future of the NATO and the WEU⁶² were opened in the EU⁶³. During the debates on a Draft Constitution in 2002-2003, a proposal arose, aiming to incorporate the WEU mutual defence clause into the EU⁶⁴. The idea was to insert a "general clause on solidarity and security as the one of NATO and the WEU, binding all Member States in the European Union, and allowing for a response to risk of any sort that threaten the Union"⁶⁵, therefore combining in one clause both a mutual assistance obligation on the model of the WEU (addressing traditional threats such as aggression by another state) and a solidarity obligation to respond to new threats, such as terrorist attacks. Today, they are included in the two separate provisions already mentioned: a solidarity clause and the mutual assistance/defence clause, which constituted the fruit of a compromise and therefore contains weaker language than the WEU's mutual defence clause. The compromise was meant to bring together the positions of three groups of states: those seeking a mutual defence commitment; those aiming to protect their traditional neutral status (such as Austria, Finland, Ireland and Sweden) and those wanting to ensure that the article would not undermine

⁶²The Western European Union operated as a forum for the coordination of matters of European security and defense. It contributed to the creation of the North Atlantic Treaty Organization (NATO) and worked in cooperation with that organization. The WEU became the primary defense institution of the European Union in the 1990s until 2001. It was born with the Brussel Treaty of 1948, an agreement signed by Belgium, France, Luxembourg, the Netherlands, and the United Kingdom to provide for collective defense and to facilitate cooperation in economic, social, and cultural matters. NATO and the Council of Europe, both of which were formed in 1949, developed out of that framework.

⁶³<https://www.europarl.europa.eu/document/activities/cont/200805/20080513ATT28796/20080513ATT28796EN.pdf>.

⁶⁴HOWORTH, *The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility*, European Foreign Affairs Review in Kluwer Law International, 2004.

⁶⁵BLANKE, MANGIAMELLI, HEIDELBERG, *The Treaty of European Union (TEU) a Commentary*, Springer, 2013, pp. 1201-12035.

NATO. The introduction of the mutual assistance clause in the TEU also allowed for the dissolution of the WEU, officially announced in 2010⁶⁶. It seems now fundamental to tackle the two topics separately, to get a better overview of their possible use and implementation.

The solidarity clause entails that the Union acts jointly mobilizing all the necessary instruments, including the military resources. Basically, it enforces the legal obligation for the Union and its Member States to act jointly in a “spirit of solidarity”. Since more than a decade, this idea of solidarity hangs heavily in the air of Europe.⁶⁷ Specifically, the solidarity clause is conceived as a treaty-based method for improving EU cooperation on a range of complex threats. However, the term solidarity is interpreted in different ways by the governments of the Member States; while some believe in the need for assisting the countries in trouble, some others use it as a preventive tool to avoid the worse scenario in the first place. The problem is that as long as solidarity will be a legal mean, Member States must convene with a specific definition and action to take, especially in the field of security and defence. The absence of cohesion between the States is, in fact, a major hurdle to a prompt response. This issue will be dealt with in the following chapters, specifically for what concerns the European migration context.

The broader provision of the clause, contained in paragraph 1 of Art. 222 of the TFEU, demonstrates the supranational attempt to involve the EU institutions as well as Member States. As for the functioning of the tool, the procedure is clarified in paragraph 3: “the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and High Representative”. Also, the Council shall act unanimously where the decision has defence implications, which implies that qualified majority voting will take place otherwise, and it is assisted by the Political and Security Committee (PSC) and the Committee on Internal Security.

In 2014 with decision 2014/415 the solidarity clause was put into practice. According to the document⁶⁸, once the solidarity clause has been invoked, the EU is entitled to mobilize all sector-specific, operational, policy or financial instruments and structures at its disposal, such as, for

⁶⁶WEU: *Ten jointly announce dissolution of Western European Union* from *Europe Diplomacy and Defence*, 7 April 2010, https://www.cvce.eu/content/publication/2010/6/7/208ee7ac-b61f-4fa7-b3eb-cc799455cb73/publishable_en.pdf.

⁶⁷MYRDAL, RHINARD, *The European Union’s Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union*, Occasional ULPapers, N.02, 2010, p. 1.

⁶⁸European Council, *Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause*, 2014/415/EU.

example, the EU Civil Protection Mechanism, the instruments under the EU Internal Security Strategy and the structures developed in the context of the EU's Common Security and Defence Policy. The Council ensures the political and strategic direction of the response, taking full account of the Commission's and the High Representative's competences. In parallel, the Commission and the EU's High Representative have to identify the instruments and capabilities in helping to respond to the crisis and propose to the Council for measures of the EU countries to react rapidly.

Within the Lisbon Treaty, a new stage of development of the EU was reached. The frame of intergovernmentalism was approached giving a central role to subsidiarity, with the consequence of interfering with the sovereignty of the Member States. This aspect is noticeable by the provision that recalls a general recourse to all the instruments at the Union disposal, such as police and judicial cooperation, civil protection, intervention and even military resources of the Member States⁶⁹. But the article remains vague on the details and implementing measures, any guide or outlines is lacking. It only brings up the procedure, which consist in the Council defining the necessary arrangements for its implementation.

Nevertheless, the real application of the clause is complex and the EU keeps on prioritizing the Member States' national responses. Moreover, the invocability of Art. 222 remains uncertain; even though a legal obligation is pursued, the Member States have the autonomy to decide whether or not to act, having coordinated within the Council. The vagueness of the provision relies on some practical aspects of application which are absent, such as: the definition of the crises and/or disasters that fall into its scope and its legal implications and the military capabilities. In particular, according to some scholars, using a qualitative approach (and giving some criteria to characterize crises and disaster), the clause should cover major kinds of events requiring a combination of available EU instruments⁷⁰. In this sense, the list would be expanded from the restrictive groups of "terrorist attacks, natural disaster and man-made disasters".

A more mixed approach could include: some additional qualitative criteria on the global nature of the threat/ attack or disaster and thresholds for the implementation of the subsidiarity principle; a non-exclusive list of the main threats/ crises to take into consideration and a triggering procedure, which would allow a reasonable interpretation of these principles on a case-by-case basis⁷¹. As for the scope of application of the clause, which seems to be used as an "umbrella", it frames all Eu cooperation on crises and disasters and consequently, providing a wider implication. Also, the legal

⁶⁹KELLER- NOELLET, *The Solidarity Clause of the Lisbon Treaty's, Common Security and Defense Policy*, Part. VII, pp.328-33, <https://institutdelors.eu/wpcontent/uploads/2018/01/tgae20117fkellernoellet.pdf>.

⁷⁰*Ibidem*.

⁷¹*Ibidem*.

connotation of the provision remains interpreted in different ways, some think that the clause should be accompanied by new policies to fasten the pace of legislation, while others reflect on the possibility to use it as an independent legal basis for cooperation in specific circumstances.

Another clause that can be considered when evaluating the potential for a defensive response is Article 42(7) of the Treaty on European Union. The latter takes part of the Treaty's specific provisions on the Common Security and Defence Policy, it contains the mutual assistance clause of the EU (also considered as the EU's mutual defence clause). It was firstly included in the Lisbon Treaty in 2009 but it's inspired by Article V of the 1954 Brussels Treaty establishing the Western European Union (WEU)⁷². After the inclusion of this article, no other provisions had been agreed to complement the EU's crisis management powers in the context of defence cooperation under the CSDP. This clause was firstly used as a response to the terroristic attacks in Paris on November 2015 to which the so-called Islamic State of Iraq and the Levant (ISIL) had claimed responsibility. The French government invoked the article as a call for Member States in the EU to help out, leaving more than a few questions open⁷³.

The scope of the provision has defensive implications covering collective defence in fact it provides for a direct reference to defence, mentioning Article 51 of the UN Charter. States on the choice of action, between diplomatic protest and military commitments⁷⁴. The measures are also to be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security Article 42(7) TEU does not necessarily imply the use of military means, that was basically decided to please the more neutral members, such as Denmark, but on the other hand, it doesn't exclude beforehand a military assistance⁷⁵.

The mutual defence clause is a special one, because it is purely intergovernmental in nature. This means that it binds member states 'horizontally' without transferring any competence 'vertically' to EU institutions⁷⁶; moreover, coordination is not required at the EU level in situations when the mutual

⁷²“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States, Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.”

⁷³TOSATO, *Interrogativi sul ricorso della Francia alla clausola di difesa collettiva ex art. 42.7 TUE*, in *Aperta contrada*, 3 dicembre 2015.

⁷⁴CİRLIG, *The EU's Mutual Assistance Clause. First ever activation of Article 42(7) TEU*, European Parliamentary Research Service, November 2015, pp.3-9.

⁷⁵*Ibidem*.

⁷⁶MYRDAL, RHINARD, *op. cit.*, p. 10.

defence obligation is invoked. In a legal sense, Article 42.7 differs from most EU treaty provisions because it is only weakly associated with EU institutions and EU level capabilities. This clause does not specify how EU partners should provide assistance but emphasizes that Member States have “an obligation of aid and assistance by all the means in their power”. In principle this formulation allows for many forms of assistance but, in practice, the explicit reference to armed aggression suggests most specifically to military means⁷⁷. There are no references to war-like measures seem to imply a scale of intensity corresponding to different modalities of permitted reactions. The Member States do not then seem obliged to undertake or participate in military operations in collective self-defence. After all, the EU is not a military alliance, nor is the mutual assistance clause likely to create one⁷⁸. It should be noted that Article 42(7) TEU is concerned with preserving the individual will of members in matters of defence and security policy, references are also found in declarations 13 and 14, which are annexed to the founding treaties and dedicated to the Common Foreign and Security Policy⁷⁹. Therefore, the mutual assistance clause seems to grant states a certain margin of discretion in identifying forms and content of the assistance stemming from the provision. According to some scholars, given the low chance of a direct armed attack against an EU member, the clause is interpreted as a tool both for operative reaction and policy development⁸⁰. For example, although the mutual defence clause makes no mention of the EU’s Common Security and Defence Policy (CSDP) structures, it could very well be used to motivate action in that area.

Thus, it appears very complex to bring hybrid threats consisting, in whole or in part, of hybrid threat context under the discipline of Article 222 TFEU or Article 42(7) TEU. This is certainly true, in particular, for the mutual assistance clause. Even if an extensive interpretation is admitted, it would seem difficult to apply to hybrid threats in the light of the international law, especially in the case of mass migratory phenomena, which are not military in nature. In fact, the prerequisites for the configurability of the right to legitimate defence under Article 51 of the United Nations Charter, expressly referred to by the mutual assistance clause, do not exist, in cases of hybrid threats namely the existence of an 'armed aggression': an armed attack and its attribution to an entity of a state nature. In fact, as has already been pointed out above, hybrid threats are characterised by the use of both conventional and unconventional means, by state and non-state actors. The possibility of perpetrating hybrid threats through a combination of military and non-conventional means does not seem to make

⁷⁷*Ibidem.*

⁷⁸CIMIOTTA, *Le implicazioni del primo ricorso alla c.d. 'clausola di mutua assistenza' del Trattato sull'Unione europea*, European Legal Papers, 2016.

⁷⁹*Ibidem.*

⁸⁰MYRDAL, RHINARD, *op. cit.*, p. 10.

these threats rise to the level of an armed attack⁸¹. Moreover, the Joint Communication of April 2016 clearly states that hybrid threats remain 'always below the threshold of an officially declared war' and, therefore, lack the necessary intensity to be equated with armed attacks⁸². "However, invoking the concept of an armed attack in cases where 'multiple significant hybrid threats amount to an armed aggression against an EU Member State' is also challenging⁸³. Another fundamental issue is to ask ourselves whether the non-statal bodies may be entailed under the scope of Art. 42 paragraph 7. In the aftermath of the terroristic attack in Paris, the clause was implied in this sense, therefore it seems like this possibility hasn't been excluded. However, there is still the need to clarify whether or not it can be used, and whether the response was in the affirmative, the Commission and High Representative should examine the applicability and the implication of art 222 TFEU and 42, par. 7 TEU⁸⁴.

When countering hybrid warfare, the concept of lawfare, as discussed in the preceding section, can be of assistance. Even though, in the European context its role may seem as ambivalent. The ambivalence of the role of law, at least in the EU, is caused by the fact that European Union is, according to many, overwhelmed by legal constrains and that makes it difficult to rely on a cynical use of law⁸⁵. The rule of law is one of the core values of the EU, according to Art. 2 TEU and under Art. 3 paragraph 5 TEU it shall "contribute to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". Analysing the global landscape, the opponents of Eu seem to be less fair in the use of law, and for this reason sometimes Europe appears more vulnerable⁸⁶. Hence, in this sense a more comprehensive use of defence law could empower the EU provided that it should rely on integration and cohesion between the Member States. In a legal perspective, the Union's action can be taken either via "horizontal" acts, that are essential in the emergency situations, as the aforementioned cases of Art. 222 and 42(7). There are, however, two issues to deal with. The first is related to the very scope of those clauses. In light of the discussion about hybrid threats, it could be analysed whether by virtue of their subject matter, the latter fall under the definition of either art. 222 TFEU or 42(7) TEU⁸⁷.

⁸¹D'AGNONE, *Migrazioni di massa e minacce "ibride" alla sicurezza degli Stati membri dell'Unione europea*, op. cit.

⁸²European Commission, JOIN/2016/018 final, p.2.

⁸³D'AGNONE, *Migrazioni di massa e minacce "ibride" alla sicurezza degli Stati membri dell'Unione europea*, op. cit.

⁸⁴D'AGNONE, *L'Unione europea e le risposte alle 'minacce ibride'*, op. cit.

⁸⁵LONARDO, op. cit, p.1093

⁸⁶See for example the role of China and Russia. BACHMANN, MOSQUERA, *Lawfare and Hybrid Warfare-How Russia is Using the Law as a Weapon*, Amicus Curiae - Journal of the Society for Advanced Legal Studies, 2016.

⁸⁷LONARDO, op. cit.

In this landscape, the amendments on a legislative level could shape the effectiveness of EU law in hybrid threats 'policy. As a matter of fact, many reforms that took place in the European context were approved as a sign of development and helped in granting effectiveness of different subject matter, also pursuant to the endorsement of the European Court⁸⁸. In this sense, the fundamental issue to stress is that as at national level, Member states are not capable of granting an expanded legal framework, so they should rely on a European cohesion. This was made clear also in the 2016 EU Global Strategy⁸⁹ according to which: "none of our countries has the strength nor the resources to address these threats and seize the opportunities of our time alone"⁹⁰. Some reforms on a legal pattern would probably lead to a more cohesive reaction to hybrid threats that would entail the possibility to focus on this kind of issues not only in times of emergency, but, on the contrary, to be always prepared in the context of hybrid threats. In general, legal and regulatory tools equip the EU, thus positioning the Union as the complementary and to a great extent autonomous allied of NATO in this domain. While the threats themselves are very broad, so are EU competences. In the words of Luigi Lonardo: "The EU has proved successful in mitigating many threats. It could be particularly powerful in the deterrence dimension, in its non-military aspects: earlier detection and prevention of the threats is, probably, the best deterrence"⁹¹. Hybrid threat remain fundamentally an open issue due to the vastity of its potential field of application. For this reason, a single legal instrument wouldn't be enough to contrast it, but on the contrary developing a set of legal bases, currently lacking is more than welcomed. They would help the Union in addressing those new, undefinable, forms of threats.

1.4.1 The EU- NATO cooperation

Another relevant aspect of EU's policy in countering hybrid threats regards its enhanced cooperation with NATO in recent years.. Historically, at the end of the Cold War the new international world order pushed towards a greater cooperation between the North Atlantic Treaty and the Western European Union. The differentiation between the two organizations at the time was meant to be that the WEU would "undertake the politico-military management of crises in which the Americans would

⁸⁸ *Ivi*, p. 1094.

⁸⁹The Global Strategy for the Foreign and Security Policy of the European Union is the report, published in 2016 coordinated by Mogherini's Cabinet and the European External Action Service (EEAS), the EU's diplomatic corps. The EU Global Strategy (EUGS) is the doctrine of the essential values and interest of the EU taken in the field of foreign and security policy. It replaced European Security Strategy 2003.

⁹⁰*High Representative, "Shared Vision, Common Action: A stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy"*, June 2016, p.3.

⁹¹LONARDO, *op. cit.*

not wish to become directly involved," but it would act with "political and military support from NATO." After the fall of the Berlin Wall, scholars began to suggest merging the crisis management missions of NATO and the WEU into a new Euro-Atlantic organization dedicated to this specific purpose.⁹².

Later, before the dissolution of the WEU in 2002 the EU and NATO announced the establishment of a strategic partnership based on mutual reinforced cooperation with crisis management at its core. Less than a year later, in March 2003, the two concluded the Berlin Plus Arrangements⁹³, facilitating NATO support for EU crisis management operations by means of sharing assets, operational planning and command. During the early 2000 the two had still very different issue to take care of: while NATO was responsible for collective defence and deterrence, EU was focused on the economic, social and regulatory development as well as softer areas of security. Then a series of event took place such as: the illegal annexation of Crimea in 2014 and the hybrid war in Ukraine, the terrorist attacks, the British vote to exit the EU and the election of Donald Trump as President of the United States in 2016, as well as serious challenges posed by cyber warfare, climate change, disruptive technologies, and the migratory crises.

The described landscape eventually pushed towards a "further enhancement of the relationship in light of our common aims and values" in the form of "accelerated practical cooperation"⁹⁴. The EU's Joint Communication and the EU Global Strategy of June 2016 emphasised the need for a strengthened partnership, leading to EU-NATO Joint Declaration at the NATO Summit in Warsaw in July 2016. The main idea behind this cooperation was the need for a single set of forces, meaning that in order to avoid duplication and maximise efficacy, common members have to work on a convergent plan.

Between EU and NATO seven areas of cooperation were identified: countering hybrid threats; broadening and adapting operational cooperation; expanding coordination on cyber security and defence; developing coherent, complementary and interoperable defence capabilities; facilitating a stronger defence industry; stepping up coordination on exercises; and building defence and security

⁹²LAȚICI, *Understanding EU-NATO cooperation. Theory and practice*, EPRS European Parliamentary Research Service, October 2020, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659269/EPRS_BRI\(2020\)659269_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659269/EPRS_BRI(2020)659269_EN.pdf).

⁹³Berlin Plus agreement is the short title for a comprehensive package of agreements between NATO and EU, https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/berlinplus_/berlinplus_en.pdf.

⁹⁴*European Parliamentary Research Service, Understanding EU-NATO cooperation Theory and practice*, PE 659.269 – October 2020, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659269/EPRS_BRI\(2020\)659269_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659269/EPRS_BRI(2020)659269_EN.pdf).

capacity and fostering the resilience of partners⁹⁵. They resulted in a total of 74 concrete actions, the majority of which require a long- term perspective with gradual results⁹⁶. In order to measure the effective implementation of these proposals, the EU continuously publishes progress reports.

Effectiveness in this cooperation is only achieved through a close collaboration in strategic communication and defense. Simultaneously, NATO and the EU must maintain a shared understanding of crisis management and potential responses. In this regard: "The High Representative, in coordination with the Commission, will continue informal dialogue and enhance cooperation and coordination with NATO on situational awareness, strategic communications, cybersecurity, and "crisis prevention and response" to counter hybrid threats, while respecting the principles of inclusiveness and the autonomy of each organization's decision-making process." This organizational cooperation is not only beneficial but also essential, as both organizations cannot operate alone.⁹⁷

The cooperation between the EU and NATO was further solidified during the 2022 Madrid Summit, where NATO once again placed hybrid threats on the agenda⁹⁸. The outcome released in the aftermath of the conference has reiterated the primary responsibility of the Allies to reinforce national resilience in order to respond to hybrid threats. Also, NATO has stressed the major role covered by collective defence in countering hybrid warfare. The summit led to the adoption of a new strategic concept which sets out the Alliance's strategy, and outlined its defence and deterrence posture, its core tasks, and the security challenges it faces. In particular, the document outlines NATO's interest in investing the ability to prepare for, deter, and defend against the coercive use of political, economic, energy, information and hybrid tactics by states and non- state actors. Specifically, point 27⁹⁹ of the document illustrates: "hybrid operations against Allies could reach the level of armed attack and could lead the North Atlantic Council to invoke Article 5 of the North Atlantic Treaty. We will continue to support

⁹⁵European Council, European Commission and NATO, *Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization*, Warsaw, 8 July 2016.

⁹⁶ZANDEE SICO, VAN DER MEER, STOETMAN, op. cit., pp. 6-30.

⁹⁷European Commission, *Joint Communication to the European Parliament and the Council, Joint Framework on countering hybrid threats a European Union response*, JOIN/2016/018 final.

⁹⁸North Atlantic Treaty Organization, *NATO's response to hybrid threats*, 21 Juin 2022, https://www.nato.int/cps/en/natohq/topics_156338.htm.

⁹⁹North Atlantic Treaty Organization, *NATO 2022, Strategic Concept*, Adopted by Heads of State and Government and the NATO Summit in Madrid, 29 June 2022, p. 7.

our partners to counter hybrid challenges and seek to maximize synergies with other relevant actors, such as the European Union”¹⁰⁰.

The document¹⁰¹ itself highlights the vital partnership with the EU which aims at reinforcing roles in supporting international peace and security. One of the central objectives is to counter cyber and hybrid threats and tackle the systemic challenges that affect Euro-Atlantic security. It is also essential to encourage non-EU Allies to fully participate in EU defense initiatives, as this would enhance the strength and capabilities of European defense. Finally, the Strategic concept stresses the essentiality of investing in NATO as the best way to ensure the enduring bond between EU and North American Allies, while contributing to global peace and stability. The military organization aims at reinforcing its role providing the necessary resources, infrastructure, capabilities and forces in order to grant peace, freedom and prosperity¹⁰².

A stepping stone towards a long-awaited common defence agreement with NATO is also represented by Article 42.7. As for the relations with NATO, the EU Treaty's mutual assistance obligation is understood as not having precedence over the collective defence obligation contained in NATO's Article 5. In this respect, it is considered that the EU's mutual assistance clause is secondary to NATO's and could not be invoked if NATO's Article 5 had already been invoked. It is argued that, in accordance with the Vienna Convention on the Law of Treaties, whereby 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail', NATO's founding act takes precedence over the application of the TEU, as also provided for in Article 351 TFEU¹⁰³.

Moreover, other legal experts consider that there is no danger of legal inconsistencies unless the EU mutual defence clause is triggered against a non-EU NATO member, which would be highly unlikely. The EU and NATO have been portrayed as organisations complementary to each other, so some problems could arise in the event of duplication of goals. However, with respect to the EU conducting crisis management operations, there is in principle no such NATO precedence. But the EU itself is constrained by primary law with regard to collective self-defence under the Common Security Defence Policy: in principle, the EU cannot conduct self-defence operations within the framework of the CSDP (only its Member States), unless the Treaty is amended or the European

¹⁰⁰NATO, *Nato 2022, Strategic Concept*, Adopted by Heads of State and Government and the NATO Summit in Madrid, 29 June 2022.

¹⁰¹*Ibidem*.

¹⁰²*Ibidem*.

¹⁰³LAÏCI, *op. cit.*

Council decides unanimously on the establishment of common defence in accordance with Article 42(2) TEU. In this sense also, NATO is the primary organizational venue for Member States to exercise collective self-defence. It may prove to be the case that the interpretation of Article 42.7's mutual defence obligation varies over time and becomes more flexible. As already underlined, those concepts such as 'armed aggression' are not static but evolve together with a changing security landscape. This creates "grey zones" in defining the applicability of the mutual defence clause in situations involving large-scale attacks on member states' information and communication networks.

To conclude, despite the increasing attention given by European institutions to hybrid threats since 2015, its applicable legal framework of reference still seems complicated. The complex nature of such threats makes it difficult to identify an unambiguous strategy for preventing and responding to them. As the term 'hybrid threats' corresponds to a plurality of possible threats, some of which can be broadly assimilated to traditional threats comprising political and territorial integrity of states, such as cyber-attacks but others are more difficult to ascribe within the typical schemes of warfare. In addition, the typical characteristics of these threats (the use of conventional and unconventional means conventional instruments, the plurality of actors using them, some of a state nature, others of a non-state nature) make it very difficult to identify effective instruments that comply with international law, which the European Union has to comply with. What is needed here is a response not only in a manner of preventing, but, above all, on the reaction side. In the following chapters these issues will be taken into consideration in a more specific study of the phenomenon of hybrid threat in the field of migration in the legal context of European Union Law.

1.5 Migration as a form of Hybrid Threat

This paragraph aims at enshrining the concept of migration employed as a hybrid threat following the reasoning of the previous paragraphs. The studies which take into consideration this aspect of migration, have been conducted mostly under a political and social point of view. For this reason, although the present thesis seeks to examine the legal framework of EU migration law, to better explain scholars' studies, some theories are (briefly) covered in the first paragraph of this chapter.

It is widely acknowledged that the migratory phenomena, specifically mass migration crises, can be considered as hybrid threats. This idea is largely supported by scholars¹⁰⁴. According to Bachmann,

¹⁰⁴For example: COLLÉN, *The Arguments for a Centre of Excellence for Countering Hybrid Threats*, in HAMILTON; *Forward Resilience Protecting Society in an Interconnected World*, Washington, 2016, p. 154,

for example, '[t] here are also other threats that arise from conflicts and consequences of globalization: from piracy that threatens world trade, to mass migration, to which Western Europe is exposed to today. The latter especially meets the requirements of a hybrid threat: strategically designed and used it has to undermine the potential of European identity and security'¹⁰⁵. Weiner sustains that migrants could be considered a threat for a number of reasons: if they create difficulties in diplomatic relations; if they could be considered hostile to the receiving country; if they are seen as a cultural threat, an economic problem, or as an intended threat sent by countries of origin or transit¹⁰⁶.

This idea is partly strengthened under the EU's policy in fact, the 2016 Joint Communication mentions among the tools for building European resilience, the need to 'intensify the exchange of operational and strategic information with the enlargement countries and within the Eastern and Southern Partnership to help combat organised crime, terrorism, irregular migration and small arms trafficking'¹⁰⁷. migration is also referred to in regard to new areas for defence actors in the internal-external security nexus. To this end, the EU-NATO Joint Declaration of 2016 on increasing collaboration between the two institutions identified also that there is 'an urgent need to [...] broaden and adapt our operational cooperation including at sea, and on migration, through increased sharing of maritime situational awareness as well as better coordination and mutual reinforcement of our activities in the Mediterranean and elsewhere'. Different documents published by both the EU and NATO make reference to the role of their missions in managing migration as a hybrid threat¹⁰⁸.

In the academical literature, this concept was born under the theory of "weapons of mass migration" suggesting that population movements can be treated as political means to political and military ends

'Hybrid influence is manifold, making use of military, political, information, economic and cultural resources, and it can be connected with critical infrastructure, cyber security and migration flows'; HUYSMANS, *International Politics of Insecurity: Normativity, Inwardness and the Exception*, in *Security Dialogue* 37, no. 1.03.2006, pp. 11–29.

¹⁰⁵BACHMANN, *Hybrid Threats 2016*, in *ResearchGate*, December 2015.

¹⁰⁶WEINER, *Security, Stability, and International Migration International Security*, Vol. 17, No. 3, 1992-1993, p. 106.

¹⁰⁷Joint Framework on countering hybrid threats a European Union response of the European Commission, JOIN/2016/018 final, 2016.

¹⁰⁸European Parliament's Briefing, *Countering hybrid threats: EU-NATO cooperation*, March 2017: 'As such, 'hybrid' is a useful concept that embraces the interconnected nature of challenges (i.e. ethnic conflict, terrorism, migration, and weak institutions; NATO ALLIED COMMAND TRANSFORMATION, *Countering the Hybrid Threat*, 'Admittedly, hybrid threat is an umbrella term, encompassing a wide variety of existing adverse circumstances and actions, such as terrorism, migration, piracy, corruption, ethnic conflict etc.' available at: <http://www.act.nato.int/nato-counteringthe-hybrid-threat>.

by states¹⁰⁹. In general, this movement of people is conceived as a potential security threat to the internal stability of countries of destination. Different scholars have been trying to provide a theoretical explanation of migration movements by analysing its security implication on receiving States. In this sense, there are researches supporting that forced displacement of migrants and refugees can be exploited for self-interest because, by forcing migration into receiving states, they inflict a security threat. Also, this treat is often shaped by perception on a level of political instability, civil conflict or ethnic conflict, economic opportunity, environmental degradation and interventionist policies¹¹⁰.

Within the context of hybrid warfare and hybrid threats mass migration can be described as a strategic mechanism effected where the state deploying the threat will place pressure on a targeted government, this will lead the state making the threat to get an advantage over the disadvantage of the targeted state¹¹¹. The state suffering from the increased flow of migration will recognize that the threat has the consequence to create tensions upon the welfare, social, medical and educational sectors of its society, which could meet a general higher level of dissatisfaction within the government. The instrumental use of displaced people as non-military instruments of state-level coercion has long been a common feature of international politics: sometimes the coercive weaponization of population movements has been used simply to generate outflows, in other cases coercion has entailed forcing large numbers of victims across borders, or migration has had the role of merely opening borders normally sealed or still coercion has been effected by exploiting and manipulating outflows created by others, whether intentionally or inadvertently¹¹².

The core migration's problematic appears to be the phenomenon of mass migration, namely the sudden movement of large number groups of people from one geographical area to another¹¹³. Mass migration can be thus, employed as a strategy in hybrid warfare: it can include a military purpose for example to change the focus of nation's armed forces from defence to assist with issues related to internal security or to effect demographic change, or according to Bachmann it can be 'a more subtle form of gradual insinuation of a particular group that settles within the state and lays itself available

¹⁰⁹ABAD, *Weapons of Mass Migration in the 21st Century: Russia, Belarus, and the European Union*, Fordham Research Commons, 2022, p. 10.

¹¹⁰ *Ibidem*.

¹¹¹BACHMANN, *Mass Migration as a Hybrid Threat? A Legal Perspective*, in *Polish Political Science Yearbook*, vol.50 (1) 2021, pp. 19- 145.

¹¹²GREENHILL, *Migration as a Weapon in Theory and in Practice*, *Military Review*, 2016.

¹¹³IOM, *International Migration Law, Glossary of Migration*, 2004, https://publications.iom.int/system/files/pdf/iml_1_en.pdf.

to outside influence from the state it identifies with'¹¹⁴. Mass migration is thus, referred to as an instrument of a state's foreign policy exploiting displacement of people, coercion or foreign policy. According to the studies of Kelly Greenhill, the weaponized use of mass migration can be achieved by 'straightforward threats to overwhelm a target's capacity to accommodate a refugee or migrant influx, on a kind of norms- enhanced political blackmail that exploits the existence of legal and normative commitments to those fleeing violence, persecution or privation'¹¹⁵.

In some cases, mass migration can be used by weak actors to achieve political goals that they would hardly attain via traditional military means¹¹⁶. This occurrence is attained thanks to the 'strategic engineered migration' according to which outgoing migrations can be deliberately induced or manipulated by state or non-state actors, in ways designed to augment, reduce, or change the composition of the population residing within a particular territory, for political, economic or military ends¹¹⁷. According to this theory, there are seven variants employed to describe the phenomenon of strategic engineered migration. Some of these types are comparable to asymmetric warfare in which governments and non-state entities try to influence or undermine their adversaries using controversial tactics¹¹⁸. The first of the seven variants is the 'coercive engineered migration', or cross-border population migrations that is reached by countries in order to persuade a target state to make certain political, military, or economic concessions. The second variant is 'disposessory' whereby a country takes advantage of migration flows in order to take territories or natural resources from the target group to where migrants are fleeing. The third variant is 'exportive', meaning that a country seeks to politically undermine a rival power. The variant of 'economic migration', then describes whereby a country makes monetary gains by exploiting the migration outflow. The fifth group, which differs from dispositive, focuses more on weakening a target government by directly sending migrants to its territory. The sixth variant is militarized whereby a country can sabotage enemy activities or reduce military support by dispatching migrants to their territories so that the enemy is more concerned with the humanitarian response. And lastly, the seventh variant revolves around migration-related propaganda which countries can use to strengthen their perceived legitimacy on a regional or worldwide level while weakening their adversaries in the process¹¹⁹.

¹¹⁴BACHMANN, *Mass Migration as a Hybrid Threat? A Legal Perspective*, op. cit.

¹¹⁵GREENHILL, *Weapons of Mass Migration*, Cornell University Press, 2010, p. 26.

¹¹⁶GREENHILL, *Migration as a Weapon in Theory and in Practice*, op. cit.

¹¹⁷*Ibidem*.

¹¹⁸ABAD, op. cit, p. 12.

¹¹⁹*Ibidem*.

According to Greenhill's study, the coercive engineered migration has been attempted at least seventy-five times since 1951 Refugee Convention¹²⁰. The development of the issue of weaponization of migration has been used in history with many relevant examples¹²¹. Mass migration can be employed both internationally and internally. In the international environment it is potentially used as a geostrategic weapon: state and non-state actors can derive direct financial and/or political capital out of this situation. Domestically instead, it can be used for domestic political advantage. Additionally, Non-State Actors and enterprising criminals can earn significant money as 'people smugglers'¹²², charging big sums to smuggle individuals into EU countries¹²³. Although there could be references to many different occurrences in history, the main event that this project aims at analysing is the Belarus' crisis that will be addressed in the third chapter.

¹²⁰The 1951 Refugee Convention or the Geneva Convention of 28 July 1951, is a United Nations multilateral treaty and one of the main sources for International Migration Law. In particular, the Convention defines the notion of refugee and sets out the rights of individuals who are granted asylum and the responsibilities of nations that grant asylum.

¹²¹Some relevant examples are Turkey and Libya, that will be addressed in the next chapter. Another relevant example in the European context is the use by former President of Serbia Slobodan Milošević of outflow of refugees from the wars in the former Yugoslavia in the 1990s to stop Western countries from intervening.

¹²²BACHMANN, op. cit.

¹²³Human trafficking is a serious crime that abuses people's fundamental rights and dignity. It involves the criminal exploitation of vulnerable people for the sole purpose of economic gain. Human trafficking is considered a modern form of slavery. EU's tries to contrast to smuggling and trafficking, https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings_en.

Chapter 2. Weaponization of migrants towards the EU and the legal framework to contrast it

This chapter represents the core of this research because it aims at providing a systematic overview of the tools used to contrast migration used as a form of hybrid threat against the European Union. Specifically, the chapter will be addressed at the investigation of the concept of migration as a hybrid threat throughout the EU context, on the basis of the description and analysis provided by in the previous chapter. Furthermore, as the main case study of our research, namely the Belarus migration crisis, that is believed to have been an alleged hybrid threat, it will be addressed in the final chapter to provide a model of the instruments here depicted. In this chapter the discussion will be primarily focused on the pillars of EU Migration Law and its fundamental tools. The topic of migration remains at the very heart of nowadays main discussions, especially in Europe. Tough, it doesn't constitute a new phenomenon, Europe has increasingly become a destination of significant migratory flows in the last decades. Indeed, the situation has surely peaked during the 2015- 2016 migratory crisis¹²⁴, reopening some old issues related to the problems of burden sharing and dissatisfaction of different Member States towards the European legislation, namely in relation to the so-called 'Dublin System'. This project also aims at analysing provisions internal to European Union and those stemming from the Refugees Convention and customary international law. Later, some relevant paragraphs analyse two 'side effects' of migration, namely the use of a legal framework aside Migration Law. Specifically, as it will be illustrated, to manage it the EU is employing tools that resort to the Common Security Defence Policy context to counteract irregular migration and the phenomena of smuggling and trafficking of migrants. In addition to that, a very common practice in today's Union is the establishment of agreements with Third Parties, in order to take back irregular migrants and anticipate the crisis. These issues rely on the so-called 'externalization of borders', a practice in many ways controversial but that has proven effective in some cases. Ultimately, the purpose of this chapter is to examine whether the migratory phenomena, falling within the framework of the discipline envisaged for hybrid threats, allow for the use of alternative and more effective instruments than the set of measures already existing at European level to deal with mass migrations. In particular, the question that will be asked regards the possibility of invoking the so-called 'solidarity clause' in the case of mass migratory phenomena, as an alternative way to effectively apply the solidarity principle, provided for by Art. 80 TFEU together with the equitable sharing of responsibility among Member States. As the interpretation are still far from being clear and the events of weaponization of migrants

¹²⁴In 2015, the Union was faced with the arrival of around two million people due to a succession of catastrophic historical events that led to a humanitarian crisis for which the EU had to find new solutions in order to manage with better tools the situation and above all to remedy it.

are still too few, the last paragraph of this chapter analyses a different tool that is commonly employed by the EU: the prevention measures under the Common Foreign Security Policy framework.

2.1 The EU Migration Law framework for weaponization of migrants

The present paragraph aims at providing the fundamental tools that concern the landscape of EU Migration and Asylum law. Once having discussed the postulations around whether mass migration could be contained under the big umbrella of hybrid threats, it appears useful to (partly) undertake the context of EU Migration and Asylum law, as it represents the basis for the investigations of this thesis. Nonetheless, this follows up reaches also international law issues, as the discipline offers a multiplicity of legal regimes relevant to migrants. The reason behind this derives essentially from the normative pluralism that characterises the evolution of the international legal system as a whole¹²⁵. This is particularly evident in the case of migrants: over time, in fact, the traditional rules on their treatment have been supplemented by provisions protecting their fundamental rights and freedoms and, with varying degrees of intensity, regulating their participation in the economic, social and even political life of the host state¹²⁶. The study is intended to depict the crucial points of the European legislation over Migration and Asylum in order to understand how the instrumentalization of migrants is dealt with by the European Union Member States. Here there will be analysed, not only the treaty provisions to discuss the share of competences among Member States, but there will also be a quick overview of the main notions and aspects that differentiate the EU legal framework from the Refugee Convention. Also, this paragraph seeks to briefly describe the pillars of the CEAS (Common European Asylum System) to better understand the dynamics and procedures we are referring to when assessing this kind of legal framework¹²⁷. The topics hereafter addressed, are related to international protection applications and admissions for refugees. In fact, European Union has proven unsatisfying in managing mass migration crises due to the difficulties in sharing the burden and creating a valid system of response for emergencies¹²⁸. Thus, it is often complex to find emergency measures as they comprise an exceptional nature, and cannot rely on the same solid legal

¹²⁵BIONDI DAL MONTE, *Le fonti del diritto dell'immigrazione*, in CORTESE, PELACANI, *Il diritto in migrazione Studi sull'integrazione giuridica degli stranieri*, Quaderni della facoltà di Giurisprudenza Università degli Studi di Trento, 2017.

¹²⁶CASOLARI, *La molteplicità dei regimi giuridici dello straniero*, in CALAMIA, GESTRI, DI FILIPPO, MARINAI, CASOLARI, *Lineamenti di diritto internazionale ed europeo delle migrazioni*, CEDAM Scienze Giuridiche, Wolters Kluwer, Milano, 2021, pp. 119-129.

¹²⁷See: HAILBRONNER, THYM, *EU Migration and Asylum Law: A Commentary*, Oxford, 2016, pp. 271- 1596.

¹²⁸MORGESE, *Principio di solidarietà e proposta di rifusione del regolamento Dublino*, 2017, in VILLANI TRIGGIANI, CHERUBINI, INGRAVALLO, NALIN, VIRZO, *Dialoghi con Ugo*, pp.471-476.

framework designed to handle easier situations, i.e., when migration fluxes can be more easily controlled. This is exactly the case of implication of the instrumentalization of migrants by third countries towards EU. Those States may rely on the emergency nature of hybrid actions to destabilize the Union and its legal responses.

When referring to migration law, what contributes to render this field so complicated is the plurality of sources to be taken care of, some legal sources have a subjective and objective scope (e.g., some international conventions on human rights), while other normative sources intervene in relation to the general condition of migrants or to specific legal status characterising this condition (e.g., European directives or some international conventions on migrant workers) or to specific territorial areas (e.g., national and regional legislation and disciplines adopted at local level)¹²⁹. Thus, in international law, there are many sources in accordance to which the legal status of migrants should be regulated: some concern the field of application of human rights law and others specifically regulate the legal status of migrants. The former are conventions, declarations or general principles that do not specifically regulate the condition of migrants, but which nevertheless, by their relevance to the person as such, are obviously capable of influencing the state legislation of reference¹³⁰. The latter, on the other hand, were created to specifically regulate the condition of migrants, often settling just some aspects or status, such as that of a worker or that of a refugee.

A series of European Union sources regulates the subject of migration. It is necessary to preliminarily highlight that migration is an area in which European states have always sought to maintain the broadest sovereignty, both in determining the conditions of entry of migrants and in managing their legal treatment. Only in recent years there has been a gradual expansion of the European Union's action in this area, whose competences are now defined in the Treaty of Lisbon. The European legal context is covered by paragraph 2 of Art.67 TFEU, under the framework of Freedom Security and Justice, according to which EU shall frame a Common Policy on Asylum, Migration and External Borders Control. The adjective 'common' denotes in particular the EU legislator's desire to avoid direct action in the field of asylum. As a result, there are different policies undertaken by the Member States, often coexisting in a confused order, and this is hardly compatible with the maintenance of excessive regulatory disparities. The 'Area of Freedom and Justice' is governed by competence of a

¹²⁹BIONDI DAL MONTE, *op. cit.*

¹³⁰For example, the 1950 European Convention on Human Rights and Fundamental Freedoms of 1950, the International Covenant on Economic, Social and economic, social and cultural rights of 1966, the United Nations Convention on the Rights of the Child of 1989, United Nations Convention on the Rights of Persons with Disabilities of 2006.

shared nature between the Member States and the European Union, based on Article 2(j) TFEU. Under article 78 TFEU European Parliament and Council are entrusted with the power of instituting the CEAS (Common European Asylum System), via the ordinary legislative procedure. This system is effectively composed of many different secondary law provisions such as several directives and regulations, some of which will be discussed later. A process aimed at reforming the CEAS has been underway for several years. A comprehensive package of proposals to this end was first presented in 2016 by the Juncker Commission; however, a large part of these proposals was not adopted by the end of the 2014-2019 legislative period. On September 23rd 2020, the Von der Leyen Commission adopted the Communication 'A New Pact on Migration and Asylum', in which it formulated policy lines for regulatory action for the framework¹³¹. The Communication stems from the observation of persisting deficiencies and inequities in European migration and asylum management and intends to foster 'a new beginning' through a comprehensive approach involving reforms of border policies, recognising their interdependence¹³².

When analysing the context of migration, the accuracy in using the correct notions seems vital. In fact, the subjects of Migration Law are multiple. In general, the concept of migration is defined as the process of moving, either across an international border, or within a State. It includes different kind of migrants, such as: refugees, displaced persons, and economic migrants¹³³. Specifically mixed flows are complex population movements which include all of the above¹³⁴. When referring to mass migration cases especially, that amounts to the context of hybrid threat, we refer mostly to the cases of migrants trying to enter illegally the territory of a State because they are forced to do so, in this end they might be escaping wars or tortures, running away from famine or drought in their country of origin. For these purposes, the notion of refugee is hereafter depicted.

Article 1 of the 1951 Refugee Geneva Convention, as amended by the 1967 New York Protocol, defines a refugee as 'A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the

¹³¹COM (2020) /609, 23.09.2020.

¹³²GESTRI, *La protezione internazionale* in CALAMIA, GESTRI, DI FILIPPO, MARINAI, CASOLARI, op. cit, pp. 77-116.

¹³³An economic migrant is defined as a person leaving his/her habitual place of residence to settle outside his/her country of origin in order to improve his/her quality of life. This term may be used to distinguish from refugees fleeing persecution, and is also used to refer to persons attempting to enter a country without legal permission and/or by using asylum procedures without bona fide cause. It also applies to persons settling outside their country of origin for the duration of an agricultural season, appropriately called seasonal workers.

¹³⁴IOM, International Migration Law, *Glossary of Migration*, 2004, https://publications.iom.int/system/files/pdf/iml_1_en.pdf.

protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. It is a crucial point and it is grounded in article 14 of the Universal Declaration of Human Rights 1948, which provides that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. The latter provision though has no legal binding effect as it is a UN resolution and, on the other side, doesn't attribute a direct right to the individual to be protected. The term asylum instead, amounts to 'persons seeking to be admitted into a country as refugees and awaiting decision on their application for refugee status under relevant international and national instruments. In case of a negative decision, they must leave the country and may be expelled, as may any alien in an irregular situation, unless permission to stay is provided on humanitarian or other related grounds'¹³⁵. The Union legitimately complies with both Conventions and the principles of *non-refoulement* as it stems from Article 78 TFEU paragraph 1.

Nevertheless, if comparing International and European Migration law, the latter results granting a wider scope of application of protection. In particular, for what concerns 'subsidiary protection', now disciplined by directive 2011/95¹³⁶¹³⁷, the notion is linked to the process that has seen the consolidation of the obligation not to proceed with the removal of migrants to countries where they would be exposed to the risk of being subjected to torture or serious violations. This obligation, in addition to deriving from a number of universal Conventions, has been articulated by a broad jurisprudence of the European court of human rights¹³⁸. According to Art. 2 let. f) the 'person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk,

¹³⁵*Ibidem*.

¹³⁶For what concerns the treatment of refugees and beneficiaries of subsidiary protection, the EU legal framework offers very broader recognition in comparison with the Geneva Convention of 1951. This aspect is consolidated by Directive 2011/95 that provides for specific treatments with the purpose of bettering the refugees' conditions, and in addition to that, equalizing them to the European Union citizens¹³⁶. The subjects entitled to subsidiary protection are granted the same treatment recognized by refugees, erasing almost all the different treatments. Particularly relevant is also directive number 33 of 2013¹³⁶ that has extended the scope of application for the guarantee of a dignified lifestyle usually granted to refugees, providing for the same rights to beneficiaries of subsidiary protection. This directive is concerned over conditions and modalities of a possible detention and contains also important dispositions in favour of minors and their education, professional formation and access to health services.

¹³⁷Directive 2011/95 of the European Parliament and Council, *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (recast), 20.12.2011.

¹³⁸GESTRI, *op. cit.*

unwilling to avail himself or herself of the protection of that country. This article is complementary and additional to the protection of refugees under the Geneva Convention¹³⁹, meaning that national authorities must first verify whether the individual qualifies as a refugee; if he or she does not, they must then proceed to verify whether the person concerned is eligible for subsidiary protection¹⁴⁰.

For the purposes of the recognition of subsidiary protection, it is imperative to define the notion ‘serious harm’, which can occur on three occasions: death sentence or execution of the death penalty, which is strictly prohibited by Article 2(1) of the Charter of Fundamental Rights; torture or other forms of inhuman or degrading treatment or punishment and serious individual threat to the life of a civilian resulting from indiscriminate violence in situations of internal or international armed conflict. The definition of torture can be found in Article 1 of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment, which essentially refers to particularly cruel treatment by which severe suffering is intentionally inflicted in order to obtain information. Instead, the notion of inhuman or degrading punishment or treatment is less specific but is generally applied with reference to treatment that does not reach the level of cruelty of torture and is not inflicted for a specific purpose but is nevertheless capable of causing serious physical injury or mental suffering. The third typology, on the other hand, is the most innovative hypothesis since it is provided for in directive 2013/32 despite the lack of solid precedents in the jurisprudence of the European Court of Human Rights¹⁴¹.

The current framework of EU cooperation in the context of protection of refugees is still relying on an examination of subsidiary protection and asylum requests led by single Member States¹⁴². For the purpose of avoiding the so-called phenomenon of asylum shopping, i. e. when asylum seekers apply for asylum requests in the most favourable Member State is imperative to determine in advance whose Member State is competent. This is regulated by the so-called Dublin ‘system’. This topic is also fundamental to have a brighter picture of the EU refugee and asylum system, which is involved in the

¹³⁹ *Ibidem*.

¹⁴⁰ This aspect has been well specified at article 10 par. 2 of directive 2013/32.

¹⁴¹ EU migration legal framework has also managed a further form of reception, the so-called temporary protection, with reference to situations in which there is a mass influx of displaced persons following events such as wars, internal conflicts, natural disasters which do not constitute individual persecution. To this end, directive n. 55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on the promotion of a balance of efforts between Member States in receiving and bearing the consequences of displaced persons was approved in 2001. (**Directive 2001/55/EC of the Council of the EU, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 20 July 2001**).

¹⁴² At the moment there is still no EU organ entitled to carry out that the examination of international protection requests. On this purpose there is the EASO, European Agency for Asylum.

management of mass migration, focusing on the rules that apply for international protection applicants.

The Dublin Regulation (Reg. 604/2013) is one of the regulations of the Common European Asylum System (CEAS) and is designed to identify the State responsible for examining applications for international protection lodged in one of the Member States¹⁴³. Today¹⁴⁴ the current applicable is Regulation (n. 604/2013), so-called Dublin III, that sets out the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person. It regulates the distribution of responsibilities among 32 States including EFTA States¹⁴⁵. Primarily, the Dublin mechanism focuses on the determination of responsibility within a single Member State 'identified as the responsible State'. This allows for faster procedures and simplifies the issue of responsibility. In fact, since only one Member State can take charge of the application, this exempts the other Member States from exercising their responsibilities. In addition, the task of initiating a procedure to determine the Member State lies with the State in which the application for protection is first lodged, according to Article 20(1)¹⁴⁶.

The Dublin system has been widely criticised, and there were many attempts to reform it through different proposals¹⁴⁷. These critics that were moved, take into account the excessive burdens that some Member States have to pursue just because they are located at the borders of EU or because they are favoured by applicants. Specifically, these are the cases that can be exploited by third actors to instrumentalize migration as it will be described, later in this chapter. Also, the Regulation is proved to be unequal and unfair in terms of equal treatment for migrants, due to different reception rates of applications and reception conditions and the possibilities of subsequent integration, which

¹⁴³AMEDEO, SPITALERI, *Il Diritto dell'Immigrazione e dell'Asilo dell'Unione Europea, Controllo delle frontiere-Protezione Internazionale-Immigrazione regolare- Rimpatri-Relazioni esterne*, pp. 106-150.

¹⁴⁴The Dublin Convention was firstly held in June 1990 and entered into force in 1997 aiming at determining which Member State was responsible for an asylum application. The Convention wanted to erase those events that overburden national reception systems, such as multiple applications for asylum, but also to stop illegal movements of asylum seekers within the territory of the Union.

¹⁴⁵Norway, Iceland, Liechtenstein and Switzerland.

¹⁴⁶Chapter III of the Regulation sets out the criteria for determining responsibility, ordered according to a hierarchy contained in Article 7 of the Regulation, according to which subsequent criteria are applied only if the previous one is not relevant. The first general criterion is certainly the applicant's family reunification, enshrined in Articles 8-10, which protect the best interests of the child and the family life of the persons concerned. The second general criterion under Article 12 is that the Member State responsible is the one in which residence permits or visas are issued. While the third and last criterion assigns responsibility to the Member State whose border the third-country applicant has illegally crossed by land, sea or air, according to Article 14. Responsibility in this case lasts twelve months, when the term expires the Member State responsible is the one in which the applicant has continuously resided (for five months) before submitting the application for international protection.

¹⁴⁷DI FILIPPO, *Considerazioni critiche in tema di sistema di asilo dell'UE e condivisione degli oneri, I diritti dell'uomo*, Editoriale Scientifica srl, n. 1, 2015, pp. 47-60.

in some cases also translate into serious violations of human rights¹⁴⁸. Lastly, the Regulation is considered not able to take into consideration the individuals wills and possibilities¹⁴⁹.

A basic assumption of EU Migration law is that procedures follow fundamental rights and the principle of *non-refoulement*. The latter represent a binding principle also codified by Art. 33 of 1951 Refugee Convention according to which: ‘No Contracting State shall expel or return (*refouler*’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’¹⁵⁰. As already reminded, the principle is completed by the EU through Article 78 of the TFEU.

2.1.1 The relevance of the principle of solidarity and equal burden sharing of responsibilities in EU Law

A relevant issue introduced by the Lisbon Treaty is the so-called principle of solidarity and equal distribution of responsibilities among Member States, one of the pillars for the development of the common policies on Asylum, Migration and Border Control. This comes in hand cases insofar as it provides for specific competences of the EU, in particular in those cases such as, for example, the episodes of instrumentalization of migration. The 1951 Refugee Geneva Convention at point 4 observes that some States may find themselves subject to exceptionally onerous obligations with regard to the concession of asylum and that a satisfactory solution to this problem, to which the UN has given a general scope and character, cannot be achieved without international cooperation. Indeed, in the field of asylum, there has been a long debate about the creation of a mechanisms for equitable burden-sharing among States, for example when, because of their geographical location, they face with the admission and protection of large numbers of refugees¹⁵¹. In the European framework, the issue emerged prominently in the 1990s, in relation to the situation of individuals displaced by the conflict in former Yugoslavia.

¹⁴⁸DI STASIO, *La crisi del 'Sistema Europeo Comune di Asilo' (SECA) fra inefficienze del sistema Dublino e vacuità del principio di solidarietà*, in *Il Diritto dell'Unione europea*, n. 2, 2017.

¹⁴⁹Directorate-General for External Policies Policy Department, *Migrants in the Mediterranean: Protecting human rights*, 2015.

¹⁵⁰*Refoulement* can be either direct, when a State decide to send back an asylum claimant to face massive violation of human rights, or indirect, when a State send back asylum claimants to a second recipient State where they may be potentially in danger and subject to refoulement or torture.

¹⁵¹GESTRI, *op. cit.* pp. 83-87.

The idea of burden sharing was first articulated in a Council Resolution of September 1995¹⁵² on burden sharing with regard to the temporary reception and stay of displaced persons. With the treaty of Amsterdam in 1997, the idea of burden sharing found an initial expression in primary law in the former article 63 TEC. Following the Lisbon treaty, the principle of solidarity is now enshrined in the opening rule of Title 5, article 67(2) TFEU and article 80 TFEU. The latter states that: ‘The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle’. In the light of this article, solidarity operates in EU law as a horizontal principle, which applies to all policies covered by Chapter 2 of Title V TFEU, namely Border Controls, Asylum and Migration. As to how the principle is to be applied, Article 80 specifies that it must operate ‘also in financial terms’.

The application of the principle of solidarity implies a sharing of responsibilities in practice¹⁵³. Particularly, with regard to the actual reception of persons, as it may require mechanisms for the fair distribution of applicants between Member States, or their relocation. Further expression is given to the various possibilities of technical assistance to the states concerned, by European institutions or agencies such as Frontex, EASO, the European Asylum Support Office or other Member States, as well as the possibility of genuine sharing of operational responsibilities.

Article 80 lays down the terms of the principle governing the Union's policies. The wording of the provisions under consideration denotes a legally binding force of the principle. The principle of solidarity has generally been attributed to a legally binding force by doctrine; this at least with regard to the European institutions but also for the Member States. From the formulation it appears that Article 80 must govern the implementation on the subject, therefore it is a binding provision for Member States. According to others, Article 80 does not provide for an obligatory scope in the sense that the rule provides for the application of the principle, the adoption of ‘appropriate’ measures ‘whenever necessary’. The recognition of such a wide margin of appreciation in the assessment of the necessity and content of the measures to be adopted, would be incompatible with a legal obligation, the rule resolving itself in conferring on the institutions a mere power to act¹⁵⁴.

¹⁵²Published on the Official Gazette of the European Community on 7th October 1995, p.1. Later consolidated by Council’s decision 96/198 of March 4th 1996.

¹⁵³GESTRI, op. cit.

¹⁵⁴*Ivi*, pp. 83-87.

The principle also appears to be endowed with normative force hierarchically superior to secondary legislation, it is also relevant from an interpretative point of view: in case of doubt, there must be given precedence to the interpretation in accordance with the principle itself. According to Advocate General Yves Bot, in his reasoned opinions presented on 26 July 2017 in the joined cases of the *Slovak Republic and Hungary v. Council*¹⁵⁵, he stated that solidarity is both a pillar and a guiding principle of the Union's policies on Border Controls, Asylum and Migration. From these assumptions this follows the possibility for the court of justice to declare, pursuant to articles 263-264 TFEU, the invalidity of an act of secondary legislation which is incompatible with the principle of solidarity and fair sharing of responsibilities, or to find fault with the adoption of the institutions, pursuant to articles 265-266 TFEU, in the event of failure to take the necessary and appropriate measures to implement the principle itself. The latter has been assessed as requiring the appropriate measures not only in the 'urgent' cases, implying a temporary and exceptional situation but also in general terms, implying thus an equitable distribution of responsibilities. In this sense, the judgement of the European Court of Justice of 6 September 2017, which dismissed the actions for annulment brought by Slovakia and Hungary against Council decision 2015/1601 of 22nd September 2015. Due to the emergency in Greece and Italy in 2015 following an unprecedented influx of third-country nationals, the Council established a temporary relocation programme to other member states of a significant number of individuals in clear need of international protection who arrived on the territory of the two states in the following two years. In particular, a first decision of 14th September 2015 provided for a mandatory relocation mechanism for all member states of 120,000 applicants. This last decision was challenged by Slovakia and Hungary *inter alia* as unnecessary, disproportionate and detrimental to their sovereignty. The Court additionally upheld the principle of solidarity in April 2020 ruling on infringement actions brought by the Commission against Poland, Hungary and the Czech Republic concerning the three states' failure to implement Council decision 2015/1601 and, in the case of Poland and the Czech Republic, also Council decision 2015/1523¹⁵⁶. The court emphasised that it was using the principle with regard to the assessment of the conduct of the states concerned, in particular in order to exclude that they could legitimately rely on considerations relating to the malfunctioning or lack of effectiveness from which the relocation mechanism provided for in the decisions would have suffered in its concrete application.

¹⁵⁵Joined C-643/15 and C-647/15.

¹⁵⁶Joined cases C-715/17, C-718/17, C-719/17, 2.04.2020.

To conclude, the principle of solidarity represents a solid legal basis when assessing the cases of mass migration, especially in the cases in which they are used by Third actors in an instrumental way. As mentioned above, this provision realizes a particular tool via which the Union can act and contrast urgent situations, legitimizing it to take normative actions within the arrival of a sudden influx of migrants. The urgent nature is indeed a distinctive characteristic of the hybrid context, especially if it relies on migration's misuse.

2.1.2 The concept of weaponization of migrants: the so-called Instrumentalization Regulation

Once having described, although partly, the EU migration framework along with the provisions effectively in force today, the present sub-paragraph seeks to investigate one of the most controversial proposals that appears useful in the explanation of the concept of the weaponization of migrants. This is made in order to depict the very core of our research, as this precise concept was introduced by the EU legislation itself and it has been described as a potential hybrid threat, specifically in the case of the Belarus migration crisis occurred in autumn 2021, that will be addressed in the following chapter.

The European Commission has released a proposal for a Regulation addressing the situations of instrumentalization in the field of migration and asylum¹⁵⁷. The regulation takes into account the concept of the instrumentalization of migrants as defined in the proposal to amend the Schengen Borders Code¹⁵⁸. According to the latter: 'A situation of instrumentalization of migrants may arise where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilize the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security'¹⁵⁹. This legislative effort aims to provide the Member States targeted by such state-sponsored mass migratory flows with adequate normative tools

¹⁵⁷Proposal of the European Commission *for a Regulation of the European Parliament and of the Council addressing situations of instrumentalization in the field of migration and asylum*, COM (2021) 890 final 2021/0427 (COD), 14.12.2021.

¹⁵⁸*Revision of the Schengen Borders Code* of the European Parliament, April 2022, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729390/EPRS_BRI\(2022\)729390_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729390/EPRS_BRI(2022)729390_EN.pdf)

¹⁵⁹FORTI, *Weaponisation of Migrants? Migrants as a (Political) Weapon and the EU Regulatory Response: What to Expect Now*, EJIL: TALK! Blog of the European Journal of International Law, March 2022.

to act with the necessary grade of flexibility and prompt in an emergency context¹⁶⁰. As explained above, on September 2020, the European Commission has published its proposal for the New Pact on Migration and Asylum¹⁶¹, which sets out a comprehensive overhaul of all problematic aspects of migration in Europe. The aim of this pact was to introduce better and faster procedures that can be based on a fairer sharing of responsibilities and solidarity. This proposal for a new regulation on the management of asylum and migration aimed at replacing the current Dublin Regulation and relaunching the reform of the Common European Asylum System (CEAS) by establishing a common framework. New procedures are foreseen for the control and regulation of external borders, the Schengen area and cooperation or partnership with third countries. Moreover, the Regulation establishes a mechanism allowing for derogations from EU law on asylum and return which will be available to Member States on a permanent basis. As such, many questions arise as to the measures' proportionality, efficiency, necessity and its impact on fundamental rights¹⁶².

According to the Instrumentalization Regulation, the Council can adopt an implementing decision to allow the Member States facing a situation of crisis due to third state-sponsored migratory flows to apply emergency measures. More precisely, targeted States can take advantage of the possibility to register asylum applications received only at specific border points¹⁶³. They can thus, limit the flow of people arriving by reducing the number of such checkpoints. In addition to that, the Instrumentalization Regulation allows the concerned Member States to use up to four weeks for registering applications for international protection from individuals found in the proximity of their external borders. Such countries can also adopt the so-called border procedure: which translates in denying entry to the territory, in assessing almost all the individual asylum applications¹⁶⁴.

The proposal has raised many legal uncertainties in terms of compliance with the Rule of Law system in particular its compatibility with fundamental rights¹⁶⁵. In fact, normalizing the derogations could have the effect of mining the fundamental safeguards for migrants, refugees and asylum seekers.

First, the definition of instrumentalization of migration is problematic and broad, including unclear terms from a legal perspective. This is particularly true for the reference to the intentions of third

¹⁶⁰ *Ibidem*.

¹⁶¹ *On a New Pact on Migration and Asylum* of the European Commission, COM/2020/609 final, https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.

¹⁶² ECRE, *comments on the Commission Proposal for a Regulation of the European Parliament and of the Council addressing situations of Instrumentalization in the field of Migration and Asylum COM (2021) 890 final*, January 2022.

¹⁶³ FORTI, *op. cit.*

¹⁶⁴ *Ibidem*.

¹⁶⁵ ECRE, *op. cit.*, p.6.

States to unsettle the European Union. In fact, the indications about how EU institutions and Member States should evaluate their determination are lacking. Moreover, the Regulation specifies that state-sponsored mass migrations put at risk nation functions and prerogatives, like territorial integrity. Despite this clarification, the text does not specify the criteria for indicating how these functionalities could be endangered. In particular, Member States can exercise a wide margin of discretion in requesting their exemption from EU asylum and migration rules. As a consequence, very different situations may therefore fall under the notion of state-sponsored migratory phenomena. Again, the standardization of derogatory regimes would jeopardize the application of EU law and, therefore, fundamental rights of migrants, refugees and asylum seekers would be undermined¹⁶⁶.

Furthermore, many concerns are raised from the possibility for the Member States to extend the border procedure to individuals who have arrived in the context of instrumentalized migration. The draft Regulation also specifies that these derogations apply to migrants moving in the context of sponsored migration and found close to external borders of the Member States. During such procedures, persons concerned cannot move freely and are “hold” at the border. In general, this approach is troubled because it may cause different standards of protection and an uneven application of fundamental rights safeguards according to the legal status of persons involved. More specifically, refugees and asylum seekers can generally benefit from the protection granted by the Refugee Convention and the relevant standards of International Human Rights Law. Those who do not fall into these legal categories would therefore not have almost any other protection but the applicable rules of EU law. The Instrumentalization Regulation would therefore exploit these different legal statuses that may cause divergent and not based on factual circumstances, outcomes for the migration applications of third-country nationals¹⁶⁷. Finally, the proposal provides for solidarity measures that only partially take into account those foreseen in the new Pact on Migration and Asylum. For example, unlike the proposal for a regulation concerning crisis and *force majeure* situations¹⁶⁸, the proposal drawn up to deal with migration flows resulting from political instrumentalization does not include relocations, which could instead be useful in order to ease the pressure on the Member States directly affected by the flows¹⁶⁹.

¹⁶⁶FORTI, op. cit.

¹⁶⁷FORTI, op.cit.

¹⁶⁸Proposal of the European Commission for a Regulation of the European Parliament and of the Council *addressing situations of crisis and force majeure in the field of migration and asylum*, COM (2020) 613 final, 23.09.2020.

¹⁶⁹MARINAI, *L'Unione europea risponde alla strumentalizzazione dei migranti: ma a quale prezzo?*, ADiM Blog, Editoriale, December 2021, p. 5.

The present proposal of the Instrumentalization Regulation has raised many concerns over the future of EU migration management and policies. Namely, when referring to migrants as weapons what appears shocking is their substantial dehumanisation, in the sense that they are referred to as ‘other than human’¹⁷⁰. Indeed, this legislative proposal leans on EU on the securitarian approach that address migrants, refugees and asylum seekers as potential threats for national security and public order¹⁷¹. The consequence of this approach may be paradoxical and actually push third states to instrumentalise migration flows as they see the particular sensitivity, and perhaps inability, of the EU to respond efficiently to mass migration phenomena. The broad derogatory regime granted by the proposed Instrumentalization Regulation leaves a troubling wide margin of discretion to the Member States in managing migration events that can lead politicians to decide to apply such emergency measures even when not necessary. Specifically, to pursue their political convictions with the consequence of endangering the solidarity principle in migration management. In this sense, a valid response should lay down the principle of solidarity as the prevailing one. The latter would provide a uniform response that guarantees respect for the fundamental rights of migrants throughout the European territory¹⁷².

2.2 The EU Externalization of borders in response to the hybrid threats: the resort to the Union External Action and the Common Security Defence Policy framework

Along with the legal tools that cover the field of application of EU Migration Law above mentioned, in recent years the European response to increasing flows of migrants from third countries has involved the use of an array of different EU actors and tools. Migration is now a policy area that has triggered an internal response but also an ‘external one’¹⁷³. The external action of the Union is here involved, especially the field of the Common Security Defence Policy. Within the latter, Europe has been employing a sort of ‘militarization of migration’. This concept takes into account many different operations stemming from an increasing interconnection with NATO and others actions in the Mediterranean. EU Migration and Asylum policy is often criticised for the alleged focus on restrictive

¹⁷⁰Statewatch, *EU: The ‘Weaponized migration’ discourse dehumanizes asylum-seekers*, November 2021.

¹⁷¹FORTI, op. cit.

¹⁷²*Ibidem*.

¹⁷³HIMMRCH, *A ‘Hybrid Threat’? European militaries and migration*, in Dahrendorf Forum Working Paper, 2 March 2018, p. 4.

measures, trying to prevent migrants from reaching Europe. For these reasons the critics often refer to it as ‘fortress Europe’¹⁷⁴.

As explained above, the approach to migration has been used lately make up a series of obstacles for migrants that contribute to the ‘fortification ‘of Europe. This is particularly true when referring to: border controls, criminalization of irregular migrants, the use of techniques of externalization of borders and the controversial pacts with Third Countries. In support to the concept of militarization of migrants, some scholars have constructed it. Specifically, Huysmans describes it as the ‘result of a powerful political and societal dynamic redefining migration as a force which endangers the good life in west European societies’¹⁷⁵. What is mostly criticized among the other things is the involvement of the police in migration management because it is seen primarily as a law enforcement policy issue. The securitization of migration as described by Huysmans has led to a control-oriented and restrictive approach to migration and freedom of movement. Some relevant aspects of this approach are: a stricter legislation and coordination among states, as well as the application of advanced technology that provides enhanced control and enforcement of external borders in order to protect the freedom of movement internally¹⁷⁶.

Primarily, Article 77 TFEU paragraph 1(b) gives the EU the competence to develop a policy to ensure the control of persons and the effective surveillance of the crossing of external borders. According to the Schengen Agreements, confirmed by Regulation 2016/399, the so-called Borders Code, the approach to be followed is to ensure high standards in external border controls which contributes to the so called ‘fortress ‘effect¹⁷⁷. The fight against irregular migration is carried out through a variety of forms of cooperation on different levels, such as administrative and police controls. In this sense, we witness also the growing presence of various agencies, tools, policies and systems that attempt to control and regulate irregular entry across the borders. As assessed above, in parallel with the harmonization of Europe's internal migration law, security actors have become widespread in managing incoming migration. Internally, the emphasis has been on regulation and oversight by EU institutions and Member States. The Visa Information System (VIS), the Schengen

¹⁷⁴DELVINO, *European Union and National Responses to Migrants with Irregular Status: Is the Fortress Slowly Crumbling?*, Centre on Migration, Policy and Society (COMPAS), Oxford, UK, 2020.

¹⁷⁵HUYSMANS, *The European Union and the Securitization of migration*, in JCMS December 2000, Vol 38 No5, pp. 751-777., p. 752.

¹⁷⁶HIMMRCH, op. cit., p. 4.

¹⁷⁷MARINAI, *Il controllo delle frontiere e la lotta all’immigrazione irregolare*, in CALAMIA, GESTRI, DI FILIPPO, MARINAI, CASOLARI, op.cit. pp. 197- 232.

Information System (SIS), the European Asylum Dactyloscopy Database (Eurodac), and the European Border Surveillance system are among these databases¹⁷⁸.

Also, a fundamental role is played by Frontex, which has now become the European Integrated Border and Coast Guard Agency. Under Art. 77 par. 2, let. d) TFEU European Union is compelled with the competence to adopt any necessary measure for a gradual establishment of an integrated External Borders Management System. The management of External Borders traditionally falls under the responsibility of the Member States, but notwithstanding this, Frontex was introduced in 2007¹⁷⁹. Following various changes, in 2016 it became, together with the Member States' borders management authorities, the European Border and Coast Guard¹⁸⁰. European integrated border management is implemented as a shared responsibility of the agency and national authorities. Although Member States retain primary responsibility for managing their external borders, the Agency retains the task of supporting the application of Union measures relating to the management of external borders by reinforcing, evaluating and coordinating the actions of Member States. Later, in 2019 a new Regulation¹⁸¹ endowed the European agency with enhanced powers and a permanent Corps of Border Guards, equipped with executive powers and able to fulfil the necessary control.

It seems useful to briefly introduce the framework regulating the External Action of EU and the mix with the Common Security Defence Policy background used in order to secure and defend the EU borders. Moreover, this paragraph also depicts the concept of migrants' smugglings and trafficking, which is interdependently linked to the wider use of police and military in this context.

Briefly, here there is depicted what is referred as the External Action of the EU, to which Title V of the TEU is devoted and generally coordinates the rules on the Union's external power, thus unifying the various areas. It thus groups together the Common Security Foreign Policy (of which the Common Security Defence Policy dealt with here, is a part) and the various material policies, which collectively contribute to the elaboration and implementation of External action¹⁸². Articles 21 and 22 TEU

¹⁷⁸See: JEANDESBOZ, *Reinforcing the Surveillance of EU Borders The Future Development of FRONTEX, CEPS, Liberty and Security challenge*, Research paper 11 and RIJPM, VERMEULEN (2015), *EUROSUR: saving lives or building borders?*, *European Security*, pp. 454-472, 2008.

¹⁷⁹Council Regulation of the European Parliament and Council *establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* No 2007/2004, 26.10.2004.

¹⁸⁰MARINAI, op. cit. in CALAMIA, GESTRI, DI FILIPPO, MARINAI, CASOLARI, op.cit. pp. 212-216.

¹⁸¹Regulation 2019/1896 of the European Parliament and Council *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, 13.11.2019.

¹⁸²BARTOLONI, *L'Unione europea come attore nelle relazioni internazionali*, in BARTOLONI, POLI, (a cura di) *L'azione esterna dell'Unione europea*, Editoriale Scientifica, Napoli, 2021, pp. 1-26.

predetermine a unified framework of principles, aims, interests and strategies that must inspire the EU External Actions. Article 21 TEU lists the guiding principles and objectives of External Action which, according to its third paragraph, the Union must respect and pursue. These are principles of a universal nature, such as human rights, with an exhaustive list limiting the scope of external action. Particularly relevant to the framework of countering hybrid threats are the areas of preserving peace, preventing conflicts and strengthening international security (let. c para. 2) and the promotion of an international system based on enhanced multilateral cooperation (let. g)¹⁸³. At the same time, Article 22 TEU stipulates that the European Council shall, on the basis of the principles and objectives set out in Article 21, issue a general act of guidance containing the definition of strategic interests and objectives to be implemented by the Union through the exercise of individual competences of external relevance. Decisions are the binding instruments identified to give rise to the discipline. These are adopted by the European Council acting unanimously on a recommendation from the Council. These recommendations are, in turn, adopted according to the procedural and voting rules laid down for each area concerned. This entails the Council acting unanimously on any initiatives by the High Representative.

When referring to militarization of migration in EU, the referral is made to military operations providing for the deployment of armed forces of Member States and Third states for peacekeeping or peacebuilding purposes in crisis scenarios outside the EU¹⁸⁴. These kinds of missions fall into the scope of the Common Security Defence Policy (CSDP), which comprehends on one level, the development of military and civil intervention capabilities to be deployed in EU peace missions and on the other, the definition of a Common European Defence. It is an integral part of the Common Foreign and Security Policy (CFSP), based on Articles 24 and 42 TEU. Revised by the Lisbon Treaty, the discipline is now included in Chapter 2 of Title V TEU. It is bound to fulfil the obligations arising

¹⁸³Para 2, Article 21 TEU: The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a)safeguard its values, fundamental interests, security, independence and integrity; (b)consolidate and support democracy, the rule of law, human rights and the principles of international law;(c)preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d)foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e)encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f)help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g)assist populations, countries and regions confronting natural or man-made disasters; and (h)promote an international system based on stronger multilateral cooperation and good global governance.

¹⁸⁴PALADINI, *La politica di sicurezza e di Difesa Comune* in BARTOLONI, POLI, (a cura di) *L'azione esterna dell'Unione europea*, Editoriale Scientifica, Napoli, 2021, pp. 289-313.

from NATO and the UN¹⁸⁵. The implementation is perpetuated by the European Council and the Council. The former performs a political steering function, identifying the interests and strategic objectives of the EU's external action, including with regard to CSDP. While the Council, in its Foreign Affairs formation, takes the necessary decisions to implement and deliver what the European Council has defined. However, the initiative on CSDP acts lies with the High Representative of the Union for Foreign Affairs and Security Policy and the Member States. Both also hold the executive function. While the High Representative as a rule ensures the implementation of decisions taken by the European Council and the Council (Art. 27 TFEU), the Member States participate in the implementation of the CSDP in a reduced way. It is also possible that the carrying out of a peacekeeping mission is entrusted to a group of member states that wish to do so. The acts adopted by the Council are decisions, as stipulated in Article 25 TEU, in contrast legislative acts are excluded. Decisions are taken by the Council on a proposal by the High Representative or the member states (Art. 42 TEU). The rule for adopting decisions is unanimity and it is possible for dissenting member states to abstain without preventing the act from being adopted¹⁸⁶.

The reference to CSDP seems necessary and stems from the very acronym in which the word 'security' and 'defence' is read. In fact, it is possible to point out that in the context of hybrid threats, and in this case of the instrumental use of migrants, the Union resorts to means such as military operation in order to contrast those threats aiming at destabilising the Union itself. Two dimensions are identified in the acronym CSDP: namely, security; by which is meant the external projection of the Union, in relation to the stability of geo-political scenarios more or less close to the EU such as the peacekeeping missions themselves, and defence; with the aim of realising the common defence policy¹⁸⁷. However, it is clear that the two dimensions influence each other. A clear example of this mutual influence can be seen in the activities of a number of bodies, whose aim is to promote, implement and develop both security and defence in a coordinated and synergetic manner. Examples are the EDA¹⁸⁸ and the EEAS¹⁸⁹.

¹⁸⁵Specifically the observation of Art. 51 of the Charter of the United Nations.

¹⁸⁶PALADINI, op. cit.

¹⁸⁷*Ibidem*.

¹⁸⁸European Defence Agency (EDA) supports cooperative European Defence projects and provides a forum for European ministries of Defence. was set up in 2004. It helps its 26 Member States (all EU countries except Denmark) to develop their military resources.

It promotes collaboration, launches new initiatives and introduces solutions to improve defence capabilities. It also helps Member States that are willing to do so to develop joint defence capabilities.

¹⁸⁹The European External Action Service (EEAS) is the diplomatic service and combined foreign and defence ministry of the European Union (EU). The EEAS is led by the High Representative for Foreign Affairs and Security Policy. It prepares acts to be adopted by the High

In addition to that, with regard to decisions establishing peacekeeping missions, the Council determines their objective, scope and general modalities of implementation on the basis of Article 43(2) TEU. Some relevant initiatives taken by EU in this context, are the deployment of military operations such as EUNAVFOR MED 2015/778/CFSP (Operation Sophia in the Aegean Sea)¹⁹⁰. In practice, those decisions can be followed by other decisions which modify or integrate their content. They can become longer in duration or be amended in budget¹⁹¹. These operations have key responsibilities such as: surveillance, deterrence, prevention, apprehension, and returns. In this sense, militarization can be seen as an extension or escalation of securitization¹⁹². The operations often support existing Frontex or national coast guard activities¹⁹³.

Migration strategy in Europe will always need to include an exterior component so, the resort to the Defence Policy is reasonable. Tough, some real risks may amount stemming from a false narrative of the threat of migration. And it is fundamental that Member states and institutions develop a coherent definition of whether and in what instances migration can represent a threat. This would not only provide a more coherent basis for future operations and missions but also counteract the tendency of some political factions to consider all irregular migration a threatening phenomenon. In fact, another clear manifestation of migrants representing a hybrid threat is linked to the trafficking and smuggling activities¹⁹⁴. The EU Renewed Action Plan against Migrant Smuggling affirms that ‘migrant

Representative, the European Commission or the Council. The EEAS is also in charge of EU diplomatic missions (and intelligence and crisis management structures).

¹⁹⁰Operation Sophia, formally European Union Naval Force Mediterranean (EU NAVFOR Med), was a military operation of the European Union that was established as a consequence of the April 2015 Libya migrant shipwrecks with the aim of neutralizing established refugee smuggling routes in the Mediterranean. The operational headquarters was located in Rome. The EU mandate for the operation ended on March 31, 2020.

¹⁹¹EUNAVFOR MED for instance was modified 8 times between 2015 and 2019. Operation Irini is its successor operation. It was enacted in 2020 aiming at contributing to the arms embargo imposed on Lybia by the CSNU.

¹⁹²HIMMRCH, op. cit.

¹⁹³*Ibidem*.

¹⁹⁴Smuggling and trafficking are frequently employed alternatively but there are serious differences, smuggling is the practice of assisting and financially profiting from people who attempt to cross borders illegally. Contrarily, individuals are coerced and exploited in human trafficking, which frequently entails transporting them against their will or under false pretences. Smuggling and trafficking are both frequently carried out through networks, but trafficking is uniquely distinguished by its association with organized crime and violent acts. In contrast to trafficking, smuggling has been characterized as a generally non-violent form of organized crime in various ethnographic studies. Frequently, it is included into social networks and communities that offer safeguards for migrants, defending them against exploitation¹⁹⁴. When the two terms are used indiscriminately in the context of irregular migration, it increases the vulnerability of trafficking victims, criminalizes smugglers' activities to the same extent as traffickers', and invalidates the genuine asylum claims of those who have been smuggled. However, it seems as though the two practices are tightly related in some situations and along particular migration paths. Because anti-smuggling activities have increased the danger involved in the industry, smuggling methods have become increasingly violent and exploitative. When additional participants are involved, smuggling operations might become more violent.

smuggling is a 'cross-border criminal activity that puts the lives of migrants at risk, showing disrespect for human life and dignity in the pursuit of profit, and undermines the migration management objectives of the EU and the fundamental rights of the people concerned'¹⁹⁵. The document is intended to establish the actions and measures to be implemented over the next five years (2021-2025) in order, precisely, to tackle the smuggling of migrants. These practices are covered by Article 5 of the Charter of Fundamental Rights and Article 79 TFEU¹⁹⁶. Also, Article 83 TFEU assigns autonomous relevance to migrant smuggling with respect to the other spheres of crime regulated by the same article. In regard of the article, the European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may establish minimum rules concerning the definition of criminal offences and sanctions¹⁹⁷. The above-mentioned Renewed Action plan on Smuggling of migrants (2021-2025) aims at providing adequate responses to the instrumental use of irregular migration by state actors, through a (sort of) concertation aimed at identifying and developing all operational-legal-diplomatic-financial instruments deemed valid. It seems appropriate to consider a law enforcement tool that could be quite efficient, in tackling this phenomenon: the already mentioned European border surveillance system EUROSUR. This system is now incorporated into the framework of Regulation (EU) 2019/1896 on the European Border and Coast Guard (FRONTEX). It aims to facilitate, structure the exchange of information and also operational cooperation within the European Border and Coast Guard', in order to 'improve situational awareness and increase the reaction capacity for border management purposes , including for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and to help ensure the protection and safety of migrants' lives' (Article 18 of Regulation (EU) 2019/1896). A system to be used not only in the context of border checks and border surveillance - obviously, external land, sea, air borders -, but, also, in the context of observation activities, detection,

¹⁹⁵Communication from the European Commission, COM (2021) 591 final, *A renewed EU action plan against migrant smuggling (2021-2025)*, 29.9.2021.

¹⁹⁶CARTA, *La disciplina del traffico di migranti: prospettive di riforma nel sistema UE*, in federalismi.it, 16 novembre 2016, in <https://federalismi.it/nv14/articolodocumento.cfm?artid=32737>.

¹⁹⁷Article 83 TFEU paragraph 1: 'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament'.

identification, as well as prevention and interception of unauthorized border crossings (Art. 19 of Regulation (EU) 2019/1896)¹⁹⁸.

In conclusion, it is evident that the EU migration management is progressively resorting to defensive tools and actors, though the use of the military appears to be *ad hoc* and driven by Member States' intentions¹⁹⁹. An external dimension of Europe's migration policy will always be necessary and should become an effective tool for constructive diplomatic relations with neighbouring regions. However, military's deployment and generally speaking, the externalization policies are handled in a critical way that is related to the misleading perception of migration as a threat. Moreover, these phenomena constitute a slippery ground for EU; the latter can be exposed towards the same Third countries with which it has concluded the agreements. In this sense, Third States may exploit this ground to bend EU to their will and consequently threaten its stability with the issue of migration flows, recreating the already discussed classic dynamic of hybrid threats. For these reasons, it is desirable to pursue a progressive connection with Third Countries (countries of origin and/ or transit country) and to rely on a broad framework of international agreements in order to foresee the actions of hybrid actors, as it will be reviewed in the next subparagraph.

2.2.1 The Agreements with Third Parties and the externalization of borders

In regard of what affirmed above, it is deemed necessary to shortly analyse the framework concerning the so-called Neighbourhood policy and the relevance of a regular dialogue between the EU, the Member States and the Third Parties. The importance of these kind of relations is by now corroborated by a wide landscape of agreements that the EU has been establishing with Third States. In fact, the so-called European Neighbourhood Policy (ENP) is the only component of EU External Action that is not included in Part V of the TFEU. It is in fact through specific agreements that EU realizes the objective of privileged relations with neighbouring countries and others. However, the European institutions use different legal bases to conclude *ad hoc* agreements with neighbouring countries²⁰⁰. Member States have for years perpetuated the fight against irregular migration involving the States from which migrants arrive. In this sense, the so called 'externalisation of borders and their control

¹⁹⁸LICASTRO, *Il caso della Bielorussia sulla strumentalizzazione dei flussi migratori e strumenti di contrasto al traffico di migranti: brevi profili sulla rilevanza del sistema europeo di sorveglianza delle frontiere EUROSUR*, in Osservatorio sulle fonti, n. 2/2022, <http://www.osservatoriosullefonti.it>.

¹⁹⁹HIMMRCH, *op.cit.*,

²⁰⁰POLI, *La politica europea di vicinato*, in BARTOLONI, POLI, *op. cit.*, pp. 177-206.

has taken hold. This phenomenon takes place deploying officials also on the territory of third countries, or cooperating with Third States. For instance, this happened with Turkey and Libya.

The development of ENP roots back to 2003 when the EU set the agreements with two blocs of Third countries, to promote a safer environment in the neighbourhood, they were namely: the Eastern neighbours, most of which formed the so-called Eastern Partnership (EaP) in 2009 and the Northern African countries, which are part of the Union for the Mediterranean. Since then, the Commission has confirmed a certain emphasis on the common interest of the EU and its partner countries on one hand to integrate third country nationals, lawfully residing in the Union, and on the other hand, to fight illegal migration²⁰¹. The context of irregularity requires the EU to reinforce the partners resilience in combating illegal migration on their behalf, in fact as back then most of the asylum seekers were not coming from those Countries involved in the ENP, but they played a different role as Country of transit. In this sense, EU Member States have the power to designate certain States as safe transit countries delegating *de facto* to them the burden of examining asylum applications and their reception, leading them to control their borders even more to avoid letting foreigners enter their territory²⁰². For what concern this topic, it is necessary to take into account some specific notions: ‘safe third country’, embedded in both the Dublin system and directive 2008/115²⁰³, basically a third state different from the one of origin of the applicant, that is considered safe whenever the applicant itself has a sufficient link with it; ‘first asylum country’, under Article 35 of directive 2013/32, is a State that recognized the status of refugee to the applicant or offers a sufficient degree of protection in particular regarding the protection of non-refoulement; and ‘safe country of origin’, according to Article 37 of the directive, Member States can design a list of countries of origin that are considered safe²⁰⁴. This definition is considered on the basis of different sources of information, such as the EASO, UNHCR²⁰⁵ and the Council of Europe. Actually, Directive 2013/32 asserts the obligation, under article 33 to qualify the application as inadmissible: along with the cases of ‘safe third country’,

²⁰¹POLI, CINELLI, *Mobility and legal migration in the context of the European Neighbourhood Policy: What role for the European Union?*, *Revista de Derecho Comunitario Europeo*, 58, 2017, pp. 979-1005.

²⁰²Associazione per gli Studi Giuridici sull’Immigrazione, *L’ esternalizzazione delle frontiere e della gestione dei migranti: politiche migratorie dell’unione europea ed effetti giuridici*, December 2019, https://www.asgi.it/wp-content/uploads/2020/01/2020_1_Documento-Asgi-esternalizzazione.pdf.

²⁰³Directive 2008/115/EC of the European Parliament and Council *on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16.12.2008.

²⁰⁴According to Annex I of directive 2013/32, the condition for being a safe country of origin is to demonstrate that there aren’t constant persecutions, torture or other forms of suffering or inhuman and degrading treatment, nor danger caused by discriminated violence in situations of both internal and international armed conflicts.

²⁰⁵United Nations High Commissioner for Refugees.

‘safe country of origin’ and ‘first asylum country’, in addition the event of an applicant that has been already received international protection in another country is considered inadmissible.

In this regard, the relationship with Third Countries requires consideration also when assessing the context of the hybrid threats, especially the instrumentalization of migrants. As outlined in the European Agenda on Security²⁰⁶, the EU needs to focus more on capacity building with partner countries in the security sector, *inter alia* linking security and developing the security dimension of the revised European Neighbourhood Policy²⁰⁷. In fact, these actions can also support partners' resilience to hybrid activities²⁰⁸. The European Union has aggressively pursued a migration policy with the overarching goal of lowering incoming flows in the external dimension since 2005. This includes trade, security, and development policies, return agreements with transit and country of origin. Especially readmission agreements aim to facilitate the return of nationals to their Country of origin, the competence in this context is provided for by Article 79(3) TFEU processing agreements with Third parties (such as paying for administrative expenses or even funding detention facilities). There are also agreements with governments to strengthen border control, and monitoring to reduce migration to Europe²⁰⁹. Nowadays, the EU has concluded a large number of Readmission Agreements with Third Countries, and to this end the EU has sought to leverage favourable treatment in trade, under privileged conditions to take advantage of the channels for legal Migration. These kinds of dynamics have been largely debated, namely for those countries that apply doubtful respect of human rights²¹⁰.

Taking Turkey as an example, there could be highlighted how the ‘militarization of migration’ can take place in parallel to other agreements. In fact, in response to the increased flow of migrants through the Eastern Mediterranean route in 2015-2016, two major agreements were reached: the EU–Turkey Statement²¹¹ and the NATO deployment in the Aegean Sea. According to EU–Turkey Statement, Turkey agreed to accept returned migrants from Greece to be assessed for their eligibility for asylum in the EU. In return, Turkey received €3 billion for facilities for refugees in Turkey, and promised further development of the Customs Unions and to re-energizing the accession process. In

²⁰⁶ https://home-affairs.ec.europa.eu/european-agenda-security-legislative-documents_en.

²⁰⁷ In 2015, the Union's strategy with regard to relations with its neighbours underwent a reorientation. Due to the lack of results marked by emerging political instability in almost all neighbouring countries, the EU started to implement its neighbourhood policy through the use of CFSP instruments. These mostly amount to sanctions, applied in cases where the political leaderships of the neighbourhood policy countries commit human rights violations or threaten the stability of a country.

²⁰⁸ JOIN/2016/018 final, *op. cit.*

²⁰⁹ HIMMRCH, *op.cit.*,

²¹⁰ MARINAI, *op. cit.* in CALAMIA, GESTRI, DI FILIPPO, MARINAI, CASOLARI *op.cit.*, pp. 197- 232.

²¹¹ Council of the European Union, *EU- Turkey Statement*, 18 March 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>.

February 2017, the NATO Standing Maritime Group 2²¹² was deployed at the request of Germany, Turkey, and Greece to ‘cut the lines of human trafficking and illegal migration’. It collaborated with Frontex Operation Poseidon²¹³ in the Aegean Sea as well as the coast guards in Turkey and Greece through agreements on information exchange.

Basically, collaboration with Turkey in this mission helped EU Member States to circumvent a restriction on their returns policy and practice, following the decision by the European Court of Human Rights in *Hirsi v Italy*²¹⁴. Basically, in this way EU and Member States avoid returning migrants to countries outside the EU without an individual investigation of their status. The Court has stated that such practice would present a potential breach of *non-refoulement*²¹⁵.

Furthermore, as suggested by the Joint Framework to counter hybrid threat and in light of a stronger link with what has been described in the previous paragraph, the approach to crisis management can be taken via a mobilization of the Common Security and Defence Policy (CSDP) instruments and missions²¹⁶. Member States can either take them independently or as a complement to EU instruments, to help partners strengthen their capabilities. Such cooperation could channel support for strategic communication, advice for key ministries exposed to hybrid threats and additional support for border management in emergencies. Further synergies between CSDP instruments and security, customs and justice actors, including relevant EU agencies such as Frontex and Eurojust, could be explored²¹⁷. Finally, the parallel dialogue and establishment of agreements with Third Parties even if it does represent a difficult compromise on a certain humanitarian level, can be useful in solving some specific occurrences linked to the context of weaponization of migrants. A clear example of this use will be provided in the third chapter of the present work: indeed, an important role was played by the Third countries involved in the Belarus migration crisis. The Union has been implementing some specific agreements to readmit asylum seekers that were taken from Iraq and other countries to Belarus via specific visa agreements. It appears thoughtful, in this regard, to exploit the way of partnerships with Third Countries in order to establish a legal and clearer path of Migration, on a

²¹²Standing NATO Maritime Group 2 (SNMG2) is a North Atlantic Treaty Organisation (NATO) standing maritime immediate reaction force. SNMG2 consists of four to six destroyers and frigates. Its role is to provide NATO with an immediate operational response capability.

²¹³Joint Operation Poseidon was a Frontex operation deployed in Greece with almost 700 guest officers, who perform border surveillance, assist in the identification and registration of incoming migrants, as well as debriefing and screening

²¹⁴ECtHR, *Hirsi Jamaa and Others v Italy*, Application no. 27765/09, 23 February 2012, para. 133.

²¹⁵DI PASCALE, *Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations*, in RUBIO-MARÍN (ed.), *Human Rights and Immigration*, Oxford, January 2014.

²¹⁶JOIN/2016/018 final, op. cit.

²¹⁷*Ibidem*.

certain way to counteract the smuggling and trafficking of people and on the other aiming at ‘anticipating’ destabilization towards the Union using the migrants. Indeed, it is preferable that in building a safer environment for the EU and the Member States politics wouldn’t underestimate the importance of human rights and asylum seekers’ needs.

2.3 Legal means to respond to the weaponization of migration under EU Law

The first chapter of this work brings together the EU main legal provisions that can be considered as a response to the hybrid context, the present paragraph instead, aims at reflecting on the applicability of these means in the specific area of migration. As analysed in the first chapter, the Joint Framework for Countering Hybrid Threats²¹⁸ identifies possible responses at European level when preventive measures are not sufficient to avoid possible hybrid threats. The document addresses two specific provisions that can be taken into account as ‘last resort’ when referring to hybrid threats, namely Art. 42.7 TUE (the so- called mutual assistance clause) and Art. 222 TFEU. Previously, there have been investigated the reasons why it is particularly hard to reconnect a response by the EU via Article 42.7 TUE, therefore here the focus will be especially on the applicability of Art. 222 as perhaps it could represent the most appropriate instrument when taking into account the case of weaponization of migrants. Although finally the tool presents various limits and a difficult applicability. For these reasons in this paragraph there will be also explicit reference to other instruments and means, individuated by the EU.

As mentioned in the Joint Framework for countering hybrid threats, ‘a rapid response to events caused by hybrid threats is crucial’²¹⁹. In this respect, the civil protection actions and capabilities by the European Emergency Response Coordination Centre could be an effective response mechanism for tackling hybrid threats and more specifically the exploitation of instrumentalization of migrants. Regarding the body, it is worth mentioning that the EU Civil Protection Mechanism (CPM) was established in 2001 and aimed at strengthening cooperation between the EU countries and 8 participating states on civil protection to improve their emergency skills and action plan. The CPM coordinates crisis-response across all EU Member States as well as non-EU Members including Iceland, Turkey, Serbia and the former Yugoslav Republic of Macedonia²²⁰. The Mechanism also helps coordinate disaster preparedness and prevention activities of national authorities and

²¹⁸JOIN/2016/018 final, op. cit.

²¹⁹ *Ibidem*.

²²⁰HIMMRCH, op. cit.

contributes to the exchange of best practices. This facilitates the continuous development of higher common standards enabling teams to understand different approaches better and work interchangeably when a disaster strikes. The Commission plays a key role in coordinating the disaster response worldwide, contributing to the transport and/or operational costs of deployments. For instance, the CPM was used to help the humanitarian emergency in Ukraine, helping assisting people who have fled to neighbouring countries. Also, it is necessary remarking the Council's Integrated Political Crisis Response (IPCR) that has the function to expedite decision-making between Member States during a crisis. The need for this mechanism was born along with the terroristic attacks of 9/11 and in Madrid and in 2013 the Council adopted the IPCR after the previous body of emergency and Crisis coordination arrangements (CCA). Briefly, this body works bringing together key actors in cases of crisis such as the EU institutions and affected Member States, to ensure coordination and managing the situation. THE IPCR supports the Council presidency, the Committee of Permanent Representatives of the governments of the member States to the European Union (COREPER) and the EU Council in order to facilitate and implementing communications.

The resort to these bodies represents indeed a valid answer to a weaponized migration attack but the measures would partly help solving the cause. For a legal response, capable of invoking some defensive tools, some other means were originally prepared by the EU.

Previously, there has been explained how the solidarity clause was created and for what purposes: Member States are called to act jointly in a 'spirit of solidarity' when a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. In this sense, providing a mechanism-of-last resort alongside the EU's civil-protection *apparatus*²²¹. The Joint Framework for countering hybrid threats itself identifies possible responses at the European level when prevention measures are not sufficient to avert possible hybrid threats and a reaction is needed.

In this landscape, the so-called solidarity clause has been invoked on several occasions by some Member States precisely with regard to migration management issues. According to the Joint report of 19th July 2017 on the implementation of the Joint Framework on countering hybrid threats²²², 'in the case of hybrid attacks, which are a combination of criminal and subversive actions, recourse to Article 222 is more likely'. The invocation of the solidarity clause deployed as a response to hybrid

²²¹PARKES, *Migration and terrorism: the new frontiers for European solidarity*, in *Brief Issue, European Union Institute for Security Studies*, December 2015.

²²²Joint Report of the European Commission *on the implementation of the Joint Framework on countering hybrid threats - a European Union response*, JOIN (2017) 30 final, p. 18.

threats, particularly when referring to migratory crises, could be in theory sustained. As analysed, ‘solidarity’ is provided for in Article 80 TFEU in the field of migration, it was used in some cases of financial support and the relocation mechanism. The applicability of Art. 222 TFEU for what concerns migration can be taken into consideration only in the case when it is perceived as a man-made disaster as introduced by the Lisbon Treaty. Indeed, it is unclear which events are capable of giving rise to man-made disasters and whether there is a threshold below which certain events cannot be brought under the regulatory umbrella. To some extent migratory crises may constitute man-made disasters, this is confirmed by a number of recent instruments adopted within the Union, including Regulation 2016/369²²³. This provision is contained only at number 2 of the preamble assessing that: ‘The impact of both man-made and natural disasters within the Union is increasingly severe. This is linked to a number of factors, such as climate change, but also to other contributing external factors and circumstances which are unfolding in the Union's neighbourhood. The migration and refugee situation currently affecting the Union is a notable example of a situation where, despite the efforts undertaken by the Union to address the root causes located in third countries, the economic situation of Member States may be directly affected’. The preamble though doesn’t have binding effects. Also, the European Court has never had the chance to rule on the scope of Art. 222 and assess whether migratory phenomena fall within the scope²²⁴, so there are few sources to reconnect the provision to this specific context.

The question is not an easy one to solve, and more than one argument concerning both the invocability and the effectiveness of the clause and its possible application in the case of mass migrations, would rather seem to argue against the possibility of a recovery of the solidarity principle for the phenomenon of hybrid threats²²⁵. Taking into account the territorial scope of the provision in fact, Decision 2014/415/CFSP on the modalities for the Union's implementation of the solidarity clause²²⁶ makes it clear that Art. 222 TFEU has internal application, as illustrated in the first chapter of this work. Hence, it follows that, assistance under the solidarity clause can only be provided within the territory of the Member State that has suffered the disaster and has requested it through its political authorities, regardless of whether the event occurred inside or outside the territory of the same. This is because, it appears evident, ‘Article 222 TFEU does not represent a clause on the defence of the

²²³Council Regulation (EU) *on the provision of emergency support within the Union*, 2016/369, 15 March 2016.

²²⁴D’AGNONE, *Migrazioni di massa e minacce “ibride” alla sicurezza degli Stati membri dell’Unione Europea*, in *Federalismi*, 2018, p. 12.

²²⁵*Ibidem*.

²²⁶Council Decision 2014/415/CFSP, *on the arrangements for the implementation by the Union of the solidarity clause*, 24.06.2014, pp. 53-58.

EU's territorial integrity'²²⁷. Consequently, even if the solidarity clause were applicable, it would be hardly effective in the case of hybrid threats characterized by mass migrations²²⁸. At the same time, the activation of the clause can take place for phenomena that originate outside European territory, the response under Article 222 TFEU must nevertheless necessarily take place within the area of a Member State's territorial sovereignty, and would therefore prove ineffective in combating migratory crises that, for their resolution, require not only the assistance of the states most affected, but also, and above all, active intervention in the migrants' countries of origin. Finally, a further argument in the same direction is the circumstance that solidarity under Article 222 TFEU can only be requested by the State victim of the disaster 'after having availed itself of the possibilities offered by existing means and instruments at national and Union level, it considers that the crisis clearly exceeds the response capabilities at its disposal'²²⁹. Assistance is therefore conceived as a last resort, as an exceptional way to deal with disasters.

Moreover, when referring to disasters that affect Member States, the criteria to evaluate the possible response of that same Member State is considered subjective²³⁰. It could be perceived quite differently depending on whether the perspective adopted is that of the Member State affected by the disaster or that of the European Union and the other Member States. According to D'Agnone, this form of 'subsidiarity' that guides the application of Article 222 TFEU is thus, quite different from the one which forms the principle under Article 5 TEU²³¹. In fact, under Art. 5 TEU the adoption of acts by the Union is subject to a prior assessment of the capacity of the Member States to sufficiently achieve the objectives of a given action. While, in the case of the solidarity clause the assessment of the state's capacity to respond is made by the state itself, which, may decide to invoke the clause whereby the instruments already in place proves ineffective. Also, the 'self 'assessment of State's capability to respond, only comes after its deployment of means and instruments offered by national and European law. Finally, the assessment of Art. 222 TFEU, does not appear susceptible to review by the Union judiciary. Nor is it by the national parliaments through the mechanism provided for in Protocol No. 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaties²³².

²²⁷KOSTANDINIDES, *Civil Protection in Europe and the Lisbon "solidarity clause": A genuine legal concept or a paper exercise*, in *Uppsala Faculty of Law Working Paper*, n. 3/2011, p. 13.

²²⁸D'AGNONE, *op. cit.*

²²⁹*Ibidem.*

²³⁰*Ivi*, p.13.

²³¹*Ibidem.*

²³²*Ibidem.*

In light of all the above, the invocability of Article 222 TFEU remains uncertainty when it comes to react to hybrid threats, especially when these consist wholly or partly of mass migratory phenomena. The first unclear element is the notion of 'disasters' within the meaning of the Article and if such threats may fall into the scope of the provision and used in such circumstances. To be more specific, under Article 3(a) of the Decision on the implementation by the European Union of the solidarity clause, a 'disaster' is 'any situation affecting or threatening to seriously affect people, the environment or property, including cultural heritage. An additional problem amounts to the fact that Article 222 TFEU seems not to cover the case of mass migratory phenomena which, from a preventive point of view, requires actions in the territories of third states from which mass departures occur. Finally, Article 222 TFEU provides for assistance only when the Member State on whose territory the disaster has occurred is unable to counteract the effects of the event, according to a discretionary basis²³³.

Indeed, according to the Declaration on Article 222 TFEU: 'Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State'²³⁴. It is therefore inferred that Member States are free to choose the most appropriate means to fulfil the solidarity obligation imposed by this provision. Nevertheless, granting of full discretion to the Member States regarding the identification of the means through which solidarity can be provided under Article 222 TFEU raises the doubt that even for hybrid threats, and in particular for mass migrations cases, the solidarity obligation would end up being implemented exclusively through forms of financial support, rather than through more effective instruments to counter the crisis faced by the Member State of first arrival. Moreover, as specified in recital 4 of the preamble of the solidarity clause decision²³⁵, the implementation of Article 222 TFEU should be based as far as possible on already existing instruments and should work without additional resources. Indeed, it is doubtful that the latter could be sufficient to deal with hybrid threats²³⁶. With regard to mass migratory phenomena, despite the numerous appeals for support coming mainly from the countries of first arrival, the existing

²³³*Ibidem*.

²³⁴*Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, December 2007, Document 12016ME/TXT.*

²³⁵D'AGNONE, op. cit., p.15.

²³⁶*Ibidem*.

instruments have demonstrated all their fragility in the absence of a structural reform of the system, implying a concrete solidarity effort on the part of all Member States²³⁷.

However, as suggested by Parkes, under Article 222, CSDP might still be relevant. The decision-making and coordination procedures of CSDP may be useful if military assets were deployed within the EU. As illustrated above, the CSDP would cover the voids left by Article 222, the latter is believed to be adopted ‘internally’ while the CSDP may act ‘externally’, meaning that those operations are usually deployed outside the Union’s territory²³⁸. It is clear that the Implementing Decision²³⁹ gives each Member State a wide freedom to choose what resources to make available. The Decision does not in any way interfere with the Member States' ability to organize themselves in accordance with Article 222; it only addresses the Union reaction. However, the Commission and High Representative would be tasked with locating any potential relevant national resources, and the EU Military Staff might assist in coordinating the use of any military force. Additionally, an abroad CSDP mission may be established as an external supplement to the internal response of the EU. For example, if Article 222 were to be used to address the current migration problem, an existing CSDP mission in a nation of origin might be quickly converted²⁴⁰.

Still, in Parkes ‘vision, it would make sense for the EU to modify its mutual-support Articles, paying close regard to how CSDP and the solidarity clause are related. But going too far in extending the scope of Articles 222 and 42.7 could also be dangerous. An adversarial actor might, for example, formulate threats that straddle the legal line between Articles 222 and 42.7 or that fall just short of triggering a provision. Therefore, the goal of demoting the two phrases to the background is even more crucial than strengthening them. Articles 222 and 42.7 are intended to be last-resort procedures; the EU already has practical daily solidarity mechanisms built into its entire toolkit of policies. These strategies include collaborative internal action intended to lessen the effects of disasters within the EU and preventative external action to foresee dangers and eradicate them at their source²⁴¹.

In conclusion, in the event of hybrid threats constituted by mass migrations, the solidarity clause shows many limits. In particular, ‘solidarity’, provided for in Article 222 TFEU, is far from being

²³⁷MORI, *La proposta di riforma del sistema europeo comune d’asilo: verso Dublino IV?*, in Eurojus.it, 7.09.2016.

²³⁸PARKES, op. cit., p. 3 ss.

²³⁹Council Decision 2014/415/CFSP, *on the arrangements for the implementation by the Union of the solidarity clause*, 24.06.2014, pp. 53-58.

²⁴⁰PARKES, op. cit.,

²⁴¹*Ibidem*.

translated into concrete actions, this clause risks remaining unhelpful, as already happened with Article 80 TFEU. It would therefore be desirable for the European institutions to make an effort to clarify the different types of hybrid threats, but above all to identify additional and specific means of reaction according, especially in the case of mass migrations. In the absence of such an effort, the category of hybrid threats remains problematic in terms of coordination with other existing prevention and response instruments. As Himmrich has argued ‘the problem of weaponization of migrants against the EU is more likely to continue to pursue a defensive policy towards migration. This includes prioritizing a reduction in inflows at all costs and relying on deterrence practices, which undermine rights-based approaches and neglect humanitarian responsibilities. The vulnerability of EU members to such weaponization threats can be remedied by building resilience through a more comprehensive and coherent internal policy. This does necessarily mean that member states will all need to accept more migrants. Even with the current level of migration, the political division over the issue within the EU on migration is already a political risk factor for many governments’²⁴². In light of the above, a stronger cooperation at EU level is desirable also on a defence perspective and policy.

2.4 A more pragmatic path towards hybrid threat? The Common Foreign Security Policy and restrictive measures framework

The means that were described above remain, at least for now, in many respects theoretical, their applicability is still object of academical interpretation so that, its practical effect remains uncertain. For these reasons, to respond to hybrid threat, namely in the cases of a misuse of migration by countries outside the EU, it appears important to resort to restrictive measures that the Union has been applying more and more often to contrast its ‘enemies. This present paragraph aims at analysing the Common Foreign Security Policy framework and its development within the imposition of restrictive measures, i.e., the global sanctions and those imposed on natural and legal persons or other non-state entities. This alternative route is described theoretically to offer diverse means to counter the instrumentalization of migrants used by third states to put pressure on the Union. From a more general point of view, the instrument of sanctions can in fact be considered one of the most effective means of responding to hybrid threats. In particular, such an additional framework was necessary since the measures described above (the mutual assistance and solidarity clause) do not seem to be exactly interpretable and referable to the situation of exploitation of the migration phenomena. For these

²⁴²HIMMRCH, *A ‘Hybrid Threat’? European militaries and migration*, in Dahrendorf Forum Working Paper, 2.03.2018.

reasons, it was deemed necessary to deal with the topic of sanctions and, more generally, to describe the functioning of the CFSP in order to offer the reader a partial view of the range of instruments that can be used by the EU to respond to controversial hybrid contexts, at least in the awaiting of a clearer picture of legal and defence instruments that could be deployed. Indeed, even in the most practical cases, sanctions have been used for these and other purposes by the Union.

The restrictive measures contained in Article 215 of the TFEU now constitute the predominant component of the acts adopted by the Union under the CFSP. The latter is dedicated to the internal Chapter 2 of Title V TEU and it is subject to specific rules and procedures as set out in Article 24 TEU. In general, the notion of Common Foreign Security Policy is rather complex because of the purely intergovernmental component, the specific discipline and the originality of the competences²⁴³. According to Article 24 TFEU, the Union's competence in this matter covers all areas of foreign policy and all matters relating to the Union's security, including the progressive framing of a Common Defence Policy²⁴⁴. As far as the competence is concerned, therefore, there is no indication except that, according to paragraph 2, it is implemented within the framework of the principles and objectives of External Action and it is based on the development of mutual solidarity of the Member States, the identification of issues of general interest and the achievement of an increasing degree of convergence of Member States' actions²⁴⁵. According to some scholars, in the absence of a clear formula designating the competence and mechanisms of the CFSP, it extends wherever states allow the Union to execute it²⁴⁶. In Article 21(2) TEU we find reference to the actions of the Union where the following are mentioned among the fundamental interests: its values and security; the pursuit of universally applicable concerns such as human development and the principles of international law; the maintenance of peace, the prevention of conflicts and the strengthening of international security. Furthermore, Article 25 TEU lists the Union's instruments to define and implement the CFSP. Decision-making power is centralized in the European Council and the Council,

²⁴³BARTOLONI, *La politica di sicurezza e di Difesa Comune* in BARTOLONI, POLI, (a cura di) *L'azione esterna dell'Unione europea*, Editoriale Scientifica, Napoli, 2021, pp. 236-263.

²⁴⁴ According to Article 24: 'The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come. Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227. Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228. Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language'.

²⁴⁵BARTOLONI, *op. cit.*

²⁴⁶*Ibidem.*

which as a rule exercise it unanimously, while implementation is vested in the High Representative for Foreign Affairs and Security Policy, with the Parliament and the Commission playing a marginal role. Decisions are the typical formal acts used; they do not have a legislative character and define the actions and positions of the Union²⁴⁷.

Among the acts mainly adopted by the CFSP there are the so-called restrictive measures. The latter are divided between measures not involving the use of force on the basis of decisions under Article 41 of the UN Charter and other types of sanctions adopted by the Union independently. Thus, in the second case, the EU adopts unilateral restrictive measures for its own foreign policy purposes and to consolidate democracy or respect for human rights on the basis of Article 2 TEU²⁴⁸. These are measures that the Union uses to protect values that only partly coincide with those protected by the UN. According to the Council of the EU, they do not have a punitive purpose; rather, they are intended to promote a change in the domestic or Foreign Policy of the politicians in power in third states and, in the absence of change, sanctions are increased. As already mentioned, the competence to restrict economic and financial relations is provided for in Article 215(1) TFEU, which allows restrictions to be established on the basis of a CFSP's decision and often documents not related to this context of the Union. Since the Lisbon Treaty, it is also possible for the Union to adopt unspecified restrictive measures against natural or legal persons, groups or other non-state entities, whose names are included in blacklists annexed to CFSP decisions imposing sanctions²⁴⁹. In general, the Union is authorized to adopt restrictions of various forms and has wide discretion in exercising this power. They can thus be implemented against sanctioned third-country subjects such as political leaders and influential people in the country with activities that in some way support the country, or even banks. These types of sanctions are called 'targeted sanctions' because they only affect certain individuals and can also be imposed in addition to global sanctions against a country. The most commonly used EU sanctions are visa bans, asset freezes and arms embargoes; such measures can cause considerable inconvenience to targeted individuals and organizations without affecting the general population²⁵⁰.

²⁴⁷BARTOLONI, *Politica estera e azione esterna dell'Unione europea*, Editoriale scientifica, 2012.

²⁴⁸POLI, *La politica di sicurezza e di Difesa Comune* in BARTOLONI, POLI, op. cit, pp. 264-288.

²⁴⁹ For instance, before the amendments of the Treaties in 2009, the Union had imposed sanctions against terroristic groups such Al-Qaida using Article 252 TFEU, in addition to the disposition of the TEC that disposed the power to establish global sanctions. With the Lisbon Treaty, this was modified and the powers of the Union were modified in the sense that there was more specific instrument against the terroristic attacks and groups.

²⁵⁰RUSSEL, *EU sanctions: A key foreign and Security Policy Instrument*, European Parliamentary Research Service, May 2018.

It is advisable to cover the topic of sanctions in order to give the reader the right tools to understand how restrictive measures work, how they are adopted and the reasons why they can be adopted. Restrictive measures are adopted by means of a Council decision, based on Article 29 TEU. It is a legally binding act for the Member States that allows the Union to establish a Common position on a thematic or geographical issue. The Council decides by unanimity. CFSP decisions imposing autonomous restrictive measures are time-limited; they must be reconfirmed every six months or they lose their effectiveness. Such decisions are taken within a maximum of 30 days. Furthermore, such acts may be implemented directly by the Union, either through non-CFSP legal instruments, such as sanctions or restrictive measures of an economic nature, or through acts of domestic law of the Member States, if the Union does not have the necessary implementing powers²⁵¹.

Also, restrictive measures of an economic nature are very usual in practice and involve measures related to the functioning of the internal market. As already mentioned, restrictive measures of an economic nature take the form of bans on imports of goods, investments, the provision of financial and other services, or the provision of technical assistance to third states. Individual restrictive measures, on the other hand, may consist of the freezing of assets and economic resources against individuals and other entities. The two categories of sanctions usually require the adoption of a measure, namely a Council regulation adopted by qualified majority on a proposal of the High Representative and the Commission, without any involvement of the European Parliament. The regulations define in detail the asset freezing regime and its exceptions.

On the other hand, as far as the motivations behind sanctions are concerned, it is particularly important to understand how restrictive measures can be opposed to hybrid threats and more specifically to the concept of the instrumentalization of migrants. As far as autonomous sanctions are concerned, motivations include those related to the violation of customary or even binding rules of law, as well as the values of the Union.

In the context of countering hybrid threats, the EU has argued in favour of increasing the use of restrictive measures. Even if some episodes are not directly related to the instrumentalization of migrants, one can still infer that they seem to be applicable in this field. This is particularly true when reading the new Regulation on restrictive measures in view of Russia's actions destabilizing the situation in Ukraine²⁵². Here it is indeed recalled that 'the Council stressed the need to further strengthen the resilience of the Union and the Member States as well as their capacity to counter

²⁵¹POLI, *op. cit.*, pp. 264-288.

²⁵²Council Regulation (EU) No 833/2014 *concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*, 31.07.2014.

hybrid threats, including disinformation, by ensuring the coordinated and integrated use of existing and possible new instruments to counter hybrid threats at Union and Member State level, and possible responses in the area of hybrid threats, in particular foreign interference and influence operations, which may include *preventive measures* and the imposition of costs on hostile state and non-state actors'²⁵³.

Later, the Council conclusions of 10 May 2021 reiterated the importance of measures to counter hybrid threats²⁵⁴. Also relevant is the 2018 Communication on Enhancing Resilience against hybrid threats²⁵⁵, in which the Commission, referring to cybersecurity supported the use of restrictive measures to be used to strengthen the EU's response to activities that harm its political, security and economic interests. According to the document: 'The more member states make full use of them, the greater the deterrent effectiveness'²⁵⁶. Regarding specifically the case of the instrumentalization of migrants, as it will be addressed in the third chapter of this work, the Council suggested an early use of restrictive measures in the aftermath of the Belarusian migration crisis. In fact, a political agreement was reached on a fifth package of lists to address the border situation, the instrumentalization of migrants and the persistence of repression inside Belarus. In line with the EU's step-by-step approach to sanctions, the strengthened legal framework allowed the EU to impose additional measures against those who 'deliberately endanger the life, health and well-being of persons and attempt to undermine the security of the EU's external borders'²⁵⁷. The Commission and Member States have systematically acted to enforce restrictions on overflights of Belarus by EU air service operators. In response to questions on enforcement received from companies, law firms and national authorities, the Commission will propose further guidance shortly²⁵⁸. Further evidence of the possible use of restrictive measures in response to hybrid threats is supported by the fact that in 2019, the EU established a framework²⁵⁹ of sanctions relating to cyber-attacks that produce significant effects in terms of access to critical infrastructure or essential services for the Member State concerned. They are launched using structures outside the Union by natural and legal persons operating outside the territory and are aimed at Member States or the Union or even at international organizations and even third countries. The measures taken are intended to deter and counter those

²⁵³ *Ibidem*.

²⁵⁴ Foreign Affairs Council, 10 May 2021, <https://www.consilium.europa.eu/en/meetings/fac/2021/05/10/>.

²⁵⁵ Commission Communication, JOIN (2018) 16 final *enhancing Resilience against hybrid threats*, 13.6.2018.

²⁵⁶ *Ibidem*.

²⁵⁷ IZZO, *Unione europea e Bielorussia tra misure restrittive e gestione dei flussi migratori*, BlogDue, 7.01.2022, <https://www.aisdue.eu/wp-content/uploads/2022/01/Izzo-BlogDUE-4.pdf>.

²⁵⁸ European Commission, Joint Framework, JOIN (2021) 32 final on Responding to state-sponsored instrumentalization of migrants at the EU external border, 23.11.2021.

²⁵⁹ Cyber attacks' nature as hybrid threat was already confirmed in the Joint Framework JOIN (2016) 18 final on *countering hybrid threats a European Union response*, 6.4.2016.

which, as described in Chapter one, are recognized as hybrid threats. In 2020, for instance, the assets and economic resources of Russian officials and organizations identified as responsible for a series of attacks were frozen.

As it will be further analysed below, additional²⁶⁰ sanctions were actually imposed on Belarus as a consequence of the former Soviet state's instrumental use of migrants. It is therefore possible to think that these restrictive measures are a clear response to the weaponization of migrants. In particular, performing a detailed analysis on the general issue of the instrumentalization of migrants, it is plausible that similar episodes or events under this phenomenology will come up again. For these reasons, it is conceivable that an almost instantaneous response to the imposition of hybrid threats could be vastly represented by the context of the Common Foreign Security Policy. Specifically, on the basis of Article 29 TEU, the Council of the Union, on 15 November, adopted a Decision²⁶¹ amending the designation criteria set out in a previous decision of the Council, in order to allow the application of targeted restrictive measures also against natural or legal persons, entities or bodies that organize or contribute to the activities of the Belarusian regime aimed at facilitating the illegal crossing of the external borders of the Union²⁶². The imposition of targeted sanctions was clearly intended to exert pressure on the Belarusian regime to comply with the rights, values and principles that are the foundations of the European architecture²⁶³.

Stemming from the analysis that was briefly introduced, we could positively affirm that the possibility to mention the restrictive measures in order to counteract episodes of weaponization of migrants is not so extravagant. On the contrary, notwithstanding the few related episodes of instrumentalization of mass migration, it seems that in practice this was the pattern followed. Indeed, the clauses of last resorts as explained in the previous paragraphs remain a path to be investigated, perhaps in the future. It remains clear that the preconditions for applying such measures must be justified by a high level of gravity that undermines the security of the Union. Such a situation occurred in the example represented by Belarus, in fact, as we will see in the following chapter, in a statement of 10 November

²⁶⁰ The fifth package of sanctions was adopted in the aftermath of the crisis.

²⁶¹ Council of the Union, Decision (CFSP) 2021/1990, 15.11.2021.

²⁶² Two documents were released on the Official Gazette: Council Implementing Regulation (EU) 2021/2124 of 2 December 2021 implementing Article 8a (1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus and Council Implementing Decision (CFSP) 2021/2125 of 2 December 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus.

²⁶³ IZZO, op. cit.

2021²⁶⁴, the High Representative, noting a further worsening of the situation - defined no longer as a threat, but as 'hybrid attack' aimed at tackling the EU Member States.

²⁶⁴Council Reunion of the 21 and 22 October, EUCO17/21, 21.10.2021.

Chapter 3. The Belarus case: a migration crisis and a hybrid threat

The present conclusive chapter aims at providing an effective example of the dynamics presented in the previous chapters. The notion of hybrid threat and warfare is well known in Europe since many decades, this is mostly linked to the fact that many tools such as terrorism and cyberattacks are not new in the EU environment. On the other hand, not surprisingly, the term has mostly never been employed to describe a case of instrumentalization of migration until, basically, last year. In the aftermath of the migratory crisis, the authority of the EU had allegedly used the expression ‘hybrid’ to describe what happened and in fact, a series of actions taken by the post-soviet State were publicly condemned. This last chapter seeks to focus on the Belarusian crisis, starting with the previous relationship between Belarus and the EU and exploring the escalation of events happening in Belarus in 2021 until the outbreak of what is considered the migratory crisis. In fact, Belarusian authorities are believed to have allegedly opened new migration routes across their borders with Latvia, Lithuania and Poland, also via the cooperation of migrant smugglers and criminal networks, in order to create an element of destabilisation for the entire European Union. The authorities in Minsk had even organised special flights and buses to bring in citizens of many third states (mainly Iraqis and Afghans) and provided migrants with the means and support to force the borders with the three aforementioned states. At the same time, the chapter will investigate what happened also on the other side of the eastern border, namely in Poland, Latvia and Lithuania to briefly evaluate the behaviour of these countries. The latter, faced with sudden and unaccustomed migratory flows from Belarus, immediately reacted by introducing a state of emergency into their respective legal systems, militarising their borders, restricting entry onto their territory, carrying out expulsions at the border and restricting the concrete possibilities for asylum seekers to obtain international protection. These sad events that took place on the EU's eastern borders in 2021, did not only reveal hostilities and a lack of solidarity, but also involved serious violations of fundamental rights, raising major critical issues regarding the reaction of the three countries involved and the response of the European Union. Lastly, the chapter will briefly dwell upon the EU responses, their implementation and their consequences.

3.1 Previous history: the EU- Belarus relations

The relationship between Belarus and the EU is considered troubled for several aspects. This paragraph aims at presenting briefly the previous history characterizing Belarus and its controversial relation with the EU. In fact, as it will be explained, this is a very complex issue that was shaped by

collects efforts towards the strengthening of cooperation on one hand, and the loosening of this relations through the imposition of sanctions on behalf of the EU²⁶⁵. The situation escalated during 2021 with the migratory crisis caused by the passage of thousands of people coming from different States towards the borders of Belarus. In June 2021 Belarus started to organize flights and internal travel to facilitate the transit of migrants towards EU, first to Lithuania and then to Latvia and Poland. Migrants were coming from Iraq, Syria, Iran, Yemen, Afghanistan and some African countries, including the Democratic Republic of Congo and Sudan. As stated by Ursula Von der Leyen, President of the European Commission, migrants were being cowardly deceived by false promises, with the complicity of 'specialized travel agencies offering all-inclusive offers: visas, flights, hotels and, somewhat cynically, taxis and buses to the border'²⁶⁶. People, waiting for a chance to get to Europe, would be made to believe that they could legally enter the EU through the Belarusian border, inducing them to undertake the expensive journey²⁶⁷. The first crossings of the borders, took place in May at the border with Lithuania and up to August about 4,000 people had crossed the border. However, after Vilnius's government had adopted the state of emergency, migrants were force to move towards Latvia and especially to the Polish border. According to the International Federation of the Red Cross, a total of at least 20,000 people were involved in this situation until November, including those who were still in Belarus, those who had crossed the border and those who had arrived in Germany²⁶⁸.

Surprisingly, this is not the first episode of Belarus causing such pression via an instrumental use of migration, on the contrary this situation had already occurred, even if with many differences. In 2002 President Lukashenko had threatened to push thousands of migrants into the European Union after the Czech Republic denied it an entry visa, preventing it from attending the NATO summit²⁶⁹. In May 2004, the Belarusian president himself demanded millions of euros to stop the influx of refugees into

²⁶⁵PORTELA, *The European Union and Belarus: Sanctions and partnership?*, in *Comparative European Politics*, suppl. Special Issue: South East and Eastern European Countries EU; Vol. 9, Fasc. 4-5, 2011, p. 486 ss.

²⁶⁶Speech by President von der Leyen at the EP Plenary on the conclusions of the October European Council and the situation in Belarus and at its border with the EU, 23.11.2022, https://ec.europa.eu/neighbourhood-enlargement/news/speech-president-von-der-leyen-ep-plenary-conclusionsoctober-european-council-and-situation-belarus-2021-11-23_it.

²⁶⁷DI PASCALE, *I migranti come "arma" tra iniziative di contrasto e obblighi di tutela dei diritti fondamentali. Riflessioni a margine della crisi ai confini orientali dell'UE*, N. 1 – 2022.

²⁶⁸IFRC, *Operational Strategy, Belarus and neighbouring countries Europe Region, Population Movement*, 15.12.2021, <https://www.ifrc.org/media/49987>.

²⁶⁹NATO, *Statement by the Head of the Delegation of Belarus at the EAPC Meeting at the level of Heads of State and Government*, 22 November 2002, <https://www.nato.int/docu/speech/2002/s021122p.htm>.

the EU, foretelling dramatic consequences for Europe. Unlike the current context, however, these were migrants already present in the country and in any case the threats were not realized.

The landscape in the current crisis is very different but it does stem from many different episodes occurred in the past two years. On 9 August 2020 the presidential elections were held in Belarus. Not only they took place against a backdrop of irregularities and repression of independent candidates²⁷⁰, but they were also followed by intimidation and violence against peaceful protesters, members of the opposition and journalists. On 23 September 2020 Aleksandr Lukashenko was invested with a new mandate in a landscape of controversial democratic legitimacy²⁷¹. This action was subject to many critics moved by the European Union, condemning the undemocratic regime and the falsified results. Thus, since October 2020, the EU has gradually imposed restrictive measures against Belarus, in particular against 44 persons including the Minister of the Interior, which was identified as responsible for electoral irregularities and the subsequent repression²⁷². At the same time, sanctions were imposed by the United States, Canada, the United Kingdom, Switzerland and Norway, had caused since August 2020 also a significant migration of Belarusian citizens to EU countries²⁷³.

The escalation has continued in the following year, specifically in May 2021, when a Ryanair airliner was forced to land to allow police to arrest a dissident journalist²⁷⁴. This action was strongly condemned by the European Council. On 4 June, the Council of the European Union therefore, decided to introduce a ban on airspace overflights and access to EU airports by all EU citizens. A package of sanctions was later adopted, imposing restrictive measures against 78 Belarusian individuals and eight entities²⁷⁵. The application of sanctions though, was not a new modality of EU responding to Belarus ambiguous actions. Indeed, in 2004 EU had already imposed restrictive sanctions in response to the unresolved disappearances of four people (including opponents and

²⁷⁰ Council of the EU, *Belarus: Declaration by the High Representative on behalf of the European Union on the so-called 'inauguration' of Aleksandr Lukashenko*, 24.09.2020., <https://www.consilium.europa.eu/en/press/press-releases/2020/09/24/belarus-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-so-called-inauguration-of-aleksandr-lukashenko/>

²⁷¹ *Ibidem*.

²⁷² European Council, *Conclusions on Belarus*, 24.05.2021, <https://www.consilium.europa.eu/en/press/press-releases/2021/05/24/european-council-conclusions-on-belarus-24-may-2021/>.

²⁷³ Sanctions & Export Controls Update, *UK, US, Canada and Switzerland significantly escalate sanctions against Belarus*, 12.08.2021, <https://sanctionsnews.bakermckenzie.com/uk-us-canada-and-switzerland-significantly-escalate-sanctions-against-belarus/>.

²⁷⁴ For a detailed analysis of the event see: BBC, *Belarus plane: What we know and what we don't*, 25.06.2021; ISPI, *Bielorussia, Dirottamento di stato*, 24.05.2021.

²⁷⁵ See: Council of the EU, *EU Restrictive Measures against Belarus*, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/belarus-timeline/>, for updated timeline.

journalists) between 1999 and 2000²⁷⁶. In that case EU, the Council of Europe and the Member States had taken 'the necessary measures to prevent the entry into or transit through their territories of the persons listed in the Annex'. Although responsible for the alleged crimes, they had failed to initiate an independent investigation and prosecution of the alleged crimes²⁷⁷.

An embargo²⁷⁸ had also been imposed in 2011 and maintained even when in 2016 EU Council decided to remove some restrictive measures²⁷⁹, as a consequence of some positive steps taken by Belarus, temporarily contributing to improve relations with the EU. The restrictive measures that remained in place (in addition to the embargo, also a ban on the export of goods that can be used for internal repression and an asset freeze and travel ban on four persons believed to be linked to the above-mentioned unsolved disappearances) were maintained in the following years.

After the numerous provisions taken against it, Belarus decided in 2021 to suspend its participation in the Eastern Partnership, i.e., the regional cooperation promoted by the European Union in 2008 and aimed at strengthening the political association and economic integration of six Eastern European and South Caucasus partner countries Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus. At the outcome of the Sixth Eastern Partnership Summit held in Brussels on 15 December 2021²⁸⁰, the participants agreed on a Joint declaration in which the EU deplored the decision of the Belarusian authorities, hoping 'to resume cooperation with them as soon as the conditions for a peaceful democratic transition are in place, in order to develop a common agenda based on common values and shared interests'²⁸¹. Following the conclusions of the European Council of 21 and 22 October 2021²⁸², in which the EU's leading Heads of State and Government condemned attempts by third countries to instrumentalise migrants for political ends, the Council of the European Union amended the sanctions regime. Firstly, on 15 November 2021, the Council adopted Decision (CFSP) 2021/199051²⁸³, which introduced the possibility of applying targeted restrictive measures

²⁷⁶*Ibidem*.

²⁷⁷Council of Europe, Parliamentary Assembly, Mr Christos Pourgourides, Cyprus, 4.02.2004, <https://www.refworld.org/docid/4162a4654.html>.

²⁷⁸Decision of the Council 2011/357/CFSP *amending Decision 2010/639/CFSP concerning restrictive measures against certain officials of Belarus of the Council* on 20.06.2011.

²⁷⁹Council of the EU, *Foreign Affairs Council*, 15.02.2016.

²⁸⁰The Eastern Partnership aims to reinforce the political association and economic integration of six Eastern European and South Caucasus partner countries: Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine.

²⁸¹Council of the EU, *Eastern Partnership summit – joint declaration*, 15.12.2021, <https://www.consilium.europa.eu/en/press/press-releases/2021/12/15/eastern-partnership-summit-joint-declaration/>.

²⁸²Conclusions of the European Council 21 and 22 October, EUCO 17/21, <https://www.consilium.europa.eu/media/52622/20211022-euco-conclusions-en.pdf>.

²⁸³Decision (CESP) 2021/1990 of the Council, *amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus*, 15.11.2021, p.10 ss.

against persons and entities organising or contributing to activities facilitating the irregular crossing of the EU's external borders. On this basis, a fifth sanctions package was adopted on 2 December 2021, imposing restrictive measures against a further 17 persons and 11 entities, including senior political officials and companies that helped to encourage and organise illegal border crossings²⁸⁴. The new measures were adopted in a coordinated manner with the United Kingdom, the United States and Canada²⁸⁵.

The controversial relation with Belarus roots also in the strong link between the ex-soviet country and Russia. Russian support to Belarus was strengthened after the 2020 elections, but at a high price for the Lukashenko regime. In return for financial and political assistance, in fact, Belarus appears increasingly dependent on its eastern neighbour. Also due to the deterioration relations with EU, Lukashenko signed a package of symbolic integration agreements with Moscow, recognised Crimea as Russian territory and redirected some export flows through Russian ports. Not to mention the above-mentioned withdrawal from the Eastern Summit. Furthermore, Lukashenko has increasingly adopted an anti-Western approach, while at the same time strengthening military cooperation with Russia. In response to the growing tension between Russia and the West, the Belarusian president has sought to demonstrate his loyalty to Putin by speculating about the placement of Russian nuclear weapons in Belarus²⁸⁶.

The friendship has been consolidated with the outbreak of the war in Ukraine on February 2022. Later on, during March 2022 the Council of Europe has announced suspension of all relations with the Belarusian authorities 'because of the country's active participation in the Russian Federation's aggression against Ukraine'²⁸⁷. Notwithstanding the fact that Belarus is currently a party in 11 treaties promoted by the Council of Europe and participates in 13 intergovernmental committees of the embarked on a path towards future membership. The relationship seems to have reached a dead end at least for the recent occurrences²⁸⁸.

²⁸⁴Council Implementing Regulation (EU) 2021/2124 of 2 December 2021 *implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus*, 2.12.2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R2124&qid=1668094451936>.

²⁸⁵Currently, the sanctions regime applies to a total of 35 entities and 195 persons, including Belarusian President Alexandr Lukashenko, his son and national security advisor national security advisor Viktor Lukashenko, as well as other key political figures, senior members level members of the judiciary, government and several leading economic actors.

²⁸⁶Osservatorio di Politica Internazionale, ISPI insight, *Tensioni nello spazio ex sovietico: i casi di Bielorussia, Kazakistan e Ucraina* (a cura di) Ferrari, Tafuro Ambrosetti, 2022.

²⁸⁷Ministers' Deputies, *Relations between the Council of Europe and Belarus*, 1429th meeting, 17 March 2022, CM/Del/Dec (2022)1429/2.5.

²⁸⁸Osservatorio di Politica Internazionale, ISPI insight, op. cit.

3.2 Analysing the crisis from a humanitarian and legal perspective

The migratory crisis of 2021 emphasized many problematic aspects, meaning that it does not represent ‘only’ a huge humanitarian disaster in which migrants were put into danger and to some extent left alone against inhuman and degrading treatment, but also, the circumstances have been recognized as a hybrid threat composing a bigger picture of alleged hostilities by Belarus towards EU. The present paragraph seeks to depict the contradictory elements of the crisis in highlighting the different crucial aspects and the reasons why this crisis was considered a very big deal.

As already stated, Belarus has been exploiting its cooperation with migrant smugglers and criminal networks and opened new migration routes in Eastern Europe. This was reached through the special flights and buses organized by Belarusian authorities to bring citizens from third states onto their territory and providing migrants with the means and support to force the borders with the three mentioned states. It appears important to stress that those actions had the intention of undermining EU as a whole.

According to the Joint Communication adopted by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy²⁸⁹, the total number of arrivals on EU territory from Belarus in 2021 amounted to more than 7,500, with more than 40,000 repeated attempts to cross the borders concerned, at least 2,000 migrants in precarious conditions in the vicinity of the border and about 15,000 persons stranded in Belarus. In addition, there have been unauthorised secondary movements which have led flows to other EU Member States that are difficult to estimate (the above-mentioned Joint Communication reports, for example, about 10,000 unauthorised entries into Germany linked to arrivals in Poland across the Belarusian border).

The situation has escalated mostly in autumn, specifically during the month of November. Different sources had denounced the gross conditions in which people, including families with children, often in need of immediate help, have been left in. According to several sources mentioned in the present work, migrants and asylum seekers have been beaten with batons and rifle butts and threatened with security dogs by Belarusian forces. Although the most shocking and disturbing element is that the police authorities forced people to repeatedly cross the border in dangerous conditions, including

²⁸⁹Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Responding to state-sponsored instrumentalization of migrants at the EU external border*, JOIN (2021) 32,11.2021, pp. 2-3.

through a fast-flowing river²⁹⁰. Also, Belarusian services tried several times to provoke Polish border guards by shooting against them near the border fence, to blind them with lasers, as well as to destroy the border fence with their vehicle. They also brought groups counting hundreds of migrants to the borderline and equipped them with stones and stun grenades. Migrants used them to attack Polish guards and policemen, hurting officers. They also regularly undertook attempts to destroy the border fence²⁹¹. About 2000 people (including many families with children) were left freezing in the woods near the border, without shelter, adequate clothing, food or essential services. More than twenty people are said to have died of hypothermia, including a baby just a few months old and a pregnant Kurdish woman who died of septicaemia²⁹². During November most of the migrants were transferred by the Belarusian authorities to a warehouse (a logistical goods distribution centre) located near the border, at the Bruzgi village, in the Belarusian region of Grodno, the conditions, however, were difficult and unsuitable for the reception of people²⁹³. The warehouse was later, only if just once, visited by Lukashenko on Nov 26 telling refugees that Belarusian authorities were not holding them from trespassing the borders with EU²⁹⁴.

Beside the mere description of the events and the escalation of tension at the border, in order to deepen the analysis of the crisis, it appears necessary to stress different aspects of the occurrence itself. Notwithstanding the relevance of the humanitarian crisis and the gravity of the whole situation, it seems fundamental to underline that the numbers of migrants involved are significantly limited when addressing the whole migratory phenomena and problematic nature²⁹⁵. For instance, those numbers are, undoubtedly, lower in comparison with the flow of almost two million people who arrived in the context of the so-called migrants in 2015-2016²⁹⁶ and it seems difficult to argue that they are of such proportions as to undermine the functioning of the asylum system of the countries involved. According to the Polish border guard there have been 33,000 attempts to cross the border irregularly

²⁹⁰Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU*, 20 December 2021, <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusianforces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>.

²⁹¹KLECZKOWSKA, *What does the 'hybrid attack' carried out by Belarus against the EU borders mean in reality? An international law perspective*, EJIL:Talk!, 13.12.2021.

²⁹²For a detailed analysis of the Humanitarian violations see: Human Rights Watch, *'Die Here or Go to Poland', Belarus' and Poland's Shared Responsibility for Border Abuses*, 24 November 2021.

²⁹³DI PASCALE, *op. cit.* p.262.

²⁹⁴'We won't in any circumstances detain you, tie your hands and load you on planes to send you home if you don't want that', EURONEWS, *Belarus will not force migrants to return home, says Lukashenko*, 26.11.2021.

²⁹⁵GLOBALLY Podcast, *'Tra Polonia e Bielorussia'* in collaboration with ISPI, 19.11.2022.

²⁹⁶Which was discussed in Chapter 2 of the present thesis.

since August, of which 17,000 in October²⁹⁷. This number, however relies on the ‘attempts’, not the successful trespassing. The times a migrant can attempt to illegally pass the border can be multiple and does not amount to the real number of people involved in the situation²⁹⁸. On the contrary, the flow rate reported in the 2015 crisis involved hundreds of thousands of people, with many deaths as well. Thereby this is emblematic of the fact that the crisis was deeply politicized, mostly by Poland as will be further discussed in the next paragraph.

Thus, the landscape in which the crisis has occurred is so much more complex than the issue itself. In addition to the refugee’s crisis, in fact, during autumn Belarus decided to suspend the application of the readmission agreement with the EU²⁹⁹, which stipulated a commitment to take back on its territory third-country nationals who entered the EU irregularly. However, according to Article 23(6) ‘either Party may, by officially notifying the other Party and after consulting the Committee, temporarily suspend in whole or in part the implementation of this Agreement. The suspension shall enter into force on the second day following notification’. It basically appears, however, that the Belarusian Parliament unilaterally passed a legislative text that sanctioned the suspension of the agreement³⁰⁰.

The crisis has been defined as a hybrid threat by the Council in the Conclusions of the 21/22th October 2021 then condemning, without further hesitation, ‘the instrumentalization of migrants and refugees by the Belarusian regime and the humanitarian crisis that it has created’³⁰¹. In fact, as stated by European Commission Vice-President Margaritis Schinas during the European Parliament session on the 15th December, what has happened on the Union's external borders with Belarus is not (only) a migration crisis, but also a hybrid threat aimed at destabilizing the Union. The occurrence was defined in this way by President Ursula Von Der Leyen³⁰² as seen above, by NATO representatives and also

²⁹⁷KOŠĆ, *Hundreds of migrants head toward Polish-Belarusian border*, in Politico.eu, 8.11.2021, <https://www.politico.eu/article/migrants-polandbelarus-border/>.

²⁹⁸GLOBALLY Podcast, op. cit.

²⁹⁹According to Art. 4 of the agreement in fact, ‘Belarus shall readmit, upon application by a Member State and without further formalities other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfil the conditions in force for entry to, presence in or residence on the territory of the Requesting State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons: (a) hold, or at the time of entry held, a residence permit issued by Belarus; (b) hold, or at the time of entry held, a valid visa issued by Belarus accompanied by a proof of entry to the territory of Belarus; or (c) illegally entered the territory of the Member States directly after having stayed on, or transited through, the territory of Belarus’, Agreement between the European Union and the Republic of Belarus *on the readmission of persons residing without authorization*, 9.06.2020.

³⁰⁰DI PASCALE, op. cit. p.263.

³⁰¹European Council Conclusions, 21 and 22 October 2021.op. cit.

³⁰²VON DER LEYEN, *State of the Union 2021*, https://ec.europa.eu/info/sites/default/files/soteu_2021_address_en_0.pdf.

by the Polish and Latvian authorities³⁰³. In the first chapter of the present work there were described the reasons why when assessing hybrid threats, it is difficult to denote a specific content with a specific list of means or tactics involved. As the European Commission pointed out, the instruments of this hybrid war would be, first of all, migrants, used for political purposes. At the same time, Belarus conducted a strong manipulation of information: discrediting the EU's international reputation, presenting it as hostile towards refugees and conversely portraying President Lukashenko's regime as a government that fulfils the legitimate wishes of people wishing to migrate, with the intention of distracting attention from the systematic violation of human rights in Belarus³⁰⁴. In addition to that the use of social media was believed to be crucial in soliciting the demand for the services of migrant smugglers and raising unrealistic expectations about the possibilities of entering the EU³⁰⁵.

When taking into consideration the border crisis in Belarus from an international law perspective, according to some scholars the Belarusian operation breaches the principle of non-intervention³⁰⁶. That's because, the Belarusian operation interfered with many spheres of internal responsibility for Poland, Latvia and Lithuania, including especially the security of their borders, and migration policies. This can be sustained regarding the Member States at stake but it's almost impossible to assert it in an EU context. Since Belarus has 'weaponized' migrants and has driven them to illegally enter the neighbouring States, different means were in play. As already stated, the primary aim was to 'punish' EU for the sanctions imposed on Belarus, destabilizing their internal situation, and undermining security³⁰⁷.

According to some scholars, the crisis could be considered an act of hybrid warfare because Belarus has used migration strategically to put pressure on the EU and create discord which amounts to state-sponsored human trafficking aimed at creating a humanitarian crisis and forcing the EU and its member states to access Belarus's demands, namely ending their sanctions. Also, Belarus has

³⁰³This situation was first qualified in these terms by Poland, followed by Lithuania and Latvia, and by NATO, which in a statement issued in November stated "The North Atlantic Council strongly condemns the continued instrumentalization of irregular migration artificially created by Belarus as part of hybrid actions targeted against Poland, Lithuania, and Latvia for political purposes"; North Atlantic Council '*Statement on the Situation on the Polish-Belarus Border*', 12.11.2021, available at: https://www.nato.int/cps/en/natohq/news_188529.htm.

³⁰⁴Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Responding to State-sponsored instrumentalization of migrants at the EU external border*, JOIN 2021/32 final, 23.11.2021.

³⁰⁵DI PASCALE, op. cit., p. 271.

³⁰⁶KLECZKOWSKA, op. cit.

³⁰⁷*Ibidem*.

engaged in “lawfare” by coercing EU states to break international and EU law and by stopping migrants and returning them to Belarus³⁰⁸. This is a violation of the principle of non-refoulement under international law, which prohibits the sending of refugees back to countries where they might get harmed. However, according to other scholars the threshold of hybrid threat needs to pass the application of the ‘use of the force test’³⁰⁹. Indeed, a mere encouragement of migrants to illegally trespass the EU border is not enough to reach the threshold of the use of force, under Article 2 (4) of the UN Charter. But according to some scholars there were evidences of some specific occurrences in that context that can be in some ways linked to the use of force. According to Kleczkowska, for instance, what can amount to really trigger the threshold are the parallel activities conducted by Belarus, nevertheless, it does not seem that currently their ‘scale and effects’ are that of an armed attack³¹⁰.

Still, the Belarusian conduct, if proven both factually and in terms of its subjective element, could well fall within those prohibited by the United Nations Convention against Transnational Organised Crime³¹¹ and, in particular, by its Protocol against the Smuggling of Migrants by Land, Sea and Air³¹², both of which are binding on Belarus. According to Art. 3 of the Protocol, States are obliged to prevent and punish the smuggling of migrants led by private individuals. On this basis, the protocol seems to imply in a quite evident way that the prohibition affects the same action when States operate in such conduct through their organs. Namely when this conduct is perpetuated in order to obtain some benefit that is not necessarily financial, or to make use of the work of private traffickers, thereby increasing their economic profits³¹³.

Finally, according to Rasi, the action of a State that collects large numbers of migrants in their countries of origin, brings them onto its territory and leads them to the border, prompting them to enter the neighbouring state, even at the cost of doing so illegally, could violate the general principle

³⁰⁸BACHMANN, *Is the Belarus migrant crisis a ,new type of war’? A conflict expert explains*, 2021.

³⁰⁹KLECZKOWSKA, op. cit., pp. 3-5.

³¹⁰One legal reasoning in favor of trespassing of the threshold of the use of force was given by Kleczkowska. When applying the ICJ jurisprudence, in *Nicaragua* the Court had stated that the ‘mere frontier incidents’ was below the threshold of an armed attack; likewise, the Eritrea-Ethiopia Claims Commission stated that ‘localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter’. On the other hand, one has to bear in mind that in the *Oil Platforms* case, the ICJ allowed for flexible test to assess whether the threshold of an armed attack was reached.

³¹¹<https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.

³¹²https://www.unodc.org/documents/middleeastandnorthafrica/smugglingmigrants/SoM_Protocol_English.pdf.

³¹³In the judgment *Bosnia and Herzegovina v. Serbia and Montenegro*, the International Court of Justice held that ‘[i]t would be paradoxical if States were [...] under an obligation to prevent, so far as within their power, commission of [certain acts] by persons over whom they have a certain influence, but were not forbidden to commit such acts [...]. In short, the obligation to prevent [a certain act] necessarily implies the prohibition of the commission of [the same act]’.

of respect for the exclusive governing authority of each state on its territory. Thus, it could be likely that Belarus is responsible for an international tort³¹⁴. The author concluded that, such an offence would be peculiar in that it would be committed through the use of an instrument, the human being, who is the holder of subjective legal positions which the author of the conduct and, in particular, the entity affected by it, would be bound to respect³¹⁵.

For the purposes of the present thesis, it can certainly be concluded that Belarus has conducted a hybrid action, weaponizing migrants, with the final purpose of ending the sanctions that the EU has progressively imposed over the years. Furthermore, those actions have breached the Convention against Transnational Organised Crime, binding on Belarus insofar as it has been allegedly smuggled migrants and putting them in a very serious dangerous situation.

3.3 The reaction of Latvia, Lithuania and Poland

As was briefly introduced, the circumstances of the crisis were very complex as Poland, Latvia and Lithuania behaved controversially. The three states proclaimed the state of emergency³¹⁶ and they are believed to have perpetrated violation of human rights as well, amending national rules with the aim of facilitating measures' implementation for migrants' rejection at the borders. The proclamation of the state of emergency in the three states was issued together with progressive legislative changes. Specifically, Latvia declared an emergency situation in four administrative territories for an initial period, until the 10 November 2021, in accordance with the Law on Emergency Situations and State of Exception. Later, the emergency situation was extended until 10 February 2022. Lithuania instead, declared a state of emergency on 10 November, that was later prolonged until 15 January 2022. Lastly, Poland declared a state of emergency on 2 September within a total of 183 localities. As said, the decree forbade anyone who was not a permanent resident from entering them, and it was prohibited taking pictures or videos of that area. The state of exception expired on 2 December but elements were introduced into ordinary legislation³¹⁷. A ministerial decree in force until 1 March 2022 further prohibits non-residents from entering the same 183 localities³¹⁸. All of these measures

³¹⁴RASI, *La reazione della Polonia alla condotta bielorusa: il rimedio peggio del male?*, SIDIBlog, 30.12.2021.

³¹⁵*Ibidem*.

³¹⁶EURACTIVE, *Twelve member states ask Commission to finance 'physical barriers' as border protection measures*, 8.10.2022, <https://www.euractiv.com/section/justice-home-affairs/news/twelve-member-states-ask-commission-to-finance-physical-barriers-as-border-protection-measures/>.

³¹⁷New Article 12a in the 1990 Protection of the State Border Act, in force as of 1.12.2021, effectively providing for a 'permanent state of exception'.

³¹⁸DEL MONTE, LUYTEN, *Emergency measures on Migration*, European Parliamentary Research Service, 2022.

however, have significantly affected asylum guarantees, derogating from obligations configured in 'absolute' terms, such as the prohibition of inhuman and degrading treatment inhuman, the principle of non-refoulement and the prohibition of collective expulsions.

The situation presented significant critical aspects especially in Poland. Specifically, Polish border guards are believed to have systematically ignored asylum applications, immediately taking back migrants who, pressurised by the Belarusian guards, had crossed the border. In November, 12,000 guards were allegedly sent to the border area, they also used tear gas and water cannons to stop migrants. The proclamation of a state of emergency in the Białowieża forest area along the Polish border, since the beginning of September, also entailed the prohibition of entry for non-residents and the taking of images of the border area, the infrastructure in it, as well as of border guards, police and military personnel, thus limiting the possibility for humanitarian organisations to offer assistance to migrants in a critical condition, and the right of journalists and photographers to document the serious situation. In December, access to the border area was not allowed even to the UN High Commissioner for Human Rights, whose officials described the situation of migrants on the border as 'harrowing and frightening'³¹⁹.

On 14 October 2021, Poland had established, by law, the possibility for border police to reject, *sic et simpliciter*, anyone who had crossed the border illegally, as well as the possibility to exclude some applications for protection submitted by those who had entered Poland illegally³²⁰. And consequently, allowing the removal of any person identified on the territory of Poland after crossing the border including asylum seekers. Migrants were also returned to the border crossing points, applying a re-entry ban for a period between six months and three years. The removals would be implemented on the basis of an order issued by the local border guard, which could be appealed before the Border Police Headquarters in Warsaw, but without suspensive effect.

The number of migrants documented by the Polish border guards were given on the basis of the 'attempts' of migrants that tried to enter. Poland had a specific interest in politicising the migration issue, an intention that was highlighted by the proclamation of the state of emergency for an unfair number of migrants³²¹. Currently, Poland and the EU have had a tenuous relationship as the EU has

³¹⁹OHCHR, *Press briefing notes on Poland/Belarus border*, 21.12.2021,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28004&LangID=E>.

³²⁰RASI, *La reazione della Polonia alla condotta bielorusa: il rimedio peggio del male?*, SIDIBlog, 30.12.2021.

³²¹For example, see UNCHR reports on the numbers of migrants hosted during the current Ukraine crisis, on <https://data.unhcr.org/en/situations/ukraine>.

struggled to deal with Poland's deteriorating rule of law situation for the past five years³²². One of the most shocking events towards this path was the fact that the Polish government has appointed the judges of the Constitutional Court, an action that the Union condemned in many ways, in general the Commission has pointed out the troubling rule of law applied in Poland³²³. In this context, the current situation also involves the monetary funds, for now frozen by the Union to be provided to Poland. Thus, it could be affirmed that the exaggeration of the migration problem is a deliberate act on the part of Poland, which for this crisis asked the Union for between 2 and 3 billion euros to build a border wall. A request that Eu could not support for moral reasons³²⁴. However, Poland's real interest is the unfreezing of the National Recovery and Resilience Plan funds currently blocked (around EUR 25 million)³²⁵.

Still, the conduct of Poland has been considered reprobable for the actions perpetuated. From an international law perspective, when assessing the existence of a Belarusian illegal conduct, a Polish response could be justified in light of a countermeasure used under the application of Article 49 of the ARSIWA³²⁶. However, the actions taken by Poland do not seem to fall under the situation covered by the Article according to which 'a countermeasure is an action directed against a State which is responsible for an internationally wrongful act'³²⁷. In contrast, the Polish actions were not directed towards Belarus but against journalists, NGOs, European parliamentarians and UN officers, whose access to the area around the border was denied³²⁸.

Ultimately, Poland was not precluded from responding to Belarus conduct by international nor Union law. In fact, some actions could have been performed if solely directed against Belarus, this would tend to place the costs of the wrong conduct on the latter and not, instead, on the individuals who were the innocent instruments of the crisis. For instance, the Union itself did implement Regulation 2021/2124 of 2 December³²⁹, imposing economic sanctions and travel restrictions on

³²²ISPI, *Commissione Ue vs Varsavia*, 23.12.2021.

³²³For a more detailed analysis of this issue, see: WIGAND, FERROLI, *Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal*, European Commission Press Release, 22.12.2021.

³²⁴GLOBALLY Podcast, op. cit.

³²⁵EURACTIV, *La Commissione sospende i fondi dei PNRR a Polonia ed Ungheria*, 9.12.2021.

³²⁶United Nations, *Responsibility of States for Internationally Wrongful Acts*, 2001.

³²⁷According to the attached commentary: 'countermeasures may *only* be adopted against a State which is the author of the internationally wrongful act' in this sense, other third parties may be injured only incidentally, United Nations, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, 2001, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

³²⁸RASI, op. cit.

³²⁹Council Implementing Regulation (EU) 2021/2124 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus, 2.12.2021.

individuals within the Belarusian state apparatus, including commanders of the border police corps and judges of the Supreme Court, as well as legal persons strongly connected to it, such as airlines and travel brokers. It is reasonable to argue that Poland could also, as a directly injured state, have adopted similar but harsher, or more far-reaching, sanctions, to the point, perhaps, of neutralising the Belarusian conduct by making it no longer worthwhile³³⁰.

According to the European Court of Human Rights the provisions of EU law, including the Schengen Borders Code and Directive 2013/32/EU, clearly embrace the principle of non-refoulement, as guaranteed by Article 78 TFEU and the Refugee Convention 1951, and also apply it to persons who are subject to border checks before being admitted to the territory of one of the Member States³³¹. As it stems from the jurisprudence of *M.K and others vs. Poland*³³², these provisions clearly aim to provide all asylum seekers with effective access to the correct procedure through which their applications for international protection can be examined³³³. Thus, under these circumstances when sending the applicants back to their country of origin, in the absence of an examination of the real risk of suffering ill-treatment in that country, the State commits a violation of Article 3 of the Convention. Border guards are thus required to follow such applications and forwarding them to a competent authority for examination of status determination, as required by national law and the Asylum Procedures Directive³³⁴.

An effective example of the present violation could be found in the judgment *D.A. and others*³³⁵, rendered against Poland only a few weeks before the adoption of the restrictive measures, where the ECHR found a violation of Article 3 ECHR and 4, Protocol 4, in relation to the refoulement of the Syrians applicants at the border between Poland and Belarus. In this specific case, the victims' possibility of submitting applications for international protection had been repeatedly denied by the Polish authorities. The Court held that the Polish State had an obligation to ensure the applicants' safety, in particular by allowing them to remain under Polish jurisdiction until a proper examination by a competent national authority. The Court, also pointed out that, taking into account the right guaranteed by Article 3, the extent of this obligation does not depend on whether the applicants carry documents authorising them to cross the border or that they have been legally admitted to the national

³³⁰RASI, op. cit.

³³¹DI PASCALE, op. cit., p.278.

³³²ECtHR, *M.K. and other vs. Poland*, appeals n. 40503/17, 42902/17 e 43643/17, judgment of 23.7. 2020, par. 179.

³³³FRASCA, *Efficacia dei diritti fondamentali nelle zone di frontiera: la Corte EDU ritorna sui respingimenti sommari nel caso D.A. e altri c. Polonia*, in ADiM BLOG, 2021.

³³⁴DI PASCALE, op. cit. p.278

³³⁵ECtHR, *D.A. and others vs. Poland*, judgment of 8.08.2021, appeals n. 51246/17.

territory for other reasons. Requirements that were instead introduced by the October legislative amendments. Lastly, asylum seekers must be provided with effective access to the correct procedure through which their applications for international protection can be reviewed and oblige the State to ensure that individuals who submit applications for international protection are allowed to remain in the State in question until their applications are reviewed³³⁶.

As the Council of Europe Commissioner for Human Rights has stressed, in any case Poland was not entitled to violate fundamental rights obligations. Even if the whole situation is the result of the reprehensible actions of Belarus which, however, is not a party to the European Convention on Human Rights³³⁷. Between the 20th August and 3rd December 2021, the European Court of Human Rights, examined a total of 69 requests for provisional measures under Rule 39³³⁸ submitted by a total of 270 applicants, mostly against Poland. The measures granted in 65 appeals, included requests to the governments of the countries concerned to provide the applicants with food water, clothing, adequate medical care and, if possible, temporary accommodation for a limited period of time. This was the case in the relevant jurisprudence of: *R.A. and Others v. Poland*³³⁹, concerning 32 nationals Afghans, who allegedly crossed the Polish-Belarusian border in August and were forcibly returned to Belarus by Polish border guards³⁴⁰. In this case, the Court decided to apply Rule 39 and requested that the Polish authorities provided all the above-mentioned supplies. Still it appears fundamental to stress that, although in many cases the state in question were requested to suspend the execution of the expulsion, the Court pointed out, that this measure does not entail obligations to let the applicants enter their respective territories, recalling the usual principles regarding the right of States, as a well-

³³⁶*M.K and others*, op. cit.

³³⁷The Commissioner noted that ‘the current Polish legislation on access to territory and international protection, which allows the immediate rejection at the border of persons entered the territory outside official border crossings, undermines the right to seek asylum and the crucial guarantees associated with it, including the right to an effective remedy’.

³³⁸Under Rule 39.1, ‘The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings. 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. 3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated. 4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.

³³⁹ECtHR Press Release, *Court gives notice of “R.A. v. Poland” case and applies interim measures*, ECtHR 283 (2021) 28.09.2021.

³⁴⁰ECtHR Press Release, *Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland*, ECtHR 244 (2021) 25.08.2021.

established principle of international law, to control the entry, stay and expulsion of migrants³⁴¹. It clarified thus, at the same time, that this measure should not have to be understood as requiring that Poland let the applicants enter their territories³⁴².

On the 7th October Lithuania proposed several demands via a letter to the European Commission supported mainly by Eastern and Northern European Member States, including the bearing of costs for erecting a wall at the external borders, in order to counter the flows of irregular migrants, as well as to adapt the current legal framework, in particular the rules contained in the Schengen Borders Code to contrast the ‘instrumental use of migratory pressure by some third countries’³⁴³. This position was reiterated in January 2022, at the Conference on Border Management held in Vilnius. The outcome of the meeting was the Joint Declaration on the need to ‘protect the EU’s external borders’, asking the EU to finance border management measures, including ‘physical barriers and other mobile or fixed infrastructure’.³⁴⁴ This provision had the consequence of pressing Belarusian authorities to return migrants who had been lured in the previous months to their countries, sometimes via flights. Indeed, the number of migrants in Belarus had been significantly reduced due to the ‘repatriation flights’ through which 3,817 Iraqi migrants have been repatriated from Belarus and 112 from Lithuania and due to the IOM Assisted Voluntary Repatriation and Reintegration Programme which assisted 381 migrants to returned from Belarus to their countries of origin last year. Later, attempts to cross the border into the EU, at the borders with Poland, Lithuania, and Latvia, were reported, but they were limited in number and scale, due to the harsh winter conditions and strengthened border protection measures. But still, despite the continuing repatriation efforts, a probable number of several hundred persons had remained in the area for months, due to their lack of ability or willingness to repatriate³⁴⁵.

When faced with the situation, the Lithuanian government declared on the 2 July 2021 the ‘extraordinary situation’ and, a few days later, the Seimas (Lithuanian parliament) passed a substantial amendment to the ‘Law on the Legal Status of Aliens or Aliens Law’, then further revised on the 10 August. Both amendments have, on the one hand, raised several criticisms concerning their

³⁴¹DI PASCALE, *op. cit.* p.278.

³⁴²The same conclusion was reached also for Latvia in the relevant case *H.M.M. and Others v. Latvia*.

³⁴³See: https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf.

³⁴⁴Joint Statement of the Ministers responsible for Migration at the Conference on Border Management, 21.01.2022.

³⁴⁵IFCR, *Belarus and neighbouring countries - Europe Region: Population Movement Emergency appeal No. MGR65001*, Operation update # 2, 22.01.2022.

compatibility with EU and international law³⁴⁶. According to the analysis carried out by the European Council on Refugees and Exiles³⁴⁷, *inter alia*, the new legislation drastically restricts the exercise of the right to asylum, as it provides for the rejection of all applications for international protection that have not been submitted at checkpoints at border crossings and does not provide for the possibility of an appeal by the applicant³⁴⁸. On 9 November 2021, the Lithuanian parliament, adopted a resolution to introduce a 'state of emergency' along the border line with Belarus and at detention centers in the interior of the country; this declaration entailed the compression of several rights of migrants and asylum seekers (and a quota-limited entry into the areas subject to this measure (i.e. granted only to residents and workers holding a permit issued by the Border Security Service). The state of emergency ended on 15 January 2022³⁴⁹. This practice was recently censured by the European Court of Human Rights. In the case *M.A. and Others v Lithuania*, concerning the prohibition of entry into Lithuanian territory and the subsequent expulsion of applicants for international protection to Belarus, the Court declared a violation of Article 3 of the European Convention on Human Rights (ECHR) by Lithuania, for preventing the applicants from exercising their right to asylum and for rejecting them at the Belarusian border in the absence of an adequate individual examination of their application for protection³⁵⁰.

More specifically, Lithuania resorted not only to national measures but also to the Union' support. With regard to the latter, following a request by the Member State, the Commission coordinated the deployment of humanitarian assistance and first aid by 19 Member States, plus Norway, through the EU Civil Protection Mechanism and has also activated a mechanism for the preparedness for and management of migration-related crises, as set out in the relevant Commission Recommendation presented within the framework of the New Pact on Migration and Asylum³⁵¹.

Similarly, Latvia adopted emergency measures on asylum and temporary migration, in force until 14 January 2022. Those measures were characterized by a limited scope, as they were to apply only to

³⁴⁶Specifically, the July reform, by modifying the content of Art. 5 of the Aliens Law and introducing a new subsection to Art. 113(4) of the same law, raises a number of questions concerning the detention of asylum seekers at the border. Doubts of compatibility with EU law arise not only with regard to the detention measures, but also with regard to derogations and limitations of specific rights granted to applicants for international protection.

³⁴⁷ECRE, Legal Note 11, *Extraordinary Responses: Legislative Changes in Lithuania*, 3.09.2021, ecre.org.

³⁴⁸SCISSA, *Misure emergenziali al confine tra UE e Bielorussia: uno scontro tra "titani" con gravi ripercussioni per i migranti*, European Papers, Vol. 7, 2022, No 1, pp. 43-49.

³⁴⁹HYNDLE-HUSSEIN, *'Lithuania's Reactions to the Escalating Migration Crisis'* (2021) Centre for Eastern Studies OSW, www.osw.waw.pl.

³⁵⁰ECtHR, *M.A. and Others v Lithuania*, App n. 59793/17, 11.12.2018.

³⁵¹Commission recommendation on a EU mechanism for preparedness and management of crises related to migration, (EU) 2020/1366 of 23 September 2020.

migratory movements at the Latvian-Belarusian border. By virtue of these amendments, border authorities may order migrants to return to the transit country, in this case Belarus, using any means and procedure at their disposal. In its considerations sent to the Latvian government, the United Nations High Commissioner for Refugees (UNHCR) expressed strong concerns about the ban on the right to seek international protection imposed on those who have crossed, or even attempted to cross, the border irregularly. UNHCR therefore recognizes that ‘the right to seek asylum and the protection against refoulement, are therefore temporarily derogated in the four territories where the emergency declaration applies’³⁵², in violation of the right to asylum and the principle of non-refoulement as established in the Geneva Convention. Furthermore, UNHCR stressed that Latvian legislation does not restrict the use of force by the police and border authorities, nor does it provide for it to be used as a last resort and only when it is justified, necessary and proportionate to the intended purpose, thus potentially leading to violations of the right to life and the prohibition of torture, inhuman and degrading treatment under the ECHR and the Charter³⁵³.

3.4 The actions and provisions taken by the EU in response to the crisis

In response to the crisis described above, the Commission published the 'Response to State-sponsored exploitation of migrants at the external borders of the EU'³⁵⁴. Previously, the Commission had already identified some lines of action to counter the instrumentalization of migrants, emphasising in particular cooperation with third countries directly involved, in the renewed Action Plan against Smuggling of Migrants (2021-2025)³⁵⁵, adopted in September, and in which the situation at the border with Belarus, framed as a form of exploitation of irregular migration. As confirmed above, Belarus was considered to be directly responsible for the situation. For these reasons, on 9 November 2021 the Council adopted a partial suspension of the EU-Belarus agreement on the facilitation of the issuance of visas for officials linked to the Belarusian regime (members of official delegations Belarus; members of national and regional governments and parliaments of Belarus, the Constitutional Court and the Supreme Court of Belarus)³⁵⁶. At the end of November, the Commission also published a proposal for a regulation introducing measures against transport operators who

³⁵²United Nations High Commissioner for Refugees, UNHCR Law Observations on Latvian Declaration of Emergency Situation www.unhcr.org, para. 8.

³⁵³SCISSA, *op. cit.*

³⁵⁴European Commission, *A renewed EU action plan against migrant smuggling (2021-2025)* - COM (2021) 591, 29.9.2021.

³⁵⁵Commission’s Communication to the European Parliament, Council, EESC, Committee of the Regions, *EU’s Action plan against migrants trafficking renewed (2021-2025)*, COM (2021) 591 final of 29.09.2021.

³⁵⁶Council of the EU, Press release, *Belarus: Council suspends visa facilitation provisions for officials of the Belarus regime*, November 2021.

facilitate or engage in trafficking in persons or smuggling of migrants in illegal entry into the territory of the European Union³⁵⁷. The measures envisaged included the suspension of the right to provide transport services to and from the Union as well as within the Union; the suspension of the right to fly over the territory of the Union; the suspension of the right to refuel or carry out maintenance within the Union; the suspension of licences or authorisations granted under Union law allowing the operation within the Union or the performance of international passenger transport activities.

At the same time the EU has also put pressure on third countries both to prevent travel to Belarus and to ensure rapid repatriations. In autumn, the High Representative, Josep Borrell, met the foreign ministers of Kazakhstan, Kyrgyzstan and Tajikistan and the deputy foreign minister of Turkmenistan, to ask for their support, and in particular Uzbekistan agreed to prevent passengers from Afghanistan, Iraq, Lebanon, Libya, Syria and Yemen from travelling to Belarus. Thus, since August 2021 flights (direct and with stopovers in third countries) from Iraq to Belarus were stopped and, since November, the repatriation of Iraqi citizens started with return flights from Belarus, Lithuania and Poland. In this regard, the Commission made up to EUR 3.5 million available to facilitate assisted voluntary returns, covering the costs of return and reintegration in the countries of origin, as well as essential humanitarian, medical and legal assistance during their stay in Belarus³⁵⁸.

Moreover, the European Union provided practical-operational support, including the deployment of Frontex, Europol and EASO personnel, to the three member states directly concerned. Although, as was emphasized, Poland refused the support offered by Frontex for deployment at its border, requesting it only for the execution of returns. Moreover, additional funds were mobilised. In particular, about EUR 37 million were disbursed in favour of Lithuania through emergency aid allocated through the Asylum, Migration and Integration Fund and EUR 700,000 were made available to provide humanitarian support to stranded migrants in Belarus.

In January 2022, a mechanism for the operational coordination of the external dimension of migration called Mocadem was initiated³⁵⁹. This was not originally a mechanism designed to deal with the

³⁵⁷Proposal for a Regulation of the European Parliament and of the Council *on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union*, COM/2021/753 final.

³⁵⁸High Representative of the Union for Foreign Affairs and Security Policy, *Responding to state-sponsored instrumentalisation of migrants at the EU external border*, JOIN (2021) 32 final, 23.11.2021.

³⁵⁹Council Implementing Decision (EU) 2022/60 of 12.01.2022 *on the Operational Coordination Mechanism for the External Dimension of Migration*, 17.1.2022, p. 79 ss.

situation at the Belarusian border, but it could have had repercussions in these situations as well. The operating mechanism, outlined in Art. 3, provided that when the situation of relations in the area of migration between the European Union and a third country that requires timely coordination and response by the Union, the Presidency of the Council may convene, with the assistance and advice of the General Secretariat, a Moadem Round Table with the aim of synthesising the information and policy proposals provided by the various Council preparatory bodies, as well as other invited parties, drawing, in particular, on the operational summaries prepared by the Council Working Party on External Aspects of Asylum and Migration and the relevant work carried out by other Council working parties.

More importantly, following the invitation of the European Council in its conclusions of 22 October, requesting a proposal of possible legislative changes, on December 1st, the Commission presented a proposal for a Council decision on temporary emergency measures for the benefit of Latvia, Lithuania and Poland³⁶⁰. This document was prepared taking into account the specific requests of the three Member States in question. These measures are exceptional and extraordinary, based on Art. 78(3) TFEU, aiming at establishing an emergency procedure, applicable to third-country nationals apprehended or found in the vicinity of the border with Belarus after illegal entry or presenting themselves at border crossing points³⁶¹. Under Article 78(3) TFEU the Member States in question are justified, for a period of six months, in derogating from the ordinary provisions contained, in particular, in Directive 2013/32/EU (the already mentioned ‘Procedures Directive’). since, the provisions of the Procedures Directive are not designed to deal with situations where the integrity and security of the Union are under attack as a result of the instrumentalization of migrants³⁶². As to the exceptionality of the situation characterised by a sudden influx of third-country nationals, which constitutes the precondition for triggering this mechanism, it is identified by the Commission in the modality of the influx which can be traced back to the so-called instrumentalization of migrants. However, while Article 78(3) TFEU does not define the nature of the 'temporary measures' that may be adopted under this provision, the Court of Justice pointed out that in order to qualify as 'sudden', within the meaning of Article 78(3) TFEU, 'an influx of nationals of non-member must be such as to render the normal operation of the Union's common asylum system impossible'³⁶³. Since the introduction of this provision by the Lisbon Treaty in 2007 this is the second time that the European

³⁶⁰Proposal for a Council Decision *on provisional emergency measures for the benefit of Latvia, Lithuania and Poland*, COM/2021/752 final.

³⁶¹*Ibidem*.

³⁶²DI PASCALE, *op. cit.*

³⁶³ECJ, *Slovak Republic and Hungary v. Council of the European Union*, 6 September 2017, Joined C-643/15 e C-647/15.

Union makes use of this provision. As discussed in the second chapter of the present work, the mechanism was used for the first time in 2015 with the adoption of the two decisions³⁶⁴. In the aftermath of the so-called migrant crisis, the two-decision provided for a redistribution mechanism of applicants for international protection who arrived in those months in Italy and Greece, in the other Member States, derogating from the ordinary criteria of competence established for the examination of applications by the so-called Dublin Regulation. Differently, from 2015-2016 provisions, this time the proposal appears to be established with a purpose of defending and securing the Union and its borders³⁶⁵.

More in detail, the proposed amendments concern the time limits and the modalities for registering applications (limiting the possibility to submit applications only at certain specified border posts and granting the authorities a deadline of 4 weeks for registration, as an exception to the current between 3 and 10 days), the possibility to apply the accelerated border procedure to all applications and not only to a limited number of cases, as currently foreseen, as well as to extend the examination period from 4 to 16 weeks, but also to limit the automatic suspensive effect of an appeal to all border procedures by giving a judge the power to decide whether or not the applicant may remain in the territory until the outcome of any decision on appeal. of any decision on the appeal. Further derogations are also provided for with reference to material reception conditions (allowing only essential needs to be met) and return conditions for third-country nationals and stateless persons whose application for international protection has been rejected³⁶⁶. The Council started examining the proposal a few days after its presentation and the procedures are still ongoing. In the beginning, Poland expressed scepticism and considered the solutions contained therein insufficient³⁶⁷, and subsequently asked for an amendment to be included in the text to legitimise the possibility of asylum claims by migrants who irregularly crossed the border, only at designated border points. In general, the procedure contained in Article 78(3) TFEU, on which the proposal is based, requires, however, approval only by the Council by qualified majority, with only the advisory opinion of the European Parliament³⁶⁸, which cannot therefore oppose adoption.

³⁶⁴Decision 2015/1601 and Decision 2015/1523 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*.

³⁶⁵DI PASCALE, *op. cit.*, p. 284.

³⁶⁶SCISSA, *op. cit.*, p.47.

³⁶⁷Agence Europe, *Poland unhappy with Commission's proposed solutions to help manage situation on border with Belarus*, 7.12.2021, <https://agenceurope.eu/en/bulletin/article/12848/11>.

³⁶⁸DE CAPITANI, *Belarus Crisis: Should also the European Parliament ask the Commission to withdraw its art.78.3 TFEU Proposal?*, 14.12.2021.

It seems necessary to emphasise that migrants were the victims of this crisis and have been instrumentalised in the security conflict between the EU and Belarus, but these people are not a security threat per se, and should not be considered or treated by either side as if they were a weapon. Migrants should not suffer the consequences of a political discount, as seems to have happened. From the analysis it arose that the measures taken at national level by Lithuania, Latvia and Poland is an unfair treatment not on the Belarusian government, but on third-state nationals, whose access to the asylum procedure and entry to the national territory are severely restricted, with inevitable repercussions on the exercise of their right to asylum³⁶⁹. It appears difficult to approve systematic refoulement and automatic repatriation to a third country that is neither safe nor democratic, such as Belarus, from EU and international asylum law. Such practices do not only violate the right to asylum and the principle of non-refoulement, but also the right to life, health and the prohibition of torture, as repeatedly affirmed by the European Court of Human Rights and UNHCR. Furthermore, it may be argued that Commission's proposal should be based on solidarity, but always taking into account the needs and rights of third-state nationals in accordance to international and migration law. The Commission itself has pointed out that Lithuania, Latvia and Poland have been 'forced' to intensify border controls border controls, to limit access points to the external borders to a minimum and to militarise the borders to prevent unauthorised entry, justifying these acts in light of the need to protect national security and territorial integrity. Despite the objective increase in arrivals in these three countries, it is hard to imagine that just over 7,000 people in total could jeopardise the resilience of the asylum system of three European states as well as constituting a real threat to their territorial sovereignty.

A few conclusions may be observed. Regarding the imposition of restrictive measures, which is covered in paragraph 1 of this chapter, it should be emphasized that, in contrast to other situations when there was a considerable uncertainty among EU Member States, it was attainable to come to an agreement on the Belarusian issue³⁷⁰. Concerning the management of migrants, it is impossible to ignore that in the context of the migratory crisis, a security-oriented logic is prevalent in dealing with the phenomenon, which is seen as a serious threat to the security of the Union rather than as a flow of people to be managed. In essence, the proposal to build a barrier along the borders of member states with Belarus, respectively, is consistent with the same logic that has characterized the development of European Union policy on immigration and asylum to this point. This logic reflects

³⁶⁹SCISSA, *op. cit.*, p. 49.

³⁷⁰ IZZO, *Unione europea e Bielorussia tra misure restrittive e gestione dei flussi migratori*, BlogDue, 7.01.2022, <https://www.aisdue.eu/wp-content/uploads/2022/01/Izzo-BlogDUE-4.pdf>.

the different perspective and approach that characterizes the EU Member States. Furthermore, the actions of the mentioned States have probably worsened an already challenging and critical situation. Deciding to militarize their borders and declaring a state of emergency, preventing the entry of migrants into their countries and violating international and European law in the process. In conclusion, there is an overwhelming evidence of the Union's ongoing vulnerability in managing migrant flows. A weakness that Belarus has chosen to use in order to undermine the Union and, even if unsuccessfully, to manipulate it to its own ends. All of the above turns out perfectly in line with the description of the controversial techniques used in the context of hybrid threats described in the first chapter of the current work. In conclusion, as was previously stated, this challenge was undoubtedly difficult to tackle and that, in some respects, at the level of European laws was not ultimately solved. The Union's needs are those of a constant response, as well as a swift search for political stability. Currently, it is clear that maintaining communication with neighbours, particularly Eastern neighbours, is essential. The international crisis is embedded in a complex, delicate scenario, which is not only related to a clash between the European Union and Belarus but in which the UE finds itself forced to deal with. In fact, the strained relationship with the Russian Federation, which, tragically, is now involved in an open conflict with Ukraine, plays a role in the background.

Conclusion

This thesis analyses the concept of the so called weaponization of migrants in the European Union and the instruments that are employed by the Union in response to those actions that have been defined as hybrid threats. In particular, the work sets the aim of inspecting these *phenomena* under the European Law framework and via a legal perspective. The discussion addresses firstly, the controversial notion of hybrid threat as it was conceived by the defence and military bodies around the world, in order then to analyse its relevance according to an international law perspective. It has been illustrated that such actions are taken by state or non-state actors with the intention of undermining or harming a target through influencing its institutional, regional, or local decision-making. Such activities are carried out through a variety of channels and are intended to avoid observation and attribution. Usually, democratic states and institutions are the preferred targets, which might be impacted in a variety of domains, including political, economic, military, civil, and informational ones. Due to their ambiguity, which is brought about by the combined employment of both conventional and unconventional means as well as an asymmetric use of military means and combat, hybrid threats are typically challenging to describe. On the other hand, the ambiguity contributes to a poor legal framework around the world, and especially in the EU. In fact, according to the documents published by the Commission and the Council in order to counteract hybrid threats the Union may resort to some specific clauses ‘of last resort’; namely, the mutual assistance clause and the solidarity clause. The implication of these tools has been object of a broad range of legal interpretation.

Once having described, within the limits represented by the issue’s controversy, the description moves from the assumption, enriched by different academical studies, that the issue of migration can be deployed as well as a hybrid threat. This conclusion is derived by the large misuse of migration, described through a series of historical occurrences of this phenomenon. In fact, it can be deployed by actors in light of a hybrid threat or attack to destabilize the security of another actor, in this sense using ‘migrants as weapons’. Indeed, migration (especially mass migration) has undertaken a high degree of complexity in today’s world: it is now one of the most discussed global issues as more people than ever before are living outside of their nation of birth nowadays. This has caused migration to be dealt with by the States as a problem and in a security perspective, especially in western States. European Union’s Member States in particular have been involved during the past decades in an increased level of incoming migration. It is thus evident, that the politicized narrative of migration has lowered the chances to solve this problem, especially if it occurs in a dismantled sense of solidarity among the Member States.

Once having confirmed the theory under which mass migration can be allegedly exploited by actors in order to create a certain degree of internal disorder in the EU, the thesis describes the legal framework involved in those ‘weaponization of migration’ occurrences. For these analyses, the issues described were: migration law and the EU external actions along with the tools that can be employed in contrast to the weaponized migration ‘attacks. What emerges from the present work is that the Union in these cases has at disposal many different tools that could be used. Some of them amount to the migration law context, via emergency instruments to give a prompt response and help the Member state that is in danger; some others resort to a more defensive approach, with the possibility to resort to military missions and instruments. It seems thus, that the application of the solidarity clause (provided for in Art. 222 TFUE) has proven controversial, rather a solid response to this sort of attacks many be found in the EU Common Foreign Policy. Specifically, it amounts to the restrictive measures to be used against actors with the purpose of undermining them via an intense economic and financial sanctions. This instrument, is nowadays largely employed by the Union for many different things, above all the violations of human rights and European values those actors have been perpetuating.

In this respect, the Belarusian case comes in hand. In fact, the ex-soviet country has proven wrongful in committing an alleged instrumentalization of migrants. Through the reach of agreements with Third parties, Belarus has been transporting during 2021 refugees and migrants to the borders with the EU (specifically Poland, Lithuania and Latvia). This behaviour has been largely criticized worldwide; in fact, it is believed to amount to a clear violation of human rights. It must be noted that, in the light of the crisis, a securitarian logic seems to prevail in dealing with the migratory phenomenon, perceived as a serious threat to the Union's security to be countered rather than as flows of people to be managed. In essence, this is the same logic that has so far characterized the development of the European Union's immigration and asylum policy, which notoriously stems from different visions and sensitivities within the Union itself, even at the institutional level, as confirmed by the proposal to build barriers along the Member States' borders with Belarus. With strict reference to the Polish case, it should be noted that the current crisis has made it possible to divert attention for a while from other well-known frictions that have arisen in recent times between Poland and the Union, which have called into question the latter's founding values. Moreover, the reactions of the aforementioned states have actually aggravated an already difficult and complex situation, when they decided to militarize their borders and proclaim a state of emergency, preventing migrants from entering their territories and thus violating international and European law.

In conclusion, the paper explores an issue that is far from a solution, especially for what concerns the legal framework. Primarily, this is confirmed with regard to the given example. The crisis can indeed be used as a case study for the complex phenomenon analyzed. Unfortunately, the events are still too recent to provide for a general updated picture of the situation, the crisis has been triggering a 'regulatory incentive' that remains for now under scrutiny of the European bodies. Secondly, in light of the instruments employed and those envisaged by the Commission in the Joint Framework for countering hybrid threats, it can be affirmed that the Union has been deploying many different tools to contrast hybrid threats. These means come from different legal basis and so, present different scopes: this is clear when comparing the means related to Migration Law and those stemming from a more defensive and security approach. If on one side the protection of refugees and migrant is at stake, on the other of course the mindset is more of a military one, in order to give a prompt response to a threat to EU security. The present work has tried to consider both approaches insofar as providing with the broader perspective and in order to enlist all of the possible instruments employed in the cases of weaponization of migrants.

It can be thus deduced that; the phenomena of weaponization of migration are not new and they amount to be gradually more employed by hybrid actors on the move. As said, migration represents now a global issue that is deeply politicized and misinterpreted. In this sense, actors (State or non-States) would probably go on in exploiting this misperception and instrumentalize migrants to bend the Union under their will. Under these assumptions and accordingly with the analysis previously undertaken in this paper, the Union need to rely on a more solid shared response not only to secure its borders but also to pursue its values, *inter alia* human rights. In this sense, it is important that the Union keep on preventing these occurrences via for example Agreements with Third countries but is also fundamental that the approach to migration rely on a less securitarian approach and a more cohesive policy among Member States. In a broader sense, the EU must firstly denounce and punish the misperception of migration, a perspective that leads to a the use of as a tool, almost a weapon, the human being.

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