Migrant Instrumentalisation: Facts and Fictions

Realities On the Ground at the EU-Belarus Border

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Recent years have seen an increase in the violation of asylum-seeker rights in the EU, including through so-called pushbacks. These practices have typically not been authorised by domestic legislation and have been denied or concealed by the relevant Member States. However, this changed with the crisis at the EU-Belarus border that has unfolded since summer 2021. Following the EU's decision to impose sanctions on Minsk, Belarus started actively issuing visas to nationals of Middle Eastern and African countries, allowing them safe passage through its territory and no longer preventing irregular border crossings into the EU.

Belarus' so-called 'instrumentalisation' or 'weaponisation' of migrants led Poland, Latvia and Lithuania to adopt long-term, far-reaching and blanket domestic legislative measures that allow to (forcefully) return people to a third country without formal return procedures and individual assessment of their asylum claims. The resulting arbitrary denial of fundamental rights protection to asylum seekers, even where they have managed to reach the EU's territory, openly violate EU and international law, most notably the principle of *non-refoulement* (for a more detailed analysis see here, here and here).

Nonetheless, in June 2023, Latvia further cemented the ongoing practice of pushbacks in domestic law, following a similar move by the neighbouring Lithuania. The last two years have also seen recurring efforts to introduce the concept of instrumentalisation of migration into EU asylum law on a permanent basis. This post will demonstrate why the 'instrumentalisation of migration' is an overly simplified and generalised term that does not capture the complexities of the situation on the ground. Its adoption into EU asylum law thus threatens both to undermine legal certainty and bear far-reaching consequences for the Rule of Law in the EU.

Why We Should Question the Instrumentalisation Paradigm

Underpinning the instrumentalisation of migration paradigm is the wide-spread assumption that the Belarusian regime 'artificially' creates migratory flows to 'destabilise' the EU. Persons crossing from Belarus are also often framed as a security threat and tool of 'hybrid warfare', a narrative that has intensified following Russia's invasion of Ukraine; described as 'illegal' or 'economic' migrants as opposed to 'genuine' refugees; or portrayed as 'pawns' used by Lukashenko in a political game. There are numerous issues with this framing of individuals crossing the EU-Belarus border. For one, such wording not only implies that there is a distinction between 'artificially created' and 'natural' migratory flows, but also dehumanises the persons affected and deprives them of any agency. At the same time, it ignores that even where there might be a plausible case of using migration to exercise political pressure on the EU, this is only possible because of global passport inequality, the EU's externalisation and containment policies, and the consequent absence of legal routes to seek protection. Thus, for those holding an Iraqi, Syrian or Afghan passport it is nearly impossible to obtain a visa for Europe, in most cases rendering the deadly Mediterranean route their only option.

The instrumentalisation narrative about 'artificial migratory flows' consisting of economic migrants, not 'real' refugees is not adequately supported by empirical evidence. As part of my socio-legal research into the EU-Belarus border crisis, I have conducted fieldwork in all three Member States concerned where I

interviewed NGO representatives, volunteers and lawyers who have been providing assistance to people crossing from Belarus. In addition, I have interviewed over 40 non-EU nationals who attempted to cross the Belarus border with Latvia during the winter of 2021/22.

My study reveals that the third-country nationals involved make up a highly heterogeneous group and frequently belong to categories with relatively high asylum-recognition rates. Examples include Afghans fleeing the Taliban, Syrians fleeing compulsory military service, Iranians fleeing political persecution, and Yazidis, an Iraq-based ethno-religious minority that was persecuted by ISIS and has been living in protracted displacement for nearly a decade. Germany approves around a half of Iraqi Yazidi protection claims it receives. Yet, during the autumn/winter 2021/2022 Yazidi asylum seekers were pushed back and forth for several months between Belarus and Latvia before being returned to Iraq via the IOM assisted voluntary return programme without their asylum applications ever being registered.

The 'instrumentalisation' paradigm also ignores the divergent profiles and motives of those trying to enter the EU via the Belarus border. Many interviewees chose this route because it was perceived as safer, following previous, unsuccessful attempts to enter the EU via other routes. Others, including an Afghan family I interviewed who arrived at the Belarus border by land via Russia and Central Asian countries, had never procured Belarusian or Russian visas or had any other connection with the Belarusian authorities. There are also people who had previously resided in Russia or Belarus long-term (either regularly or irregularly) before deciding to seek protection in the EU due to the lack of safety, human rights violations, risk of *refoulement* or deteriorating political and economic conditions in these countries.

The Commission's Troubling Embrace of the Instrumentalisation Paradigm

In June 2022, CJEU declared Lithuanian legislation effectively depriving a non-EU national of an opportunity to apply for asylum solely because they had crossed the border irregularly as incompatible with the Asylum Procedures Directive – even in the event of a declaration of an emergency due to a 'mass influx of aliens'. Moreover, Belarus cannot be considered a safe third country (for the relevant ECtHR judgments see here and here).

Nevertheless, the Commission appears to have embraced the instrumentalisation narrative. Most notably, it has failed to initiate any infringement procedure against Member States who have continued to engage in the practices the CJEU declared a breach of EU law, let alone criticise their policies. Moreover, in late 2021, following the call of the European Council, it also presented a set of proposals codifying the 'instrumentalisation' concept into EU asylum law: a proposal for a Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland; a proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum (Instrumentalisation Regulation); and a proposal to amend the Schengen Borders Code.

The Instrumentalisation Regulation proposal did not go as far as domestic legislation authorising push-backs and suspending the right to seek asylum. The Regulation nevertheless allowed Member States to derogate from the EU's asylum standards by extending registration period for asylum applications (Art.2(1)(a)), the extensive use of border procedures (Art 2(1)(b)) and *de facto* detention of protection seekers. While it failed to secure a majority in the EU Council in December 2022, there are now attempts to incorporate its content into the proposed Crisis, Force Majeure and Instrumentalisation Regulation, as part of the New Pact on Migration and Asylum.

Proving the 'Instrumentalisation of Migration:' Some Definitional Issues

The draft Crisis, Force Majeure and Instrumentalisation Regulation defines the 'instrumentalisation of migrants' as:

> *'[…]a situation where a third country or non-state actor encourages or facilitates the movement of third country nationals to the external borders or to a Member State, with the aim of destabilising*

> *the Union or a Member State where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security.'*

An immediate problem with the definition is the difficulty of attributing accountability to a state party for the alleged instrumentalisation of migrants. Non-EU nationals are typically brought to the EU-Belarus border by intermediaries that are non-state actors. To establish the accountability of the state it would thus be necessary to assess if and to what degree state actors are involved in the operation of a particular facilitators' network. At the same time, whilst there are numerous reports of the Belarusian authorities forcing non-EU nationals to cross the border, my interviewees revealed that this occurred only after they were previously pushed back by Member State authorities. While Belarusian border guards did not prevent them from crossing the Latvian border for the first time, they also did not force them to do so.

Establishing the aim of destabilising the EU appears equally challenging. For one, visas are officially issued for purposes such as tourism, study, work or private visits. Even if the real aim behind the third country's liberal visa policy is to put pressure on the EU, this is a subjective and generalised finding that will likely suffer from overinclusion. Thus, it wrongfully assumes that every holder of a Belarus (or Russian) visa who later decides to irregularly cross into the EU from Belarus has been instrumentalised. This not only ignores the complexity of reasons for crossing and profiles of border crossers outlined above but also denies the people involved any agency. Moreover, by imposing blanket restrictions on the right to seek asylum, it is implied that every foreign national crossing irregularly from Belarus has been instrumentalised, including those who had never acquired Belarusian or Russian visas.

Finally, putting 'essential functions of a Member State' at risk is a very high threshold to meet, in that it would require an overwhelming influx of non-EU nationals. However, even at the peak of the crisis in 2021, Polish border guards recorded less than 40,000 'attempts of illegal border crossings' from Belarus, with the numbers dropping to 15,000 in 2022. Moreover, because many attempt to cross multiple times, the actual numbers are likely significantly lower. Thus, even though the Latvian authorities claimed to have registered over 6,600 border crossing attempts between August 2021 and April 2022, an analysis of daily border guard statistics and interviews with the non-EU nationals involved suggests that the actual number of people behind these figures was as low as around 250 (see here, here and here). Those belonging to this group arrived at the Latvian border at different times and were pushed back and forth for several weeks or months (in most extreme cases up to seven months).

Such low numbers of protection seekers hardly represent a threat to a state's national security that could not be addressed by existing legal means without resorting to blanket measures denying individuals the right to seek asylum and effectively subjecting them to inhuman and degrading treatment. Nor do they put the essential functions of the state at risk – particularly in light of the fact that the same Member States have in total welcomed over a million people fleeing Ukraine.

The proposal for the merged Regulation further provides that 'Member States may apply derogations [..] in a situation of instrumentalisation only in respect of third-country nationals or stateless persons who are subject to instrumentalization.' The document, however, does not specify how this requirement is to be implemented. Any such determination seemingly necessitates an individualised assessment of each case on the basis of unknown criteria, an impossible task to undertake.

Concluding Remarks

Used as a rationale for a radical departure from EU and international asylum law, the 'instrumentalisation of migration' concept has led to the creation of exclusion zones, where protection seekers are deprived of their fundamental rights solely because they attempt to enter the EU via a certain third country. Yet, as the above analysis shows, the concept is vaguely defined, highly problematic on a variety of levels and does not

accurately reflect the realities on the ground. Individuals crossing from Belarus make up a highly heterogeneous group, find themselves in diverse situations and do not necessarily have any connection with the Belarusian or Russian authorities. In light of this, the national as well as EU-level reliance on the concept of instrumentalisation to justify radical departures from the right to seek asylum cannot be sustained and ought to be abandoned.

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