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Hybrid Warfare or Hybrid Threat – The Weaponization of Migration as an Example of the Use of Lawfare – Case Study of Poland

Abstract: This article aims to address the issue of alleged hybrid warfare attacks on Lithuania, Latvia, and Poland. The scope of the article covers the Belarus operations conducted in 2021. Firstly, the author addresses the issue of pushing migrants from a descriptive perspective. Secondly, he debates whether Belarus operation was conducted within the scope of hybrid warfare, hybrid threat, and lawfare? The author concludes that the Republic of Belarus has operated lawfare falling within the hybrid threat spectrum. It means that the situation is not to be classified under the law of armed conflict from the perspective of international and non-international armed conflicts and *ius ad bellum* violation. Thirdly, the author claims that Belarus has violated international law, so certain legal redress is appropriate and justified. Belarus's actions may result in a court proceeding before the International Court of Justice and before other international institutions.

Keywords: *refugee, non-state actors, use of force, the migration crisis, law of armed conflict*

Introduction

In recent months, Belarusian authorities have commenced operations called by many an act of hybrid war (AFP, 2021; Scally, 2021) or simply hybrid warfare aggression (AP, (2021). It was oriented toward transferring mostly migrants from the Middle East and North Africa (MENA) through Belarus to Lithuania, Latvia, and Poland. Although it may look like business as usual on the part of the Belarus authorities, it is not. All three affected states have publicly opposed gross human rights violations in Belarus (*Belarus Declaration...*, n.d.). President Lukashenko's operation repeats the Russian Federation's *modus operandi* of weaponizing migrants in recent years (BBC, 2016; Rettman, 2020). In this way, his actions

are very similar to Russian orchestrated actions to use migrants as a means of coercion to obtain sanctions relief from the EU (de Bendern, 2021).

The uncontrolled flow of migrants has become an element of the political and security landscape. As General Philip Breedlove, former Head of NATO forces in Europe, has stated: *Russia is working actively to exacerbate the refugee flows in an attempt to destabilize and destroy the EU* (Schoemaker, 2019). In testimony in front of the House Armed Services Committee, he said that: *Together, Russia and the Assad regime are deliberately weaponizing migration from Syria in an attempt to overwhelm European structures and break European resolve* (Schoemaker, 2019).

Additionally, apart from inducing migration (O'Rourke-Potocki, 2016), Russia was promoting an anti-migration narrative, which increased polarization and right-wing movements in Europe (Szakacs & Bognar, 2021). Serving such a cocktail of inducing migration while at the same time ratcheting up the fear migrants was designed to destabilize EU countries.

Mass migration simply became a tool of hybrid warfare used for various purposes, from military to political ones. Turkey and Russia have successfully used mass migration as a method of influence (Bachmann, 2021, pp. 120–125).

This threat is an essential one from the EU perspective. Most of the European countries are covered by so-called Schengen Conventions. It means that a person crossing the external border of any EU country formally may freely move about within all Schengen countries. Potential transgressions in this regard may undermine one of the crucial EU freedoms and lead to public security threats in non-border EU countries.

The current situation is concerning for several reasons. Firstly, it undermines the multilateral international legal order as well as the protection of refugees and human rights protection; secondly, it poses all the elements needed for disinformation and public opinion manipulation; and thirdly, under some circumstances, it gives grounds for further conflict escalations, i.e., violence on the border, the use of state armed forces and paramilitaries, and pushing trade in illicit substances.

The main question is whether the Belarusian authorities are conducting hybrid *warfare*? If not, then the issue of hybrid *threats* will need to be discussed, particularly in the realm of *hybrid threat warfare*. Defining and describing whether states have potential legal redress and effective countermeasures against a warfare aggressor state is related to the main question.

Although the situation in question spills over three countries, i.e., Latvia, Lithuania, and Poland; only the latter case is analyzed in great detail in this work. Access to primary sources is an asset for analyzing the most updated governmental data and the situation's dynamics.

1. Belarus Pushing Migrants: A Case Study

The whole operation began in 2021 after the European Union imposed sanctions against Belarus. Throughout the year, the number of illegal crossings has risen. In this way, Alexander Lukashenko responded to his crackdown on protesters and the arrest of a dissident journalist on board a Ryanair flight, which was forced to land in Minsk (BBC, 2021).

It is difficult to provide the exact numbers of pushed migrants, but according to Politico, more than 4000 illegal crossings were registered in 2021 in Lithuania only, compared with just 81 for the whole of 2020 (Psara, 2021). According to various sources, the Poland Border Guard has stopped around 16,000 migrants trying to cross the Poland-Belarus border in 2021 (Schmitz, 2021).

Also, according to various sources, people seeking entrance to the EU are collected by persons related to the Lukashenko authorities, mostly in Iraq, and flown to Minsk (Gerdžiūnas, n.d.). Later on, they are transported by buses and escorted by the Belarusian Border Guard to the border with Lithuania (since the beginning of 2021), and more recently, to the border with Poland (since June 2021). Belarusian Guards are facilitating illegal crossings into the mentioned countries, in some cases using law enforcement measures such as batons or tear gas¹.

2. What Is Hybrid Warfare?

The notion of hybrid warfare, or hybrid aggression in the case of the Belarus migrants, a crisis has been used numerous times (AFP, 2021). However, despite the concept's popularity, the notion of hybrid warfare has no legal definition. Therefore, it refers to international relations, and foremost to security studies or military affairs. Interestingly, it has to be noted that many international politics or military/security studies oppose the existence of either notion². Thus, a commonly-accepted definition of hybrid warfare is not fully agreed upon by either military or international politics scholars as a separate category of war.

Despite the *in statu nascendi* character of hybrid warfare, there are some commonalities or universal threads in most definitions. Some scholars declare that „Hybrid warfare can be characterized as a comprehensive strategy based on a broad, complex, adaptive and often highly integrated combination of conventional and unconventional means. It uses overt and covert activities, including military, paramilitary, irregular, and civilian actors, targeted to achieve (geo) political and strategic objectives. Hybrid warfare is directed at an adversary's vulnerabilities, focused on complicating decision making and conducted across the full spectrum (which can encompass diplomatic, political, information, military, economic,

¹ Video with Belarus Board Guard: <https://www.youtube.com/watch?v=TIVl64A87bk>

² For example, very critical about the concept are Bettina Renz and Hannah Smith (n.d.).

financial, intelligence and legal activity) while creating ambiguity and deniability” (UK MOD–Written Evidence..., 2016, p. 4).

Colonel Frank Hoffman, one of the founding fathers of the concept of hybrid warfare, has defined a hybrid enemy as *any adversary that simultaneously employs a tailored mix of conventional weapons, irregular tactics, terrorism, and criminal behavior in the same time and battlespace to obtain their political objectives* (Jonsson, 2019, p. 9).

A similar view has been presented by Russian scholars, who see the hybrid warfare effort as one oriented on the taking of *informational, psychological, moral, climatic, and organizational measures, setting up and encouraging destructive opposition, and secretly fomenting and intensifying ethnic strife and ethnic conflicts* (Jonsson, 2019, p. 62). A summary of the Russian findings was presented in General Gierasimov’s speech for the Academy of Military Science in 2013. He said: *Today, it is obvious that the line between peace and war is blurring. Non-military forms and means of struggle have received an unprecedented technological development and acquired a dangerous and sometimes violent nature* (Jonsson, 2019, p. 1).

The Chinese approach is best described in two major publications/governmental positions – first the publication *Unrestricted Warfare* by Qiao Liang and Wang Xiangsui (1999); and second, the „three warfares” concept/strategy, which was officially adopted by the Central Military Commission (CMC) in November 2003 (Clarke, 2019, p. 191). The ‚Three Warfares’ means psychological warfare, public opinion warfare, legal warfare, or lawfare; whereas unrestricted warfare is self-explanatory.

What seems universal about the notion of hybrid warfare is that it falls within the increasing complexity of armed conflict, where adversaries may combine different types of warfare plus non-military means to neutralize conventional military power (Monaghan, 2019, p. 87).

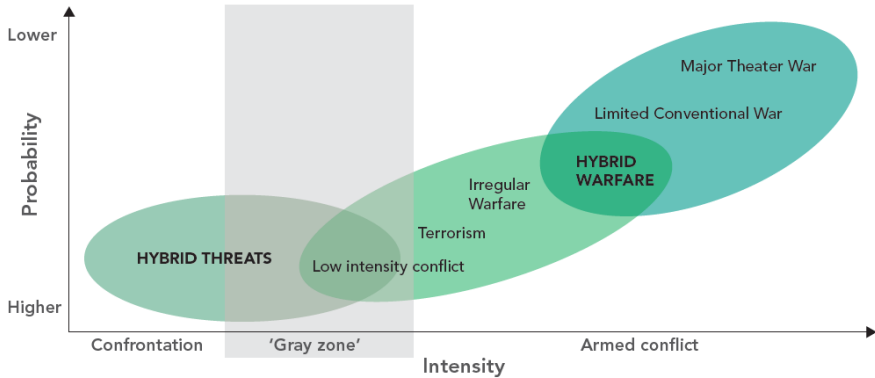
3. Or Maybe a Hybrid Threat?

All mentioned definitions indicate an armed violence component of hybrid war or warfare. However, the situation on the border of Poland and Belarus does not qualify as an act of aggression or an armed conflict. It should be considered something of hybrid nature, not as a hybrid war. So, what are we facing at the border with Belarus? If it is not hybrid warfare, maybe it is a hybrid threat?

The idea of hybrid threats was initially presented in the NATO Capstone Concept for The Military Contribution to Countering Hybrid Threats in 2010 (*BI-SC Input...*, n.d.). The understanding of the concept has evolved since then. The easiest grasp of the definition of hybrid threats was proposed in the so-called UK 2015 Strategic Defense and Security Review. Hybrid threats were classified as a „tier one” risk to national security and „hybrid attacks” on allies as a „tier two” risk (Monaghan, 2019, p. 85). Hybrid warfare and threats

are understood as two phases of the same phenomenon (Weissmann, 2019, pp. 17–26). Monaghan's (2019, p. 87) graphics illustrate it well.

FIGURE 1. Hybrid Threats and Hybrid Warfare Shown on a Continuum of Conflict³⁵



Since this paper operates in the realm of international law and security studies, it has to be said that hybrid threats do not fall into the category of armed conflict. Hybrid threats may have the same aims as hybrid warfare, such as exploiting an adversary's vulnerabilities or complicating decision-making, which affects diplomatic, political, information, military, economic, financial, intelligence, and legal activities (European Centre of Excellence..., n.d.). However, they are not hybrid war/warfare nor an armed conflict as understood by international law.

To summarize, hybrid threats combine a wide range of nonviolent means to target vulnerabilities across the whole of society in order to undermine the functioning, unity, or will of their targets while degrading and subverting the *status quo*. This kind of strategy is used by revisionist actors to gradually achieve their aims without triggering decisive responses, including armed responses (Monaghan, 2019, p. 87). What seems universal for 'hybrid threats' is the synchronized use of a broad spectrum of instruments designed to stay below the thresholds of detection, attribution, and foremost retaliation (Balcaen et al., 2021, p. 1).

The aims of the Belarus operation are oriented toward the weakening of affected states and creating internal strife between Latvia/Lithuania/Poland and the EU over the issue of migrants/refugees. It creates difficulties with political decision-making. It also aims to shame Poland and Lithuania as brutal regimes that do not fulfill their human rights obligations. Belarus's actions do not fall into the hybrid warfare category. Lack of armed involvement results in Belarus's activity falling into the category of 'tier one threats', namely hybrid threats. It raises another critical question: whether 'lawfare' may be used in hybrid threats' manipulations as a part of hybrid warfare.

4. What Is Lawfare in a Hybrid Environment?

Many international actors have manipulated international law for their own political or strategic purposes (Kowalczevska, 2014, pp. 38–53). The popularity of such manipulation has led to a neologism, a mix of two words; warfare and law – i.e., lawfare. Lawfare has become one of the characteristic traits of a hybrid war. The hybrid warfare aggressor uses and weaponizes the law to manipulate and change the existing international legal paradigms (Bachmann & Munoz, 2016, p. 70).

The concept of law as a weapon of war was first termed „lawfare” in an essay by Charles Dunlap in November 2001 – although, as Kittire (2016, p. 4) pointed out, the history of the concept arguably goes back to Hugo Grotius.

There are at least two general approaches to lawfare. The first sees lawfare as part of a militarized effort³. For example, Dunlap describes lawfare as *a method of warfare where law is used as a means of realizing a military objective* (Dunlap, 2001, p. 4). According to him, it is a method of war like any other, but using non-kinetic means and intending to intimidate the adversary into obtaining strategic objectives (Bachmann & Munoz, 2016, p. 72).

A similar approach is provided by Tropin, who posits that lawfare is a misuse of the law to achieve a military objective and to undermine the legal framework (Tropin, 2021, p. 17). The same line of reasoning is employed by Hill, who states that lawfare means „... the misuse of the law to achieve military objectives”. In this respect, the military nature of the objective is crucial since aggressive legal maneuvers alone are not enough to constitute lawfare (Beck 2014, pp. 306–318). Beck’s definition of lawfare concurs with the previous one. She says that lawfare covers (1) misusing the law in order to (2) achieve a military objective and (3) undermine the legal framework (Beck, 2014, p. 308).

Susan Tiefenbrun gives the strictest approach. She considers lawfare as „... a weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy”. The use or misuse of law is only lawfare where it seeks to achieve a military objective or objectives. Therefore, she excludes from the definition of lawfare moves employed to gain a political, and not military, advantage (Beck, 2014, p. 309). Another well-known supporter of the militarized approach is Ordre Kittrie. He characterizes lawfare actions as those situations whereby a party/actor uses the law to create the same or similar effects as those traditionally sought through conventional kinetic military actions (Bachmann & Munoz, 2016, p. 73). In other words, he defines „lawfare” as the strategy of „using – or misusing – the law as a substitute for traditional military means aimed at achieving an operational objective” (Kittrie, 2016, p. 2). As such,

³ The author intentionally does not refer to IHL wording, such as ‘armed conflict’. This is because hybrid warfare situations often fall outside the scope of the traditional dichotomy.

lawfare seems to be considered part of hybrid warfare – i.e., a militarized effort including armed violence.

Bachman offers a second and slightly more relaxed approach. On the one hand, he posits that lawfare can exploit the disadvantages of legal restrictions in place for the compliant actor, leading to the emergence of „asymmetric warfare by abusing laws” (Bachmann & Munoz, 2016, p. 74). He supports the military aspect of lawfare by saying that lawfare is: *a method of war, like others, using non-kinetic means and intending to influence the adversary for the benefit of strategic objectives* (Bachmann & Munoz, 2016, pp. 72–73). However, he places lawfare outside a purely military context, saying that it can be used in the context of hybrid warfare and ‚influence operations’ (Bachmann & Munoz, 2016, p. 73). The influencing of operations mainly consists of „non-kinetic, communications-related, and informational activities that aim to affect the cognitive, psychological, motivational, ideational, ideological, and moral characteristics of a target audience”, and they are executed in a synergic environment.

Similar approaches are present in the Chinese doctrine of ‚three lawfare concepts’. According to it, lawfare is a „struggle for legal superiority by mobilizing domestic and international laws to gain the political initiative and military victory. Methods of legal warfare include legal deterrence, legal attack, legal counterattack, legal binding, and legal protection” (Lee, 2014, p. 203). As such, this definition does not rely on using lawfare solely within the scope of a military operation. It puts lawfare not only in the realm of armed hybrid warfare but in a more nuanced environment of non-military hybrid threats and influence operations. According to this view, the situation on the border between Poland and Belarus falls into the category of lawfare, being part of an influence operation constituting a hybrid threat.

a. The Legal Framework of the Belarus Operation

Belarus is using the existing legal framework to manipulate and influence neighboring countries and the European Union. It particularly influences the observance of international law and refugee law.

Lawfare can be based on the exploitation of international law to influence a hybrid threat. There are certain legal regulations regarding the status of a person applying for refugee status in Poland, which are being skillfully used by Belarusian authorities

Poland and other EU countries are bound by overlapping international, supranational, and domestic sets of rules affecting the status of refugees and migrants. The first is the Geneva Convention of 1951, together with the New York Additional Protocols of 1967, regulating the status of refugees. Article 1 A (2) identifies who is considered a refugee (UN General Assembly, 1951, p. 137). The second set of rules results from the EU asylum system. In particular, they concern Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing 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 a stateless person; and Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

A certain clarity vis-à-vis the legal dilemma related to the mass influx of migrants was shed by the European Court of Human Rights interim measure decision. The European Court of Human Rights clearly defined the obligations of Poland and Latvia, summarized as follows: *„The Court decided, without prejudice to any duties that Belarus may have under international law regarding the situation of the applicants, to apply Rule 39 and request that the Polish and Latvian authorities provide all the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter. It clarified, at the same time, that this measure should not be understood as requiring that Poland or Latvia let the applicants enter their territories. The Court also noted that this decision was taken in accordance with the fact that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the convention, to control the entry, residence and expulsion of aliens* (ECHR, 2021).

The European Commission presented similar reasoning. In his statement, Adalbert Jahnz, the EC spokesperson for home affairs, said that: *The Commission supports border management in Lithuania, both operationally and financially. And we are ready to deploy further assistance as required and in fact we are in discussion with Lithuania about such further support.* Speaking on behalf of the Commission, he did not oppose building a fence between Lithuania and Belarus, stating that: *We (the Commission) do not finance fences, but our funding supports integrated border management solutions that ensure that irregular border crossings do not go undetected and are then linked to effective and fast migration management and asylum systems* (Laukagalis, 2021). His statement concurred with the statement of the European Commission spokesman Christian Wigand, who stated that: *The EC firmly rejects attempts to instrumentalize people for political purposes; as well as that: orderly, robust border management and full respect for the fundamental rights of migrants are needed as the only effective and humane way of managing migration.*

The so-called non-refoulement principle also influences the situation of migrants. This rule originates from refugee law and prohibits sending a foreigner back to his country of origin (where his basic rights may be violated in other ways than 1951 Geneva Convention persecution – i.e., freedom from torture, right to life). Additionally, it prohibits so-called chain deportation (he must not be returned to any country where his life or freedom would be threatened, or to a country which would probably send the foreigner further, including *inter alia* back to the country of origin, where he or she is at risk of persecution). The Polish government policy violates the ECHR's Art 2 (right to life) and Art 3 (freedom from torture), which may lead to procedures before the ECHR.

Persons entering Poland and Lithuania from Belarus are using illegal routes outside the designated border crossings. According to several sources, this results from the Belarussian

authorities and smuggling networks pushing migrants to illegal crossings (Schmitz, 2021). Such actions constitute part of the lawfare operation designed to exploit legal gaps and create a grim image of people trapped between barbed wires.

On the one hand, the illegal crossings are not grounds for waiving the protection under the Geneva Conventions exclusion clauses (UN General Assembly, 1951). On the other hand, states are entitled to protect their borders against the illegal movement of persons and goods, as stated by the ECHR.

By pushing migrants through the border, Belarus exposes them to the perils of illegal border crossing and potential criminal responsibility in Poland and other countries. Belarus is also engaging in lawfare by coercing EU states to break international and EU law (Bachmann, 2021). Belarus is thus using the existing human rights protection system to exploit vulnerable groups and obtain financial benefits.

To summarize, it is founded to suggest that Belarus is intentionally misusing the law. In this sense, it fulfills the definition of lawfare proposed by Bachman and the Chinese 'three warfares' approach, which sees a lawfare operation also in the form of an influence operation. From this perspective, Belarus's actions fall into the category of a hybrid lawfare operation and belong to the so-called hybrid threats. Additionally, the duty to not generate a migration outflow can now be considered an obligation existing under international law (Bazanath & Kajtar, 2017, p. 48).

5. How to Oppose Hybrid Threat Lawfare?

In order to counteract hybrid threats lawfare, both political and legal instruments have to be used. Political instruments, especially in the international environment, tend to turn into *in statu nascendi* legal rules. However, first and foremost, opposition to hybrid threat lawfare has to be based on utilizing the existing multilateral international law legal order.

The reasoning presented has shown that the situation in question falls into the hybrid threats category. The lack of a hybrid attack does not exclude the right of the state to protect its interest against the malicious (mis)use of international law. It follows the core principle of international law that every internationally wrongful act of a State entails the international responsibility of that state. It is well settled that an act of a State that breaches an international obligation will be internationally wrongful, even if it does not contravene the state's own internal law (Gallagher & David, 2014, p. 281).

The author and other scholars such as Bazanath and Kajtar (2017) argue that willfully flooding other states with migrants and refugees is illegal under international law, and affected states should seek compensation. Belarus's actions may result in a court proceeding before the International Court of Justice and before other international institutions. Particular attention should be paid to the procedure based on the violation of the United Nations Convention against Transnational Organized Crime – Protocol against the Smuggling of Migrants by Land, Sea, and Air (UN General Assembly, 2000). The New Pact on Migration

and Asylum has been adopted at the EU level by the European Council (*A renewed EU action plan...*, n.d.). The document provides many strategies, including actions against state actors such as Belarus. It calls for cooperation among EU agencies to fight against migrant smuggling – i.e., between the European Asylum Support Office (EASO), Frontex, Europol, and Eurojust. It also recalls that the EU and member states have mandated Common Security and Defense Policy (CSDP) missions over the past years to address security challenges related to irregular activities and create Anti-Smuggling Operational Partnerships *A renewed EU action plan...*, n.d., p. 16).

Conclusions

Hybrid warfare and hybrid threats are synchronized and systematic, and so should be the response. National governments should coordinate a coherent approach amongst themselves to understand, detect, and respond to hybrid warfare/threat. Multinational frameworks – preferably using existing institutions and processes – should be developed to facilitate cooperation and collaboration across borders (MCDC, n.d., p. 4).

Belarus is conducting its operation against Latvia, Lithuania, and Poland. The operation falls into the category of hybrid threats; particularly a lawfare hybrid operation. Belarus's actions encompass exploiting international law; undermining the multilateral legal protection of migrants and refugees; and increasing tensions.

An individualistic approach by a single government is not enough. Since the Belarusian operation is synchronized, the countermeasures should be too. The states affected should refer to the existing international legal order instead of resorting to reciprocity. It is particularly important because of the human cost of such a policy and the number of people dying in the forests between Poland and Belarus.

Poland and other countries have several potential options for legal redress against Belarus. However, illegal actions by one state may and should not lead to illegal actions on the part of the affected states. Illegal actions undermine the international and supranational legal order, which is at the core of the security of Poland and neighboring countries.

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