

Migrants as a Weapons System

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*It takes a particularly evil mindset to see that people and their vulnerability and humanity can actually be used as a means to achieve political ends.*¹

Ivo Daalder, former U.S. Ambassador to NATO

*[T]here is nothing in the world today that cannot become a weapon.*²

Qiao Liang & Wang Xiangsui, Colonels, People's Liberation Army

I. THE PROBLEM

It has been suggested that Vladimir Putin intentionally targeted civilians in Ukraine, at least in part, to create refugees for the purpose of destabilizing European neighbors.³ The displacement of civilians would have been of secondary importance to occupying Ukrainian territory, but an important Russian objective nonetheless. Even as a second-order effect, it would have illustrated to neighboring states what could happen to them if they resist Russian suzerainty, while concurrently fomenting domestic dissention simply by the presence of large numbers of displaced people. While the means Russia elected—intentional targeting of civilians—caught many by surprise,⁴ the attempt to coerce European countries through the instrumentalization of displaced Ukrainians should not have surprised anyone.

As recently as December 2021, just two months before Russia's invasion of Ukraine began, U.S. officials accused Belarusian leader Alexandr Lukashenko of bringing migrants from war-torn nations to Belarus in order to create a humanitarian

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1. Franco Ordoñez, *Authoritarians Are Using Migrants as Weapons. The White House Frets It's on the Rise*, NAT'L PUB. RADIO, (Dec. 13, 2021), <https://perma.cc/3S6D-VDLM>.

2. QIAO LIANG & WANG XIANGSUI, *UNRESTRICTED WARFARE 16* (trans. 1999, Echo Point Books & Media 2015).

3. Anne Appelbaum, *There Is No Liberal World Order*, ATLANTIC (Mar. 31, 2022), <https://perma.cc/7HVP-979Z> (“His army targeted civilians, hospitals, and schools. His policies aimed to create refugees so as to destabilize Western Europe.”).

4. Arguably, this should not have been a surprise either. Although intentional attacks against civilians not directly participating in hostilities are prohibited, civilians are often directly targeted in armed conflict despite the prohibition. Vanessa Holzer, *Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insights from Customary International Humanitarian Law*, in *REFUGE FROM INHUMANITY? WAR REFUGEES AND INTERNATIONAL HUMANITARIAN LAW 101* (David James Cantor & Jean-Francois Durieux eds., 2014).

crisis to force concessions from EU member states.⁵ People from countries in Africa, the Middle East, and as far afield as Cuba were seen trapped and dying, trying to cross into Poland and Latvia while largely unprotected from the northern European winter.⁶

Ursula von der Leyen, President of the European Commission, described the situation as “not a migration crisis,” but as a “hybrid attack.”⁷ She said, “This is an attempt by an authoritarian regime to try to destabilize its democratic neighbors. This will not succeed.”⁸ But, at least in part, it did succeed. The European governments that had previously refused to recognize Lukashenko as the lawful president of Belarus following his questionable election in 2020 now had to recognize him as the de facto leader—even if only for the purpose of sanctioning him.⁹ Lukashenko made the same threat to flood the EU with asylum seekers if his demands were not met twice previously, in 2002 and 2004.¹⁰ In 2002, he declared, “if the Europeans don’t pay, we will not protect Europe from these flows.”¹¹ In response, member states “pledged to spend more than half a billion euros to enhance their border security and deter future attempts at coercion.”¹²

The weaponization of migration has a long¹³ and generally successful history of being employed by weaker powers to significant effect against stronger ones. It is especially successful against liberal democracies, because accepting large numbers of refugees en masse is often a politically charged and domestically

5. Ordoñez, *supra* note 1. It has also been reported that Lukashenko enticed these individuals, primarily Iraqi and Syrian Kurds and Afghans, through travel agents promising easy access to the European Union. Kelly M. Greenhill, *When Migrants Become Weapons*, FOREIGN AFF. 155–164, 155–56 (Mar./Apr. 2022) <https://perma.cc/VLS7-VM44> [hereinafter Greenhill, *When Migrants Become Weapons*]; Mark Galeotti, *How Migrants Got Weaponized: The EU Set the Stage for Belarus’s Cynical Ploy*, FOREIGN AFF. (Dec. 2, 2021), <https://perma.cc/79FT-EG5J>.

6. Ordoñez, *supra* note 1; Aleksandra Jolkina, *Legalising Refoulement: Pushbacks and Forcible ‘Voluntary’ Returns from the Latvian-Belarus Border*, RLI BLOG ON REFUGEE L. & FORCED MIGRATION (Aug. 22, 2022), <https://perma.cc/2R43-YZRD>.

7. Ordoñez, *supra* note 1. On the definitional issue of what constitutes a “hybrid attack” and how it differs from, for example, gray zone competition, see Tarik Solmaz, “Hybrid Warfare”: One Term, Many Meanings, SMALL WARS J. (Feb. 25, 2022), <https://perma.cc/BH4S-ATS6>.

8. Ordoñez, *supra* note 1.

9. Greenhill, *When Migrants Become Weapons*, *supra* note 5 at 155 (“[A] key objective appears to have been to discomfit, humiliate, and sow division within the EU for failing to recognize him as the legitimate winner of the flawed 2020 Belarussian presidential election and for imposing sanctions on his country after he brutally suppressed the pro-democracy protests that followed.”); Ordoñez, *supra* note 1.

10. Stephen M. Walt, *The World Has No Answer for Migration*, FOREIGN POL’Y (Nov. 30, 2021) <https://perma.cc/G2ZR-CAC3>.

11. KELLY M. GREENHILL, WEAPONS OF MASS MIGRATION: FORCED DISPLACEMENT, COERCION, AND FOREIGN POLICY 19 (2010) [hereinafter GREENHILL, WEAPONS OF MASS MIGRATION]; see also Kelly M. Greenhill, *When Virtues Become Vices: The Achilles’ Heel of Migration Social Policy*, in HANDBOOK ON MIGRATION AND SOCIAL POLICY 199, 201 (Gary P. Freeman & Nicola Mirilovic eds., 2016) [hereinafter Greenhill, *Virtues*].

12. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 5–6.

13. MARK GALEOTTI, THE WEAPONIZATION OF EVERYTHING: A FIELD GUIDE TO THE NEW WAY OF WAR 137, 141 (2022) (“Innocent people are, and arguably have been, weapons of war. Ethnic cleansing, displacing communities considered hostile or just alien, is a miserable corollary of conflict. . . . Civilian lives have always been not just subjects of war but its objects and, sometimes, its weapons.”).

divisive issue.¹⁴ The refugees “are turned into living warheads thanks to asylum laws.”¹⁵ Most states that take seriously the rule of law and their obligations to asylum-seekers maintain other democratic commitments including free speech and a free and open press—commitments that make it difficult for governments attempting to mitigate this sort of political blackmail to overcome high levels of domestic dissention.

In this article, I suggest that the weaponization of migrants,¹⁶ i.e., the use of migrants as a weapons system,¹⁷ is likely to increase against the United States and its allies. Many states, most notably including China and Russia, routinely conduct operations below the level of armed conflict. These “gray zone” operations shape the operating environment to their advantage in the event of future conflict while destabilizing and undermining competitors now.¹⁸ Instrumentalizing population flows is one way to accomplish both of these objectives, through both the threat and the actual flow of people into the territory of a target state.

This development is troubling from both security and humanitarian perspectives. But it also provides an opportunity to reconsider some foundational

14. Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT’L SEC. 43–71, 49 (Summer 1996) (quoting Stanley Hoffmann, *Sovereignty and the Ethics of Intervention*, First Annual Theodore M. Hesburgh Lecture Series, Joan B. Kroc Institute for International Peace Studies, University of Notre Dame (Jan. 24, 1995)) (“[M]ass expulsions are used by the sending country to deliberately destabilize or embarrass strategic or political adversaries. As Hoffmann notes, ‘states can easily export mischief, so to speak, by dumping refugees or economic migrants on neighbors.’”). A similar phenomenon can now be observed within the United States. Tom Nichols, *A Sadistic Immigration Stunt*, ATLANTIC (Sep. 16, 2022), <https://perma.cc/APA8-SCCV> (discussing the Florida state government having chartered a flight to send migrants to Massachusetts); Andy Neuman & Raúl Vilchis, *Seeking Asylum in Texas; Sent to New York to Make a Political Point*, N.Y. TIMES (Aug. 6, 2022), <https://perma.cc/P6VU-SA7Z> (“Since April, Gov. Greg Abbott of Texas, a Republican, has been shipping newly arrived asylum seekers to immigrant-friendly Democratic cities on the East Coast to try to pressure the Biden administration into cracking down at the border.”).

15. GALEOTTI, *supra* note 13, at 147.

16. *Id.* at 5 (“We are already in a time when, especially in the context of current confrontation between Russia and the West, there is talk of the ‘weaponisation’ of this and that, from information to—bizarrely—football hooliganism.”); *id.* at 10–11 (citing Greggor Mattson, *Weaponization: Ubiquity and Metaphorical Meaningfulness*, 35 METAPHOR & SYMBOL 250–65 (2020)) (“Sociologist Greggor Mattson has found that while the term ‘weaponisation’ has been around for decades, it really took off in general use in 2017—presumably not unconnected with the 2016 US presidential elections and claims of Russian interference—such that it not only seemed to rode the boundaries between civilian life and uncivil conflict but also reflected a kind of nostalgic amnesia for a lost world that had never really existed, where these two were kept rigidly apart.”).

17. Phil Klay, *Money as a Weapons System*, in REDEPLOYMENT 77–118 (2014); David Luban, *Humanitarianism as a Weapons System*, 32 TEMPLE INT’L & COMP. L. J. 47 (2018). This weaponization differs from the use of the term “weaponized” in *The Commander’s Guide to Support Operations Among Displaced Persons, Refugees, and Evacuees*, which uses “weaponized” to refer to the purposeful introduction of persons exposed to chemical, biological or radioactive agents into a vulnerable population. JONATHAN M. WILLIAMS & JUSTIN E. KIDD, COMMANDER’S GUIDE TO SUPPORT OPERATIONS AMONG WEAPONIZED DISPLACED PERSONS, REFUGEES, AND EVACUEES i–ii (2014), <https://perma.cc/B5NY-U4ZD>. For more on the appropriate terminological use of “weapon system,” “weapons system,” and “weapons systems,” see Sharon Weinberger, *How To: Speak Pentagon*, WIRED (May 14, 2008), <https://perma.cc/MTH8-NSU5>.

18. Aaron R. Petty, *Mass Atrocity Prevention Operations: A SOF Core Activity in Support of Great Power Competition*, 7 SPECIAL OPERATIONS J. 55, 57 (2021).

principles of the laws of war that were set down in an era that could not possibly have considered the ways in which states now compete against each other. An understanding that existing law prohibits this sort of conduct would benefit the United States and its allies while offering some measure of protection to individual migrants against the possibility of being weaponized by an unscrupulous state. First, the weaponization of migrants could be deemed a violation of international law relating to armed conflict. While some states may have little compunction about violating either international norms generally or those relating to migrants specifically, treating the weaponization of migrants as a law of war issue raises the stakes in a way that may dissuade its use. Second, to the extent this type of conduct is not already prohibited, the United States should engage in “lawfare” to establish the principle. For a variety of reasons, the United States is unlikely to begin weaponizing migrants against one of its neighbors.¹⁹ Since competitors and spoilers are far more likely to engage in this type of conduct, it makes sense as a matter of legal policy to advocate for a consensus that it is not legally permissible. If competitors know that such actions will be held out as a violation of the law of war, and that as a type of “armed attack” it may legitimately provoke retaliation, they may be less likely to engage in this sort of conduct in the first place. Deterring the threat and actual weaponization of migrants would improve the security posture of the United States and reduce the likelihood that migrants actually find themselves weaponized.

II. THE STRATEGIC ENVIRONMENT

There has always been a social dimension to warfare, and society is always a relevant consideration in strategy. But “its centrality to twenty-first-century conflict has become extreme. Virtually all the actors now challenging the West—large and small, state and non-state, from Al-Qaeda and Hamas to China and Russia—have adopted multifaceted strategies with society at their core.”²⁰ Conversely, it has long been hypothesized that democracies rarely go to war with each other due to a lack of willingness on the part of the respective populations.²¹

Because societal attitudes can have strategic consequences, they can be strategic vulnerabilities exploited through “political warfare.” The roots of political warfare are evident in the writings of foundational theorists of military strategy including Clausewitz and Sun Tzu. George Kennan suggested,

[p]olitical warfare is the logical application of Clausewitz’s doctrine in time of peace. In broadest definition, political warfare is the employment of all the means at a nation’s command, short of war, to achieve its national objectives.

19. See Ariel E. Levite & Jonathan (Yoni) Shimshoni, *The Strategic Challenge of Society-centric Warfare*, 60 SURVIVAL 91–118, 99 (Dec. 2018-Jan. 2019) (noting that apart from the geographic improbability, weaponized migration is a “method[] that the West is loathe to use in retaliation”).

20. *Id.* at 92.

21. See, e.g., Hyung Min Kim & David L. Rousseau, *The Classical Liberals Were Half Right (or Half Wrong): New Tests of the “Liberal Peace”*, 1960–88, 42 J. OF PEACE RSCH. 523–543, 538 (2005).

Such operations are both overt and covert. They range from such overt actions as political alliances, economic measures (such as . . . the Marshall Plan), and “white” propaganda to such covert operations as clandestine support of “friendly” foreign elements, “black” psychological warfare and even encouragement of underground resistance in hostile states.²²

This description overlaps significantly with what British strategist Basil Liddell Hart called the “indirect approach,” which follows from Sun Tzu’s precepts to “[s]ubdue the enemy without fighting’ and ‘[a]void what is strong to strike what is weak.’”²³ These “[i]ndirect methods ‘endow warfare with intelligent properties that raise it above the brute application of force,’” and can include information operations, psychological operations, cyber attacks, proxy warfare, and some types of special operations.²⁴

This is the current strategic environment in which the United States finds itself. Derek Bernsen has suggested that “[t]he U.S. is already at war, and Great Power Competition is that war.”²⁵ But both China and Russia are well aware that a direct military confrontation with the United States would be unwise.²⁶ Therefore, they engage in competition below the level of armed conflict by applying national power through other means. Conventional military power still matters a great deal, but states—and nuclear-capable states in particular—exercise their coercive power indirectly.²⁷ In a sense, irregular warfare is no longer an adjunct to conventional military power. Instead, as Devin Knoll and others suggest, strategic competition requires an amalgamation of irregular and conventional warfare because irregular warfare frames conventional capabilities.²⁸

It may also be helpful to further differentiate between the types of gray zone activities. Some conduct in the gray zone could be understood broadly as preparation of the environment, to stack the odds in favor of conventional forces should their employment become necessary. Others, however, are not intended to achieve objectives in advance and in support of conventional forces but are entirely independent of the possibility of conventional warfare. These independent gray zone activities are designed to destabilize, delegitimize, or otherwise weaken an adversary through means short of kinetic warfare to avoid reciprocal

22. George F. Kennan, Policy Planning Staff Memorandum 269, U.S. Dep’t of State (May 4, 1948) <https://perma.cc/E8A4-N2SM>.

23. Andrew Mumford, *The New Era of Proliferated Proxy War*, in THE STRATEGY BRIDGE (Nov. 16, 2017), <https://perma.cc/U2YA-8C5E>.

24. *Id.* (quoting Basil Liddell Hart, STRATEGY: THE INDIRECT APPROACH 17 (rev. ed. 1967)).

25. Derek Bernsen, *War in All but Name*, THE STRATEGY BRIDGE (Apr. 26, 2021), <https://perma.cc/S3CY-KRF4>.

26. Bernsen, *supra* note 25.

27. Mumford, *supra* note 23 (“The resurgence of proxy warfare (a type of conflict long associated with the Cold War) does not reinvest the wheel in strategic terms. Indeed, in many ways contemporary proxy warfare is the latest iteration of what Sir Basil Liddell Hart labelled the *indirect approach*.”).

28. Devin Knoll, Kevin Pollpeter & Sam Plapinger, *China’s Irregular Approach to War: The Myth of a Purely Conventional Future Fight*, MOD. WAR INST. AT WEST POINT (Apr. 27, 2021), <https://perma.cc/UEZ8-7TS6>.

kinetic strikes in response—“measured attempts to revise the status quo without provoking outright war.”²⁹

While irregular warfare in support of conventional forces has a lengthy pedigree, the novelty of “independent”-type gray zone activity aims to achieve military objectives while remaining largely unconstrained by either the laws of war or even general international consensus on what conduct is acceptable.³⁰ Often these activities are undertaken in non-traditional domains, including disinformation, cyber intrusions, and space, where the strength of the rules-based order is less fully developed. In some instances, it may be difficult to meaningfully distinguish where the conduct in these domains becomes “militarized” and how to distinguish such uses from the use of non-military elements of national power in, for example, the diplomatic or economic domains. Both Russia and China engage in this sort of conduct regularly and take full advantage of the existing ambiguities. Indeed, it should be little surprise that “[i]nformation warfare, combined with political and economic acts of aggression, comprises the majority of actions between the United States and Russia, and the United States and China.”³¹

Russia intentionally blurs these lines to achieve national objectives. Often referred to as the “Gerasimov Doctrine”³² or “New Generation Warfare,”³³

Russia’s contemporary non-linear-warfare doctrine, in keeping with the tsarist and, even more so, Soviet-Leninist strategic tradition, reflects a society-centric paradigm. It is a multidimensional and multidisciplinary strategy that consciously blurs the classical distinctions between warriors and non-combatants, front and rear, peace and war, state and proxies, and fact and fiction; and which employs a variety of tools – military technology and operations, information and cyber, economic pressure, ethnic bridgeheads and sensitivities – in order to manipulate both rival societies and its own.³⁴

China is pursuing a similar path, seeking to integrate instruments of national power including economics, demographics, information, cyber, and command and control³⁵ because Chinese doctrine views the use of non-military sources of

29. Joshua Haste, *Just War in the Grey Zone*, PROVIDENCE (Sept. 9, 2020), <https://perma.cc/C27L-VC52>.

30. See, e.g., Yevgeny Vindman, *Is the SolarWinds Cyber Attack an Act of War? It Is, If the United States Says It Is*, LAWFARE (Jan. 26, 2021), <https://perma.cc/Y5W9-GY6G>.

31. Bernsen, *supra* note 25.

32. Camilla G. Cooper, *From Preparing for War to Protecting the Peace: Legal Hurdles for Effectively Dealing with Hybrid Threats in NATO*, 59 MILITARY L. & L. OF WAR REV. 142, 145 (2021).

33. JOHN CHAMBERS, COUNTERING GRAY ZONE HYBRID THREATS: AN ANALYSIS OF RUSSIA’S ‘NEW GENERATION WARFARE’ AND IMPLICATIONS FOR THE US ARMY 24–29 (2016), <https://perma.cc/C3UJ-H35Z>.

34. Levite & Shimshoni, *supra* note 19, at 98.

35. *Id.* at 100 (“China’s strategic response is similar to Russia’s, but also distinct. As embodied in the country’s own variant of multi-domain warfare, the Chinese pursue, both offensively and defensively, the logical integration of traditional military technologies and operations with a variety of societal tools and capabilities encompassing geo-economics and demographic manipulation (including forced

power as essential to victory in a conventional conflict.”³⁶ As discussed in *Unrestricted Warfare*, “there is nothing in the world today that cannot become a weapon, and this requires that our understanding of weapons must have an awareness that breaks through all boundaries.”³⁷ For example “a single man-made stock-market crash, a single computer virus invasion, or a single rumor or scandal that results in a fluctuation in the enemy country on the Internet, all can be included in the ranks of new-concept weapons.”³⁸ These are “still weapons in the narrow sense” because they are “capable of inflicting material or psychological casualties on an enemy.”³⁹ And they are capable of inflicting casualties because they “are closely linked to the lives of the common people.”⁴⁰

The authors of *Unrestricted Warfare* suggest that “people will awake to discover with surprise that quite a few gentle and kind things have begun to have offensive and lethal characteristics.”⁴¹ As a result, it has been suggested that the United States needs to “increase awareness of the second-order consequences of subtle activities that may not register on a Western military planner’s day-to-day radar, and of the strategic impact that the PLA intended without escalating to war.”⁴²

The weaponization of migrants is precisely this sort of gray zone activity that falls below the traditional threshold of open warfare but has substantial potential to disrupt, destabilize, or coerce targets without necessarily (or likely) drawing a military response.⁴³ Similar to other gray zone domains, it is a type of “societal warfare,”⁴⁴ in which challengers seek to “influence behavior of their targets by exploiting the existence of competing domestic interests within the target state(s) and by manipulating the costs or risks imposed on their civilian population(s).”⁴⁵

The instrumentalization of population flows may be a favorite of weaker states to extract concessions against stronger ones, but strategic competitors use this

migration and resettlement); information, propaganda and cyber; and diverse mechanisms for strict and intensifying domestic control and mobilization.”)

36. Knoll et al., *supra* note 28.

37. QIAO & WANG, *supra* note 2, at 16. *But see* Peter Mattis, *So You Want To Be a PLA Expert?*, WAR ON THE ROCKS (June 2, 2015), <https://perma.cc/BD2K-WH7W> (identifying the limitations of relying on *Unrestricted Warfare*). *The Science of Military Strategy*, an official statement of PLA doctrine, does not discuss the issue, *see* CHINESE AEROSPACE STUD. INST., IN THEIR OWN WORDS: SCIENCE OF MILITARY STRATEGY (2020), <https://perma.cc/E954-R3J3>, so *Unrestricted Warfare* may be the best insight available.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 17.

42. Kevin Bilms, *Beyond War and Peace: The PLA’s “Non-War Military Activities” Concept*, MOD. WAR INST. AT WEST POINT (Jan. 26, 2022), <https://perma.cc/5CDJ-ZZRP>.

43. Matthew Holehouse, *EU Chief: Migrant Influx Is “Campaign of Hybrid Warfare” By Neighbors to Force Concessions*, TELEGRAPH (Oct. 6, 2015), <https://perma.cc/J67G-9GSX> (noting weaponization of migrants is a type of “hybrid warfare”).

44. Kelly M. Greenhill, *Asymmetric Advantage: Weaponizing People as Nonmilitary Instruments of Cross-Domain Coercion*, in CROSS-DOMAIN DETERRENCE: STRATEGY IN AN ERA OF COMPLEXITY 259, 275 (Jon R. Lindsay & Erik Gartzke eds., 2019) [hereinafter Greenhill, *Asymmetric Advantage*].

45. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 3.

tactic as well. Moreover, larger states may have the capacity to exacerbate existing population flows that would not otherwise be significant,⁴⁶ or to create them in the first place. Of particular concern, Russia “sees some benefits in the destabilizing effects of large-scale migration to the EU, particularly as it relates to the rise of xenophobia and political parties skeptical of the European project and the broader liberal order.”⁴⁷

For example, in March 2016, General Philip Breedlove, then-Supreme Allied Commander Europe, accused Russia of intentionally exacerbating the migrant flows from Syria in order to destabilize the EU. General Breedlove suggested that “[t]ogether, Russia and the Assad regime are deliberately weaponizing migration from Syria in an attempt to overwhelm European structures and break European resolve.”⁴⁸ In particular, he suggested the Assad regime’s use of barrel bombs and chlorine gas, which have “absolutely no military utility” was designed to spur the mass movement of civilians out of Syria and into Europe in order to “make them a problem for Europe [and] to bend Europe [to their will].”⁴⁹ Sadly, the intentional targeting of civilians by the Assad regime, Russia’s proxy in Syria, appears to have been but the dress rehearsal for Russia’s intentional targeting of civilians in Ukraine.

III. THE WEAPONIZATION OF MIGRANTS

Migration flows often generate conflict both within and between states.⁵⁰ Indeed, “[m]igration and refugee flows have likewise been identified as one of the most significant causes of armed conflict in the post-Cold War period.”⁵¹ However, there is “widespread belief that the majority of outflows are simply the unintended consequences of man-made or natural humanitarian disasters—for example, wars, floods, famines”⁵² Certainly, some migrant flows are the unintended

46. *Id.* at 49-50 (noting that coercers may increase “the size, scale, and scope of an existing outflow, shifting its character (e.g., by adding more members of either ‘undesireable’ or particularly sympathetic groups), making escalatory threats, or simply directly lobbying members of pro- and anti-refugee/migrant camps”).

47. THE WHITE HOUSE, REPORT OF THE IMPACT OF CLIMATE CHANGE ON MIGRATION 10 (Oct. 2021).

48. *Id.* (quoting *Full Spectrum Security Challenges in Europe and Their Effects on Deterrence and Defense Before the H. Comm. on the Armed Services*, 114th Cong. 4 (2016) (statement of General Philip Breedlove, Commander, United States European Command)).

49. *Full Spectrum Security Challenges in Europe and Their Effects on Deterrence and Defense Before the H. Comm. on the Armed Services*, 114th Cong. 12 (2016) (statement of General Philip Breedlove, Commander, United States European Command).

50. Myron Weiner, *Security, Stabilization, and International Migration*, 17 INT’L SEC., 91 (Winter 1992/93) [hereinafter Weiner, *Security*].

51. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 6 (citing Idean Salehyan & Kristian Gleditsch, *Refugees and the Spread of Civil War*, 60 INT’L ORG. 335 (2006)). See also Idean Salehyan, *The Externalities of Civil Strife: Refugees as a Source of International Conflict*, 52 AM. J. POL. SCI. 787, 787–801 (2008).

52. Kelly M. Greenhill, *Strategic Engineered Migration as a Weapon of War*, 10 CIV. WARS 6, 6 (2008) [hereinafter Greenhill, *Strategic Engineered Migration*]; see also JOHN HOPE SIMPSON, THE REFUGEE PROBLEM: REPORT OF A SURVEY 4 (1939) (noting “[w]ars between nations have always created refugees”).

consequences of policy choices, or begin out of necessity due to *force majeure*, but “international population movements are often impelled, encouraged, or prevented by governments or political forces.”⁵³ Indeed, many, and historically perhaps most, are “created as the direct result of political decisions taken by sovereign states, often for specific political and/or military ends.”⁵⁴ And these decisions have occurred in virtually every corner of the globe,⁵⁵ and with a large degree of regularity.⁵⁶

This deliberate use of migrant flows to achieve political or military objectives is a type of weaponization. As Myron Weiner has explained, “[f]orced emigration can be an instrument by which one state seeks to destabilize another, force recognition, stop a neighboring state from interfering in its internal affairs, prod a neighboring state to provide aid or credit in return for stopping the flow, or extend its own political and economic interests or those of a dominant ethnic group through colonization or decolonization.”⁵⁷ While migrant flows are very often humanitarian crises, to see them exclusively through a lens of humanitarianism would be naïve:⁵⁸ “They do not merely happen; more often they are made to happen.”⁵⁹

Weaponization is not a new idea, nor is it a new phenomenon.⁶⁰ Even considering only the context of refugees, the idea of weaponization has been considered for more than two decades. Following the Kosovo conflict in 1999, “it was widely argued that a new and different armament—the refugee as a weapon—had entered the arsenals of the world.”⁶¹ And the list of things that can be weaponized continues to grow. For example, Russia’s invasion of Ukraine has prompted fears of weaponization of food supply lines.⁶² Use of the phrase “migrants as a

53. Myron Weiner, *Introduction: Security, Stability and International Migration*, in INTERNATIONAL MIGRATION AND SECURITY s1, 4 (Myron Weiner ed., 1993) [hereinafter Weiner, *International Migration*].

54. Greenhill, *Strategic Engineered Migration*, *supra* note 52, at 6.

55. *Id.* at 7.

56. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 22 (“there has still been on average at least one attempt at coercive engineered migration per year since the Refugee Convention came into force.”).

57. Weiner, *Security*, *supra* note 50, at 102–03. See also Gil Loescher, *Refugee Movements and International Security: Strategic Roots of Refugee Movements*, 268 THE ADELPHI PAPERS 28, 31 (1992).

58. Weiner, *Security*, *supra* note 50, at 103. See also Loescher, *supra* note 57, at 31 (“The export of refugees can also be used as a bargaining chip in inter-state negotiations over trade and bilateral political recognition.”).

59. Weiner, *International Migration*, *supra* note 53, at 5.

60. See GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 262 (noting the weaponization of migrants has “has a long and influential history that includes both war and peacetime use.”). In other fields, weaponization of both knowledge and of natural resources have been noted recently, to take just two examples. See Michael Patrick Lynch, *Truth as a Democratic Value*, in TRUTH AND EVIDENCE: NOMOS LXIV 15–34, 16 (Melissa Schwartzberg & Philip Kitcher eds., 2021) (“[T]he very democratization of knowledge that the Internet had briefly promised to bring has been weaponized”); see also International Institute for Strategic Studies, *Climate Change and Weaponization of Natural Resources*, INT’L INST. FOR STRATEGIC STUD. (Feb. 8, 2022), <https://perma.cc/GNJ3-XK3P>.

61. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 262.

62. Michael N. Schmitt, *Weaponizing Food*, ARTICLES OF WAR (Mar. 28, 2022), <https://perma.cc/9YS4-GC77>; Ian Ralby, David Soud & Rohini Ralby, *Why The U.S. Needs to Act Fast to Prevent Russia From Weaponizing Food Supply Chains*, POLITICO (Feb. 27, 2022), <https://perma.cc/RPT4-8K8R>.

weapons system” reflects both the instrumentalization and weaponization of migrants by outside forces (i.e., it captures that the migrants are being acted upon and largely lack agency).⁶³

Lukashenko is hardly alone in drawing on this principle. Former Libyan leader Muammar al-Ghaddafi used it successfully against the EU⁶⁴ and Turkish President Recep Tayyip Erdoğan has done so as well.⁶⁵ In response to European criticism of Turkish offensives in northern Syria, Erdoğan responded, “Hey EU, wake up! I say it again; if you try to frame our operation there as an invasion, our task is simple: we will open the doors and send 3.6 million migrants to you.”⁶⁶ Hosting Syrian refugees has allowed Turkey to concurrently solidify conservative support by framing humanitarianism as a religious imperative; justify its foreign interference as pretending to a neo-Ottoman empire; and brandish a weapon against the European Union (EU) to extract policy concessions.⁶⁷

Indeed, “[t]he weaponization of refugees has become a fundamental feature . . . of the interactions between Turkey and Europe.”⁶⁸ A March 18, 2016 agreement between the EU and Turkey was made under the shadow of threats from Turkish officials to accede to their demands or face significant migration-related consequences.⁶⁹ The EU was politically trapped and Turkey knew it.⁷⁰ In addition to addressing the migration issue, EU member states also agreed to concessions on access to visas to EU countries for Turkish nationals and to revive discussions on Turkish EU membership.⁷¹ Overall, Erdoğan was able to use Syrian refugees as a bargaining chip in extracting billions in payments and political concessions from the EU.⁷²

63. I prefer use of the terms “weapons system” and “weaponization” to Greenhill’s catchier “weapons of mass migration” because it addresses the problem, identified by Marder, that the “weapons of mass migration” metaphor may work to the disadvantage of the migrants themselves. See Lev Marder, *Refugees Are Not Weapons: The “Weapons of Mass Migration” Metaphor and Its Implications*, 20 INT’L STUD. REV. 576, 579–81 (2018). Treating weaponization of migrants as a law of war violation refocuses on the humanitarian aspect of the issue and responds to a security problem without securitizing the problem. See Anne Hammerstadt, *The Securitization of Forced Migration*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 265, 270 (Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long & Nando Sigona eds., 2014) (noting the dehumanizing effects of constructing migrants as enemies).

64. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 1-2.

65. Arthur Jennequin, *Turkey and the Weaponization of Syrian Refugees*, BRUSSELS INT’L CTR. 1 (Jan. 2020), <https://perma.cc/5PLE-K2CM>.

66. *Id.*

67. *Id.* at 2.

68. *Id.*

69. Kelly M. Greenhill, *Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis*, 22 EUR. L. J. 317, 325 (2016) [hereinafter Greenhill, *Open Arms*].

70. *Id.* at 325.

71. *Id.* at 327-28.

72. Ordoñez, *supra* note 1.

Erdoğan's interactions with the EU reflect one of two types of coercion that can be exercised through the threat of weaponized migration.⁷³ "One is predicated on overwhelming the capacity of the target state to absorb or manage migration crises."⁷⁴ For example, "Arab states that forced out their Jewish communities after Israeli independence in 1948 expected the massive influx to overwhelm the newly established state (whose population doubled in three years)."⁷⁵ The second type, exemplified by Erdoğan and Lukashenko, is agitation. Agitation is "predicated on a kind of political blackmail aimed at exploiting competing political interests within the target state."⁷⁶ "[M]ost attempts in the developed world focus more directly on agitating" and "the probability of coercive success tends to be greater in the case of agitating" as well.⁷⁷ This is because agitation "merges the international and domestic concerns of a state into one and transforms its domestic normative and political virtues into international bargaining vices."⁷⁸ In short, where weaponized migration is directed at a liberal democracy, it exploits the virtues of liberal democracy itself.⁷⁹

The problem is that there are more people in the world who want to leave their countries than there are other countries willing to accept them.⁸⁰ Because economically developed liberal democracies are often the intended destination of those who seek to emigrate, immigration is a significant topic of public debate and a significant concern of governments and citizens in many of these countries.⁸¹ Further, many migrants have experienced some form of insecurity, and many destination countries have adopted legal obligations with respect to the treatment of refugees.⁸² Migrants, including those whose movement has been caused or exacerbated by another government, may seek to claim refugee status in order to remain in countries in which they would otherwise have no claim to remain.

Although the populations of most liberal democracies are generally receptive to the idea of supporting individuals or small groups of "bona fide" refugees, there is also significant public concern that some claimants to refugee status are

73. Parallel differentiation between support to potential kinetic effects and supplanting the need for kinetic effects have been noted in other gray zone activities, particularly cyberspace. See Stephenie Gosnell Handler, *The New Cyber Face of Battle: Developing a Legal Approach to Accommodate Emerging Trends in Warfare*, 48 STAN. J. INT'L L. 209, 215–16 (2012).

74. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 262–63; see also Weiner, *International Migration*, *supra* note 53, at 7 ("A . . . type of forced emigration can be described as part of a strategy to achieve a foreign policy objective. Governments may, for example, force emigration as a way of putting pressure on neighboring states.")

75. Dowty & Loescher, *supra* note 14, at 50.

76. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 262–63.

77. *Id.* at 263.

78. *Id.* at 262–63.

79. See Greenhill, *Strategic Engineered Migration*, *supra* note 52, at 16.

80. Weiner, *International Migration*, *supra* note 53, at 2.

81. *Id.* at 1.

82. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150.

intending to emigrate for economic or other reasons that do not require humanitarian protection. A recent survey by the nonpartisan Pew Research Center found that about half of Americans believe the United States has no responsibility to accept refugees at all, and public opinion for much of the 20th Century disapproved of admitting large numbers of them.⁸³ Public sentiment in Europe is broadly similar.⁸⁴ In Britain, “[m]any feel that the refugee crisis may have weighed heavily on public opinion in the UK in the run-up to the Brexit referendum,”⁸⁵ and European Council President Donald Tusk warned that the failure to find a solution to the divergent national responses to the migrant crisis could lead to the EU failing as a political project.⁸⁶ Indeed, the recent episode in Belarus, “exposed the tension—some might say the hypocrisy—between the liberal ideals on which the EU was founded and the self-interested behavior of individual European nations.”⁸⁷

Liberal democratic states have particular difficulty defending against weaponized humanitarian crises,⁸⁸ and that, combined with their access to financial and political resources, has made them “the most popular targets of this kind of coercion in the last half century.”⁸⁹ When attempting to balance the humanitarian concerns and legal obligations with the potential strain to the social fabric, financial resources, and political stability there are no good answers, only vulnerabilities.⁹⁰

“Like immigration and refugee policy more generally, real and threatened migration crises tend to split societies into (at least) two mutually antagonistic and often highly mobilized groups: the pro-refugee/migrant camp and the anti-refugee/migrant camp.”⁹¹ This domestic disagreement can be exploited by “challengers on the international level [who] seek to influence target behavior on the domestic level by engaging in a kind of norms-enhanced political blackmail”⁹²—a “potential wedge through which they can inflict pain that can

83. Jens Manuel Krogstad, *Key Facts About Refugees to the U.S.*, PEW RSCH. CTR. (Oct. 7, 2019), <https://perma.cc/C4XJ-ZYM4>.

84. GREENHILL, *WEAPONS OF MASS MIGRATION*, *supra* note 11, at 43.

85. Hans Schoemaker, *Allegations of Russian Weaponized Migration Against the EU*, MILITAIRE SPECTATOR, Aug. 2019, at 361.

86. Greenhill, *Open Arms*, *supra* note 69, at 318.

87. Walt, *supra* note 10.

88. Levite & Shimshoni, *supra* note 19, at 99.

89. GREENHILL, *WEAPONS OF MASS MIGRATION*, *supra* note 11, at 4.

90. Myron Weiner, *Bad Neighbors, Bad Neighborhoods: An Inquiry into the Causes of Refugee Flows*, 21 INT’L SEC. 5, 5 (Summer 1996).

91. GREENHILL, *WEAPONS OF MASS MIGRATION*, *supra* note 11, at 3–4, 40, 43 (“[M]igration crises tend to engender diverse and often quite divisive responses within the societies expected to bear or absorb their consequences. During most crises, for instance, some segment of society will strongly support offering protection, refuge, or asylum to the displaced, whereas another segment will be steadfastly opposed. . . Indeed, in contrast to most foreign policy issues, refugees and immigration have engaged Western publics like few others, especially in regions that have been host to the largest numbers of illegal migrants and asylum seekers.”).

92. Kelly M. Greenhill, *Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion*, 9 STRATEGIC INSIGHTS 116, 124 (Spring-Summer 2010).

endanger a leader's relationship with his or her core supporters or even stimulate general unrest within a target state."⁹³

A liberal democratic target state has little freedom of action when faced with such a situation. First, they are less likely to be taken seriously if they threaten a course of action with serious negative domestic repercussions.⁹⁴ And because there are likely to be vocal, organized, resourced, and diametrically opposed groups on both sides, *any* course of action other than acceding to the sending state's demands, is likely to engender serious negative domestic repercussions. Additionally, any course of action that could be perceived or communicated as illiberal risks imposition of hypocrisy costs—"those symbolic political costs that can be imposed when there exists a real or perceived disparity between a professed commitment to liberal values and norms and demonstrated actions that contravene such a commitment."⁹⁵ In short, "liberal democratic targets can be hobbled by their very nature in international crisis bargaining."⁹⁶

Perhaps somewhat surprisingly given its relative geographic isolation, "[t]he United States has been the most popular target of all."⁹⁷ U.S. *National Intelligence Estimates* have warned of vulnerability in this context and have recommended adopting preventive measures.⁹⁸ Even the White House has acknowledged that "adversaries could incite or aid irregular migration to destabilize U.S. allies/partners."⁹⁹ Like other liberal democracies, the United States is likely to find itself trapped between two competing domestic imperatives, both of which constrain its ability to respond credibly to threats of weaponized migration.¹⁰⁰ Kathleen Hicks and others have suggested that "[a]s it pursues its objectives, the United States should not lose sight that its laws, principles, and values are strategic *advantages* in gray zone competition."¹⁰¹ Perhaps our humanitarian commitments are a strategic advantage; whether they are or not, they reflect our values. But equally we must not lose sight that the data suggest those same laws, principles, and values can also be a strategic vulnerability.

93. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 43.

94. *Id.* at 263.

95. *Id.* at 4.

96. *Id.* at 265.

97. *Id.* at 18. See also Greenhill, *Virtues*, *supra* note 11, at 216 ("As they are most exposed to the vagaries of pluralism, we should expect the most highly liberalized and decentralized 'soft' states (such as the USA) to be most vulnerable of all; it is thus unsurprising that the USA appears in fact to have been the most popular target, with EU member states in second place and growing in popularity over time.").

98. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 22. See also Greenhill, *Virtues*, *supra* note 11, at 217; DAVID F. GORDON, GEORGE C. FIDAS & DEMETRIOS PAPADEMETRIOU, GROWING GLOBAL MIGRATION AND ITS IMPLICATIONS FOR THE UNITED STATES NATIONAL INTELLIGENCE ESTIMATE 2001-02D 6, 30 (2001), <https://perma.cc/2QA5-ZYDB>.

99. THE WHITE HOUSE, REPORT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION 9 (2021).

100. Kelly M. Greenhill, *Engineered Migration and the Use of Refugees as Political Weapons: A Case Study of the 1994 Cuban Balseros Crisis*, 40 INT'L MIGRATION 39, 42 (2002) [hereinafter Greenhill, *Balseros*].

101. KATHLEEN H. HICKS, LINDSEY R. SHEPPARD, ALICE HUNT FRIEND, HIJAB SHAH, ASYA AKCA & JOSEPH FEDERICI, CSIS, BY OTHER MEANS: PART I: CAMPAIGNING IN THE GRAY ZONE 19 (2019).

IV. THE CHALLENGE

The question for the United States and its allies is how their strategic vulnerability to weaponized migration can be mitigated. While “potential target states can and should be better prepared for the significant possibility that their sheer material strength may offer insufficient protection against an unconventional attack,” it is unclear what, exactly, should be done.¹⁰² Various potential solutions to the problem of weaponized migration have been suggested. We could, as Stephen Walt seems to suggest, simply throw up our hands and do nothing, while lamenting the likelihood of recurrence.¹⁰³ Seeking compensation before the International Court of Justice, as Piotr Łubiński proposes, is unlikely to succeed in actual repayment, is not a significant deterrent, and in any event cannot compensate for political destabilization.¹⁰⁴ Kelly Greenhill recommends that potential targets could “develop and be prepared to implement comprehensive and *politically acceptable* contingency plans,” “launch education campaigns with the goal of teaching the public the real economics of immigration,” “actively cultivate the support of other states that could aid in burden sharing,”¹⁰⁵ or “conduct (more and more visible) exercises designed to combat migration-related unnatural disasters.”¹⁰⁶ None of these options is satisfactory.

Politically acceptable contingency plans and “combatting migration-related unnatural disasters” are limited by deep domestic political division on immigration issues.¹⁰⁷ Permitting entry even temporarily for refugee status determinations is politically fraught, as has been aptly illustrated by President Biden’s decision to extend the Trump-era Migrant Protection Protocols, otherwise known as the “Remain in Mexico” policy, and the debate in Congress over whether the Title 42 health-related restrictions on entry should be extended.¹⁰⁸ Denying or diminishing opportunities for migrants to seek asylum is equally divisive.¹⁰⁹ Education campaigns are unlikely to change that anywhere, and especially not in small countries where migrant flows of significant size could be perceived as a threat to cultural or the social fabric of the country, regardless of any potential economic benefit or humanitarian imperative. Burden sharing has not really worked even in the EU,

102. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 273; *see also* GORDON ET AL., *supra* note 98, at 6, 30.

103. Walt, *supra* note 10 (“I wish I knew how to solve this problem, but it’s a safe bet that it will get worse in the years ahead.”).

104. *See* Piotr Łubiński, *Hybrid Warfare or Hybrid Threat – The Weaponization of Migration as an Example of the Use of Lawfare – Case Study of Poland*, 51 POLISH POL. SCI. Y.B. 1 (2022).

105. Greenhill, *Balseros*, *supra* note 100, at 64.

106. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 275.

107. The willingness of countries such as Poland and Hungary to host Ukrainians following Russia’s 2022 invasion appears to be an outlier and may be attributable to some combination of those countries’ attitudes toward Russia resulting from recent history under Soviet domination, outrage at Russian conduct, and a degree of cultural, ethnic, and religious affinity.

108. Diana Roy, *Why Biden Is Restarting the Trump-Era ‘Remain in Mexico’ Program*, COUNCIL ON FOREIGN RELATIONS (Jan. 27, 2022), <https://perma.cc/Y9QC-WLT4>.

109. *See, e.g.*, *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2021) (challenging the Migrant Protection Protocols program).

where the need to cultivate such support should (theoretically) be lower than for other countries that are not part of a super-national political union.¹¹⁰ Alternatively, states could simply accede to the coercer's demands but, like negotiating with small children or terrorists, giving in to demands encourages repetition.¹¹¹ Other options are necessary. One such option is to impose countervailing or reciprocal costs. Specifically, I suggest reframing the problem as one of self-defense under traditional law of war principles. Reframing the issue this way might dissuade states from creating or exacerbating migrant flows in the first place, which in turn could significantly improve the physical security of migrants themselves.¹¹²

Gray zone tactics “seek to leverage the costs of war as a deterrent, at once applying coercive pressure against their targets while remaining beneath the traditional thresholds of *casus belli* for retaliatory actions.”¹¹³ It follows that if the conduct no longer falls below the *casus belli* threshold, the risk of retaliatory actions increase, and the cost of war is now a deterrent to the adversary contemplating gray zone activities in the first place.¹¹⁴ However, such costs would be effective only if they do not require any further political action—as noted above, threats to impose costs that *do* require action are often ignored because they carry unpalatable domestic consequences within the target state.¹¹⁵ Instead, what is needed is a cost that is self-imposed; one that flows directly and automatically from engaging in the proscribed conduct *without* the need for the target state to do anything further to impose it. Such additional costs could be imposed by changing the legal framework against which the conduct is measured.

Some norms are more easily violated than others. And—Russia's recent conduct in Ukraine notwithstanding—the fundamental principles of the law of war as embodied in the Hague and Geneva Conventions is about as hard as

110. See, e.g., Linda Basile & Francesco Olmastroni, *Sharing the Burden in a Free Riders' Land: The EU Asylum and Migration Policy in the Views of Public Opinion and Politicians*, 59 EUR. J. OF POL. RSCH. 669 (2019).

111. Greenhill, *When Migrants Become Weapons*, *supra* note 5, at 160.

112. This differs from the common conception of securitization of forced migration. See, e.g., Hammerstadt, *supra* note 63. As used here, securitization is not concerned with the security implications of any individual or group of migrants, or with balancing the security of the receiving state against humanitarian considerations. Security in the sense used here concerns state intent and instrumentalization underlying the movement, and the purposeful intent to disrupt, destabilize, and invade sovereignty. Without framing weaponized migration as securitization in this sense, there is no basis on which to seek the protection of the law of war.

113. Hastey, *supra* note 29.

114. For example, Chinese approach to warfare “involves a broad array of nonmilitary types of antagonism, including the use of illicit networks, industrial espionage, cyberattacks, propaganda, bribery of public officials, and intimidation—all of which intentionally avoid direct military confrontation with the United States.” Robert S. Burrell, *How to Integrate Competition and Irregular Warfare*, MOD. WAR INST. AT WEST POINT (Aug. 5, 2021), <https://perma.cc/C992-FDBU>. For Russia, gray zone activities can “involve[] sophisticated tools, including proxies, cyber warfare, low-cost technologies, selective repression, and even murder.” Eliot A. Cohen, *The Return of Statecraft: Back to Basics in the Post-American World*, FOREIGN AFF. 117, 121 (May/June 2022). One containment method would be to narrow the category of what is insufficient to trigger a response.

115. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 263.

international public law gets. Countries that may be willing to weaponize migrants now may be less inclined to do so if it is broadly understood as an act of aggression. Where weaponized migration fits into the international law framework remains unsettled, so there is space to advocate for where it should fall.¹¹⁶ And while “the cost of violating international laws may be regarded as low relative to the costs of compliance” in the refugee context, the costs are likely greater when the issue is framed as one of aggression of one sovereign state against another rather than protection of vulnerable individuals.¹¹⁷ Indeed, this may have been a motivating factor behind Ylva Johansson’s suggestion that Lukashenko was “using human beings in an act of aggression.”¹¹⁸

Another factor to consider is the “‘deterrence gap’ in the gray zone where the United States is too slow or too risk-averse to respond to non-conventional provocations.”¹¹⁹ Advocating for a legal rule that addresses non-conventional provocations might help to mitigate this lack of agility or unwillingness to accept risk. Finally, from a humanitarian perspective, raising the stakes on the legality of the conduct at issue may reduce the likelihood of it occurring in the first place, which benefits the migrants themselves as well as the intended target state.¹²⁰ Maintaining the rule of law is a key element of defeating gray zone threats, but “[d]oing so will require reinforcing norms in some places and creating new norms and adapting institutions in others. . . This includes placing a foreign policy priority on establishing norms in largely ungoverned domains.”¹²¹ Weaponization of migrants is one such ungoverned domain where the United States and its allies can establish norms to mitigate their vulnerability to this gray zone threat.

A. Define the Prohibition

First, the legal prohibition as it is found in existing international law must be clearly defined. “Treaties shape state expectations about what conduct is unacceptable,” but applying old rules to new domains requires new interpretations.¹²² Articulating an interpretation of how existing law applies in new domains signals to other states what conduct is unacceptable, and where coercive responses are understood to be permissible. The possibility of coercive measures may deter

116. Greenhill, *Virtues*, *supra* note 11, at 218 (“[T]here is the perplexing question of where CEM fits within the universe of perverse and un-humanitarian consequences of state-level pushback against the gradual expansion and institutionalization of human rights norms and international legal protection, traditionally reflected in national and regional migration and social policy.”).

117. Greenhill, *Strategic Engineered Migration*, *supra* note 52, at 16.

118. Greenhill, *When Migrants Become Weapons*, *supra* note 5, at 156.

119. Katie Crombe, Steve Ferenzi & Robert Jones, *Integrating Deterrence Across the Gray – Making It More Than Words*, MIL. TIMES (Dec. 8, 2021), <https://perma.cc/Z966-8WPX>.

120. Barry R. Posen, *Military Responses to Refugee Disasters*, 21 INT’L SEC. 72, 81 (Summer 1996) (evaluating potential military responses to displacement, cautioning against military intervention, and noting “[t]he ‘causes’ of mass population displacement, and the actual displacement, will likely be underway before rescuers decide to act”).

121. HICKS ET AL., *supra* note 101, at 24–25.

122. James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559, 559 (Aug. 2007).

some states from engaging in that conduct in the first place. Prorok and Appel found that “combatants are more likely to comply with the law when they anticipate third-party coercion and that third parties are more likely to coerce when they have both the willingness and opportunity to so.”¹²³ Thus, “combatants who interact with strong democratic alliance, trade, and IGO partners” are more susceptible to be coerced into complying with international law because those partners have the capacity to impose meaningful costs on noncompliance or to provide benefits for compliance.¹²⁴ In short, U.S. economic clout and military power mean that U.S. views about what conduct is prohibited under international law are likely to carry significant weight because the United States has the capacity to reward those who agree and to impose costs on those who disagree. This capacity, however, depends on a clearly defined legal obligation that makes violations readily identifiable.¹²⁵ States are more likely to avoid and respond to violations of “bright lines” than supposed violations where no bright line has been established.¹²⁶ Imposing costs for violations of norms that are not clearly established might even appear capricious and unpredictable.

If states accede to the view that the use of weaponized migration is contrary to the law of war, it would be reasonable to assume a high degree of compliance with that view in practice. Morrow has found that compliance with the law of war is greatest where individual soldiers lack the means to commit a violation without state sanction. For example, prohibited chemical and biological weapons have rarely been used—presumably because individual soldiers can use such weapons only if their governments issue them.¹²⁷ At the other end of the spectrum, proper treatment of prisoners and civilian detainees has a poor compliance record, again, because individual soldiers very often have the means to engage in mistreatment, even where it is prohibited by their own government.¹²⁸ While individual soldiers have the means to harm individual refugees, the weaponization of migrants en masse requires state involvement.¹²⁹ Thus, it is reasonable to suspect that if a norm against the weaponization of migrants were to emerge, it would largely be honored.

123. Alyssa K. Prorok & Benjamin J. Appel, *Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War*, 58 J. OF CONFLICT RESOL. 713, 713 (2013).

124. *Id.*

125. *Id.* at 717.

126. Morrow, *supra* note 122, at 561 (“States should be more likely to respond to violations that breach these legal ‘bright lines’ than to acts that are not clearly illegal.”).

127. *Id.* at 569.

128. *Id.*

129. Loescher, *supra* note 57, at 28 (“[L]arge-scale displacements are not just the result of external interventions or of random upheavals, conflicts and inequalities, but frequently stem from officially instigated or organized state actions.”).

B. Assess Intent and Impact

The rhetoric surrounding the weaponization of migrants can sometimes be hyperbolic. For example, Hungarian prime minister Viktor Orbán said that Syrian refugees “look like an army.”¹³⁰ Of course, it is inappropriate and not particularly useful to compare unarmed displaced migrants to an invading army, but that is not to say that the perception of the threat imposed by a large movement of people is not genuine. In some instances, “migrants can be a threat to [a] country’s political stability.”¹³¹ More importantly, however, is the potential for unregulated or mass migration to make “make people and governments feel insecure and under threat” regardless of how real the perceived threat may be.¹³² “[W]hat constitutes a threat—be it security, economic, social, or cultural—is as much a matter of perception as of objective reality,”¹³³ but it is the perception of insecurity that creates the conditions for strategic vulnerability.

Thirty years ago, Gil Loescher noted that “refugees have become instruments of warfare and military strategy.”¹³⁴ There is an “inconvenient, and oft ignored, truth that military assaults are far from the only way to undermine already fragile political bargains and governance arrangements (or to make citizens feel endangered, afraid and reactionary). Fears of irregular (mass) migration also do so, and do so at great potential cost to states’ leaders and to the laws, values and human rights norms they are (at least ostensibly) committed to uphold.”¹³⁵ As a result, “turning people into ‘demographic bombs’ has been an attractive and relatively successful instrument of cross-domain persuasion for those state and nonstate actors who are willing to employ it, despite the obvious moral and legal impediments to its use.”¹³⁶ For example, John McCain, speaking at the 2016 Munich Security Conference, suggested that Putin “wants to exacerbate the refugee crisis and use it as a weapon to divide the transatlantic alliance and undermine the European project.”¹³⁷ Similar to cyberattacks and information warfare¹³⁸—which likewise lack a robust governing legal framework—the real or threatened coercive weaponization of migration flows is a “kind of nonkinetic cross-domain influence.”¹³⁹ This is the strategic environment that allowed Martha Minow to conclude “the nature of warfare has changed; now refugees are the war.”¹⁴⁰

130. Greenhill, *Open Arms*, *supra* note 69, at 318.

131. Weiner, *International Migration*, *supra* note 53, at 9.

132. Greenhill, *Open Arms*, *supra* note 69, at 318.

133. *Id.* at 319.

134. Loescher, *supra* note 57, at 4–5.

135. Greenhill, *Open Arms*, *supra* note 69 at 318.

136. Greenhill, *Asymmetric Advantage*, *supra* note 44, at 261.

137. Schoemaker, *supra* note 85, at 363.

138. Laura B. West, *Beyond Fighting Words: Reconceptualizing Information Warfare and Its Legal Barriers*, 8 NAT’L SEC. L.J. 162 (2021); TOM NICHOLS, THE DEATH OF EXPERTISE 108–10 (2017) (observing that finding useful or accurate information on the Internet is made difficult by the noise created by the plethora of useless and inaccurate information); Vindman, *supra* note 30 (noting the ambiguity and competing frameworks governing use of force as applied in the cyber context).

139. Greenhill, *Asymmetric Advantage*, *supra* note 44, at 260.

140. Greenhill, *Strategic Engineered Migration*, *supra* note 52, at 6.

If migrants are bullets,¹⁴¹ or refugees are the war, then is not intentionally using migrants to inflict harm on an adversary an armed attack? There is a threshold question of what degree or type of harm is sufficient to reach this threshold. The assumption that anything other than bombs and bullets is fair game underlies nearly all gray zone competition. But finer distinctions can, and ought, to be made. “Some countries, such as France, are beginning to quantify what constitutes an act of war in cyberspace.”¹⁴² Former Estonian President Toomas Ilves explained, “you don’t need to physically attack a country to debilitate it.”¹⁴³ If a military objective is to destroy or debilitate say, a power station, for an indefinite period of time, does it really matter whether that is accomplished kinetically (by dropping a bomb on it) or electronically (by hacking into it)? If a Chinese military airplane intentionally releases something into the air with the purpose of degrading or disabling an Australian military airplane, does it really matter whether the thing released is shaped like chaff and travels slowly or shaped like a bullet and travels quickly?¹⁴⁴

When the Hague Conventions were adopted, the ways in which war could be waged were relatively few and acts of war relatively unambiguous.¹⁴⁵ States also had the courtesy to actually declare war from time to time, which made determinations of when the law of war applied to international armed conflict straightforward. Today, no one declares war, the ways in which wars are fought have multiplied, and the domains in which states compete with each other—other than through kinetic strikes—have grown exponentially. Gray zone competition assumes that certain conduct falls below the level of an armed attack, but it is not clear what constitutes an armed attack under Article 51 of the UN Charter.¹⁴⁶

141. During the 1980 Mariel Boatlift, a White House official described Castro’s expulsion of criminals and the mentally ill as “bullets aimed at the United States.” Dowty & Loescher, *supra* note 14, at 60.

142. Bernsen, *supra* note 25; Vindman, *supra* note 30 (noting France has taken the position that a cyber attack need not be physically damaging or destructive to reach the level of an armed attack). Likewise, the Netherlands appears to accept that cyber attacks need not have physical effects provided there are “very serious non-material consequences.” Letter from the Gov’t of the Kingdom of the Netherlands to the Parliament on the International Legal Order in Cyberspace, Ministry of Foreign Affairs, 1, 4 (July 5, 2019) (available online) (English translation). This position differs from the assessment of a conventional armed attack, which does not have gradations. Scale and effects is a framework to assess whether a *nonconventional* attack with something that is not always and only a weapon is sufficiently similar to a conventional attack to give rise to a right of self-defense in response. It does not imply that an armed attack with conventional weapons has to reach some arbitrary level of harm before a state can defend itself.

143. Bernsen, *supra* note 25.

144. Austin Ramzy, *Chinese Pilots Sent a Message. American Allies Said They Went Too Far*, N.Y. TIMES (June 9, 2022), <https://perma.cc/5QYM-8XT2>.

145. Vindman, *supra* note 30 (“Historically speaking, at least, a massive conventional surprise attack—like Pearl Harbor, for example—that caused unprecedented death, damage and destruction was almost the definition of a *casus belli*. . . [but] the mature ability to sense and respond to threats by modern advanced states has deterred them from engaging in the obvious *casus belli* of a bygone age.”).

146. Laurie Blank, *Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict*, 96 NOTRE DAME L. REV. 249, 251–57 (2020) (noting there is no explanation of the phrase “armed attack” in the records of the San Francisco Conference and that “identifying the particular

“Armed” begs the question “with what?” And “attack” must be measured against a spectrum of conduct and may occur in any number of contested domains. Similarly, the Hague Conventions were drafted for a simpler time and an “open style of warfare.”¹⁴⁷ As recent events have shown, conventional warfare is clearly still with us. But the nature of international competition—including warfare—has transcended Hague law and the UN Charter.

Notwithstanding the need for a new consensus on how the law of war applies in new domains,

key States, including the United States, appear hesitant to set forth their views on how LOAC should develop and, more importantly, be interpreted. In particular, they have remained relatively silent in the face of major efforts by the ICRC and academia to restate customary LOAC (as in the ICRC’s Customary International Humanitarian Law study), to comment on how LOAC has developed (as in the ICRC’s Commentaries project), or to apply existing law to new warfare phenomenon (as with the Tallinn and HPCR Air and Missile Warfare Manuals).¹⁴⁸

Hesitancy to adopt legal interpretations of the law of war in some of these novel domains is understandable. For example, the cyber domain is developing rapidly, and a position on a legal issue taken today may be moot, or create downstream confusion, as technology continues to develop. Perhaps more importantly, the United States may not wish to adopt specific legal positions that would limit its own freedom of action or that might be difficult to reverse later, should the need arise.

However, as noted above, the United States is unlikely to use weaponized migrants to extract concessions from or to destabilize other states; it is far more likely to continue to be the target of such conduct. Thus, while there may be good reasons to refrain from adopting legal positions with respect to application of the law of war in other gray zone domains, there is little to be gained by refraining from doing so with respect to weaponization of migrants. To the contrary, a clear prohibition would benefit the United States, the migrants who might otherwise be weaponized, and U.S. allies—particularly those that receive large numbers of migrants, and which might otherwise be pressed to respond to what is in fact an act of aggression as though it is solely a humanitarian emergency.

threshold . . . proves challenging”); Yishai Beer, *Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense*, 59 COLUM. J. TRANSNAT’L L. 117, 125–30 (2020) (“[T]he contour of the armed attack threshold is disputed. It ranges from any use of armed force at one pole, followed along the spectrum by a consequential approach, which demands painful consequences, to the opposite pole, the ICJ’s demand of scale and effects.”).

147. Ken Watkin, *Special Forces, Unprivileged Belligerency, and the War in the Shadows*, LIEBER INST. AT WEST POINT, (Mar. 8, 2020), <https://perma.cc/8GP6-QNLY> (“[S]hadow warfare appears *prima facie* to be the antithesis of the open style of warfare that underpinned the 1907 Hague Land Warfare Regulations.”).

148. Michael N. Schmidt, *Embracing LOAC Pluralism*, LIEBER INST. AT WEST POINT (Jan. 7, 2022), <https://perma.cc/A9DU-QGGM>.

“As is well known, the core international legal rule relating to the right of a state to resort to armed force—the *jus ad bellum*—is embodied in Article 2(4) of the U.N. Charter, which provides: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’”¹⁴⁹ There are two exceptions to this prohibition on the use of force against another state: when authorized by the Security Council, and in self-defense.¹⁵⁰ Because the Security Council is not able to deter or prevent all uses of force, “[t]he right of States to act individually and collectively in self-defense . . . remains a central pillar of international peace and security.”¹⁵¹

Article 49 of Additional Protocol I to the Geneva Conventions defines “attacks” as “acts of violence against the adversary, whether in offence or in defence.”¹⁵² The International Court of Justice has equated “violence” with the “use of force.”¹⁵³ But there is little authority outlining the precise scope of what counts as sufficient “violence” or “use of force” to constitute an “attack,” or whether some uses of force may be unlawful under international law, yet insufficient to constitute an armed attack.¹⁵⁴ The UN Charter does not define either term.

In a recent case before the International Criminal Court, amici curiae suggested two necessary elements: “First, an ‘attack’ must involve an act reasonably expected to produce physical injury or damage to a person(s) or object(s).”¹⁵⁵ The force need not be kinetic, so long as there are reasonably expected violent consequences to its application, i.e., death or injury to persons, damage or destruction to objects.¹⁵⁶ However, in noting that merely impeding the functionality of an

149. Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter*, 43 HARV. INT’L L.J. 41, 42 (2002).

150. *Id.* at 44.

151. William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 298 (2004).

152. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

153. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 22, P. 39 (July 8).

154. Murphy, *supra* note 149, at 44. The Lieber Institute at West Point recently held a symposium on the topic. See Ronald Alcala & Sasha Rodin, *Symposium Intro: The ICC Considers the Definition of “Attack,”* LIEBER INST. AT WEST POINT (Oct. 27, 2020), <https://perma.cc/9GW2-UTUE>. Mike Newton helpfully suggested that “‘Attack’ as used in Article 8(2)(e)(iv) means attack.” Mike Newton, *A Radical Reimagining of the Concept of Attack*, ARTICLES OF WAR (Oct. 29, 2020), <https://perma.cc/2DXA-JFH5>. One might think that if an “attack” is “violence” under Additional Protocol I, and “violence” is “use of force” under the ICJ’s advisory opinion, then an “attack” should mean the same thing as a “use of force” under the UN Charter. That is the position taken by the United States, but it is not the consensus view. Elizabeth K. Kiessling, *Gray Zone Tactics and the Principle of Non-Intervention: Can “One of the Vaguest Branches of International Law” Solve the Gray Zone Problem*, 12 HARV. NAT’L SEC. J. 116, 124 n.29 (2021).

155. Prosecutor v. Ntaganda, ICC-01/04-02/06 A2, Submission of Observations to the Appeals Chamber Pursuant to Rule 103, ¶13 (Sept. 18, 2020).

156. *Id.*

object without damaging it does not constitute an attack, the amici left open the possibility “degradation of functionality in the unique context of cyber operations” might be sufficient.¹⁵⁷ The second requirement is that “the motivation for executing the act must be to cause harm to the adversary or other persons or objects in the conduct of hostilities.”¹⁵⁸

In the context of weaponization of migrants, the second requirement can be assumed. Without the creation, exacerbation, or instrumentalization of people, there is no weaponization. The first question is more difficult. The harm caused by weaponized migration is not “violent” in the traditional sense (though violence often accompanies large movements of people). But it certainly can impose real costs—not just political costs—in terms of humanitarian response, and sometimes can be reasonably expected to damage the polity of the target state. In this sense, weaponized migration might be comparable to a cyberattack on critical infrastructure. It may not necessarily be violent in the traditional sense, but it can inflict substantial and potentially irreversible consequences. It is far closer to bombs and bullets than to electronic jamming or dropping leaflets.¹⁵⁹ It should be recognized as such under international law, both as a threat to peace and security and under customary international law.

1. Threat to Peace and Security

“[T]here is increasing recognition by the international community that massive refugee flows do in fact constitute a threat to international peace and security”¹⁶⁰ because “the spillover of refugees destabilizes neighboring countries.”¹⁶¹ That, or the extraction of concessions, is why states engage in weaponization of migrants in the first place.¹⁶² The weaponization of migrants can constitute “force” under Article 2(4) of the UN Charter, and it is therefore “increasingly accepted as grounds for international action, including armed intervention against the state generating the refugee flow.”¹⁶³ The justification for intervention is strongest

157. *Id.*

158. *Id.* ¶14.

159. Reasoning by syllogism to conventional warfare to assess whether particular gray zone conduct constitutes an armed attack has been suggested previously. Because of the inherent difference between kinetic strikes and gray zone activities, Thomas Eaton suggests it makes more sense to examine the “overall terms” of the scale and effects of the conduct, rather than the specific physical damage (if any) directly attributable to it. Thomas Eaton, *Self-Defense to Cyber Force: Combatting the Notion of “Scale and Effect”*, 36 AM. U. INT’L L. REV. 697, 717 (2021) (“Stronger answers can be found by comparing cyber-attacks to conventional means that would have similar effects: a) Is a denial of service more like frequency jamming or destroying communication lines? b) Is an attack that closes a state off from commerce more like economic sanctions or a blockade? c) Is invasive malware more like espionage or sabotage?”); *cf.* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27) (noting “scale and effect” are relevant criteria in determining the existence of an armed attack).

160. Dowty & Loescher, *supra* note 14, at 58.

161. *Id.* at 44.

162. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 262–63.

163. Dowty & Loescher, *supra* note 14, at 44–45. This understanding is broadly consistent with the “scale and effects” test the Tallinn Manual suggests for determining when a cyber attack constitutes a

where a particular group is targeted because “the protection of the individual from racial or religious intolerance is a vital condition of international peace and security.”¹⁶⁴ But the cause of the flow need not be persecution as defined in the Refugee Convention¹⁶⁵ to constitute a threat to international peace and security.¹⁶⁶

2. Customary International Law

Regardless of whether weaponization of migrants constitutes a threat to peace and security generally, “[w]hen refugees are being used as a weapon, the target state is within its rights in invoking the right of self-defense.”¹⁶⁷ Article 51 of the UN Charter provides that states retain an inherent right to both individual and collective self-defense if an armed attack occurs.¹⁶⁸ Dowty and Loescher explain, “deriving a right of international intervention from the imposition of a refugee burden on other states is a reasonable extension of customary law. The reason that customary law did not deal with the issue was not because principles of state responsibility did not apply, but because ‘the refugee problem’ was not a problem in inter-state relations before the twentieth century.”¹⁶⁹

Finally, a target state would still be permitted to “resort to measures of *retorsion*, defined in Oppenheim’s classic treatise on international law as ‘retaliation for discourteous, or unkind, or unfair and inequitable acts by acts of the same or of a similar kind.’”¹⁷⁰ Dowty and Loescher draw on earlier international law authorities Sir Robert Yewdall Jennings and L.F.L. Oppenheim,

“Jennings goes further, however, arguing that ‘the willful flooding of other states with refugees constitutes not merely an inequitable act, but an actual illegality, and *a fortiori* where the refugees are compelled to enter the country of refuge in a destitute condition. He cites President Benjamin Harrison, who in 1891 based U.S. protests to Russia over its treatment of Jews on the argument that ‘a decree to leave one country is, in the nature of things, an order to

use of force. NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 330–31 (Michael N. Schmitt ed., 2nd ed. 2017).

164. Dowty & Loescher, *supra* note 14, at 59 (quoting Letter of Resignation of James G. MacDonald, High Commissioner for Refugees (Jewish and Other) Coming from Germany (Dec. 27, 1935)).

165. Convention Relating to the Status of Refugees art. I(A)(2), July 28, 1951, 189 U.N.T.S. 150.

166. It also bears noting that “[i]ntervening in refugee-producing situations on the basis of a threat to peace and security, rather than on a purely humanitarian basis, also changes some of the considerations and conditions in execution. Proportionality would have to consider that “[i]ntervention would be aimed not just at the immediate relief of victims, but also at rectifying the conditions that comprise a continuing threat to the peace of other states.” Dowty & Loescher, *supra* note 14, at 60.

167. *Id.* at 50.

168. U.N. Charter art. 51.

169. Dowty & Loescher, *supra* note 14, at 45, 53 (“Customary international law has nothing specific to say about refugees because the issue did not exist in the past.”).

170. *Id.* at 54 (quoting L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL 2: DISPUTES, WAR AND NEUTRALITY 134–35 (7th ed. 1952, H. Lauterpacht ed.)).

enter another.”¹⁷¹ The illegality derives from the doctrine of abuse of rights, known in the common law as the maxim *sic utere tuo alienum non laedas*. According to Oppenheim, this principle “is applicable to relations of States no less than to those of individuals” and is one of the general principles of law recognized by civilized states that the International Court of Justice is bound to apply under Article 38 of its Statute.¹⁷² The principle itself has long been recognized in other contexts, including the 1941 Trail Smelter Arbitration and the 1949 Corfu Channel case.¹⁷³

Some commentators, along with the International Law Commission, further distinguish between retorsion as acts that are independently lawful and “counter-measures” that are lawful only because they are responding to and attempting to end an internationally wrongful act, such as a use of force.¹⁷⁴ Regardless, the universally recognized principle of self-defense can be understood as a particular application of the retorsion principle.

C. Advocate for the Position

The legal position occupied by weaponization of migration, like other gray zone tactics, is contested and uncertain. What is certain is that strategic competitors are deploying legal arguments to suit their preferred policy outcomes in ways that more closely resemble operational preparation of the environment than anything like a courtroom or a battlefield.¹⁷⁵ Chinese lawfare, in particular, is designed to gain “legal principle superiority” over an adversary and delegitimize adversary actions.¹⁷⁶ The PLA also relies on “legal warfare to provide the basis for launching an attack.”¹⁷⁷

Some have suggested that “lawfare”—essentially the instrumentalization of law for military or political purposes¹⁷⁸—is a debasement of law.¹⁷⁹ That is, the

171. *Id.* (quoting R. Yewdall Jennings, *Some International Law Aspects of the Refugee Question*, 20 BRIT. Y.B. OF INT'L L. 98, 111–12 (1939)). President Harrison’s remarks were contained in a message to Congress dated December 9, 1891, and are reprinted at 79 Cong. Reg. 10247 (June 27, 1935).

172. Dowty & Loescher, *supra* note 14, at 55 (quoting L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL 2: DISPUTES, WAR AND NEUTRALITY 134–35 (7th ed. 1952, H. Lauterpacht ed.)).

173. Dowty & Loescher, *supra* note 14, at 55. See also Jennifer Peavey-Joanis, *A Pyrrhic Victory: Applying the Trail Smelter Principle to State Creation of Refugees*, in TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 254, 260–61 (Rebecca M. Bratspeis & Russell A. Miller eds., 2006).

174. Michael N. Schmitt, *Cyber Operations and the Jus ad Bellum Revisited*, 56 VILL. L. REV. 569, 582 (2011).

175. ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 165 (2016) (“[T]he PRC is waging lawfare today in an effort to tilt to its advantage future kinetic battlegrounds”).

176. Elsa Kania, *The PLA’s Latest Strategic Thinking on the Three Warfare*, 16 CHINA BRIEF 13 (2016) (discussing the 2015 Chinese National Defense University Science of Military Strategy).

177. Knoll et al., *supra* note 28.

178. E.g., Jill Goldenziel, *Information Lawfare: Messaging and the Moral High Ground*, 12 J. NAT’L SEC. L. & POL’Y 233, 234–36 (2022).

179. KITTRIE, *supra* note 175, at 33 (acknowledging that lawfare “risks contributing to corroding the rule of law”). Objections on other grounds have been raised as well. See, e.g., Leila Nadya Sadat & Jing

weaponization of law denies its universality and, by extension, its authority, all of which weakens legal principles and increases uncertainty.¹⁸⁰ The U.S. domestic legal system, however, is already widely understood as instrumental—a means to an end, rather than a pre-existing, fully formed entity full of rules waiting to be discovered.¹⁸¹ It may be a race to the bottom, and it is unfortunate there is a race at all. But if everyone else is running, it would be foolish to stand still.¹⁸² As Orde Kittrie has noted, “the United States’ failure of over the last decade to adopt a broad and systematic lawfare strategy, with a robust offensive component, makes little sense.”¹⁸³ There is every reason for the United States to adopt and advocate for a position that the weaponization of migrants is unlawful under international law.¹⁸⁴

Geng, *On Legal Subterfuge and the So-Called “Lawfare” Debate*, 43 CASE W. RESV. J. INT’L L. 153 (2010).

180. See generally Julian Ancelin, Address at Le lawfare de la paix par le droit à la guerre contre le droit (Feb. 17, 2022); Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 472 (2007).

181. BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 1, 6, 7, (2006); Steven D. Smith, *The Academy, the Court, and the Culture of Rationalism*, in THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (C. Wolfe ed., 2004); RICHARD A. POSNER, OVERCOMING LAW 391 (1995); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10, 20 (1988); Calvin Woodward, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 732 (1968).

182. GALEOTTI, *supra* note 13, at 6 (“Like it or not, this is one way the world may be turning: it simply behooves us to be thinking about it now. It is all very well to complain about how other, smarter, more agile and ruthless powers may be using these instruments against us, but if all we do is react, we will always be complaining.”). Orde Kittrie has powerfully made the same point:

If the United States abstains from the international instrumental lawfare in which U.S. adversaries are already engaging, and fails to develop more effective defenses, it will enable those adversaries to continue and, indeed, increase ‘using the law as a hammer’ against the United States. In contrast, in light of the U.S. expertise in instrumental lawfare that has been honed within the U.S. domestic legal system, and lawfare’s relatively lower financial costs to the United States and reduced casualty costs for both lawfare deployers and targets, the U.S. national interest would benefit from the United States increasing its deployment of international instrumental lawfare while improving its defenses against instrumental and compliance-leverage disparity lawfare.

KITTRIE, *supra* note 175, at 38. See also *id.* at 31 (“[V]arious developments over the past decade have made lawfare even more powerful than it was in 2005, and many state and non-state actors are taking advantage of the opportunity by waging lawfare more aggressively and systematically than they were before.”); Michael Dressler, *Lawfare: Both an Existential Threat to the International Rule of Law and an Indispensable Tool of American Foreign Policy in the Twenty-First Century*, PENN ST. L. REV. (FORUM BLOG) (Mar. 6, 2021), <https://perma.cc/6N5X-SQFX>.

183. *Id.* at 31; see also *id.* at 29 (“The U.S. federal executive branch has taken a remarkably sporadic and unsystematic approach to offensive lawfare.”).

184. Doing so would be consistent with the United States’ current position with respect to “armed attack,” that permits every state to “effectively to protect itself and its citizens from every illegal use of force aimed at the State.” Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 94 (1989); see also Beer, *supra* note 146, at 127–28; Taft, *supra* note 151, at 300.

CONCLUSION

Ambassador Samar Sen of India asks,

If aggression against another foreign country means that it strains its social structure, that it ruins its finances, that it has to give up its territory for sheltering refugees . . . what is the difference between that kind of aggression and the other type, the more classical type, when someone declares war, or something of that sort?¹⁸⁵

The answer is probably “very little.” If the intent and the effect of weaponized migration are similar to conventional warfare, why should the means matter? Mark Galeotti notes that “our present notions of war, as something formally declared and ended, fought largely on the battlefield, where laws are meant to protect non-combatants and define the acceptable forms of force, are becoming less and less relevant.”¹⁸⁶ Means are significant with respect to how war is waged—the *jus in bello*—and they have to be proportionate and distinguish between combatants and non-combatants. Means are less significant with respect to whether an armed attack has occurred—intent, scale, and effects are all means-agnostic.¹⁸⁷

“The Russians have been challenging Western interests while remaining under the traditional *casus belli* threshold – a kind of twenty-first-century ‘salami strategy.’”¹⁸⁸ The Chinese do the same as a matter of doctrine.¹⁸⁹ It is unlikely that the United States will be able to alter Russian or Chinese conduct unilaterally. But what the United States can do is change how that conduct is categorized and how it is more broadly understood and judged elsewhere, by articulating the range of consequences that could permissibly attach to it, particularly with respect to new types of conduct that do not fit neatly into nineteenth century categories. This, in turn, may diminish or deter the use of weaponized migration against the United States and its allies and partners.

In addition to advancing U.S. security interests, increasing the seriousness with which the United States views weaponized migration would likely benefit the would-be migrants themselves. Mass migration is itself an arduous, often dangerous undertaking; reducing artificially caused or exacerbated migrations is to the benefit of all. Further, where the migrant flow has been created or exacerbated by unlawful means, treating the use of weaponized migrants as an armed attack may in some measure deter unlawful means to create migrant flows.¹⁹⁰

185. GREENHILL, WEAPONS OF MASS MIGRATION, *supra* note 11, at 12 (quoting Samar Sen, Ambassador of India to the United Nations).

186. GALEOTTI, *supra* note 13, at 14.

187. Vindman, *supra* note 30 (“A cyberattack of sufficient magnitude may surprise and cripple an opponent’s ability to wage war effectively in the way kinetic attacks no longer can hope to achieve.”).

188. Levite & Shimshoni, *supra* note 19, at 99.

189. Knoll et al., *supra* note 28; Levite & Shimshoni, *supra* note 19, at 98–100.

190. For example, the use of chemical weapons and barrel bombs in Syria or the intentional shelling of civilians and hospitals in Ukraine. See Breedlove, *supra* note 49.

To be sure, there is some degree of risk, particularly with regard to nuclear powers, that expanding the definition of armed attack, and thus lowering the *casus belli* threshold, increases the risk of conventional war. But to redefine what we *may* do is not to redefine what we *must* do, and permitting our adversaries to achieve objectives through conduct that falls below the current *casus belli* line is not to say that it is right, or justified, or even peaceful. There is a gap between conduct that we can respond to with force, and conduct that is antithetical to our interests or to peace and security generally, but which we can do very little about. Our adversaries know this and exploit it to great effect. Joshua Hastey aptly observes, “[u]ntil strategists and just war thinkers begin to consider how to broaden our conceptions of the *jus ad bellum* standards, we will remain hostage to hostile actors who are willing to exploit our restraint.”¹⁹¹

191. Hastey, *supra* note 29.
