# *From the 2015 European "Migration Crisis" to the 2018 Global Compact for Migration: A Political Transition Short on Legal Standards*

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*The "European migration crisis" is the culmination of a series of failed attempts to elaborate a comprehensive European immigration policy beyond repression of undocumented migrants and border closures. This article will outline the causes of the "crisis" and the general resistance of courts to the repressive impulse of European executives, as well as suggest that the 2018 United Nations Global Compact on Migration offers a conceptual framework that indicates a "way forward" for All States, including EU member States. The first part will highlight that the "crisis" was foreseeable as soon as 2012 and that EU member States failed in all their attempts to create a common response to it. Instead, they resorted to the crudest mechanisms possible: border closures and mechanisms obstructing the mobility of migrants, including a questionable cooperation with Libyan "authorities" and the transfer of development funds to migration control cooperation with African countries, regardless of consequences. These measures do not respond to push and pull factors of migration and mostly exacerbate the precarity of migrants. Within the EU, one witnessed the progressive marginalisation of the European Commission –which had, in the previous period, overseen the recast of most of the Schengen instruments –in favour of a political control of the immigration file by the European Council. The second part will show that the migration-related case law of the ECJ has followed two contrasting paths. On the one hand, the Court has confirmed the necessity of interpreting the law in a manner that is consistent with European and international law, in particular with respect to the protection of the fundamental rights of individuals (A). This tendency is reflected in the interpretation of what could be called the "internal" management of migration, in other words, management within the Union, between Member States. On the other hand, the Court, either through its silence or self-restraint, leaves much authority and discretion to the States (B). Beyond the classic margin of appreciation and interpretation, it is a whole segment of "external" migration policy, pertaining to questions that arise outside of the territory of the EU or in their relations with third countries, which has been abandoned to national sovereign authorities. The third part will demonstrate that a conceptual framework for a change in attitude has recently been provided by the Global Compact for Safe, Orderly and Regular Migration (GCM). The result of widespread consultations with a large array of stakeholders and negotiations between all UN Member States, the Compact was adopted in an intergovernmental conference in Marrakech, on 10 December 2018, then endorsed by the UN General Assembly. The central idea is that of a progressive and regulated facilitation of the movement of people across borders. As in the case of any major policy area (infrastructure, energy security, food security...), States should take a long-term perspective, looking thirty or fifty years down the road. For the EU, the primary mechanisms for achieving such ends would likely be the conclusion of successive visa liberalization agreements with target countries, as well as with regions that already benefit from a degree of free movement (for example the Southern cone of South America or the Economic Community of West African States). It would also require substantial efforts to strengthen policies facilitating the professional, labor and social integration of migrants. Overall, the "European migration crisis" demonstrates that human mobility cannot be met by repression only: facilitating, legalising, regulating and taxing it must be part of the solution framework.*

Titre en français: *De la « crise migratoire » européenne au Pacte mondial sur les migrations: une transition politique en manque de normes juridiques.*

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*La « crise migratoire européenne » est le point culminant d'une série d'échecs dans l'élaboration d'une politique européenne globale en matière d'immigration, politique qui dépasserait la simple répression des migrants sans papiers et la fermeture des frontières. Cet article analyse les causes de la « crise » et la résistance générale des juridictions face à l'approche répressive des exécutifs européens. Il suggère également que le Pacte mondial sur les migrations, adopté en 2018 aux Nations unies, offre, à tous les États, en ce compris les États membres de l'Union européenne, un cadre conceptuel adéquat pour développer, dans le futur, de véritables politiques migratoires.*

*La première partie souligne que, dès 2012, la « crise » était prévisible et que les États membres de l'UE ont systématiquement échoué à y apporter une réponse commune. Ils ont, au contraire, fait usage des méthodes simplistes habituelles: fermeture des frontières, refoulement et mesures tendant à bloquer les migrants en amont des frontières; le tout se faisant par des moyens contestables, en ce compris par une coopération douteuse avec les « autorités » libyennes et par l'utilisation de fonds de développement pour financer une coopération migratoire avec les pays africains, ce quelles qu'en soient les conséquences. En réalité, ces mesures ne répondent pas aux facteurs de répulsion et d'attraction de la migration et exacerbent surtout la précarité des migrants. Au sein des institutions de l'Union européenne, on a observé la marginalisation progressive de la Commission européenne - qui avait, dans la période précédente, supervisé le remaniement de la plupart des instruments de Schengen - en faveur d'un contrôle politique du dossier de l'immigration par le Conseil européen.*

*La deuxième partie analyse la jurisprudence de la Cour de justice de l'Union européenne. Celle-ci a suivi, en matière d'immigration, deux voies opposées. D'une part, la Cour a confirmé la nécessité d'interpréter le droit de la migration en conformité avec l'ensemble du droit européen et international, en particulier en ce qui concerne la protection des droits fondamentaux des personnes (A). Cette tendance se reflète dans l'interprétation de ce que l'on pourrait appeler la gestion « interne » de la migration, c'est-à-dire la gestion au sein de l'Union, entre les États membres. D'autre part, la Cour, par son silence ou sa réserve, abandonne une large part de souveraineté et de pouvoir discrétionnaire aux États (B). Au-delà de la classique marge d'appréciation et d'interprétation, c'est tout un segment de la politique migratoire « externe », concernant les questions qui se posent en dehors du territoire de l'UE ou dans les relations avec les pays tiers, qui a été abandonné à la souveraineté des autorités nationales.*

*La troisième partie montre qu'un cadre conceptuel pour un changement d'attitude a récemment été fourni par le Pacte mondial pour des migrations sûres, ordonnées et régulières (GCM). Fruit de vastes consultations avec un large éventail de parties prenantes et de négociations entre tous les États membres des Nations unies, le Pacte a été adopté lors d'une conférence intergouvernementale à Marrakech le 10 décembre 2018, puis approuvé par l'Assemblée générale des Nations unies. L'idée centrale est celle d'une facilitation progressive et réglementée de la circulation transfrontalière des personnes. Comme pour tout grand domaine politique (infrastructures, sécurité énergétique, sécurité alimentaire…), les États doivent adopter une perspective à long terme, en se projetant dans trente ou cinquante ans. Pour l'Union européenne, les principaux mécanismes permettant d'atteindre ces objectifs seraient probablement la conclusion progressive d'accords de libéralisation des visas avec des pays cibles, ainsi qu'avec des régions qui bénéficient déjà d'un certain degré de libre circulation (par exemple, le cône sud de l'Amérique du Sud ou la Communauté économique des États d'Afrique de l'Ouest). Cela nécessiterait également des efforts substantiels pour renforcer les politiques facilitant l'intégration professionnelle et sociale des migrants. Globalement, la « crise migratoire européenne » montre que la régulation de la mobilité humaine ne peut se contenter de la seule répression : la facilitation, la légalisation, la réglementation et la fiscalisation de la mobilité doivent faire partie du cadre de solutions.*

## 1. INTRODUCTION

What is the meaning of the words "migration crisis"? In Greek, the word *κριση* refers to the action or ability to separate, distinguish, or decide, in particular with respect to the outcome or resolution of a war. In medicine, the word "crisis" denotes "a moment during a serious illness when there is the possibility of suddenly getting either better or worse".[1] It is also "a time when a difficult or important decision must be made".[2] In other words, a crisis is not inherently negative. It has been said that the 2015 European migration "crisis" was more a crisis of governance than of migration. In other words, migration is less the cause of a "crisis" than it is a symptom of a governance issue permeating most contemporary societies, whether at the European or Global level. Using the European "migration crisis" as a starting point, this article will examine the challenges of migration governance in the contemporary world.[3]

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1 *Cambridge English Dictionary, sub verbo* "crisis". In the West, it is often asserted that the Chinese word for crisis contains two characters *wēi* which means danger and *jī* which means opportunity. In fact, it would appear that the second character *jī* signifies more precisely the decisive moment, without positive or negative implications.

2 *Oxford English Dictionary, sub verbo* "crisis".

3 This article is a translated, updated and revised version of: Jean-Yves Carlier & François Crépeau, "De la 'crise' migratoire européenne au Pacte mondial sur les migrations: Exemple d'un mouvement sans

We start from the position that migration is, has always been, and will remain an inherent part of human existence. Quantitatively, in absolute terms, the number of migrants is increasing. However, in relative terms, taking into consideration the increase in the world's population, the number of migrants expressed as a percentage of the world population seems relatively constant over the past century at approximately 3.5%.[4] Most human beings are either migrants themselves or close descendants of either internal or international migrants. Qualitatively, migration varies over time and space according to various factors, notably demographics, politics, and economics. It is not a question of migration but of *migrations*. The "crisis" of the past decade offers a singular opportunity to transform the governance of migration, and so it is critical to examine the role of law in the management of migration movements.

The subtitle of this article — "A Political Transition Short on Legal Standards" — announces our conclusion. In a 2011 article,[5] we demonstrated how European migration law, like international migration law, was "softening", that is to say moving towards a *soft law* framework that favored non-binding instruments, voluntary cooperation and discreet "discussion" forums. Indeed, soft law tends, in many instances, to replace the formal law traditionally made by States or regional organizations such as the European Union, with the more informal elaboration of "good practices" and "lessons learned". This evolution, sometimes formalized within the European Union as an "open method of coordination" (OMC),[6] often occurs in more or less closed forums.

One cannot deny the value of the outcomes that may result from "discussions" in such forums: they are a locus for trust-building, consensus-building, sharing of conceptual frameworks, exchange of experience and expertise and action coordination. However, persistent questions remain. Is law — which has the primary objective of ordering life in society and, in particular, empowering individuals to defend their rights against the powers that be — given a sufficient role in this new conceptualization of migration governance? Does this migration governance leave open too many policy and practice spaces where State action is subject to very limited oversight, if any? Pushed to the extreme, can this shift come to erase the legal subjectivity, the legal personhood of migrants, thus denying them any capacity for

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droit?*"* (2018) 64 AFDI 461, online : <dial.uclouvain.be/pr/boreal/object/boreal:210014>, which itself constituted a follow-up to: Jean-Yves Carlier & François Crépeau, "Le droit européen des migrations: exemple d'un droit en mouvement?" (2011) 57 AFDI 642, online : <persee.fr/doc/afdi_0066-3085_2011_num_57_1_4202> [this article was updated as of 1 January 2020].

4 OECD, "Demography and Population Migration Statistics" (2020), online: *OECD Statistics* <stats.oecd.org>; IOM, "Global Migration Data Portal" (2019), online: *International Organization for Migration* <gmdac.iom.int/global-migration-data-portal>. See also IOM, "World Migration Report 2020" (2019), online: *International Organization for Migration* <iom.int/wmr>; United Nations, "Global Migration Database" (2015), online: *United Nations Department of Economic and Social Affairs* <un.org/en/development/desa/population/migration/data/empirical2/index.asp>.

5 *Supra* note 3.

6 See David M Trubek & Louise G Trubek, "Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination" (2005) 11:3 Eur LJ 343. See also the criticism of the OMC on the economic crisis, Martina Prpic, "The Open Method of Coordination" (19 October 2014), online: *At a Glance*: *European Parliament Research Service* <europarl.europa.eu/RegData/etudes/ATAG/2014/542142/EPRS_ATA(2014)542142_EN.pdf>.

empowerment? Hannah Arendt raised this last possibility in her description of refugees fleeing Nazi Germany as *Flüchtling*, *Heimatlos*, those who are stateless and thus outlaws or "law-less".[7]

Since Arendt's time, international law has partly filled the void in the legal protection of individuals who are no longer protected by their State of origin, thanks to the 1951 Geneva Convention Relating to the Status of Refugees.[8] However, the Geneva Convention was not intended to cover the entire phenomenon of migration. Other texts pertaining to migrants that have been adopted regionally or nationally, such as the EU-Turkey statement or the MoU between Italy and Libya,[9] rely too often on short-term fixes for situations characterized as "crises", such as the "European crisis". What remains are the general human rights protection instruments, which apply in principle to all persons, including migrants. However, this protection often fails, as the management of migration movements is too often characterized by State officials relying on the exclusive exercise of territorial sovereignty, in the form of administrative discretionary decision-making processes and political decisions, from which legal oversight is mostly absent or inefficient.[10]

Thus, the role of the judiciary is fundamental as it reviews the legality or constitutionality of migration-related executive or administrative decisions, and should thus permit the voice of the migrant to be heard and her interests to be defended, despite the migrant being generally denied access to traditional channels of legislative or executive power. This role is played in the first place by the national judiciary. But these judges must benefit from the support

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7 In *The Origins of Totalitarianism*, in the chapter entitled "The Decline of the Nation-State and the End of the Rights of Man", under the sub-heading "The Perplexities of the Rights of Man", Hannah Arendt reveals herself to be skeptical of the international protection of human rights: "This new situation, in which 'humanity' has in effect assumed the role formerly ascribed to nature or history, would mean in this that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible." Hannah Arendt, "Title II: Imperialism" in *The Origins of Totalitarianism*, (New York: Harcourt Brace Jovanovich Publishers, 1951) at 298. Similarly, before the war, in his presentation at the Academy, Lord Phillimore contested certain doctrines (*Fiore* and *Cruchaga*) that recognized under international law the rights of individuals (including the right to emigrate, the right to property and freedom of conscience). He specified that individuals were not citizens of the world. Every individual came from some State and would never be able to bring their own State to justice (he wrote, in French: "l'individu n'est pas *civis mundi*. Il est toujours le ressortissant d'un État quelconque […] l'individu ne parviendra jamais à citer en justice contre sa propre patrie"). Lord Phillimore, *Droits et Devoirs Fondamentaux des États* (Paris : Académie de Droit International, 1923) at 67. In the time since, regional human rights protection has precipitated a clear evolution in the relationship between the individual and the State.

8 *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189.

9 European Council, Press Release, 144/16 "EU-Turkey Statement", (18 March 2016), online: <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>; Odysseus Network, *Memorandum of Understanding on Cooperation in the Fields of Development, the Fight Against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic,* Libya and Italy, 2 February 2017.

10 See Geneviève Bouchard & Barbara Wake Carroll, "Policymaking and administrative discretion: The case of immigration in Canada" (2002) 45:2 Can Public Admin 239; Dorte Sindbjerg Martinsen, "Judicial policy-making and Europeanization: The proportionality of national control and administrative discretion" (2011) 18:7 J Eur Pub Pol'y; Marjorie S Zatz & Nancy Rodriguez, "The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement" (2014) 39:3 Law & Soc Inquiry 666.

and guidance of international jurisdictions which are not bound by the constraints of State sovereignty, including the pressures of the electoral cycle. Such is the role of the European judge, either at the European Court of Human Rights in Strasbourg or, increasingly, the European Court of Justice (ECJ) in Luxembourg. Such is also the role of international quasi-judicial bodies, such as the United Nations treaty bodies. The judiciary may then become part of the progressive development of a true system of global migration governance. Such a global system has been emerging slowly but surely over the past decade. In December 2018, its first concrete normative step has taken the form of the adoption by the UN General Assembly of the Global Compact for Migration.

On the basis of these findings, this article is divided into three parts: a diagnosis of the European "migration crisis" (I), an analysis of the case law of the European Court of Justice in the context of this crisis (II), and a presentation of why the Global Compact for Migration should inspire leaders when developing a long-term strategic vision for European and global governance of human mobility (III).

In analyzing the European "crisis", the first part of this article reveals the lack of normative and political cohesion in the European migration policy. Consequently, there is frequent recourse to the courts. At times, from the migrants' point of view, they must ensure that their basic human rights are safeguarded. Sometimes, from the point of view of States, they must try to correct the lack of solidarity in the governance of the migratory phenomenon.

The second part of this article makes it possible to measure this phenomenon on the basis of concrete examples in the case law of the ECJ at the time of the European "crisis". These examples relate both to the internal management of migration, within the EU, and to the external management with third countries such as Turkey. The analysis shows that in reality, on the one hand, internally, the Court cannot compensate for the lack of solidarity between States and must limit its role to safeguarding a few human rights in individual situations. On the other hand, externally, the Court does not want to intervene in the control of relations with third States, leaving these issues to political management—or lack of management. Such observations are not specific to Europe but permeate the entire governance of migration between the Global North and the countries of origin.

Consequently, a broader, global perspective is taken in the third part of the article. There is a need for the development of a genuine concerted policy between States of origin, host States, intergovernmental organizations, and civil society organizations, in order to make breaking these deadlocks possible. The Global Compacts on Refugees and, in particular, on Migration are paving the way for real global governance of mobility. It may progressively evolve, as was the case for the international protection of human rights, from political objectives delineated in soft law, to a sophisticated framework of collective governance, founded on the recognition of migrants' rights, enshrined in hard law, under the control of the courts. This part particularly emphasizes the framing offered by the Global Compact on Migration, as a much more visionary document than the Global Compact on Refugees. The latter essentially calls on the States to engage better and do more of what they currently do. The former invites them to link their human rights and migration governance policy frameworks, through a long-term strategic vision of global human mobility.

## 2. DIAGNOSIS OF THE EUROPEAN "CRISIS": EUROPEAN CO-RESPONSIBILITY FOR MIGRANTS' RIGHTS' VIOLATIONS

In 2011, our study published in the *Annuaire Français de Droit International* was entitled "European Migration Law: An Example of a Law in Movement?" The broad description made then of the accomplishments of European migration law will not be repeated here.[11] The present analysis will instead focus on the outcomes of the recent "European migration crisis". It will highlight that the "crisis" was entirely foreseeable as early as 2012 and that EU member States failed in all their attempts to create a common response to it. Instead, they resorted to the crudest mechanisms possible: border closures and mechanisms obstructing the mobility

[11] *Supra* note 3. For summaries of European migration law prior to those mentioned in footnote 21 of our 2011 AFDI article, see Loïc Azoulai & Karin De Vries, eds, *EU Migration Law: Legal Complexities and Political Rationales* (Oxford: Oxford University Press, 2014); Pieter Boeles, *European Migration Law*, 2nd ed (Anvers: Intersentia, 2014); Jean-Yves Carlier & Sylvie Sarolea, *Droit des étrangers* (Brussels: Larcier, 2016); Vincent Chetail, Philippe De Bruycker & Francesco Maiani, eds, *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Martinus Nijhoff, 2016); Denis Duez, *L'Union européenne et l'immigration clandestine. De la sécurité intérieure à la construction de la communauté politique*, (Brussels : Éditions de l'ULB, 2008); Kees Groenedijik, *Commentaar Europees Migratierecht* (The Hague : Sdu Uitgevers, 2013); Kay Hailbronner & Daniel Thym, eds, *EU Immigration and Asylum Law : Commentary*, 2nd ed, Oxford: Beck/Hart, 2015); Yves Pascouau, *La politique migratoire de l'Union européenne* (Paris : LGDJ, 2011); Steve Peers et al, eds, *EU Immigration and Asylum Law: Text and Commentary*, 2nd ed, (Leiden : Martinus Nijhoff, 2012); Luc Leboeuf, "Politique commune d'asile" (2017) Jurisclasseur Eur 2640. For analyses of the "crisis", see in particular: Idil Atak & François Crépeau, "Managing Migrations at the External Borders of the European Union: Meeting the Human Rights Challenges" (2015) 3:5 EJHR 601; Ségolène Barbou des Places, "Droit d'asile et de l'immigration. Les tribulations de la solidarité interétatique" (2017) RTDE 337; Céline Bauloz, "Le règlement Dublin à l'épreuve du principe de non-refoulement: chronique d'une crise annoncée" (2017) SRIEL 139; Marc Bossuyt, "The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Issues" (2015) EJHR 581; Vincent Chetail, "Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System" (2016) EJHR 584; Maarten Den Heijer, Jorrit Rijpma & Thomas Spijkerboer, "Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum System" (2016) 53 CMLR 607; Editorial Comment: "From Eurocrisis to Asylum and Migration Crisis: Some Legal and Institutional Considerations About the EU's Current Struggles" (2015) CMLR 1437; Geoff Gilbert, "Why Europe Does Not Have a Refugee *Crisis*" (2015) 27:4 IJRL 531; Fabienne Jault-Seseke, "Évolution récente du droit des étrangers et du droit d'asile" (2017) RCDIP 37; Esin Kücük, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing" (2016) 22:4 ELJ 448; Henri Labayle, "La crise des politiques européennes d'asile et d'immigration, regard critique" (2017) RFDA 893; Violeta Moreno-Lax, "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm" 56:2 (2017) JCMS 1; Karine Parrot, "Le code communautaire des visas contre le droit d'asile" (2018) RCDIP 59; Daniel Thym, "The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy" (2016) 53:6 CMLR 1545; Evangelia (Lilian) Tsourdi & Daniel Thym, "Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions" (2017) 24 MJECL 605. The European legal texts on migration are easily accessible in English and French on the website <europeanmigrationlaw.eu>. These texts are complemented by references to the case law. Commentaries and additional information are also available on the websites of academic networks: Odysseus Network, "EU Immigration and Asylum Law and Policy" (2020), online: *Academic Network for Legal Studies on Immigration and Asylum in Europe* <odysseusnetwork.eu>; Odysseus Network, "EU Immigration and Asylum Law and Policy" (2020), online: <eumigrationlawblog.eu>; ELSJ, (2020) online: *Réseau Universitaire européen dédié à l'étude du droit de l'Espace de liberté, sécurité et justice* <gdr-elsj.eu>.

of migrants, including a questionable cooperation arrangement with Libyan "authorities" and the transfer of development funds to migration control cooperation initiatives with African countries, regardless of consequences. These measures do not constitute a response to the push and pull factors of migration and mostly exacerbate the precarity of migrants. Within the EU, one witnessed the progressive marginalization of the European Commission – which had, in the previous period, overseen the recast of most of the Schengen instruments – in favour of political control of the immigration file by the European Council.

### 2.1. A Foreseeable "Crisis"

The "European migration crisis" of 2015–2016 has deep roots in the closure of the borders of European countries to labor migration in the 1980s, following the oil crises of the preceding decade. It was around 1982 that the term "asylum seeker" first appeared in the media, as border closures transformed the request for refugee status, marginal as it was, into the only pathway to entry. Closing the borders to labor migration triggered a substantial increase in the number of asylum applications throughout the Global North. Since then, States have unfailingly reduced the number of asylum requests first by reforming administrative procedures in order to accelerate the determination process and make it more "efficient", then by seeking to block arrivals by disrupting migration pathways both at the borders and beyond them in States of transit and of origin. This repressive attitude resulted in the development of an expansive irregular migration "industry", against which European States have deployed increasingly drastic measures.

In the short term, the proximate cause of the "migration crisis" of 2015–2016 was the Syrian civil war. Starting in 2011, hundreds of thousands of Syrians sought refuge in Turkey, Lebanon and Jordan. In January 2019, this number reached over 5.6 million.[12] Up until 2016, Europe offered little support to these refugees or to the countries that received them. It was therefore foreseeable that migrants would, after some time, decide to take their future into their own hands and attempt to move to places where they could rebuild their lives and those of their children. If States did not provide the means of mobility, migrants would find other providers. Creating a future for one's children is one of the most fundamental human aspirations.

### 2.2. An Absence of Solidarity in the Reception of Migrants

In 2013, the Lampedusa tragedy, which resulted in over 360 deaths,[13] convinced Italian authorities of the necessity of action. Operation *Mare Nostrum* permitted Italian authorities to save the lives of 150,000 migrants but was criticized—specifically by British authorities—for strengthening the people-smuggling networks by offering an effective entryway to Europe.[14] Requests by the Italian government for financial assistance went unanswered. Without the support of other European States, operation *Mare Nostrum* was replaced, in 2014, by operation *Triton* which was the product of cooperation between several European coast guard services

12 See UNHCR, "Syria" (2020), online: *Refugees Operational Portal* <data2.unhcr.org/en/situations/syria>.

13 Zen Nelson, "Lampedusa boat tragedy: a survivor's story", *The Guardian* (22 March 2014), online: <www.theguardian.com/world/2014/mar/22/lampedusa-boat-tragedy-migrants-africa>.

14 Alan Travis, "UK axes support for Mediterranean migrant rescue operation", *The Guardian* (27 October 2014), online: <www.theguardian.com/politics/2014/oct/27/uk-mediterranean-migrant-rescue-plan>.

and led by Frontex. With an operating budget of less than a third of that of *Mare Nostrum*, and a patrol range limited to 30 nautical miles off the Italian coast, this operation was much less ambitious than *Mare Nostrum* and had as its principal mandate ensuring effective border control, not the rescue of migrants at sea.[15]

In 2014, over 219,000 migrants entered Europe by sea, primarily via the central Mediterranean route to Italy (170,100). The primary countries of origin for these migrants were Syria and Eritrea.[16] According to the International Organization for Migration (IOM), over 3,000 migrants were lost at sea. The majority of Syrians did not request asylum in Italy, preferring instead to continue onward to northern Europe, specifically Germany—which had a labor market in need of young workers—or Sweden—which announced in 2013 that all Syrian asylum-seekers on its territory would be granted permanent residency.[17] Indeed, applying for asylum in Italy would have entailed identifying oneself for the purpose of the Dublin system and being subject to return to Italy from any other EU Member State.

In 2015, after three years of civil war, the countless Syrians in Turkey, Lebanon and Jordan realized that no one was coming to their aid. Consequently, many decided to seek out a place where they could rebuild their lives and ensure their children's future on their own, opting to enter Europe via Greece and the Balkans, in part because Turkey had no visa requirements for the majority of citizens of Middle East States. Over a million undocumented migrants and refugees entered Europe in 2015, over 800,000 of which entered through the maritime passage between Turkey and the Greek islands.[18]

Long lines of migrants walking through the Balkans towards Northern Europe filled the world's television screens. As the "European migration crisis" reached its peak, Chancellor Angela Merkel decided to open Germany's borders, famously declaring to her fellow Germans on 31 August 2015 "Wir schaffen das!" ("We can do this" or "We'll manage it") and instituting a policy to relocate refugees to various German Ländern (federated states).[19] Today, many blame Merkel for having caused the crisis even though she was (merely) applying the sovereignty clause of the Dublin Regulation that permits derogation. Initially favorable to the reception of

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15 See Martina Tazzioli, "Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton" (2016) 4:1 Migr Stud 1 at 2; Mieke Van Laer, "Comparaison des opérations : Mare Nostrum vs Triton" (30 April 2015), online: *Solidaire* <www.solidaire.org>; ECRE, "Mare Nostrum to end – New Frontex operation will not ensure rescue of migrants in international waters" (10 October 2014), online: *European Council on Refugees and Exiles*<www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/>.

16 See IOM, "The Central Mediterranean route: Deadlier than ever" (June 2016) at 2, online (pdf): *Global Migration Data Analysis Centre* <publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue3.pdf>; UNHCR, "The Sea Route to Europe: The Mediterranean passage in the age of refugees" (1 July 2015) at 6, 11, online (pdf): *UNHCR* <www.unhcr.org/protection/operations/5592bd059/sea-route-europe-mediterranean-passage-age-refugees.html>.

17 See The Local, "Sweden offers residency to all Syrian refugees" (3 September 2013), online: *The Local Sweden* <www.thelocal.se/20130903/50030>; IANS, "Sweden offers home to Syrian refugees" (3 September 2013) online: *The Business Standard* <www.business-standard.com>.

18 See IOM, "Mediterranean" (30 March 2020), online: *Missing Migrants Project* <missingmigrants.iom.int/region/mediterranean>.

19 Joyce Marie Mushaben, "Wir schaffen das! Angela Merkel and the European Refugee Crisis" (2017) 26:4 German Politics 516.

refugees in light of Germany's history, German public opinion began to turn hostile as populist politicians exploited the theme of the "dangerous foreigner".[20]

No European State was prepared for this type of migration movement. Admission, reception, social integration and labor integration policies were non-existent or largely inadequate. The challenges that followed fanned the flames of resentment and fear. The extreme right political party Alternative für Deutschland (AfD) benefited greatly from this, particularly in eastern Germany, while other parties shifted towards more conservative positions to avoid losing electors.[21]

The semantic confusion in the political and media discourse reinforced fears. European leaders and journalists used the terms "refugee" and "migrant" interchangeably, at once emphasizing a radical difference in the legal status of the two and yet conflating them politically to designate the vast majority of arrivals.[22] Similarly, the concurrent use of human trafficking and migrant smuggling, and the conflation of traffickers with smugglers contributed to the uncertainty surrounding the status of migrants, who were considered simultaneously to be victims and criminals. Such confusion then permitted all generalizations, mislabeling, and shifts in meaning, which in turn fostered the development of a security-centric and repressive rhetoric.[23]

### 2.3. The Border Closures

The response of European States was to close their borders. In March 2016, Macedonia closed its border with Greece, in particular the passage at Idomeni.[24] Turkey and the European Union had already agreed to an action plan on 15 October 2015 (EU-Turkey Joint Action Plan),[25] which was intended to reinforce their cooperation with respect to the support of Syrian asylum seekers in Turkey, who would benefit from temporary international protection, and migration management more generally. After several meetings, on 18 March 2016, the European Council published, via a press release on its website, an "EU-Turkey Statement".[26] To summarize, the Statement announced that Turkey would prevent migrants from transiting

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20 See e.g. Alison Smale, "As Germany Welcomes Migrants, Sexual Attacks in Cologne Point to a New Reality", *The New York Times* (14 January 2016), online: <nytimes.com/2016/01/15/world/europe/as-germany-welcomes-migrantssexual-attacks-in-cologne-point-to-a-new-reality.html>.

21 See Max Fisher & Katrin Bennhold, "Gemany's Europe-Shaking Political Crisis Over Migrants, Explained", *New York Times* (3 July 2017), online: < nytimes.com/2018/07/03/world/europe/germany-political-crisis.html>; BBC, "Germany election: Merkel challenged by anti-migrant AfD", *BBC News* (4 September 2016), online: <www.bbc.com/news/world-europe-37269330>.

22 See generally Heaven Crawley & Dimitris Skleparis, "Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's 'Migration Crisis'" (2018) 44:1 J Ethnic & Migr Stud at 48.

23 See Paolo Campana & Federico Varese, "Exploitation in Human Trafficking and Smuggling" (2016) 22 Eur J Crim Pol'y & Research 89 at 101, 103.

24 Senada Šelo Šabič & Sonja Borić, "At the Gate of Europe: A Report on Refugees on the Western Balkan Route" (Zagreb: Friedrich Ebert Stifung, 2018), online (pdf): < library.fes.de/pdf-files/bueros/kroatien/13059.pdf>.

25 EC, *EU-Turkey Joint Action Plan* (Brussels, 15 October 2015).

26 See General Secretariat of the Council of Europe, Press Release, "EU-Turkey Statement on the European Council" (18 March 2016).

towards Greece and would readmit migrants that nevertheless successfully arrived in Greece from Turkey. In exchange, European States would resettle one refugee for every migrant readmitted by Turkey.[27] As "payment" for this agreement, Turkey would receive six billion euros, including three billion euros to facilitate the integration of Syrians into the Turkish labor market. The EU would also accelerate the visa liberalization "roadmap" with the objective of lifting visa requirements for Turkish citizens, which had long been a point of tension between European and Turkish authorities in the context of the ongoing process of Turkish accession to the EU.[28]

At the same time, "Operation Sophia" (officially, EUNAVFOR Med) was put in place to prevent the passage of migrants to Europe.[29] Its principal objectives were the collection of information on human smuggling and trafficking networks, search and rescue of migrants at sea, destruction of boats of smugglers, training of the Libyan coast guard, and collaboration with Frontex and Europol. As its functions increased, so did its budget. As was the case with *Mare Nostrum*, critics of the operation claimed that its search and rescue mission had done little to deter migrant smuggling and human trafficking operations and that it had failed to reduce the number of deaths at sea.[30]

In fact, these efforts to combat irregular migration have succeeded in reducing the number of migrants crossing the Mediterranean. In 2016, over 363,000 migrants arrived on Europe's coasts. The number of deaths at sea was over 5,000, that is, one death per 71 arrivals. The statistics for 2017 are over 172,000 migrants with over 3,100 deaths at sea, which makes it one death per 55 arrivals. In 2018, over 116,000 arrived, with over 2,200 deaths, resulting in one death per 51 arrivals.[31] Thus, in absolute terms, the number of migrants that succeed in making the journey to Europe and the number of deaths have both decreased. However, in relative terms, the proportion of deaths at sea has increased.

In conclusion, the EU's border closures and repressive measures have made these migration pathways more dangerous and many smugglers are willing to risk the lives of their "clients": there is indeed shared responsibility.

### 2.4. A European Agenda to Obstruct Migration Movements

The EU adopted its European Agenda on Migration in March 2015, and it tracks and reports on its progress regularly.[32] Policies have been introduced and measures implemented in

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27 For more detail, see *infra*, II.B.1, note 89.

28 See generally Baptiste Bonnet, ed, *Turquie et Union européenne*, (Bussels: Bruylant, 2012) (on the Association Agreement); Harun Arikan, *Turkey and the EU: An Awkward Candidate for EU Membership?*, 2nd ed (London: Routledge, 2017) at 67.

29 EU, "EUNAFOR MED Operation Sophia", online: <operationsophia.eu/>.

30 See e.g. Giorgia Bevilacqua, "Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities" in Gemma Andreone, ed, *The Future of the Law of the Sea* (Basel: Springer International Publishing, 2017) at 176, 178; BBC, "EU naval mission has failed to end people smuggling – peers" (12 July 2017), online: <www.bbc.com/news/uk-politics-40577755 >.

31 See UNHCR, "Desperate Journeys: January-December 2018" (January 2019) at 6, online (pdf): *The UN Refugee Agency* <data2.unhcr.org/en/documents/download/67712>.

32 See e.g. European Commission, *Progress Report on the Implementation of the European Agenda on Migration* (2019), online (pdf): <ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/

all fields. One of the measures included an attempt to reinvigorate the Dublin system. Under the Dublin regime, asylum seekers must have their application for refugee status processed by the State that is responsible for their entry into the European common territory. In most cases, this is the country responsible for the external European border crossed by the asylum seeker. During the "crisis", the Dublin system was completely overwhelmed and the system through which asylum seekers were to be returned to the country responsible for hearing their claim failed. In 2014, the Dublin office in Italy—responsible for handling readmission applications from other EU countries—was staffed by only three officers.[33] Given the reticence of other EU States to accept refugee resettlement from Italy and Greece, neither of these countries had any incentive to ensure the efficient operation of the Dublin system.[34]

One of the most dramatic measures to come out of the European Agenda on Migration was the creation of hotspots in Italy (Taranto, Messina, Trapani, Pozzallo, Lampedusa) and in Greece (Lesbos, Samos, Chios, Kos, Leros). These hotspots are detention centers in which new arrivals are identified (including by recording their fingerprints in the Eurodac system), information about their methods of transport is recorded, their asylum claims are heard, and a decision is made whether to let them enter onto the territory of the EU or to return them to a country of transit (in particular Turkey). The management of these hotspots remains, to this date, very controversial, particularly in light of their poor construction, frequent overpopulation, the absence of adequate services (especially for children), recurrent instances of violence, and the numerous administrative difficulties which result in prolonged detention of many individuals who are innocent of any crime, who are kept mostly idle, and whose futures are uncertain.

The EU Agency for Fundamental Rights and many other human rights protection mechanisms and institutions—including one of the authors of this article during his mandate as UN Special Rapporteur on the Human Rights of Migrants—have devoted numerous studies to the critical situation in the hotspots, insisting on guarantees for the human rights to which every migrant is entitled in all cases.[35] Such studies demonstrate that many failures to systematically respect fundamental rights remain, including with respect to the protection of unaccompanied minors (appointment of guardians, legal representation, access to education, etc.), the respect for the principle of family unity (low rates of family reunification on European territory), the implementation of forced returns to countries of transit or of origin, and the determination of refugee status.

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european-agenda-migration/20191016_com-2019-481-report_en.pdf>

33 See UNHCR, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Follow-up Mission to Italy (2–6 December 2014)*, A/HRC/29/36/Add.2 (2015) at para 36.

34 See the case law analysis on this matter *infra*, II.A.1 & II.A.2.

35 See FRA, "Opinion of the European Union Agency for Fundamental Rights on Fundamental Rights in the 'Hotspots' Set up in Greece and Italy" (29 November 2016) at 14-16, online (pdf): *European Union Agency for Fundamental Rights* <fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-5-2016-hotspots_en.pdf>; FRA, "Update of the 2016 FRA Opinion on fundamental rights in the hotspots set up in Greece and Italy" (3 March 2019), online (pdf): *European Union Agency for Fundamental Rights* <fra.europa.eu/en/opinion/2019/migration-hotspots-update>; on the Agency's website, the page dedicated to its work in the hotspots, FRA, "Asylum, Migration and Borders" (2020), online: <fra.europa.eu/en/theme/asylum-migration-borders/fra-work-hotspots>; OHCHR, *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Greece*, 35th Sess, UN Doc A/HRC/35/25/Add.2 (2017).

### 2.5. Limited Impacts and Slow Outcomes

The EU has invested considerable resources in Greece and Italy in order to support national authorities in the admission of refugees and to assist the refugee status determination process. Thousands of specialists have traveled to the hotspots to assist local authorities. Nevertheless, such efforts have been slow to produce any substantial outcomes. Greece has virtually abandoned any effort to return migrants to Turkey under the EU-Turkey Statement (1,836 returns between 2016 and the end of 2018).[36]

In 2016, the European Commission had announced a plan to relocate 60,000 asylum seekers from Greece to other EU Member States as a show of solidarity. Many States objected to this plan, in particular members of the Visegrád group that did not wish to receive any refugees.[37] Other Member States made no effort to accommodate these asylum seekers. The Commission did relocate 24,000 refugees at the end of 2018 and hoped to establish a program to resettle 50,000 refugees directly from transit countries in 2019.[38]

However, Greek and Italian authorities, as well as their respective populations, resent the countries of Northern Europe that closed their borders to migrants. Their refusal to share the responsibility of welcoming the migrants cannot be compensated for financially through transfers of funds. The absence of a coherent, coordinated, EU-wide policy to offer migrants settlement options in all Member States, subject to their capacity, in the context of enabling greater freedom of movement for migrants, has been acutely felt.

The Commission's initiatives on the relocation of asylum seekers and the resettlement of refugees are moves in the right direction. EU States must learn to treat the reception of refugees and openness to migrants as permanent features of their political agendas and not as temporary anomalies. Admittedly, political or environmental events can trigger or accelerate migration movements. However, it is the lack of preparation stemming from the persistent refusal to consider themselves as immigration countries which causes the disorganization of national and Union administrations and the moral panic provoked within European populations.

### 2.6. A Questionable Cooperation with Libya

At the end of 2017, images of slavery in the detention centers in Libya caused a political and media stir. A joint African Union–European Union–United Nations taskforce was established in November 2017 and has facilitated the repatriation of over 16,000 migrants in Libya to their countries of origin with the assistance of the International Organization for

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[36] See European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council: Progress Report on the Implementation of the European Agenda on Migration* (6 March 2019) at 3, online (pdf): *European Commission* <ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306_com-2019-126-report_en.pdf>.

[37] For a detailed discussion on this matter, see *infra*, II.A.2; in the case law *infra* note 80.

[38] See AIDA, "Relocation of asylum seekers in Europe: A view from receiving countries" (May 2018) online (pdf): *Asylum Information Database* <asylumineurope.org/sites/default/files/aida_brief_relocation.pdf>. See also generally: European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council: Progress Report on the Implementation of the European Agenda on Migration* (6 March 2019) at 16, online (pdf): *European Commission* <ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306_com-2019-126-report_en.pdf>.

Migration (IOM).[39] At the same time, over 1,300 refugees were evacuated from Libya as part of the new EU-funded UNHCR Emergency Transit Mechanism.[40]

The chaotic political situation in Libya is such that any collaboration with its "authorities" raises significant concerns. In particular, the catastrophic situation of the migration detention centers has been known for over a decade.[41] Nevertheless, cooperation between European (Italian in particular) and Libyan authorities in order to intercept migrants on Libyan territory has continued throughout. While the evaluation of the detention centers was absolutely necessary, claiming that the return of these migrants to their countries of origin is a humanitarian operation contains a dose of hypocrisy. Their detention was in large part a known result of the collaboration between European and Libyan authorities to prevent onward migration to Europe and to return migrants to their countries of origin. Many could claim that detention in conditions of quasi-slavery is part of a strategy of deterrence.[42]

### 2.7. Migration Prevention in the Guise of Development in Africa

The EU has also sought to develop cooperative relationships with authorities in African countries that are either countries of origin or transit for migrants. The "European Union Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa" (The European Union Trust Fund for Africa) was established in December 2015 as part of the Joint Valletta Action Plan arising from the European Agenda on Migration.[43] The planned endowment for the fund is 2.5 billion euros. Its declared goal is to promote economic development through education grants, entrepreneurial support and job creation so as to provide young Africans with opportunities other than migration. The fund was designed as an urgent response mechanism with the objective of enabling a "swift, common, complementary and flexible response to the different dimensions of an emergency situation"[44] and supporting political dialogue, programs of development cooperation, humanitarian assistance, and crisis intervention assistance. This intention is laudable and seeks to break down the traditional silos between different areas of international development cooperation policy.

However, the objective of deterring irregular migration risks sidelining the long-term development goals. European States are seeking short-term results in terms of a decrease in irregular migration, yet the challenging political and economic conditions in Africa will likely

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39 See EEAS, "Joint AU-EU-UN Taskforce assists 16,000 people" (2 March 2018) online: *European External Action Service* <eeas.europa.eu/delegations/tchad/40705/node/40705_en>.

40 See "European Agenda on Migration: Continuous Efforts Needed to Sustain Progress" (14 March 2018) online: *European Commission* <europa.eu/rapid/press-release_IP-18-1763_en.htm>.

41 The migrant detention situation in Libya was well explained in the documentary *Come un uomo sulla terra* by Ricardo Biadene. See WorldCat, "Come un uomo sulla terra" (2020), online: <www.worldcat.org/title/come-un-uomo-sulla-terra/oclc/646256940>; Richard Biadene et al, "Come un uomo sulla terra," DVD (Rome: Castel Gandolfo, 2009).

42 See Martin Baldwin-Edwards & Derek Lutterbeck, "Coping with the Libyan migration crisis" (2019) 45:12 J Ethnic & Migr Stud 2241 at 2247, 2254.

43 See European Commission, "International Cooperation and Development" (2020), online: *European Commission* <ec.europa.eu/europeaid/regions/africa/eu-emergency-trust-fund-africa_en>.

44 See European Commission, "A European Union Emergency Trust Fund for Africa" (2015), online: *European Commission* <europa.eu/rapid/press-release_MEMO-15-6056_en.htm>.

take a generation or more to improve regardless of the considerable efforts and resources being deployed. To think that anti-immigration emergency measures will succeed in the short term when nearly 70 years of international development policy have allegedly failed is undoubtedly a fantasy. There will be no magic solution to the underdevelopment of Africa. Only concerted efforts, sustained over the course of decades, will produce the kind of equitable development that will enable most Africans to make trans-Mediterranean mobility a choice and not a necessity.[45]

The readmission of irregular migrants by their States of origin is often a condition of development assistance even as these States are much more in need of the remittances that these migrants would be able to send back to their families and which have proven to be one of the best mechanisms for financing development.[46] For now, the financial incentive allows Europe to compel countries of transit and origin to bend to their desire to restrict migration. It is difficult to say how long this incentive will remain effective. If progress is not seen in the development of countries of transit and origin, eventually States of the Global South will reject this development model and refuse to participate in the restriction of mobility in the future, especially African countries as they are trying to establish free movement zones on their continent.[47]

### 2.8. The Political Marginalization of the Commission

One of the key factors in the hardening of European attitudes is the progressive "toxification" of the national political debate on questions of migration. Up until the 1980s, labor migration was the responsibility of the ministries of Labor, Social Affairs, Justice, or Foreign Affairs. With the border closures in the 1980s, the increase in the number of asylum seekers and the implementation of the Schengen zone, responsibility for migration control was transferred to ministries of the Interior or Home Affairs, which were already responsible for cross-border drug and arms trafficking, organized crime, and terrorism. The traditional fear of the "stranger" and the conflation of migration with existential threats in the media allow for all kinds of stereotypes, making migrants responsible for all social ills.

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45 See David Kipp, "From exception to rule: the EU Trust Fund for Africa" (December 2018), online (pdf): *Stiftung Wissenschaft und Politik* <nbn-resolving.org/ urn:nbn:de:0168-ssoar-61080-9>.

46 "After two consecutive years of decline, remittance flows to low- and middle-income countries (LMICs) increased by an estimated 8.5 percent in 2017, to reach $466 billion, a new record […]. Remittances are now more than three times the size of official development assistance […]. Excluding China, remittance flows are also significantly larger than foreign direct investment (FDI) in LMICs. Remittances are relatively more stable than cyclical private debt and equity flows. These figures reflect only officially recorded data; the true size of remittances, including flows through informal channels, is significantly larger." KNOMAD & World Bank, "Migration and Remittances—Recent Developments and Outlook" (April 2018), online (pdf): *KNOMAD* <www.knomad.org/sites/default/files/2018-04/Migration%20and%20Development%20Brief%2029.pdf>.

47 See "Free Movement of People" online: *Africa Regional Integration Index* <www.integrate-africa.org/rankings/dimensions/free-movement-of-people/>; UNECA, "Free Movement of Persons" online: *United Nations Economic Commission for Africa* <uneca.org/oria/pages/free-movement-persons>; GDI "Towards a Borderless Africa? Regional Organisations and Free Movement of Persons in West and North-East Africa" (January 2019), online (pdf): *German Development Institute* <www.die-gdi.de/uploads/media/BP_1.2019.pdf>.

In the organization of European institutional competencies, the European Commission is supposed to take the lead with respect to legislation. The fundamentals of European migration policy were developed through inter-State cooperation outside of the formal structures of the EU: for twenty years, the governments of the Schengen area worked on this, sheltered from the oversight and critique of the European Parliament or the ECJ.[48] Following the integration of the Schengen acquis into the EU, the Commission attempted to limit the repressive initiatives of Member States and to protect the rights of migrants. The recasting of directives and regulations pertaining to immigration over the last decade is one example of this effort.[49]

However, since the European elections in 2014 and particularly since the political crisis in the fall of 2015, the Commission has had to leave the majority of political initiative to the Council: the Council will systematically reject legislative initiatives that do not align with the national political interests that it is meant to defend. The proposals for reform of the European common asylum system, presented in May and June 2016, were the subject of much criticism and remain dead letter.[50] Here, as in other areas, the Commission no longer plays its historic role as guardian of the Community interest. This evolution is more noticeable in the domain of migration than in other areas because it raises issues pertaining to national sovereignty. European migration policy is now essentially guided by a European Council that has its eyes glued to the six or seven national electoral cycles taking place over the next twelve months—cycles in which populist parties use migration as their straw man. Thus, the implementation of European directives and regulations is insufficient and supervisory mechanisms are ineffective.[51]

The lack of normative coherence in European migration policy stems from the absence of the stabilizing and unifying role traditionally played by the Commission. The progressive transformation of different aspects of European migration policy does not differ substantially from the way in which national policies are adopted in the majority of countries of the Global North: policy evolves as a function of electoral agendas, events that influence public opinion, tragedies that occur here and there, and the speculations of the strategic advisors of heads of State on the type of message that is likely to win elections. Absent effective participation by migrants themselves, particularly those who are most vulnerable, in social debates surrounding migration policies, these policies are most often based on stereotypes, myths and fantasies, just as when committees of men were developing policies pertaining to women's rights.

Since migrants do not vote and the executives make policies without consulting them, the courts then remain the guardians and final guarantors of the fundamental rights of migrants. National courts are the first line of defense. Frequently they request interpretive assistance

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48 See "Schengen Agreement" (1 October 2019), online: *Schengen Visa Info* <www.schengenvisainfo.com/schengen-agreement/>.

49 See Francesca Ippolito & Samantha Velluti, "The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness" (2011) 30:3 Refugee Survey Q 24 at 36.

50 For a systematic review, see *Chetail, supra* note 8 (the proposals addressed are COM (2016) 270–272, 465–468). See the note by the Council of the EU, *Reform of the Common European Asylum System and Resettlement* 15057/1/17 REV 1 (2017). On this topic, see also Sergio Carrera, *An Appraisal of the European Commission of Crisis: Has the Juncker Commission delivered a 'new start' for EU Justice and Home Affairs?* (Brussels: Centre for European Policy Studies, 2019) at 21–25.

51 See Marco Scipioni, "Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis" (2018) 25:9 J Eur Pub Pol'y 1357.

by way of referred questions to the ECJ, which is less susceptible to the pressures of national sovereignty. Outcomes at the Court vary. While the ECJ mostly plays the role of guarantor of fundamental principles and rights when interpreting migration policy within the Union, it is much more reserved, even absent, when it comes to interpreting this same policy from an external point of view, in the context of the relations between the Union and the rest of the world.

## 3. THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE: BETWEEN PROTECTING FUNDAMENTAL RIGHTS AND SAFEGUARDING NATIONAL SOVEREIGNTY

The migration-related case law of the ECJ has followed two contrasting paths. On the one hand, the Court has confirmed the necessity of interpreting the law in a manner that is consistent with European and international law, in particular with respect to the protection of the fundamental rights of individuals (A). This tendency is reflected in the interpretation of what could be called the "internal" management of migration, in other words, management within the Union, between Member States. On the other hand, the Court, either through its silence or self-restraint, leaves much authority and discretion to the States (B). Beyond the classic margin of appreciation and interpretation, it is a whole segment of "external" migration policy, pertaining to questions that arise outside of the territory of the EU or in their relations with third countries, which has been abandoned to national sovereign authorities.

### 3.1. The Legal Interpretation in the Internal Management of Migration Policy

The role of the ECJ in the protection of the fundamental rights of migrants is far from negligible. Either at the instigation of the European Court of Human Rights or on its own initiative through interpretation of EU law in a manner consistent with international human rights law, the ECJ outlines the distinction between principles and exceptions in international migration as it does in other domains of European law. In doing so, the Court also draws inspiration from its case law on the freedom of movement within the EU, in particular recalling that freedom of movement is a fundamental freedom entitled to a broad interpretation while, in contrast, any obstacle or limitation to that freedom should be construed narrowly. However, the legal frameworks governing freedom of movement within the EU and migration to the EU are distinct. While the free movement of persons within the EU is protected as one of the "four freedoms" of European integration (free movement of goods, capital, services and persons), there is no formal right to migration under current international law, even if the right of every individual to leave any country, including their own, may imply a right to emigration.[52] In this regard, the European Court of Human Rights has often repeated that "as a matter of well-established international law and subject to its treaty obligations, a State has the right to

[52] See *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171 art 12.2 (entered into force 23 March 1976) [*ICCPR*]; *European Convention on Human Rights,* 4 November 1950, ETS 5 Protocol 4, art 2.2 (entered into force 3 September 1953) [*ECHR*]; *African Charter on Human and Peoples' Rights,* 27 June 1981, CAB/LEG/67/3 rev 5, 21 art 12.2 (entered into force 21 October 1986) [*ACHPR*]. See also Carlier & Sarolea, *supra* note 8 at 99 (on the paradox of the right to emigrate without a corollary right to immigrate which could be described as "The Suspended Step of the Stork" according to the title of a film by the Greek filmmaker Theo Angelopoulos).

control the entry of non-nationals into its territory".[53] Nevertheless, this "well established" principle of sovereignty has been questioned in doctrinal analysis.[54] In any event, in all cases the principle is "subject to [the State's] treaty obligations",[55] including those that protect the fundamental rights of all persons.

This delicate balance between the sovereignty of States and fundamental rights has also evolved as the sources from which sovereignty is derived have multiplied. It is no longer a question of a single, unique sovereignty—that of the State—but of many concurrent and complementary sovereignties. Such is the complexity of interpreting migration law in the context of regional integration, as in the EU. It is beyond the scope of this article to review all of the legal texts related to migration policy.[56] We will limit ourselves to two jurisprudential examples in which the Court has attempted to balance sovereignty against fundamental rights, ultimately giving greater weight to the latter. The first case is that of the interpretation of the Dublin Regulation in individual cases (1). The second pertains to the emergency measures adopted with respect to group entry (2).

#### *3.1.1. Dublin: Individual Entry*

Even as it has evolved and been modified over time, the basic principle of the Dublin Regulation persists. Within the territory of the EU, the Member State responsible for examining an asylum application is, in principle, the State through which the migrant entered onto EU territory.[57] Frequently lacking the required travel documents, asylum seekers travel more often by land and sea than by air. As this article has previously noted, the geographic configuration of Europe is such that the countries along the southern and eastern borders are most often the countries through which migrants traveling via the Mediterranean and Balkan routes enter and which are thus designated as the States responsible for examining asylum applications. Frequently then, Central or Northern European States will require that migrants be returned to Member States in the south and the east for the determination of their claims. In the context of these procedures, the ECJ has enforced respect for both the fundamental substantive and procedural rights of individuals. In terms of procedure, the Court has repeatedly emphasized that while the Dublin Regulation is a mechanism for the redistribution of asylum seekers

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53 Established case law since *Abdulaziz, Cabales, and Balkandali v The United Kingdom* (1985), 9214/80, 9473/81 & 9474/81 ECHR at para 67.

54 See Sylvie Sarolea, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante* (Brussels: Bruylant, 2006). See also Vincent Chetail, "Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Victoria to Vattel" (2016) 27:4 Eur J Intl L 901 (historical view of international law); Chantal Thomas, "What Does the Emerging International Law of Migration Mean for Sovereignty?" (2013) Cornell Law School Research Paper No 13-72; Marjoleine Zieck, "Refugees and the Right to Freedom of Movement: From Flight to Return" (2018) 39:1 Mich J Intl L 19.

55 See Hugh Kindred et al, *International Law Chiefly as Interpreted and Applied in Canada,* 8th ed, (Toronto: Emrond Montgomery Publications, 2014).

56 See *supra* note 11.

57 EC, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* [2013] OJ, L 39/5.

between States, it also grants asylum seekers clear rights which can be invoked before national courts. This is the case with regard to respect for the strict timelines intended to ensure speedy identification and transfer procedures.[58] In 2017, the Court held that the calculation of time limits for the determination of the competent State within Dublin should begin as soon as the competent authority has been "informed, with certainty, of the fact that a third-country national has requested international protection, and [that] it is not necessary for the written document prepared for that purpose to have a precisely defined form".[59] In addition, whatever the nature of the judicial review and whether it is an administrative review or a full appeal, for the remedy to be effective the applicant must be able to invoke circumstances subsequent to the decision to transfer the individual to another Member State.[60] On the substance, the ECJ has confirmed that transfer to another Member State responsible for the examination of the asylum application cannot lead to inhuman or degrading treatment, even if the transfer is conducted in accordance with the Dublin Regulation. The latter is indeed grounded, according to the *Bosphorus* case law, in the principle of mutual trust between Member States and the presumption that Member States will respect fundamental rights when implementing EU law.[61] In this regard, it is interesting to note two interactions that will be discussed below. On the one hand, there is a tension between different sovereignties to guarantee fundamental rights. On the other, there is an interaction between the two European courts to specify the required level of protection from degrading and inhuman treatment.

The tension between different sovereignties was revealed as early as the first case on the Dublin Regulation brought before the European Court of Human Rights in 2011.[62] In that case, the European Court of Human Rights (let us call it sovereignty #1) relied on Article 3 ECHR in its interpretation of the Dublin Regulation, a legal text derived from the EU (sovereignty #2). In order to prohibit Belgium from returning an Afghan asylum seeker to Greece (the State responsible for hearing the application) where he risked being subject to inhuman and degrading treatment contrary to Article 3 ECHR, the Strasbourg Court required Belgium to use the "sovereignty clause" found in Article 3(2) of the Dublin II Regulation of the time. This provision would allow Belgium, by virtue of its national sovereignty (sovereignty #3), to examine any asylum request, regardless of which State was responsible for it under the Dublin Regulation. The option of exercising national sovereignty (#3) becomes an obligation if, by refusing to exercise this right and applying the EU's (#2) Dublin Regulation, the State

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58 See *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* [GC], C-63/15, [2016] ECHR 1, I-409, ECLI:EU:C:2016:409; *George Karim v Migrationsverket* [GC], C-155/15, [2016] ECHR I-410, ECLI:EU:C:2016:410; *Bundesrepublik Deutschland v Aziz Hasan,* C-360/16, [2018] ECHR I-35; ECLI:EU:C:208:360. See also Maarten Den Heijer, "Remedies in the Dublin Regulation: Ghezelbash and Karim" (2017) 54:3 CML Rev 859 (regarding the extent of the national Court judge's control over the transfer decision resulting from the application of the Dublin Regulation); Silvia Morgades-Gil, "The Right to Benefit from an Effective Remedy Against Decisions Implying the Return of Asylum-seekers to European Safe Countries" (2017) 19:3 Eur J Migr & L 255.

59 *Tsegezab Mengesteab v Bundesrepublik Deutschland* [GC], C-670/16, [2017] ECHR I-587, ECLI:EU:C:2017:587, at para 88.

60 See *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl*, C-201/16, [2017] ECHR I-805, ECLI:EU:C:2017:805.

61 *Bosphorus v Ireland* [GC], No 45036/98, [2005] ECHR 1, ECLI:CE:ECHR:2005:0630.

62 *MSS v Belgium and Greece* [GC], No 30696/09 [2011] ECHR 1, ECLI:CE:ECHR:2011:0121.

concerned creates a risk of inhuman or degrading treatment contrary to the interpretation of the ECHR by the European Court of Human Rights (#1). The intersection of sovereignties is such that we are referring to an exercise of national or domestic sovereignty in the implementation of a European legal text that guarantees respect for the fundamental rights of the migrant in question.[63] The ECJ confirmed the European Court of Human Rights' interpretation later that same year in its verdict in the *NS* case. The ECJ stated that the "Common European Asylum System is based on the full and inclusive application of the Geneva Convention [On the Status of Refugees] and the guarantee that nobody will be sent back to a place where they again risk being persecuted" and that "[a]ccording to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law".[64] This interpretation is consistent with international and EU human rights law. Nevertheless, in order to avoid too great an indictment of the Dublin Regulation, the ECJ specified that the exception to transfers under the Dublin Regulation would only come into effect "if there are substantial grounds for believing that there are systemic flaws (or deficiencies) in the asylum procedure" in the receiving State.[65] In 2013, this concept of "systemic flaws" was integrated into the general principles of the revised Dublin III Regulation. According to the text of the Dublin Recast Regulation, an exception must be made to the transfer of applicants in cases "[w]here it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment".[66]

It is at this point that the second interaction, namely that between the Strasbourg and Luxembourg Courts, comes into play to further define the required level of protection from inhuman or degrading treatment. In 2013, the ECJ confirmed that the exception requires systemic deficiencies in the receiving State.[67] However, in its *Tarakhel* decision in 2014, the European Court of Human Rights, referring to the requirement for an individual and concrete assessment of the real risk of inhuman or degrading treatment, required the application of the exception even if there were no systemic deficiencies.[68] The debate was heating up. Would the ECJ adopt this interpretation? The answer is affirmative. In 2017, in the *CK* decision, disregarding the opinion of the Advocate General who argued that there were no systemic

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63 Certainly, the concept of sovereignty employed here is polysemic. It is no longer limited to the *summa potestas*, according to the classic conception of State sovereignty. Competing sovereignties suggests instead that each body be subject, if not to the control, at least to the influence of the other bodies.

64 *NS v Secretary of State for the Home Department* & *ME et al v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [GC], C-411/10 & C-493/10 [2011] ECHR I-13993, ECLI:EU:C:2011:865 at paras 75, 77 (cases joined in December 2011).

65 *Ibid* at paras 86, 89, 99, 106.

66 EC, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013,* [2013] OJ, L 180/3, art 3(2) [*Dublin III Regulation*].

67 *Shamso Abdullahi v Bundesasylamt* [GC], C-394/12, [2013] ECR I-813, ECLI:EU:C:2013:813 paras 60, 62.

68 *Tarakhel v Switzerland* [GC], No 29217/12 [2014] ECHR 1, ECLI:CE:ECHR:2014:1104.

deficiencies in the reception State, the Court took into consideration the individual risk of degrading treatment resulting from the state of health of the applicant.[69] The circumstances of the case were such that the individual assessment of risk pertained to the conditions during the transfer itself. The same reasoning, however, would seem to extend to a situation where the risk in question materialized not during the transfer but in the destination State, as was the case in *Tarakhel*. Additionally, the ECJ specified in *CK* that "far from affecting the existence of a presumption that fundamental rights are respected in each Member State, [this interpretation] ensures that the exceptional situations […] are duly taken into account by the Member States".[70]

In all those individual cases, the Court confirmed the necessity of interpreting the law in a manner that is consistent with European and international law, in particular with respect to the protection of the fundamental rights of individuals and attempted to draw a connection between the principle of mutual trust between States and respect for fundamental rights.[71] However, this mutual trust and the individual assessment of fundamental rights would be put to the test when faced with large scale group migration during the crisis.

#### *3.1.2. Crisis: Group Situations*

The Dublin system has been the subject of much criticism. Two critiques are particularly noteworthy. The first critique is that the system results in an unequal distribution of asylum seekers between Member States. The burden borne by Member States located along the external

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69 *CK, HF & AS v Republic of Slovenia*, C-578/16, [2017] ECR 1, ECLI:EU:C:2017:127.

70 *Ibid* at para 95.

71 On this question, see Luc Leboeuf, *Le droit européen de l'asile au défi de la confiance mutuelle* (Limal : Anthemis, 2016). Similar reasoning, which makes mutual trust subject to respect for fundamental rights, is found in the interpretation of other domains of European law. Thus, within the area of freedom, security, and justice, with respect to the recognition between States of judgments in civil matters, see *Avotins v Latvia* [GC], No 1750/07, [2016] ECHR, ECLI:CE:ECHR:2016:0523. In that case, the Court in Strasbourg, in a Grand Chamber, while finding that there was no violation of the fundamental rights protected by Article 6 ECHR, admitted the legitimacy of the principle of mutual trust but noted that the principle could not be used to "[limit] to exceptional cases the power of the state in which recognition is sought to review the observance of fundamental rights by the State of origin". In fact, the Court noted, this form of limited and incomplete review "could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin in order to ensure that the protection of those rights is not manifestly deficient" (para 114). In the context of the Dublin transfers, this corresponds to a review by the Member State where the application for asylum is introduced of the respect for fundamental rights by the destination Member State that would be responsible for the application. The Court in Strasbourg adopts a similar approach when it examines the relationship between the ECHR and international law, considering that "the respondent State cannot validly confine itself to relying on the binding nature of Security Council resolutions, but should persuade the Court that it has taken—or at least has attempted to take—all possible measures to adapt the sanctions regime to the individual situation of the applicants, at least guaranteeing them adequate protection against arbitrariness" (*Al Dulimi and Montana Management v Switzerland* [GC], No 5809/08, [2016] ECR, ECLI:CE:ECHR:2016:0621 at para 149, regarding freezing the assets of Iranians in Switzerland, a violation of Article 6 ECHR). For a study of the relationship between mutual trust and fundamental rights, see notably: Florence Benoît-Rohmer, "Les Cours européennes face au défi de la confiance mutuelle" (2017) RTDH 391; Emmanuelle Bribosia & Anne Weyembergh, "Confiance mutuelle et droits fondamentaux: 'Back to the future'" (2016) CDE 469.

borders of the Union, particularly in the south and the east, is the heaviest. Financial transfers which might be satisfactory in dealing with issues of common policy concerning "goods", such as the EU's Common Agricultural Policy, are not sufficient for either the individuals involved or for the States when it is a question of human mobility. The second principal critique acknowledges the unreasonable lengthening of procedures. The length of time required to determine which Member State is responsible for examining the asylum application, before any consideration of its merits, undermines the proper and expeditious procedures that States expect and that the parties are entitled to.[72] These flaws in the Dublin system become even more pronounced when the number of asylum seekers increases significantly, as occurred during the crisis in 2015–2016, and when migrant populations are mixed—that is, when they include different categories of migrants including, but not limited to, asylum seekers.

It becomes increasingly difficult to view EU migration policy as respecting Article 67(2) of the *Treaty on the Functioning of the European Union* (TFEU) and framing "a common policy on asylum, immigration and external border control, based on solidarity between Members States, which is fair towards third-country nationals".[73] This was the opinion reached by Advocate General Sharpston in the cases *AS* and *Jafari*. The Advocate General ruled that it was unrealistic to consider returning asylum seekers to Croatia or Slovenia given that the authorities of these States had organized the crossing of their border of an "exceptionally large number" of migrants for the purpose of allowing them to continue on to Austria and Germany. More than ever, the Dublin mechanism was inadequate. In the clearest terms, Advocate General Sharpston noted that "[the] circumstances at the material time fall within a gap for which there is no precise legal provision in the Treaties or secondary legislation […] put bluntly, the Court is now asked to provide a legal solution and to fit it retrospectively to a factual situation with which the applicable legal rules are ill-equipped to deal."[74] Despite the exceptional nature of the situation, the Court maintains a classic interpretation of the Dublin regulation, deeming that the applicants had "irregularly crossed the border into a Member State" which was thus responsible for the asylum application.[75]

However, that same day, in the *Mengesteab* case, the Court applied a very flexible interpretation of the submission of an application for asylum such that most of the migrants involved were able to use the claim that the six-month time limit had been exceeded in order to refuse their transfer to Slovenia or Croatia. The Court's piecemeal solution demonstrates its capacity for accommodation. But the gap between the written texts and the situation in practice, noted by the Advocate General, had the benefit of requiring States and EU institutions

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72 See among other authors, on those two critiques, Stefan Breitenmoser, Otto Lagodny & Peter Uebersak, eds, *Schengen und Dublin in der Praxis* (Zurich: Dike Verlag, 2018).

73 *Treaty on the Functioning of the European Union,* C 326/49 [2012], OJ, art 67(2).

74 *AS v Republic of Slovenia,* C-490/16, [2017] ECR, ECLI:EU:C:2017:443 in the opinion of Advocate General Sharpston at paras 109 & 171.

75 *Supra* note 62; *Jafari* [GC], C-646/16, [2017] 1, EU:C:2017:586 [*Jafari*]. See Iris Goldner Lang, "Croatia and EU Asylum Law: Playing on the Sidelines or at the Centre of Events?" in Vladislava Stoyanova & Eleni Karageorgiou, eds, *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (Leiden: Brill, 2018); Daniel Thym, "Judicial Maintenance of the Sputtering Dublin System on Asylum Jurisdiction: *Jafari*, *A.S., Mengesteab and Shiri*" (2018) 55:2 CMLR 549. For his part, Daniel Thym considers that "[i]t is not the function of judges to replace unfortunate political decisions by means of statutory interpretation, be it in normal circumstances or in times of crises" at 558.

to fulfill their responsibilities. These could be assumed simply by the implementation of Directive 2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons. The Court has mentioned this "temporary protection" Directive in various cases that raised interpretation difficulties with respect to the Dublin Regulation.[76] According to Article 5(1) of that Directive, "the existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority".[77] During the "crisis", failure to achieve a qualified majority meant that the Directive was not implemented. *A contrario,* one could say that there was no "mass influx" during the "crisis".

In the absence of the implementation of the temporary protection Directive, the Council must rely on Article 78(3) TFEU to adopt "provisional measures" to address "an emergency situation characterized by a sudden inflow of nationals of third countries".[78] The political situation having prevented the use of existing structural solutions, provisional measures provide for the relocation of 40,000 and then another 120,000 asylum seekers in clear need of international protection, primarily from Greece and Italy, to other Member States.[79] Although they could have benefited from this outcome, Slovakia and Hungary, with the support of Poland, sought to annul the second decision (2015/1601) and instead put in place a temporary relocation mechanism. Giving the Council a broad margin of discretion in the adoption of emergency measures under Article 78 TFEU, the Court refused to adopt the position of the States of the Visegrad Group and rejected the claim for annulment. In its decision, the Court referred to the principle of solidarity without emphasizing its "importance […] as a founding and existential value of the Union" as proposed by Advocate General Bot.[80] The Court attempted to reconcile European values and respect for national identity even as it noted that "considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law."[81] Thus the Court once again

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76 As early as 2011 *supra* note 64 at para 12 [*NS*] and 2017 *ibid* at para 97 [*Jafari*].

77 EC, *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,* [2001] OJ, L 212, art 5(1).

78 *Supra* note 73, art 78(3).

79 EC, *Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, [2015] OJ, L 239/146; EC, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, [2015] OJ, L 248/80.

80 See *Slovak Republic and Hungary v Council* [GC], C-643/15 and C-647/15, [2017] ECR 618, ECLI:EU:C:2017:618 at paras 18, 24 (opinion of Advocate General Bot delivered on 26 July 2017). Although the Commission's procedure was not against the four Member States of the Visegrad Group, all four were concerned. Hungary and the Slovak Republic, as parties to the proceedings, were formally supported in the case by the Republic of Poland. The Czech Republic, for its part, had also refused the Commission's decision. Only one other country opposed (Romania) and one country abstained (Finland). See Bruno De Witte & Evangelia (Lilian) Tsourdi, "Confrontation on relocation - The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v. Council" (2018) 55:5 CML Rev 1462.

81 *Ibid* at para 305 (Judgment of the Court [GC] delivered on 6 September 2017). For a critique expressing regret that the Court did not follow the opinion of the Advocate General, see Henri Labayle, "La solidarité n'est pas une valeur: la validation de la relocalisation temporaire des demandeurs d'asile par la Cour de justice" (7 September 2017), online (blog): *EU Immigration and Asylum Law and Policy Blog* <www.

confirms, if only as a minor note, its role as guardian of the principles and interpretation of EU law. Nevertheless, this was not the case when, during the same period of crisis, the Court was forced to address the external aspects of migration policy.

### 3.2. The Failure to Engage in the Management of External Migration Policy

The EU plan to relocate asylum seekers within the Union was intended, in part, as a mechanism for managing the impact of the crisis through the balanced distribution of migrants on a group basis between Member States according to quotas, as opposed to relying on the complex and inequitable system of individual allocation under the Dublin Regulations. In practice, this solution was met with little success due to the reticence, and even overt opposition, by Member States. It seemed that what was needed were accompanying preventative measures. Faced with these migrant "flows", it was necessary to "turn off the taps".[82] By instituting restrictive measures "upstream", outside of its territory, the objective is to limit the number of migrants able to access and to enter the EU. These are the measures that make up the external management of European migration policy.[83] For the purpose of this discussion, we are highlighting two types of management. The first is a *hard* external management which

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eumigrationlawblog.eu/la-solidarite-nest-pas-une-valeur-la-validation-de-la-relocalisation-temporaire-des-demandeurs-dasile-par-la-cour-de-justice-cjue-6-septembre-2017-slovaquie-et-hongrie-c-consei/>.

82 The metaphors that are often used to transform migrants from human beings into a liquid state are deserving of substantial critique. See e.g. François Crépeau & Leanne Holland, "Little Bee or the Rejection of Refugees in the Global North" in Olivier Delas & Michaela Leuprecht, eds, *Liber Amicorum Peter Leuprecht* (Brussels: Bruylant, 2012) at 335:

> We still use a language that relates such threatening figures (the despised 'cosmopolitan' interloper of the '30s) to the water, the sea, i.e. the main waterways which we used for most of human history (until, very recently, we learned how to make and maintain roads) and which were also the passage for feared invaders: the Phoenicians, the Assyrians, the Greeks, the Romans, the Vikings, the Normans, the Arabs, etc. We talk about migration 'waves', 'flows' and 'streams', 'stemming the tide', 'tsunamis' of migrants. Forgetting that borders have always been porous, save for a few modern dictatorships, we imagine our borders as dykes which should be watertight and we talk of 'sealing' them. The image of the Dutch boy with his finger on the leak comes to mind. Migration is an impersonal, fungible, liquid or viscous matter that can infiltrate itself everywhere, an image which isn't far from that of the 'cockroaches' of the Rwandan genocide. We can see how important these images remain in our collective consciousness, when there is so much media hype regarding migrant arrivals by boats, be they Haitians trying to reach Florida, Libyans and Tunisians en route for Malta or Lampedusa, or Sri Lankans crossing the Pacific towards Vancouver. Many more migrants reach our countries every year by air or by land, but the boats seem to be triggering a deep seated fear of 'invasion'.

83 See Marianne Dony, ed, *La dimension externe de l'espace de liberté, de sécurité et de justice au lendemain de Lisbonne et de Stockholm: un bilan à mi-parcours* (Brussels: Éditions de l'Université de Bruxelles, 2012); Paula Garcia Andrade, "EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally" (2018) 55:1 CML Rev 157; Paula Garcia Andrade, *La acción exterior de la Unión Europea en materia migratori. Un problema de repartó de competencias* (Valencia: Tirant lo Blanch, 2014); Marleen Maes, Marie-Claire Foblets & Philippe De Bruycker, eds, *External Dimensions of European Migration and Asylum Law and Policy* (Brussels: Bruylant, 2011); Elefteria Neframi, *L'action extérieure de l'Union européenne. Fondements, Moyens, Principes* (Paris: LGDJ, 2010); Eleftheria Neframi, "La dimension extérieure des politiques de l'Union européenne" (Paper delivered at the XXVIIIe Congrès de la FIDE, 23 May 2018 to 26 May 2018) [unpublished].

works through externalization by asking third States to control and manage migrants. The EU-Turkey statement is an example of this (1). The second is management by the EU and its Member States beyond their own borders, in diplomatic missions, through the visa control process (2).

#### *3.2.1. EU-Turkey Statement*

In October 2015, Turkey and the EU concluded the EU-Turkey Joint Action Plan in order to respond to the crisis created by the situation in Syria. Several meetings "dedicated to deepening Turkey-EU relations as well as addressing the migration crisis" were held on the implementation of this action plan. Following the third meeting, on 18 March 2016, the EU and Turkey issued a statement via press release. It states:

> In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points:
>
> 1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of *non-refoulement*. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said Directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.
>
> 2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18,000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54,000 persons […][84]

[84] European Council, Press Release, No 144/16, "EU-Turkey statement" (18 March 2016), online: <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement>.

Following this statement, the number of asylum applications from migrants in the Greek Islands seeking to avoid returning to Turkey exploded. Like those who fail to file an asylum claim, those migrants whose claims are determined to be inadmissible or unfounded can be returned to Turkey. Various cases were brought before the General Court of the EU, including three cases seeking to annul the agreement, brought by three asylum seekers, two nationals of Pakistan and one of Afghanistan. Many questions were raised about both substantive and procedure issues. Were the cases eligible to be heard in light of Article 263 TFEU? Given that the cases were brought by individual applicants, these applicants had to be able to demonstrate that this act was "of direct and individual concern to them".[85] Another question raised was whether the Statement constituted a simple declaration or whether it was a formal agreement that had legal effects. If it is a formal agreement, does this Statement, which refers specifically to international law, actually comply with that law? Is the Statement consistent with the principle of *non-refoulement*[86] contained in Article 33 of the Geneva Convention on Refugee Status? What is the impact of the fact that Turkey has maintained the geographical limitation of the Geneva Convention, which excludes its application to refugees coming from non-European countries including Syria, Afghanistan or Iraq?[87] Avoiding any discussion of all these questions, the General Court declared itself incompetent to hear the case. By an order of 28 February 2017, following a very careful and detailed analysis of the documents, the General Court of the EU ruled that "the EU-Turkey statement […] cannot be regarded as a measure adopted by the European Council […and that…] the expression 'Members of the European Council' and the term 'EU' contained in [this] statement […] must be understood as references to the Heads of State or Government of the European Union […] who […] met with their Turkish counterpart".[88] Consequently, the General Court declared that it lacked jurisdiction to overturn this accord, as it was not a question related to an act of a European institution but to an agreement concluded between the Member States and Turkey. An appeal was filed, but the ECJ considered this appeal to be lacking in consistency and precision and declared it inadmissible.[89] The Court notes "the appeals thus simply make general assertions that the General Court disregarded a certain number of principles of EU law, without indicating with the requisite degree of precision the contested elements in the

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85 *Supra* note 73, art 263.

86 *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189, art 33.

87 On these critiques, see notably Margarite Helena Zoeteweij & Ozan Turhan, "Above the Law — Beneath Contempt: The End of the EU-Turkey Deal?" (2017) 27:1 Swiss Rev Intl & European L 151.

88 See *NF v Council*, T-192/16, [2017] ECR 128, ECLI:EU:T:2017:128 at paras 69, 71. For comments, see Jean-Baptiste Farcy & Géraldine Renaudière, "L'accord UE-Turquie devant le Tribunal de l'Union européenne: une incompétence lourde de conséquences?" (19 April 2017), online (blog): *Centre Charles de Visscher pour le droit international et européen* <uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/tribunal-de-l-union-europeenne-28-fevrier-2017-nf-ng-et-nm-conseil-europeen-aff-t-192-16-t-193-16-et-t-257-16.html>; Paula García Andrade, "External Competence and Representation of the EU and Member States in the Area of Migration and Asylum" (17 January 2018), online (blog): *EU Immigration and Asylum Law and Policy Blog* <eumigrationlawblog.eu/external-competence-and-representation-of-the-eu-and-its-member-states-in-the-area-of-migration-and-asylum/>; Narin Indriz, "The EU-Turkey Statement or the 'Refugee Deal': The Extra-Legal Deal of Extraordinary Times?" in Dina Siegel & Veronika Nagy, eds, *The Migration Crisis? Criminalization, Security and Survival* (The Hague, Eleven Publishing, 2018); Thomas Spijkerboer, "Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice" (2018) 31:2 J Refugee Stud 216.

89 *NF v Council*, C-208/17 P to C-210/17 P, [2018] ECR 705, ECLI:EU:C:2018:705 at paras 10–11.

orders under appeal or the legal arguments specifically advanced in support of the application for annulment".[90] Commenting on this avoidance strategy and bringing it closer to Eurozone crisis management, similarly endorsed by the Court, Pieter-Augustijn Van Malleghem notes that this "post-democratic executive federalism", in Habermas' words, "seems to go hand in hand with a lack of control of conformity with the fundamental rights recognized by Union law".[91] In fact, by a simple order, quite summarily reasoned, the Court closes any judicial debate on the various controversies raised by the General Court decisions. Among these, the question of the division of competences between the Union and Member States is at the very heart of the debate on post-democratic executive federalism. The Court's order seemed to move away from or even call into question the principle of pre-emption as enshrined in the ERTA case law.[92] According to this case law, the extent of EU law harmonization at an internal level restricts the competence of Member States at an external level. It would have been interesting to glean the Court's position on the external consequences of not only the extent of European harmonization in the field of freedom of movement, but also of asylum. Once the link between internal and external competences has been acknowledged, the question would arise of "ensur[ing] the continuity of the protection afforded where [the person] is transferred to a third country".[93] The above extract is drawn from the Opinion of Advocate General Bot in the *Schrems* case. The words "the person", here in square brackets, are simply substituted for the words "personal data" which are the subject of the *Schrems* judgment.[94] Can what is done and said in law about personal data not apply to individuals? Even if the EU secondary laws are distinct, are the principles of protection of fundamental rights underlying them differently? Is it not possible to develop, with regard to the extraterritoriality effect of fundamental rights, also in the field of asylum, what former Advocate General Cruz Villalón calls "a principle of continuity" from internal to external competences?[95]

So far, concerning the EU-Turkey Statement, it will be the national courts and potentially the European Court of Human Rights, which will be called upon. Greek courts appear divided with regard to whether the Statement conforms to the requirements of international law. The State Council of Greece has struck at the heart of the issue by admitting that, on the one hand, Turkey may be considered a safe third country, yet on the other hand, an in-depth evaluation

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90 *Ibid* at para 16.

91 Pieter-Augustijn Van Malleghem, "La Cour de justice refuse de revisiter la légalité de l'accord UE-Turquie" (4 October 2018), online (blog): *Cahiers de l'EDEM* <uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-j-u-e-aff-jointes-c-208-17-p-a-c-210-17-p-ordonnance-du-12-septembre-2018-nf-ng-et-nm.html>.

92 *Commission of the European Communities v Council* (1971), C-22/70, ECR I-264, ECLI:EU:C:1971:32 at paras 28–30.

93 *Schrems v Data Protection Commissioner*, C-362/14, [2015] ECR 627, ECLI:EU:C:2015:627 at para 139 (opinion of Advocate General Bot delivered on 23 September 2015).

94 *Schrems v Data Protection Commissioner*, C-362/14, [2015] ECR 650, ECLI:EU:C:2015:650 (judgment of the Court [GC] of 6 October 2015).

95 Pedro Cruz Villalón, "Un principe de continuité ? Sur l'effet extraterritorial de la Charte des droits fondamentaux de l'UE" in Paschalis Paschalidis & Jonathan Wildemeersch, eds, *L'Europe au présent! Liber Amicorum Melchior Wathelet,* (Brussels: Bruylant, 2018) 317 at 334; Pedro Cruz Villalón, "The EU Charter of Fundamental Rights and the Legal Order of Third Countries: A commentary on the *Schrems/PNR data* jurisprudence" (2019) at 20, online (pdf): *Government of Spain* <www.cepc.gob.es/docs/default-source/agenda/3rdcountries.pdf?sfvrsn=0>.

of the risk of inhuman or degrading treatment in Turkey must be undertaken.[96] In essence, this converts a group-based solution back into an individual analysis, consistent with human rights principles and the case law of the European Court of Human Rights, particularly with regard to the above-noted Dublin Regulation. The Court of Human Rights confirmed this analysis in another case that was similar to that pertaining to the EU-Turkey Statement. In *Ilias and Ahmed v Hungary*, the Court ruled that the systematic transfer of migrants to Serbia under a readmission agreement concluded between the two countries violated Article 3 of the ECHR.[97] With respect to the EU-Turkey Statement, the Strasbourg Court has ruled only indirectly on the deprivation of liberty in Greece with a view to the return of migrants to Turkey. However, the Court ruled that the detention had a basis in Greek law that was adopted in order to implement the Statement and in light of the fact that the objective of detaining the claimants was to prevent them from remaining irregularly in Greece, to guarantee their eventual expulsion, and to permit their identification and registration in the context of implementing the EU-Turkey Statement.[98] Nevertheless, the Court found a violation of Article 5(2) of the ECHR due to a failure to provide sufficient information.

By refraining from monitoring the agreement with Turkey, the ECJ reaffirmed the power of the European Council. As noted in the diagnosis of the crisis above, the Council now dominates the field of European migration policy at the expense of the Commission, which is relegated to the role of consultant and executor. This rise in power is reinforced by the fact that no judicial review is being exercised, despite the evidence that the Council was both at work and the guiding force behind this EU-Turkey statement.

#### *3.2.2. Visas*

Visa implementation measures that require prior authorization of travel are another way in which entrance into European territory is controlled. In fact, in the triptych "visa, asylum, immigration", the visa policy was the first area of common policy in the EU, beginning with the progressive adoption of a common list of third countries whose citizens required a visa to enter the Union, as well as the adoption of a common visa model.[99] In 2009, the Union adopted the Community Visa Code.[100] This Code applies to visa requests for short term stays under three months. It is a "Community" program in that the granted visa enables the individual to stay anywhere within the territory of the Union. It is also a "Community" Code

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96 Asylum Information Base, "Greece: The Ruling of the Council of State on the Asylum Procedure Post EU-Turkey Deal" (10 March 2017), online (blog): *European Council on Refugees and Exiles* <www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal>. See also Constantin Yannacopoulos, "A Third Country Named Safety" in Emmanuelle Saulnier-Cassia (ed.), *Jurisprudences nationales intéressant le droit de l'Union européenne*, (2018) 1 RTDEur 191.

97 *Ilias and Ahmed v Hungary,* No 47287/15 [2017] ECHR, ECLI:CE:ECHR:2017:0314 at para 125 (referred to the Grand Chamber which delivered judgment on 21 November 2019).

98 *JR and others v Greece*, No 22696/16 [2018] ECHR, ECLI:CE:ECHR:2018:0125 at para 112.

99 EC, *Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement,* [2001] OJ, L 81/1; EC, *Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas*, [1995] OJ, L 164/1.

100 EC, *Regulation (EC) No 810/2009 of the European Parliament and the Council of 13 July 2009 establishing a Community Code on Visas,* [2009] OJ, L 243/1 [*Visa Code*].

in that it establishes rules that are common in terms of procedure, the possibility of recourse, and the enumerated grounds, which would permit the refusal of a visa. The discussion remains open as to whether or not there is a subjective right to a visa.[101] In any event, it is certain, based on the jurisprudence of the Court, that only the criteria expressly stated in the Code may serve as grounds to refuse a short-stay visa.[102] Nevertheless, States still possess a broad margin of discretion. This discretion is primarily the result of the main ground of refusal, which is the existence of "reasonable doubts as to […] [the applicant's] intention to leave the territory of the Member States before the expiry of the visa applied for."[103] Similarly, in procedural terms, while the State retains a certain degree of autonomy in the organization of effective remedies, it must respect "two cumulative conditions, namely respect for the principles of equivalence and effectiveness" such that, read in light of the Charter of Fundamental Rights, the remedies must "at a certain stage of the proceedings, guarantee a judicial appeal."[104]

It is in the context of this type of judicial remedy that, during the crisis, Syrians contested the refusal of visas that they had requested from the Belgian embassy in Lebanon. The visa in question was requested and refused based on the Community Visa Code. It was, however, a special visa: one with limited territorial validity, in other words, one that permitted a stay only on the territory of the State that granted the visa. Article 25(1)(a) of the Community Visa Code allows States to issue a visa with limited territorial validity "exceptionally […] when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations."[105] Advocate General Mengozzi was of the opinion that international obligations resulted in a duty to grant this type of visa to a Christian family living in Aleppo in Syria, due to the real risk of being subject to inhuman or degrading treatment. His opinion ended with a sentence that is now well-known. Having recalled the emotions evoked by the deaths in the Mediterranean and admitting that it was commendable to be outraged by them, he added that "the Court nevertheless has the opportunity to go further, as I invite it to, by enshrining the legal access route to international protection which stems from Article 25(1)(a) of the Visa Code. Make no mistake: it is not because emotion dictates this, but because EU law demands it."[106] The Court did not follow this suggestion. Upon considering the application of the Community Visa Code, the Court concluded that "an application for a visa with limited territorial validity […] with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days […] does not fall within the scope of that code but, as European Union law currently stands, solely within that of national

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101 *El Hassani v Minister Spraw Zagranicznych*, C-403/16, [2017] ECR 659, ECLI:EU:C:2017:659 at paras 91–106 (opinion of Advocate General Bobek delivered on 7 September 2017).

102 *Koushkaki v Bundesrepublik Deutschland* [GC], C-84/12, [2013] ECR 862, ECLI:EU:C:2013:862 at para 63 (judgment of the Court [GC] of 19 December 2013).

103 *Visa Code*, *supra* note 84 art 32(1)(b).

104 *El Hassani v Minister Spraw Zagranicznych*, C-403/16, [2017] ECR 960, ECLI:EU:C:2017:960 at paras 27, 42 (Judgment of the Court [FC] of 13 December 2017).

105 *Supra* note 100, art 25(1)(a).

106 *XX v Belgium*, C-638/16, [2017] ECR 93, ECLI:EU:C:2017:93 at para 175 (opinion of Advocate General Mengozzi on 7 February 2017).

law."[107] In so finding, the Court remained silent on Article 33 of the Code according to which: "[t]he period of validity and/or the duration of stay of an issued visa may be extended if the visa holder provides proof of serious personal reasons justifying the extension of the period of validity or the duration of stay." An intermediate position between the duty to grant the visa proposed by the Advocate General, and the exclusion from Community law of this question would have permitted the Court to demand respect for the procedural guarantees and the substantive requirements of the Visa Code, while still respecting the margin of appreciation of the State concerning exceptional grounds.

The Court added that "[s]ince the situation at issue […] is not […] governed by EU law, the provisions of the Charter [of Fundamental Rights of the European Union], in particular Articles 4 [prohibition on inhuman or degrading treatment] and 18 [right to asylum] thereof […] do not apply to it."[108] It is true that the Charter of Fundamental Rights only applies when we are dealing with the implementation of EU law, which, in the eyes of the Court, is not the case here.[109]

Nevertheless, in the *Chavez-Vilchez* case (also in 2017), the Court adopted a broader interpretation, granting a more prominent role to the Charter.[110] The *Chavez-Vilchez* case concerned the free movement of persons within the Union and the right to stay for family members of European citizens. Specifically, the case addressed the issue of whether the Netherlands could expel the foreign mothers of Dutch children whose Dutch fathers did not care for them. The particularity of this case was that the children, European citizens whose foreign mothers the Netherlands wanted to expel, were Dutch citizens in the Netherlands and had not left their country of citizenship. In EU law, these situations are generally qualified as purely internal in that the European citizens concerned remain present in the State of their nationality. Accordingly, they do not benefit from the rights tied to the free movement of persons, including the right to stay of their parents who are third country nationals.

Since 2011, however, the Court has ruled that it may take notice of purely internal situations when "the genuine enjoyment of the substance of the rights" of the EU citizens is in question in that they would be forced to leave EU territory.[111] In 2017, in *Chavez-Vilchez*, to determine the substance of these rights, the Court referred expressly to Articles 7 (family life) and 24(2) (best interests of the child) of the Charter of Fundamental Rights of the European Union.[112] Consequently, the Charter is not simply a key to be used to interpret EU law; it is now a key that can be used to enter *into* the jurisdiction of European law. This reasoning,

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107 *XX v Belgium*, C-638/16, [2017] ECR 173, ECLI:EU:C:2017:173 at para 51 (judgment of the Court [GC] 7 March 2017).

108 *Ibid* at para 45.

109 On this question, see Fabrice Picod, "Article 51: Champ d'application" in Fabrice Picod & Sébastien Van Drooghenbroeck, eds, *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article* (Brussels: Bruylant, 2018) at 784; Nicolas Cariat, *La Charte des droits fondamentaux et l'équilibre constitutionnel entre l'Union européenne et les États membres* (Brussels: Bruylant, 2016).

110 *Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank* [GC], C-133/15, [2017] ECR I-354, ECLI:EU:C:2017:354 at para 78 [*Chavez-Vilchez*].

111 See *Ruiz Zambrano* [GC], C-34/09, [2011] ECR I-124, ECLI:EU:C:2011:124 at para 45; *Dereci*, C-256/11, [2011] ECR I-734, ECLI:EU:C:2011:734.

112 *Supra* note 110 at para 70.

developed by the Court with respect to purely internal situations, could be transposed to situations that are external to the Union. If fundamental rights contained in the Charter are concerned, the relevant European legal instrument, for example the Community Visa Code, should also be applicable.

The decisions of the General Court (confirmed by the ECJ) with regard to the EU-Turkey Statement and the Court of Justice concerning humanitarian visas, highlight the absence of the EU jurisdiction in the external aspects of European migration policy. Should we conclude instead that there is a sort of "judicial passivism […] where the CJEU is consciously (actively) not using its powers where it should"?[113] It is perhaps preferable to speak of abstention rather than "judicial passivism". As with any court decision, the intent of the Court is difficult to determine. Certainly, as required, this absence can be justified by law. It would be more controversial to claim that the Court is exercising reverse political activism by refusing to participate in a legal debate about these questions. In the end, we should look at the totality of the Court's jurisprudence from which it can be concluded that, when it comes to internal aspects of migration policy, the Court does not hesitate to play the role of guardian of fundamental rights in the interpretation of EU law.

We might then conclude that the Court's absence in the external dimension of the EU migration policy is a measure of caution justified by a difficult context. This absence must, however, be temporary. The word "crisis" comes from the Greek verb κρίνω, which means, among other things, "to judge".[114] In order to claim their rights in organized societies from which they are excluded, the migrant, more than any other individual, requires the judge. The judge is the guarantor of the individual rights of the migrant. Beyond the challenging societal debates about migration, and precisely because of these debates, the judge must apply, interpret and develop the law, including that which concerns the EU migration policies in relation to the rest of the world. In doing so, the judge can play a role in the slow and progressive construction of global migration management.

## 4. EMERGING FROM THE "CRISIS": TAKING INSPIRATION FROM THE GLOBAL COMPACT FOR MIGRATION

Europe has the physical and political capacity to integrate millions of migrants and refugees if it chooses to mobilize around this objective. As Ken Roth, Director of Human Rights Watch, once said, "if there is a crisis, it is one of politics, not capacity."[115] Indeed, the resettlement of refugees and the welcoming of migrants at all skill levels must become a permanent feature of the European political agenda. European leaders need to present the European public with a rationale which illustrates the advantages of migration, without hiding its challenges. European authorities need to plan the necessary investments to ensure labor

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113 Iris Goldner Lang, "Towards 'Judicial Passivism' in EU Migration and Asylum Law? Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference" (24 January 2018), online (blog): *EU Immigration and Asylum Law and Policy* <eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference/>.

114 *Supra* note 1.

115 Kenneth Roth, "The Refugee Crisis That Isn't", *The Huffington Post* (3 September 2015), online: <hrw.org/news/2015/09/03/refugee-crisis-isnt>.

and social integration of these migrants, including through material and financial support of innovative initiatives undertaken by States, regions and municipalities that demonstrate leadership in this field.

Europe cannot aspire to remain a "fortress" and to continue to uselessly spend indecent amounts of money (in comparison with the needs in other areas) to protect itself from migration movements over the long term. The experience of Bulgaria and Romania is a good example: despite the substantial differentials in their per capita revenue, these two countries were not emptied of their populations following their entry into the EU. Thanks to the free movement of people, Romania is the country receiving the largest proportion of its citizens as return migrants. In fact, repeated return trips for labor purposes are a frequent occurrence and benefit both the country of origin and the destination country. Thanks to the European principle of freedom of movement, allowing people to come and go as they see fit is in the interest of both the countries of origin and the countries of destination.

For refugees, despite resistance by many Member States, the Commission's attempts to structure a coordinated response around the concepts of relocation and resettlement are a step in the right direction.[116] Europe has the capacity to integrate millions of refugees if—and only if, together with all Member States—it puts into place a selection process in transit countries, works in collaboration with international organizations to select the most vulnerable, builds a robust policy of social integration through labor and education, works with civil society organizations to ensure better conditions for social and professional integration in cities, and encourages the fight against all forms of xenophobia.

Consequently, the central idea should be that of a progressive facilitation of the movement of people across the external borders of the EU. As in the case of any major policy area (e.g. infrastructure, energy security, food security), the Union's plans should take a long-term perspective, looking thirty or fifty years down the road. The primary mechanisms for achieving these ends would likely be the conclusion of successive visa liberalization agreements with target countries, as well as with regions that already benefit from a degree of free movement (for example the Southern cone of South America or the Economic Community of West African States). It would also require substantial efforts to strengthen policies facilitating the professional, labor and social integration of migrants.[117]

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116 See Roman Lehner, "The EU-Turkey 'deal': Legal Challenges and Pitfalls" (2019) 57:2 Intl Migration at 178.

117 This is already the case for visas, in applying Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas and those whose nationals are exempt from that requirement. Annex I of the Regulation which lists the third countries whose nationals are subject to the visa requirements went from 127 countries in 2001 to 104 countries in 2018. This reduction is the product of successive adaptations tied to accessions to the Union and exemption agreements. In particular, many countries of South and Central America, including Mexico, were removed from the list. EC*, Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement* [2001] OJ, L 81.

A conceptual framework for this change in attitude has recently been provided by the Global Compact for Safe, Orderly and Regular Migration (GCM).[118] The result of widespread consultations with a large array of stakeholders and negotiations between all UN Member States, the Compact was adopted in an intergovernmental conference in Marrakech, on 10 December 2018, then endorsed by the UN General Assembly.[119]

The Global Compact is not perfect: some shortcomings and blind spots are mentioned hereafter. However, as a holistic and inclusive policy framework, it goes a long way towards responding to many of the failures of current European migration policies through a systematized, coordinated and principled approach to human mobility. After explaining the innovative process leading to the GCM, this part will highlight a number of its most striking features.

### 4.1. The Process Leading to the GCM

The GCM is the result of a process of political maturation over the course of more than ten years. States long refused to allow the UN to be the stage for debate on migration policy, given that migration was considered to be an issue of exclusive national interest and territorial sovereignty. Some States cooperated bilaterally over certain borders, and some regional agreements included the political choice of freedom of movement. But most international discussions on these questions occurred outside of normal forums of cooperation. Consider for instance the IOM, which was kept outside the UN family from 1951 to 2016, the European Schengen process in which EU Member States built (without the constraints and oversight of EU institutions) a common migration policy later integrated in the EU legal framework, or the over thirty "regional consultative processes" and "inter-regional migration forums" which are supported by IOM.[120]

The European "migration crisis" of 2015 changed this perspective. Gradually, States have come to accept that the UN has a role to play in the development of a global migration framework. The New York Declaration on Refugees and Migrants of 19 September 2016[121]

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118 GA, *Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Draft outcome document of the Conference, Annex: Global Compact for Safe, Orderly and Regular Migration*, UNGAOR, 2018, A/CONF.231/3, online: <undocs.org/A/CONF.231/3> [*GCM*].

119 See "Marrakech, Morocco" (10-11 December 2018), online: *Intergovernmental Conference on the Global Compact for Migration* <www.un.org/en/conf/migration/>; UN News, "General Assembly officially adopts roadmap for migrants to improve safety, ease suffering" (19 December 2018), online: *UN News* <news.un.org/en/story/2018/12/1028941>. Early comments of this Global Compact include Jane McAdam, "Global Compact for Safe, Orderly and Regular Migration' (2019) 58:1 ILM at 160, and the 2019 Special Issue on the Global Compacts of the *International Journal of Refugee Law*.

120 See the authors' previous 2011 article, *supra* note 3; Elizabeth G Ferris & Katharine M Donato, *Refugees, Migration and Global Governance: Negotiating the Global Compacts* (London: Routledge, 2019); François Crépeau, "L'émergence d'une conversation globale sur les politiques migratoires – Retour sur un mandat de Rapporteur Spécial des Nations Unies sur les droits de l'homme des migrants (2011-2017)" (2019) 17 Droits fondamentaux–Revue électronique, online (pdf): <www.crdh.fr/wp-content/uploads/L%E2%80%99%C3%A9mergence-dune-conversation-globale-sur-les-politiques-migratoires.pdf>.

121 *New York Declaration for Refugees and Migrants,* GA Res 71/1, UNGAOR, 71st Sess, Annex, Agenda Items 13 & 117, UN Doc A/RES/71/1 (2016). For commentaries, see Elspeth Guild, "Unsafe, Disorderly and Irregular Migration? Examining the Assumptions Underlying the United Nations' New

announced the negotiation and adoption of two global compacts by 2018, one on refugees and the other for migrants. In contrast with the Global Compact for Refugees process, which was spearheaded by the High Commissioner for Refugees, the Global Compact for Migration was set in an intergovernmental context and drafted under the guidance of two experienced and respected senior diplomats, the UN ambassadors from Mexico and Switzerland in New York. In fact, although it was undertaken in the context of the UN, it was considered important that the States "appropriate" the process and its result, given that the subject of migration should remain within the realm of national sovereignty in light of its political sensitivity.

The process leading to the GCM was divided into three phases once a resolution on modalities had been adopted.[122] First, States, experts and multiple other stakeholders were convened for a "consultation" phase in six thematic two-day sessions, plus regional consultations and stakeholder consultations. Second, in a "stocktaking" phase inspired by the results of the consultations, the two ambassadors produced a "Zero Draft" with the support of the Office of the UN Special Representative of the Secretary General on International Migration, Ms. Louise Arbour. Third, the Zero Draft was submitted to States—civil society was in the room and corridors—during a "negotiation" phase, also in six thematic sessions. On 13 July 2018, UN Member States finalized the text for the GCM. The Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration was held on 10–11 December 2018 in Marrakech, Morocco,[123] followed closely by a formal endorsement by the UN General Assembly on 19 December 2018.[124]

The GCM contains numerous points raised by many different stakeholders, including strengthened safeguards for the human rights of migrants. The intent of the authors of the Zero Draft was to raise the bar in terms of the objectives of the negotiations: the lowest common denominator would not suffice. Many observers had feared that the outcome would simply be a technical arrangement between destination States that wish to limit irregular migration and States of origin that are seeking to facilitate the transfer of remittances. The text of the GCM, however, demonstrates a desire to better protect migrants without threatening States in their sovereignty, and to place the question of migration at the heart of discussions about international development.

In terms of implementation, follow-up, and review, the GCM comprises five types of operational measures: a capacity-building mechanism, including funding and knowledge sharing; the UN network on Migration, which replaces the Global Migration Group; global, regional and sub-regional dialogues; an intergovernmental review forum at the global level, to be

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York Declaration" (2018) 50:1 Peace Research: Cad J Peace & Confl Stud 53; Maurice Kamto, "La déclaration de New York pour les réfugiés et les migrants" (2016) AFDI 429.

122 See Kathleen Newland, "The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement" (2018) 30:4 Intl J Refugee L 657–660.

123 See generally "Global compact for migration", online: *UN Refugees and Migrants* <refugeesmigrants.un.org/migration-compact>.

124 See United Nations, Press Release, GA/12113 "General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants," (19 December 2018) online: *UN Meetings Coverage & Press Releases* <www.un.org/press/en/2018/ga12113.doc.htm>.

supported by regional and sub-regional fora; and national action plans.[125] Such mechanisms are clearly intergovernmental, with the inclusion of regional and sub-regional levels of governance and the involvement of stakeholders. The strengths of this approach are its flexibility and respect for State sovereignty and different State capacities; the inclusion of capacity-building elements including funding and knowledge; the mobilization and involvement of the different layers of governance including, in addition to States, local/city and regional institutions; and the greater coordination and central role of UN organizations in the UN Migration Network. There are, however, also some challenges that come with this approach, the most important of which is the fact that these mechanisms will be based on the voluntary review by States of their own implementation of their national action plans.[126]

The GCM includes "actionable commitments" for States. It is not a legally binding instrument; rather it is a policy framework that seeks to encourage States to cooperate on a number of specific, well-identified issues. In adopting this form of agreement, States accept the general guidance provided, all while maintaining their autonomy in terms of the specific actions to undertake as well as the pace of their implementation. Given the frequently toxic nature of the national political context when it comes to questions of migration, the objective of the GCM is to offer States courses of action that permit economic and social progress through international cooperation, without feeding the growth of national populist anti-immigration groups in the domestic political context.

Europe could use the GCM as a basis to build its own conceptual trajectory—an inspirational pathway of sorts—towards the "facilitation of mobility" which is at the heart of the vision borne by the UN Member States when they adopted Sustainable Development Goals target 10.7 and the GCM.[127] Manifestly, this long-term vision of "mobility facilitation" appears to be at odds with the short-term political objectives announced by European governments and the dominant nationalist populist anti-immigration discourse. One hopes that the current nationalist populism will only last for a short time (say, a decade or two) and that another generation of politicians will be less afraid of mobility and diversity. Then, the GCM could prove a valuable blueprint for a change of tack.

### 4.2. Principles, Objectives and "Actionable Commitments"

The GCM lists three principles[128] (paras 8–14) worth highlighting. First, a *common understanding* of migration phenomena is necessary to enable States to speak the same language, to share reliable data, and to reflect on common solutions. Second, a *shared responsibility* encourages States of origin, transit and destination, North and South, to work together and

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125 See Elspeth Guild, Tugba Basaran, & Kathryn Allinson, "From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)" (2019) 57:6 Intl Migr 43.

126 See Sandra Lavenex, "GCM Commentary: Implementation, Follow-Up and Review" (25 October 2018), online (blog): *Refugee Law Initiative* <rli.blogs.sas.ac.uk/2018/10/25/gcm-commentary-implementation-follow-up-and-review>.

127 François Crépeau, "Towards a Mobile and Diverse World: 'Facilitating Mobility' as a Central Objective of the Global Compact on Migration", (2018) 10:10 Intl J Refugee L 1, online: <doi.org/10.1093/ijrl/eey054>.

128 *Supra* note 118 at paras 8–14.

to negotiate solutions that respond to the needs and interests of all actors including migrants, States, municipalities, businesses and communities. Third, a *unity of action* permits States to undertake the implementation of common solutions to "facilitate and ensure" safe, orderly and regular migration for the benefit of all.

These three principles emphasize the interconnected nature of all migration-related issues, including those pertaining to refugees, which are nonetheless addressed by a different Global Compact. No State or group of States can hope to manage migration successfully if the interests and needs of other States are not also taken into consideration. In other words, States that favor the restriction of irregular migration cannot ignore the emigration needs of countries of origin, and vice-versa. The only solutions possible will be those that emerge through a shared intellectual framework based on common interests.

The GCM also sets out a series of guiding principles[129] (para 15) that are consistent with the principles and objectives of the EU. Migration management must be people-centered, be grounded in international cooperation, respect national sovereignty, protect the rule of law and the guarantees of due process, implement the principle of sustainable development, ensure the protection of human rights, be gender-responsive, be child-sensitive, and be based on "whole-of-government" and "whole-of-society" approaches such that the voices of all stakeholders are heard.

The twenty-three objectives of the GCM[130] (para 16) largely reflect the migration-related issues raised by both State and non-State actors during the consultations:

> 1) Collect and utilize accurate and disaggregated data as a basis for evidence-based policies
>
> 2) Minimize the adverse drivers and structural factors that compel people to leave their country of origin
>
> 3) Provide accurate and timely information at all stages of migration
>
> 4) Ensure that all migrants have proof of legal identity and adequate documentation
>
> 5) Enhance availability and flexibility of pathways for regular migration
>
> 6) Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work
>
> 7) Address and reduce vulnerabilities in migration
>
> 8) Save lives and establish coordinated international efforts on missing migrants
>
> 9) Strengthen the transnational response to smuggling of migrants
>
> 10) Prevent, combat and eradicate trafficking in persons in the context of international migration
>
> 11) Manage borders in an integrated, secure and coordinated manner
>
> 12) Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral

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129 *Ibid* at para 15.

130 *Ibid* at para 16.

> 13) Use migration detention only as a measure of last result and work towards alternatives
>
> 14) Enhance consular protection, assistance and cooperation throughout the migration cycle
>
> 15) Provide access to basic services for migrants
>
> 16) Empower migrants and societies to realize full inclusion and social cohesion
>
> 17) Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration
>
> 18) Invest in skills development and facilitate mutual recognition of skills, qualifications and competences
>
> 19) Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries
>
> 20) Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants
>
> 21) Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration
>
> 22) Establish mechanisms for the portability of social security entitlements and earned benefits
>
> 23) Strengthen international cooperation and global partnerships for safe, orderly and regular migration[131]

Each objective is detailed in a number of paragraphs outlining "actionable commitments", which States can decide to implement.

Through a coherent set of objectives and actionable commitments, the GCM offers guidance for solutions to many of the migration-related challenges that States — including EU Member States — will face in coming decades. For the purposes of this article, we will examine eight of these which seem most promising.

### 4.3. Greater Protection for the Human Rights and Labor Rights of Migrants

The many human rights and labor rights guarantees contained in the GCM are detailed and generally apply to all migrant workers, regardless of their status. The GCM thus includes guarantees related to, among others: providing proof of legal identity (Objective 4); ensuring ethical labor recruitment policies and practices and decent working conditions (Objective 6); reducing the vulnerabilities of migrants (Objective 7); saving lives (Objective 8); combatting human trafficking (Objective 10); reducing the use of migrant detention and developing alternatives to detention (Objective 13); improving consular protection (Objective 14); providing access to basic services for migrants (Objective 15); enhancing the social inclusion of migrants (Objective 16); combatting all forms of discrimination against migrants (Objective 17); and providing safe and dignified return and readmission procedures (Objective 21).

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131 *Ibid.*

There is a clear rule-based governance approach that brings the treatment of migrants closer to that of citizens and reduces the administrative discretion of government authorities. There is also a clear desire to anchor the debate on migration governance in the framework of human rights, which is one of the three pillars of the UN and which is notably absent from many of the public debates on migration in recent years, with the exception of European law due to the standard-setting action of the European Commission.[132]

Nevertheless, other elements remain ill-conceived. For instance, the text reflects the obsession that many States (particularly the countries of the Global North) have with efficient mechanisms of return and readmission in the countries of transit or origin.[133] On a positive note, the human rights guarantees set out in Objective 21 call on States to limit the administrative discretion of their immigration authorities in a number of ways: prohibiting collective expulsions; implementing procedures that are "safe; dignified and in full compliance with international human rights law […] that facilitate sustainable reintegration"; providing for consular assistance; ensuring individualized assessment; prioritizing voluntary returns; decision-making based on the best interests of the child and the appointment of legal guardians for unaccompanied minors; providing legal information and assistance; establishing or strengthening "national monitoring mechanisms on return"; and facilitating the "sustainable reintegration of returning migrants into community life" by providing them with broad support in the countries of origin. Some of these guarantees, such as the prohibition of collective expulsion of migrants, are already enshrined in formal human rights instruments, and have been the subject of many legal challenges.

More worrying, however, is the willingness to include biometric identifiers in all population registries and civil registry systems. This anticipates the systematic record-keeping of all foreigners, despite the stated guarantees regarding the right to privacy and protection of personal data. Such protections have never been effectively guaranteed for migrants who rarely make use of complaint mechanisms and have limited access to justice. Nevertheless, this is a direction that the EU seems determined to pursue.[134]

Unfortunately, the questions of the migrants' access to justice (criminal, civil and administrative), access to dispute resolution mechanisms (national human rights institutions, mediation, arbitration), and access to other actors responsible for the defense of human and labor rights (e.g. labor inspectors) are only partially addressed by means of "firewalls".[135] Moreover, the GCM fails to develop the material conditions necessary to ensure access to *effective* justice. In fact, it is highly likely that the destination States will refuse to implement many migrant empowerment measures. For example, "access to free or affordable legal advice and assistance of a qualified and independent lawyer" is only provided for migrants in

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132 *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, CESCR, 2017, UN Doc E/C.12/2017/1 (a similar approach is found here).

133 See Kathleen Newland, "The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement" (2018) 30:4 Intl J Refugee L 657.

134 See Sara Vannini, Ricardo Gomez & Bryce Clayton Newell, "Mind the Five: Guidelines for Data Privacy and Security in Humanitarian Work With Undocumented Migrants and Other Vulnerable Population" (2019) J Assoc Sciences & Technology, online: <doi.org/10.1002/asi.24317>

135 See *infra* III.G.

detention, not for migrants subject to complicated administrative immigration procedures.[136] Neither does the GCM provide for access to free or affordable legal advice and assistance, access to translation and interpretation services at all stages of the procedures, or access to adequate and timely information concerning the individuals' rights and available remedies. The facilitation of the unionization of all migrant workers, regardless of their status, so as to better protect their rights, is not mentioned either. Despite stronger rights guarantees in EU legislation and sophisticated implementation mechanisms, an evaluation of the *effective* access of migrants to justice in Europe is yet to be conducted.

European States are manifestly hesitant to constrain the exercise of their discretionary power in the implementation of mechanisms of return and readmission to States of transit and origin.[137] They might also refrain from strengthening the oversight and due process measures applicable to border control and detention, or from developing alternatives to detention.

It is also possible that the European States will initially refuse, in the name of deterrence, to recognize the human rights and labor rights of undocumented migrants and will insist on maintaining a sharp distinction between documented and undocumented migrants in their policies and practices, despite the fact that such a distinction would be contrary to the letter and the spirit of many provisions in international human rights instruments.

### 4.4. Increased Protection for Children, Families and Vulnerable Migrants

The rights of migrant children are systematically mentioned in the text of the GCM. They are one of the key guiding principles but are also specifically referred to in Objectives 3, 4, 5, 7, 8, 10, 11, 12, 13, 15, 16, 21, and 22. The authors of the GCM clearly demonstrate a firm commitment to the protection of children as children, without penalizing them for their migrant status. However, it is unclear whether States will accept the effective implementation of the best interests of the child principle with respect to migrants through measures that will significantly curtail their administrative discretion; for instance, through the swift and systematic appointment of a legal guardian for all unaccompanied minors and restrictions on their return to States of origin or transit.

Access to family reunification procedures "at all skill levels" (Objective 5) would require eliminating the prohibition of family reunification for temporary migrant workers with precarious status (single-employer sponsorship mechanisms). For non-democratic countries like the Gulf States, who employ millions of temporary migrant workers, this objective will remain unacceptable for the foreseeable future. For high-income countries, despite the economic implications and the stated desire of some European governments to reduce family immigration, this could be an achievable objective if they embrace the idea of facilitating mobility.

The issue of gender is also noted in the guiding principles and the text of the GCM contains many references to gender responsiveness, including in Objectives 3, 5, 6, 7, 10,

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136 *Global Compact for Safe, Orderly and Regular Migration*, UNGA, 73rd Sess, Annex, Agenda Items 14 & 119, UN Doc A/RES/73/195 (2019) at para 29(e).

137 See Emily Schultheis & Krishnadev Calamur, "A Nonbinding Migration Pact Is Roiling Politics in Europe", *The Atlantic*, (11 December 2018) online: <www.theatlantic.com/international/archive/2018/12/un-global-migration-compact-germany-europe/577840/>

12, 15, 16 and 22. However, the condition of migrant women is only specifically mentioned in Objectives 4, 6, 10 and 22. The gender-equality provisions that are well developed in EU internal policy could act as inspiration for similar measures with respect to migration policy.

The commitment to reflect on migration solutions to respond to various threats or crises (environmental, among others) which force individuals to migrate for survival is also welcome (Objective 2). Indeed, if EU Member States had progressively offered resettlement places to hundreds of thousands of Syrians each year since 2012, the scope of the 2015 "migration crisis" could have been considerably reduced. The operationalization of regular migration routes would have prompted many Syrians to register, pay the required visa fees (which are inevitably less than the fees paid to human smugglers) and wait their turn for legal entry into Europe, rather than risking their savings and the lives of their children for the benefit of unscrupulous migrant smugglers.

### 4.5. "Facilitating" Migration

The GCM demonstrates strong support for the "facilitation" of migration by which States commit to making migration speedier, simpler, cheaper and safer for migrants. Indeed, terms that are derived from the verb "to facilitate" are used an impressive sixty-two times in the text. This is not an accident.

More fundamentally, States commit to "adapt options and pathways for regular migration" (Objective 5). This implies increasing the number of short-stay or resident visas through visa facilitation agreements or eliminating the visa requirement for short stays entirely through visa liberalization agreements.

Facilitated regularization of undocumented status should also become a major policy tool. Although the word "regularization"—considered as politically sensitive—has been deleted from the text of the GCM, States still commit in Objective 7 to "facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status, on a case by case basis and with clear and transparent criteria, especially in cases where children, youth and families are involved, as an option to reduce vulnerabilities, as well as for States to ascertain better knowledge of the resident population" (para 23(i)). Even without being expressed explicitly, the idea of regularization of undocumented migrants is present as a tool to reduce clandestine migration and acknowledge effective integration.

In the same vein, changes of administrative status should be "facilitated" (para 23(h)). At present, too many migrant workers are prevented from changing employer by their visa modalities (e.g. single-employer sponsorship visas) or face huge administrative difficulties and delays in changing employer, even when ill-treated. This increases the precariousness of their legal and social condition and silences them, since voicing criticism may result in losing their job, and thus their work and residence permit, which often results in deportation. Employers know that many migrants have debts to repay and cannot afford to lose their job and be deported—and too often, employers exploit this constructed precariousness.[138]

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[138] See François Crépeau, *Report of the Special Rapporteur on the human rights of migrants: Labour exploitation of migrants*, UNHRCOR, 26th Sess, UN Doc A/HRC/26/35 (2014) at para 18.

This "facilitation" approach would be in line with Objective 10.7 of the 2030 Agenda for Sustainable Development, adopted in 2015,[139] according to which States undertake to "facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies".[140]

In an important oversight, the GCM contains no specific mention of the responsibility of destination States' authorities in tolerating underground labor markets exploiting undocumented migrants or of the exploitation of temporary migrant workers with precarious status (single-employer sponsorship visas, as discussed above). Millions of employers in destination States are in need of cheap labor in economic sectors that cannot be relocated (agriculture, construction, extraction, hospitality, fisheries, caregiving, domestic labor). This unacknowledged need for labor is a key pull factor in illegal migration: millions of employers in the Global North are ready to integrate undocumented migrants into clandestine labor markets. As long as employers offer these jobs, there will be migrants willing to risk everything to claim them and the smuggling industry will offer the mobility options that States refuse to provide.

Consequently, States need to engage in a broad social discussion about how to transform these economic sectors to ensure their transition in the medium-term to exploitation-free labor markets using both financial and tax incentives, and the effective prosecution of employers that engage in exploitative practices. Only a significant reduction in the irregular labor market will permit a similar and lasting reduction in irregular migration. Although it is politically sensitive, this complex transformation is essential if we wish to reduce the pull factors and, by extension, irregular migration. The GCM offers no assistance in this regard. European migration policy discussions also fail to meaningfully engage with this key structural dimension of migratory movements. For the moment, a head-in-the-sand approach appears to be preferred: States are simply pretending that the problem is not there.

It seems likely that States of origin, like destination States—including those at the heart of the EU—are unwilling to subject their recruitment agencies to stringent regulation (inspections, audits, accountability, transparency), given the financial and political importance of this industry, not to mention the increased costs that these mechanisms would necessitate.[141] Nor is the effective strengthening of the role of labor inspectors in the context of the enforcement of labor standards (for all workers regardless of their status) on the agenda for States.

Thus, it is sadly predictable that destination States, at least for now, continue to pursue their current policy choices. They will continue to invest in the suppression of irregular migration (combatting smuggling, construction of detention centers and "walls", coast and border guard training, implementing Integrated Border Management systems, sale of state-of-the-art equipment such as patrol speedboats). They will continue to limit their investments in mechanisms to facilitate regular migration (including the administrative infrastructure

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139 See generally *Transforming our world: the 2030 Agenda for Sustainable Development*, Res 71/1, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015) at 21.

140 *Ibid.*

141 See Report of the Special Rapporteur on the human rights of migrants, *Recruitment practices and the human rights of migrants*, UNGAOR, 70th Sess, UN Doc A/70/310 (2015) at 5.

necessary to manage the increased number of visa requests) in long-term economic and social integration strategies for migrants, or in efforts to combat discrimination faced by migrants.

### 4.6. Facilitating Access to Basic Services and to Civil Registry Systems

In Objective 15 of the GCM, States undertake to "ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services" including health services, education, housing and social security.[142]

Although reference to the term "firewall" was removed from its final version, the GCM nevertheless manifests a strong support for the concept of the "firewall" which enables any migrant, regardless of status, to approach authorities (police), public services (health services, labor inspections, housing services, schools) or even private services (banks, insurance agencies), without fear of being reported to immigration authorities (Objectives 6, 7, 15). Similarly, disconnecting access to identity, civil registration or travel documents or public or municipal services from the migration status of the individual (Objective 4) is an excellent application of the "firewall" principle, which will reduce the fear of the authorities and empower all migrants to defend their rights. In doing so, the primary objective of such public agencies and service providers is prioritized: fully realizing their mission to serve and protect the entire population. Easier access to long-term resident status in the destination country and to eventual nationality/citizenship in that country would be along those same lines.[143] In view of the sophistication of their public administrations, the EU and its Member States are well placed to make these objectives a reality. However, it is clear that some European countries believe that the concept of firewalls is detrimental to their interests. The United Kingdom has thus required landlords and banks to verify the immigration status of their clients but has removed the requirement for health professionals to pass on information about the immigration status of their patients.[144]

### 4.7. Reduction in the Use of Migration Detention

In the GCM, States commit themselves to limiting the use of detention in the migration context. Migration detention must not be used for the purpose of punishment or deterrence: this goes directly against the thrust of the Australian "Pacific Solution"[145] and other countries' migration policies, which have used mass detention of migrants (inland or in offshore facilities)

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142 See also *supra* note 10 ("the essential minimum content of each right should be preserved in all circumstances and the corresponding duties extended to all people under the effective control of the State, without exception" at para 9).

143 See e.g. EC*, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents* [2004] OJ, L 16/44 (it remains rarely used by Member States).

144 See Jonn Elledge, "Why Does Theresa May Think Landlords Would Make Good Immigration Officers?", *The Guardian* (22 October 2015), online: <www.theguardian.com/commentisfree/2015/oct/22/theresa-may-landlords-immigration-right-to-rent-discrimination>; Alan Travis, "UK Banks to Check 70m Bank Accounts in Search for Illegal Immigrants", *The Guardian* (21 September 2017), online: <www.theguardian.com/uk-news/2017/sep/21/uk-banks-to-check-70m-bank-accounts-in-search-for-illegal-immigrants>; Denis Campbell, "NHS Will No Longer Have to Share Immigrants' Data with Home Office", *The Guardian* (9 May 2018), online: <www.theguardian.com/society/2018/may/09/government-to-stop-forcing-nhs-to-share-patients-data-with-home-office>.

145 See e.g. Chandra Roam, "The Uncertain Future of Australia's Pacific Solution", (2018) 19:2 San Diego Intl LJ 371.

a key aspect of their deterrence strategies. Detention must be in accordance with due process protections, it must be "non-arbitrary, based on law, necessity, proportionality and individual assessments" and it must be used "as a measure of last resort only". States further commit to "implement and expand alternatives to detention" (Objective 13).

There is disappointment about the wording regarding the detention of children for immigration purposes, where the final text ("by working to end the practice of child detention in the context of international migration") is less protective than that of the Zero Draft ("by ending the practice of child detention in the context of international migration", para 29(h)).[146]

Although they are already legally constrained, European States do not appear politically disposed to accept migration detention as an exceptional measure of last resort only.[147] Within the EU, States resort to the deprivation of liberty as a deterrent measure: the "hotspot" system implemented by the Union in Greece and Italy is largely based on this idea of deterrence through the creation of very difficult reception conditions, which is not far from the concept of the "hostile environment" proposed by the United Kingdom.[148] European States also favor the use of detention in States of transit, in particular in Africa as the cases of Libya and Mali have demonstrated. Detention is still too often presented in political discourse as a key mechanism of deterrence of irregular migration, despite a dearth of reliable evidence to this effect.[149]

### 4.8. The Development of Integration Policies

The Global Compact encourages the development of policies of social, labor and education integration, including through measures providing for the recognition of foreign qualifications and non-formally acquired skills with a view of optimizing the employability of migrants in the formal labor market of the destination State (Objective 18).

This objective will require States to revise and adapt many policies and practices—ensuring that they reach the most vulnerable members of society, whether citizens or foreigners—and to put in place or reinforce numerous implementation mechanisms that are accessible to all individuals, regardless of their social or migration status. Relevant policies would include those that aim at: combatting discrimination and racism; reducing poverty and addressing social housing, education, vocational training needs; ensuring occupational health and safety; and respecting labor standards.

Of equal concern will be effective access for all, including migrants regardless of status, to all of the relevant implementation and enforcement mechanisms for these policies, including

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146 See e.g. *New York Declaration for Refugees and Migrants*, GA Res 71/1, UNGAOR, 71st Sess, UN Doc A/RES/71/1 (2016) at para 33.

147 See EC, *Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning art illegally staying third-country nationals,* [2008] OJ, L 348/98 (known as the 'Return Directive', it permits the detention of illegally staying third-country nationals, but views detention as a measure of last resort available unless other sufficient but less coercive measures can be applied effectively).

148 See Jamie Grierson, "Hostile environment: anatomy of a policy disaster", *The Guardian* (27 August 2018), online: <www.theguardian.com/uk-news/2018/aug/27/hostile-environment-anatomy-of-a-policy-disaster>.

149 See e.g. Zakariya El Zaidy "EU migration policy towards Libya - A policy of conflicting interests" (2019) online (pdf): *Friedrich-Ebert-Stiftung* <library.fes.de/pdf-files/bueros/tunesien/15544.pdf>.

national human rights institutions, mediation, anti-discrimination agencies, labor inspectors, and social workers, as well as the numerous public consultations on various social policies.

The text of the GCM also demonstrates strong support for the transferability or portability of social security entitlements and benefits from which former migrant workers returning to their country of origin should be able to benefit (Objective 22). This would greatly contribute to facilitating human mobility, permitting families to make meaningful choices. For example, migrant parents could more easily return to their country of origin for their retirement with an increased purchasing power, while their children, nationals of the destination country, could continue to pursue their studies and careers without the responsibility of financially supporting their parents and with the assurance that each could visit the other without difficulty.

### 4.9. Reducing the Cost of Remittances and the Linkage between Development and Migration

The GCM demonstrates strong support for reducing the costs incurred when migrant workers send remittances to their families (Objective 20). This objective has long been pursued by the World Bank which views remittances as a key element of economic development for countries of origin.[150] It is also an important element in the Addis Ababa Action Agenda of the Third International Conference on Financing for Development of 16 July 2015.[151]

In addition, the linkages between migration policies and development policies could lead to interesting experiences, especially if they capitalize on the benefits that flow from the expansion of economic mobility initiatives. The second objective of the GCM addresses, among other things, the creation of economic development opportunities, which would permit individuals to find gainful employment in their own countries and thus not be forced to emigrate: migration would become a choice.

However, the contribution of the GCM to international development policies risks being marginal. Economic development is the objective of the 2030 Agenda for Sustainable Development, but the complexity of this objective means that development efforts must come from the intersection of a number of critical policies and practices over a long period. Is it realistic to believe that the fear of uncontrolled migration in the short term will engage industrialized States in international development strategies that will require substantial, continuous investment over the course of one or two generations?

Thus, the current European migration policy, particularly in Africa, does not appear to respond to the requirements of long-term international development, but instead appears to serve quasi-exclusively the short-term political interests of the Global North. This policy consists of taking development funds intended to respond to the needs of the target countries and investing them in measures designed to contain irregular migration in these countries (before migrants are able to reach European borders), such as the training of border guards and coast guards, the construction of detention centers, and the creation of integrated border

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150 See World Bank Group, "Remittances" (July 2016) at 2, online (pdf): *Inter-Agency Taskforce on Financing for Development Issue Brief Series* <un.org/esa/ffd/wp-content/uploads/2016/01/Remittances_WBG_IATF-Issue-Brief.pdf>.

151 See UNGA, *Resolution adopted by the General Assembly on July 2015,* 69th Sess, 99th Mtg, A/RES/69/313 (2015) at para 40.

management systems—all measures that appear to only respond to the needs of destination countries.

In another oversight, the GCM does not contain any real discussion of the close relationship between mobility and development. States still seem to remain incapable of acknowledging that mobility can be a driving factor in development if it is encouraged, facilitated and governed according to the interests of migrants, the labor market and economic perspectives. Linking migration policy to international development policy would have long-term benefits.

The role of municipalities in the economic and social integration of migrants is also given little mention, despite playing a key role in integration and acknowledging that the prosperity of municipalities depends on the mobility and diversity of their populations (for example, para 20(g)). One might have hoped that the central role that municipalities play in migration (whether internal or international), given that migration is fundamentally tied to urban development, would have been better highlighted and their potential contribution emphasized. European municipalities have the means to make an important contribution in the migration context and European States would be well advised to listen more attentively to the municipal actors who have developed innovative integration and twinning policies that are relevant to reciprocal mobility.[152]

### 4.10. The Consolidation of Migration Data and Information Sharing

The sharing of information on migration policy and information from migrants on the choices at their disposal (Objective 3) could allow for more informed decision-making. Nevertheless, the information that they possess on the "dangers" of irregular migration has not succeeded in dissuading potential migrants. This information must be accompanied by an increase in the availability of legal migration pathways. Failing this, faced with the simultaneous hardening of the borders of destination countries and the ongoing needs of their labor markets, recourse to human smugglers will remain a preferred option.

The development of a Global Migration Data Portal (Objective 1), which all States would contribute to and benefit from, could permit migration policymaking to be based on precise and common data, as opposed to the fantasies and myths that often underpin this work today.[153] Access to this information would need to be supported by multiple policies to combat discrimination and by practices aimed at the empowerment of migrants (Objective 17). The self-organization of diasporas should also be encouraged (Objective 19). Thus, both migrants and the host communities would be able to benefit from this information.

However, the development of the Global Migration Data Portal presupposes a capacity to produce and analyze migration data which largely surpasses that which the national statistical systems in most countries of the world possess, particularly those of the Global South. The risk then is that the Portal will be fed predominantly by high-income destination States according

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[152] See generally "2018 Annual Report: Seven Core Message" (2018) online (pdf): *The Expert Council of German Foundations on Integration and Migration* <www.svr-migration.de/wp-content/uploads/2018/04/SVR_Annual_Report_2018.pdf> ("municipalities [*Kommunen*] play an important role in integration" at 3).

[153] Aviva Chomsky, *"They take our jobs" and 20 other myths about immigration* (Boston: Beacon Press, 2007).

to their own needs: they would be the only States served by the Portal, thus reinforcing, rather than offsetting, global inequalities.

In addition, the question of control over personal data and the right to privacy of migrants remains to be addressed in detail, since it is scarcely mentioned in the GCM. In practice, this data is currently in quasi-free circulation among international security services, given the absence of an effective recourse through which migrants could obtain protection for their personal information.[154] The strengthening of European personal data protection guarantees and the implementation of true willingness to make these effectively accessible to migrants could serve as an example for the rest of the world.

## 5. CONCLUSION

The analysis of the European migration "crisis", the responses from the European courts and the long-term global perspective highlight two major risks. One is political, the other legal.

The political risk consists in denying reality. This would mean limiting ourselves to considering and managing the situation as a short-term "crisis". After the "crisis" of the Second World War, which was on a completely different scale, policymakers took stock of the need for a change in policy orientation. It is in that context that the core human rights protection instruments were developed and the European community integrated the mobility of people as a fundamental freedom. Today, policymakers, advocating isolationism and the closure of borders, have forgotten the lessons of the generation that experienced war.

One of the founding fathers of Europe, Jean Monnet, recalled that European countries did not engage in the grand enterprise of breaking down the barriers that divided them to simply raise even higher barriers between themselves and the rest of the world.[155] For the political elites to act with foresight and vision, it will be necessary for a significant portion of the population to reject the politics of fear that seem to dominate. It will be up to the youth of today, so much more mobile and open to diversity than past generations, to convey an alternative perception of the world.

Similarly, as in the case of other social movements, it will be up to the principal stakeholders — the migrants themselves—to make their voice heard. Today, lacking access to the political stage for the most part, this voice is often only heard in the context of the few court proceedings taken by migrants to protect their rights. The second and legal risk is thus failing to safeguard and develop these rights. In other words, recalling the subtitle of this article, limiting the discussion to that of a "political transition short on legal standards" means allowing States to develop their cooperation on migration policies, without empowering migrants to defend their rights.

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154 Even the European surveillance mechanisms is virtually silent on this point. See European Data Protection Supervisor, *Annual Report 2017*, Publications Office of the European Union (2018), online (pdf): <edps.europa.eu/sites/edp/files/publication/18-03-15_annual_report_2017_en.pdf>.

155 Jean Monnet "Allocution de monsieur Jean Monnet au National Press Club" (Conference presentation delivered at the National Press Club in Washington, DC, 30 April 1952) ("six pays européens ne se sont pas engagés dans la grande entreprise d'abattre les barrières qui les divisent pour dresser des barrières plus élevées entre eux et le reste du monde" at 624). Archived with Marianne Monnet Nobécourt, in Eric Roussel, *Jean Monnet* (Paris : Fayard, 1996).

Certainly, the achievements of human rights protection instruments have been considerable. As demonstrated in the second part of this article, courts have generally and quite consistently defended the rights of migrants, on par with those of citizens, rejecting the populist calls for discrimination and insisting on a principled interpretation of human rights guarantees. The rejection of the human rights framework no longer seems feasible, but temporary regressions are always possible. In the short term, the safeguard of the rights of migrants is largely due to the institutional independence of courts, national human rights institutions and other quasi-judicial bodies. Though sensitive to the political context, these institutions are not directly subject to electoral agendas and remain committed to a coherent interpretation of the norms that protect the rights of all. They must preserve and consolidate this role. However, courts have been much more reluctant to use the human rights framework in order to sanction intergovernmental cooperation when this cooperation leads to human rights outside their jurisdiction.

In the long term, new options must be explored to develop the concept of mobility itself as a fundamental liberty of all individuals. The Global Compact for Migration could help in this regard.

Indeed, the GCM initiative could be viewed as containing a litany of platitudes and empty words, "strong in the details but weak on the overall design".[156] There is a substantial risk that States will use these "soft law" proclamations to shirk the obligations that flow from the "hard law" of human rights protection.[157]

But the process, insofar as it is State-driven, could also, in the long term, result in real progress in the development of a human-rights-based international migration law. Contemporary international law often derives from a process kick-started by an instrument of soft law, which allows States to gain experience with concepts and wording, before committing them later to binding legal instruments. For instance, the Universal "Declaration" of Human Rights preceded the two binding Covenants, as well as multiple specialized international and regional human rights treaties. One hopes that the progressive collective implementation of the GCM will allow States to better understand the promises and challenges of human mobility and to develop an international human-rights-based mobility governance framework that will benefit States and migrants alike.

After all, as the European Court of Human Rights has already articulated: "The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance."[158]

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156 Vincent Chetail, *International Migration Law*, (New York: Oxford University Press, 2019) at 331.

157 Ryszard Cholewinski, "The Global Compact for Safe, Orderly and Regular Migration: What Now with Standards?" in Paul Minderhoud, Sandra Mantu & Karin Zwaan, eds, *Caught in Between Borders. Citizens, Migrants and Humans, Liber Amicorum Elspeth Guild*, (Tilburg: Wolf Legal Publishers, 2019) at 324.

158 *Guzzardi v Italy* (1980), ECHR, No 7367/76, ECLI:CE:ECHR:1980:1106 at para 93.