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The EU Migration, Border Management and Asylum Reform in the Aftermath of the «Refugee Crisis»: Towards an Effective Enforcement

L. J. Ruiz Díaz, L. Calvo-Mariscal, E. W. Petit de Gabriel, J. Kienast, A. Dos Santos Soares, M. Jordana Santiago, N. Szablewska, D. Fernández-Rojo (Ed.)

Universidad de Deusto

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1. Libro

Un autor

—Lluís Duch, *Mito, interpretación y cultura* (Barcelona: Herder, 1998), 56-58.
—Duch, *Mito*…, 15.
—Santiago Segura, *Gramática latina* (Bilbao: Universidad de Deusto, 2012), 74-76.
—Segura, *Gramática*..., 75.

Duch, Lluís. *Mito, interpretación y cultura*. Barcelona: Herder, 1998.

Segura, Santiago. *Gramática latina.* Bilbao: Universidad de Deusto, 2012.

Dos autores

—Orfelio G. León e Ignacio Montero, *Diseño de investigaciones: Introducción a la lógica de la investigación en psicología y educación* (Madrid: McGraw-Hill/Interamericana de España, 1993).

León, Orfelio G. e Ignacio Montero. *Diseño de investigaciones: Introducción a la lógica de la investigación en psicología y educación*. Madrid: McGraw-Hill/Interamericana de España, 1993.

Tres autores

—Julio Borrego Nieto, José Jesús Gómez Asencio y Emilio Prieto de los Mozos, *El subjuntivo*…

Borrego Nieto, Julio, José Jesús Gómez Asencio y Emilio Prieto de los Mozos. *El subjuntivo: valores y usos*. Madrid: SGEL.

Cuatro o más autores

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—Irene Andrés-Suárez, ed., *Antología del microrrelato español (1906-2011): El cuarto género narrativo* (Madrid: Cátedra, 2012), 15-16.
—Andrés-Suárez, *Antología del microrrelato*...

Andrés-Suárez, Irene, ed. *Antología del microrrelato español (1906-2011): El cuarto género narrativo*. Madrid: Cátedra, 2012.

Editor, traductor o compilador además de autor

—Salvador Fernández Ramírez, *La enseñanza de la gramática y la literatura*. Ed. por José Polo (Madrid: Arco/Libros, 1985), 145-46.

18 Fernández Ramírez, *La enseñanza*…, 33

Fernández Ramírez, Salvador. *La enseñanza de la gramática y la literatura*. Editado por José Polo. Madrid: Arco/Libros, 1985.

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19 Gómez Mendoza, «Ecología urbana y paisaje de la ciudad», 180.

Gómez Mendoza, Josefina. «Ecología urbana y paisaje de la ciudad». En *La ciudad del futuro*, editado por Antonio Bonet Correa, 177-217. Madrid: Instituto de España, 2009.

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Rieger, James. Introducción a *Frankenstein; or, The Modern Prometheus*, de Mary Wollstonecraft Shelley, XI-XXXVII. Chicago: University of Chicago Press, 1982.

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—Austen, *Pride and Prejudice*, cap. 23.

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—Salvador Gutiérrez Ordóñez, *Lingüística y semántica: Aproximación funcional* (Oviedo: Universidad de Oviedo, 1981), http://www.gruposincom.es/publicaciones-de-salvador-gutierrezordonez.
—Philip B. Kurland y Ralph Lerner, eds., *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), acceso el 28 de febrero de 2010, http://press-pubs.uchicago.edu/founders/.
—Gutiérrez Ordóñez, *Lingüística y semántica.*
—Kurland y Lerner, *Founder's Constitution*, cap. 10, doc. 19.

Gutiérrez Ordóñez, Salvador. *Lingüística y semántica: Aproximación funcional*. Oviedo:

Universidad de Oviedo, 1981. http://www.gruposincom.es/publicaciones-de-salvador-gutierrez-ordonez.

Kurland, Philip B., y Ralph Lerner, eds. *The Founders' Constitution*. Chicago: University of Chicago Press, 1987. Acceso el 28 de febrero de 2010. http://press-pubs.uchicago.edu/founders/.

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—María José Hernández Guerrero, «Presencia y utilización de la traducción en la prensa española», *Meta* 56, n.º 1 (2011): 112-13.
—Hernández Guerrero, «Presencia y utilización de la traducción en la prensa española», 115.

Hernández Guerrero, María José. «Presencia y utilización de la traducción en la prensa española».*Meta* 56, n.º 1 (2011): 101-118.

2.2. Artículo en una revista en línea

—Ángeles Feliu Albadalejo, «La publicidad institucional en la arena parlamentaria española», *Revista Latina de Comunicación Social* 66 (2011): 470, doi:10.4185/RLCS-66-2011-941-454-481.
—Feliu Albadalejo, «La publicidad institucional», 475.

Feliu Albadalejo, Ángeles. «La publicidad institucional en la arena parlamentaria española»., *Revista Latina de Comunicación Social* 66 (2011): 454-481. doi:10.4185/RLCS-66-2011-941-454-481.

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—Sheryl Gay Stolberg y Robert Pear, «Wary Centrists Posing Challenge in Health Care Vote», *New York Times*, 27 de febrero de 2010, acceso el 28 de febrero de 2010, http://www.nytimes.com/2010/02/28/us/politics/28health.html.
—Stolberg y Pear, «Wary Centrists...».

Stolberg, Sheryl Gay, y Robert Pear. «Wary Centrists Posing Challenge in Health Care Vote». *New York Times*, 27 de febrero de 2010. Acceso el 28 de febrero de 2010. http://www.nytimes.com/2010/02/28/us/politics/28health.html.

4. Reseña del libro

—David Kamp, «Deconstructing Dinner», reseña de *The Omnivore's Dilemma: A Natural History of Four Meals*, de Michael Pollan, *New York Times*, 23 de abril de 2006, Sunday Book Review, http://www.nytimes.com/2006/04/23/books/review/23kamp.html.
—Kamp, «Deconstructing Dinner».

Kamp, David. «Deconstructing Dinner». Reseña de *The Omnivore's Dilemma: A Natural Historyof Four Meals*, de Michael Pollan. *New York Times*, 23 de abril de 2006, Sunday Book Review. http://www.nytimes.com/2006/04/23/books/review/23kamp.html.

5. Tesis o tesina

—Francisco José Hernández Rubio, «Los límites del eliminacionismo: Una solución epigenética al problema mente-cerebro» (tesis doctoral, Universidad de Murcia, 2010), 145, http://hdl.handle.net/10201/17600.
—Hernández Rubio, «Los límites del eliminacionismo», 130-132.

Hernández Rubio, Francisco José. «Los límites del eliminacionismo: Una solución epigenética al problema mente-cerebro». Tesis doctoral. Universidad de Murcia, 2010. http://hdl.handle.net/10201/17600.

6. Documento presentado en conferencias, ponencias, congresos o similares

—Silvia Rodríguez Vázquez, «Flujos de traducción: Herramientas de ayuda a la gestión de proyectos en función de la situación de trabajo» (conferencia, Universidad de Salamanca, 8 de noviembre de 2012).
—Rodríguez Vázquez, «Flujos de traducción».

Rodríguez Vázquez, Silvia. «Flujos de traducción: Herramientas de ayuda a la gestión de proyectos en función de la situación de trabajo». Conferencia pronunciada en la Universidad de Salamanca, 8 de noviembre de 2012.

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—«McDonald's Happy Meal Toy Safety Facts», McDonald's Corporation, acceso el 19 de julio de 2008, http://www.mcdonalds.com/corp/about/factsheets.html.

McDonald's Corporation. «McDonald's Happy Meal Toy Safety Facts». Acceso el 19 de julio de 2008. http://www.mcdonalds.com/corp/about/factsheets.html.

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—José Luis Ramírez, 17 de marzo de 2012 (21:28), comentario a Alberto Bustos, «Hacer los deberes», *Blog de Lengua española*, 13 de marzo de 2012, http://blog.lengua-e.com/2012/hacerlos-deberes/#comments.

Blog de Lengua española. http://blog.lengua-e.com/2012/hacer-los-deberes/#comments.

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—Mike Milanovic (director ejecutivo de Cambridge ESOL), en conversación con el autor, septiembre de 2011.

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—Benjamin Spock, entrevista por Milton J. E. Senn, 20 de noviembre de 1974, entrevista 67A, transcripción, Senn Oral History Collection, National Library of Medicine, Bethesda, MD.
—Spock, entrevista.

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—Asunto C-38/14, Mr. Jones versus Secretariat of State, Judgment of the Court of 23 June 2015, ECLI:EU:C:2015:222.

Norma jurídica

—Ley 14/2007, de 26 de noviembre, del Patrimonio Histórico de Andalucía (*BOJA* núm. 248 de 19 de diciembre de 2007).
—Real Decreto 1065/2007, de 27 de julio, por el que se aprueba el Reglamento General de las actuaciones y los procedimientos de gestión e inspección tributaria y de desarrollo de las normas comunes de los procedimientos de aplicación de los tributos (*BOE* núm. 213 de 5 de septiembre de 2007).
—Reglamento (UE) n.º 492/2011, del Parlamento Europeo y del Consejo, de 5 de abril de 2011, relativo a la libre circulación de trabajadores (*DOUE* L 241 de 27 de mayo de 2011).

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Sumario / Contents

Introduction
Presentación

Introduction

David Fernández-Rojo
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Abstract: This special issue of the Deusto Journal of European Studies includes seven of the contributions presented during the International Conference entitled "The EU Migration, Border Management and Asylum Reform in the Aftermath of the Refugee Crisis: Towards an Effective Enforcement", held at the University of Deusto on June 2 and 3, 2022. This event took place within the framework of the activities of the Jean Monnet Network on EU Law Enforcement (EULEN). This Erasmus+ project's ambition is to bring academics and practitioners together, to address the challenges for EU law enforcement in a world without territorial borders. In particular, this special issue reveals that since the 2015 "refugee crisis" the EU is experiencing an acute implementation deficit and that several enforcement and implementation discrepancies remain at the national level.

Keywords: European Union, Migration, Asylum, Migrant Smuggling, Area of Freedom Security and Justice, Enforcement, agencies.

The 2015 "refugee crisis" revealed the urge to ensure the functioning of the Schengen area and the Common European Asylum System (CEAS), the need to operationally assist those Member States most affected by the sudden and extraordinary arrival of mixed migratory flows, and the need to effectively and uniformly implement the European Union (EU) measures regarding migration, asylum and border management. It is necessary to promote a transnational dialogue among administrations at the EU, national and local level, as well as to adopt effective measures that overcome the existing implementation deficit concerning migration, asylum and border management. In this regard, for example, EU decentralised agencies in the Area of Freedom, Security and Justice (AFSJ) have emerged as key actors, not only in providing operational assistance to frontline Member States, but also in effectively and uniformly implementing the EU border management, migration and asylum laws and policies adopted. The focus of the EU in border management, migration and asylum matters is shifting from adopting measures to tackling the existing implementation deficit.

Due to the predominantly operational nature of migration, border management and asylum policies, the EU decentralised agencies stand out as the mode of administrative governance, specially indicated for providing technical expertise, exchanging information, and coordinating the operational activities of the Member States. That is, migration, border management and asylum policies have recently been amended and strengthened with a clear trend from decentralised enforcement towards developing more and more forms of transnational (i.e. the European Migrant Smuggling Centre of Europol, the reinforced cooperation of the AFSJ agencies on the ground through the hotspot approach, the Justice and Home Affairs Agencies network, etc.) and centralised enforcement (i.e. the transformation of Frontex into the European Border and Coast Guard, EASO into the European Union Agency for Asylum, the reinforcement of the mandate of Europol, etc.)

Against this background and due to the scarcity of research on these matters, this special issue of the *Deusto Journal of European Studies* includes seven of the contributions presented during the International Conference held at the University of Deusto on June 2-3, 2022. This event took place within the framework of the activities of the Jean Monnet Network on EU Law Enforcement (EULEN). This special issue thus aims to address three key questions: 1) To what extent are the operational tasks and inter-agency cooperation of the AFSJ agencies reinforced to assist the concerned Member States in effectively and uniformly implementing the migration, border management and asylum measures adopted at EU level? 2) How can the rule of law and the protection of fundamental rights be guaranteed within an AFSJ where EU and Member State agencies are expanding their operational and implementation powers? 3) To what extent will the reform of the EU migration, asylum and border management matters, in the aftermath of the "refugee crisis", ensure a consistent and effective enforcement of the legal instruments and policy measures in place.

Regarding enforcement in border management and migration matters, **Lucas J. Ruiz Díaz** opens the special issue by analysing the European Parliament's role in effectively scrutinising the implementation of EU law and policies by the AFSJ agencies. Lucas suggests several recommendations to enhance the accountability of these agencies to fully respect the principles of the rule of law and the values on which the EU is based. Subsequently, **Lorena Calvo Mariscal** explores the legal implications, both formal and material concerns, that exist in the application of the 2020 Memorandum of Understanding between Malta and Libya. Lorena frames this non-legally binding agreement within the strategy of the EU and its Member States to cooperate with Libya in the deterritorialisation of migration management to reduce the number of

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migrants and asylum seekers arriving at Europe's external borders. Furthermore, **Eulalia W. Petit de Gabriel** wrote a paper about separated children and the related dilemma between general and individual interest in EU migration law compliance. In particular, Eulalia argues that the expansion of the legally recognised concept of family shall help in protecting interpersonal bonds not based on biological relationships, according to the European Court of Human Rights and the Court of Justice of the EU (CJEU). In addition, she understands that restrictions to the right to family life can be taken for fighting against crime, although a goal of general prevention may not comply with human rights standards on the limitation of rights.

In regards to enforcement of EU asylum law, **Julia Kienast** wrote a paper centred on analysing the language of EU leaders and its influence on the implementation of EU asylum law by triggering derogations, exceptions and amendments. She compares this process with regards to the 2015 "refugee crisis", the Belarus border crisis and the current Ukrainian crisis to portray how the reaction to similar facts differs. Julia considers that the problem lies less in sufficient contingencies for a sudden influx, but rather a lack of solidarity since refugee protection builds on the prohibition of discrimination. **Alfredo Dos Santos Soares** also analyses solidarity in his paper since he considers that the term lacks a clear definition and meaning, appearing rather as an amorphous concept. Alfredo examines the doctrinal debates on the nature, scope and abstract character of the solidarity principle and explores the role that the CJEU is playing towards an effective solidarity in asylum matters.

The last two papers of this special issue address migrant smuggling and modern slavery, respectively. **Mirentxu Jordana Santiago** assesses the "Facilitators Package". Mirentxu analyses several controversies that this framework entails, especially the excessive criminalisation and the neglect of the human rights perspective. Mirentxu contends that the eradication of migrant smuggling requires the sum of efforts and coordinated action of different actors such as national authorities and European agencies (i.e. Europol and Eurojust). **Natalia Szablewska**'s paper can be framed under the securitisation of migration trend, which obscures the underlying social, economic and political "push" factors that fuel modern slavery. In this regard, Natalia maintains that a more comprehensive response is needed, which examines the issues of migration management, market regulation and development more widely. For that, her paper uses a comparative lens to examine global developments in regulating labour-related forms of modern slavery vis-à-vis migration management in the context of achieving sustainable development goals.

About the author

David Fernández-Rojo is a researcher and associate professor at the University of Deusto. David's research focuses on the European Area of Freedom, Security and Justice. He is particularly interested in the impact of the decentralised agencies' operations, in terms of the effective and uniform national implementation of the migration, asylum and border management measures adopted at the EU level. David is a key researcher in the Jean Monnet Network European Union-Asia Pacific Dialogue and coordinator at the University of Deusto of the Jean Monnet Networks EU Law Enforcement and EU Counterterrorism. David conducted postdoctoral research at the Instituto Barcelona de Estudios Internacionales (IBEI) and the University of Zürich, as well as part of his PhD research in the U.S. (Washington College of Law and Georgetown Law Center) and The Netherlands (Utrecht University, RENFORCE).

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Presentación

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Resumen: Este número monográfico de *Cuadernos Europeos de Deusto* incluye siete contribuciones realizadas durante la Conferencia Internacional *The EU Migration, Border Management and Asylum Reform in the Aftermath of the Refugee Crisis: Towards an Effective Enforcement*, celebrada en la Universidad de Deusto los días 2 y 3 de junio de 2022. Este evento tuvo lugar en el marco de las actividades de la Red Jean Monnet sobre *EU Law Enforcement* (EULEN). El objetivo de este proyecto Erasmus+ consiste en congregar a académicos y profesionales para abordar los desafíos relativos a la aplicación efectiva de las normas comunitarias en un espacio sin fronteras. En concreto, este número monográfico revela que desde la «crisis de los refugiados» de 2015, la UE viene experimentando un significativo déficit de implementación y que son varias las discrepancias que persisten en la aplicación a nivel nacional y local de las normas y políticas adoptadas por la UE.

Palabras clave: Unión Europea, migración, asilo, tráfico ilícito de migrantes, Espacio Europeo de Libertad Seguridad y Justicia, aplicación, agencias.

La «crisis de los refugiados» de 2015 reveló la necesidad de asegurar el funcionamiento del espacio Schengen y del Sistema Europeo Común de Asilo (SECA), la necesidad de ayudar a los Estados miembros más afectados por la llegada repentina y extraordinaria de flujos migratorios mixtos, así como la necesidad de aplicar de manera eficaz y uniforme las medidas adoptadas por la Unión Europea (UE) en materia de migración, asilo y gestión de fronteras. Es preciso promover un diálogo transnacional entre las administraciones a nivel comunitario, nacional y local y adoptar medidas eficaces que superen el déficit de implementación existente en materia de migración, asilo y gestión de fronteras en la UE. En este sentido, por ejemplo, las agencias descentralizadas del Espacio Europeo de Libertad, Seguridad y Justicia (ELSJ) han devenido en actores clave, no solo en la prestación de asistencia operativa a los Estados miembros, sino también en la implementación efectiva y uniforme de las políticas y normas de la UE.

Debido al carácter predominantemente operacional de las políticas de migración, gestión de fronteras y asilo, las agencias descentralizadas de la

UE destacan por estar especialmente bien posicionadas de cara a proporcionar conocimientos técnicos, intercambiar información y coordinar las actividades de los Estados miembros sobre el terreno. Las políticas de migración, gestión de fronteras y asilo de la UE se han visto reforzadas en los últimos años y se ha evolucionado de una implementación exclusivamente en las manos de los Estados miembros al desarrollo de métodos transnacionales de cooperación (por ejemplo, el Centro Europeo de Tráfico Ilícito de Migrantes de Europol, la cooperación reforzada de las agencias del ELSJ en los *hotspots*, la red de agencias del ELSJ, etc.) o a la aplicación centralizada de estas políticas en la UE (por ejemplo, la transformación de Frontex en la Guardia Europea de Fronteras y Costas, la EASO en la Agencia de Asilo de la UE, el refuerzo del mandato de Europol, etc.)

En este contexto y en atención a la todavía incipiente investigación desarrollada sobre el tema, este número monográfico de la revista *Cuadernos Europeos de Deusto* incluye algunas de las contribuciones presentadas durante la Conferencia Internacional celebrada en la Universidad de Deusto los días 2 y 3 de junio de 2022. Este evento tuvo lugar en el marco de las actividades de la Red Jean Monnet *EU Law Enforcement* (EULEN) y en el que se pretendió abordar tres cuestiones: 1) ¿En qué medida se refuerzan las tareas operativas y la cooperación interinstitucional de las agencias del ELSJ para ayudar a los Estados miembros en la aplicación uniforme y efectiva de las medidas adoptadas en materia de migración, gestión de fronteras y asilo por la UE? 2) ¿Cómo se puede garantizar el estado de derecho y la protección de los derechos fundamentales en un ELSJ donde las agencias de la UE y los Estados miembros están reforzando sus competencias operativas? 3) ¿Hasta qué punto la reforma de la UE en materia de migración, asilo y gestión de fronteras tras la «crisis de los refugiados» garantizará una aplicación coherente y eficaz de los instrumentos jurídicos y las medidas políticas adoptadas?

Lucas J. Ruiz Díaz abre el número monográfico analizando los poderes del Parlamento Europeo para examinar las agencias del ELSJ tras el progresivo refuerzo de sus mandatos en la última década. Lucas sugiere algunas recomendaciones para reforzar la responsabilidad de dichas agencias con el fin de respetar plenamente los principios del Estado de Derecho y los valores sobre los que la UE se fundamenta. Seguidamente, **Lorena Calvo Mariscal** explora las implicaciones legales, tanto formales como materiales, que existen en la aplicación del Memorándum de Entendimiento concluido en 2020 entre Malta y Libia. Lorena enmarca este acuerdo jurídicamente no vinculante en la estrategia de la UE y sus Estados miembros de cooperar con Libia en la desterritorialización de la gestión de la inmigración para reducir el número de migrantes y solicitantes de asilo que llegan a las fronteras exteriores de Europa. Por último, **Eulalia W. Petit de Gabriel**

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escribió un artículo acerca de los menores separados y el dilema entre el interés general y el interés individual en la aplicación del derecho migratorio de la UE. Eulalia argumenta que la expansión del concepto de familia sancionado por el Tribunal Europeo de Derechos Humanos y el Tribunal de Justicia de la Unión Europea (TJUE) permite proteger vínculos no exclusivamente biológicos. Asimismo, entiende la autora que el objetivo de prevención general como es la lucha contra el tráfico o la trata no es suficiente por sí mismo para garantizar el respeto de los requisitos de las limitaciones de derechos.

En lo que a la aplicación efectiva y uniforme de la política de asilo de la UE respecta, **Julia Kienast** se centra en estudiar el lenguaje de los líderes de la UE y su influencia en la aplicación de la legislación de la UE al provocar derogaciones, excepciones y modificaciones. Julia compara este proceso con respecto a la crisis de los refugiados de 2015, la crisis fronteriza de Bielorrusia y la actual crisis ucraniana para retratar cómo difiere la reacción ante hechos similares y, por tanto, para mostrar cómo la política de asilo de la UE adolece una falta de Estado de Derecho. La autora considera que el problema radica en la falta de solidaridad pues no hay distinción entre la responsabilidad de los solicitantes de asilo en función de su nacionalidad. **Alfredo Dos Santos Soares** también analiza la solidaridad al no presentar esta una definición y un significado claro, apareciendo más bien como un concepto amorfo. En concreto, Alfredo examina los debates doctrinales sobre la naturaleza, el alcance y el carácter del principio de solidaridad y valora el papel que el TJUE está desempeñando en pro de una solidaridad efectiva.

Los dos últimos artículos se centran en estudiar respectivamente el tráfico ilícito de migrantes y la esclavitud moderna. **Mirentxu Jordana Santiago** analiza varios puntos controvertidos del «paquete de facilitadores» como son la excesiva criminalización y el descuido de la perspectiva de los derechos humanos. Mirentxu estima que la erradicación del tráfico de personas requiere la suma de esfuerzos y la acción coordinada de diferentes actores como autoridades nacionales y agencias como Eurojust o Europol. El artículo de **Natalia Szablewska** cierra este número monográfico prestando atención a cómo la creciente securitización de la migración oculta los factores sociales, económicos y políticos subyacentes que alimentan la esclavitud moderna. En este sentido, Natalia arguye la necesidad de dar una respuesta más amplia que examine las cuestiones de la gestión de la migración, la regulación del mercado y el desarrollo en general. Para ello, su artículo desarrolla un enfoque comparativo para examinar la evolución mundial de la regulación de las formas de esclavitud moderna relacionadas con el trabajo en relación con la gestión de la migración en el contexto de la consecución de los objetivos de desarrollo sostenible.

Sobre el autor

David Fernández-Rojo es doctor encargado e investigador en la Universidad de Deusto. Su investigación se centra en el Espacio Europeo de Libertad, Seguridad y Justicia. Está particularmente interesado en el impacto de las operaciones de las agencias descentralizadas de la UE en términos de la implementación nacional efectiva y uniforme de las medidas de migración, asilo y gestión de fronteras adoptadas por la UE. David es investigador en la Red Jean Monnet *European Union-Asia Pacific Dialogue* y coordinador en la Universidad de Deusto de las Redes Jean Monnet *EU Law Enforcement* y *EU Counterterrorism*. David realizó estancias posdoctorales en el Instituto Barcelona de Estudios Internacionales (IBEI) y la Universidad de Zúrich, así como predoctorales en EE.UU. (*Washington College of Law* y *Georgetown Law Center*) y Países Bajos (Universidad de Utrecht, RENFORCE).

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Estudios
Articles

The European Parliament's Oversight of the Agencies of the Area of Freedom, Security and Justice. Where are we Now and Where are we Heading[1]

La supervisión por parte del Parlamento Europeo de las agencias del espacio de libertad, seguridad y justicia. Dónde nos encontramos ahora y perspectivas de futuro

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Summary: I. Introduction.—II. The legal changes after the Lisbon Treaty and the praxis of oversight afterwards. 1. The general oversight powers of the European Parliament over the Area of Freedom, Security and Justice. 2. The oversight over the agencies. The main concerns that the legal and praxis evidence.—III. The main sources of conflict and the need for further reforms to enhance agencies' accountability and transparency.—IV. Conclusions.

Abstract: Despite becoming a legislative actor comparable to the Council after the entry into force of the Lisbon Treaty, the European Parliament (EP) still lacks the power to effectively scrutinize the implementation of the European Union (EU) law and policies by the agencies of the Area of Freedom, Security and Justice (AFSJ). The case of Frontex has demonstrated the extent to which the successful protection of human rights is at stake when it comes to the activities at the external borders to halt irregular migration flows and other illegal cross-border activities. Abuses in this regard have been highlighted by several International Organizations and non-Governmental Organizations, forcing the EU Institutions to act accordingly. This paper analyzes the current state of affairs of the EP's

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[1] This paper was presented at the International Conference of the Jean Monnet Network on EU Law Enforcement (EULEN), entitled «The EU Migration, Border Management and Asylum Reform in the Aftermath of the Refugee Crisis: Towards an Effective Enforcement», organized by the University of Deusto and held in Bilbao on 2 and 3 June 2022. The author would like to thank the peer reviewers for their valuable comments to improve the original draft. All the website pages referenced were latest accessed on 29 July 2022.

powers to scrutiny AFSJ agencies after the progressive enhancement of their mandates in the last decade, and suggests several recommendations to enhance the accountability of these agencies to fully respect the principles of the rule of Law and the values on which the EU is based.

Keywords: European Union, European Parliament, AFSJ, border management, migration policy

Resumen: *A pesar de convertirse en un legislador comparable al Consejo tras la entrada en vigor del Tratado de Lisboa, el Parlamento Europeo (PE) todavía carece de los poderes necesarios para controlar de manera efectiva la implementación del Derecho y políticas de la Unión Europea (UE) por parte de las agencias del Espacio de Libertad, Seguridad y Justicia (ELSJ). El caso de Frontex ha demostrado la medida en la que la protección efectiva de los derechos humanos está en juego cuando se abordan las actividades en las fronteras exteriores para detener los flujos de inmigración irregular y otras actividades transfronterizas ilícitas. Los abusos en este sentido han sido señalados por Organizaciones Internacionales y Organizaciones no gubernamentales, lo que ha provocado la intervención de las instituciones de la UE para ponerles coto. Este trabajo analiza el estado actual de la cuestión en relación con los poderes del PE para examinar las agencias del ELSJ tras el progresivo refuerzo de sus mandatos en la última década y sugiere algunas recomendaciones para reforzar la responsabilidad de dichas agencias con el fin de respetar plenamente los principios del Estado de Derecho y los valores sobre los que la UE se fundamenta.*

Palabras clave: *Unión Europea, Parlamento Europeo, ELSJ, gestión de fronteras, política de migración*

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I. **Introduction**

With the entry into force of the Lisbon Treaty, the European Parliament (EP) became a legislative actor comparable to the Council in terms of competences and responsibilities. Nowadays, however, it still lacks the power to effectively scrutinize the implementation of European Union (EU) law and policies by, and the activities of, the agencies of the Area of Freedom, Security and Justice (AFSJ). After decades of progressive development thanks to the stimulus given by the European Council, at present the main problem lies in the fact that the AFSJ covers policies that directly touch at the basic principles of the protection of fundamental rights of individuals, along with several "regalian functions of the State", such as borders and (rule of) law. Indeed, some authors have argued that the AFSJ has turned into "the inferno of the rule of law"[2] because of the breakdown of some of its main elements, such as the protection of the legislative prerogatives of national and European parliaments against the interference of the executives in a European normative process clearly driven by intergovernmental logics —and rules— in specific areas of EU integration. For instance, in the last decade the case of the European Border and Coast Guard (Frontex) has persistently demonstrated the extent to which the effective protection of human rights is in danger when it comes to the activities prompted and coordinated by the agency at the external borders to halt irregular migration flows and other illegal cross-border activities. Abuses have been repeatedly condemned by several International Organizations[3], non-Governmental organizations[4], and the Academia[5], forcing the EU Institutions to act accordingly and progressively reinforce the protection and safeguards mechanisms within the agency, the fulfilment

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[2] Ignacio Borrajo Iniesta, "El Estado de Derecho en el Espacio de Libertad, Seguridad y Justicia de la Unión", in *Estado de Derecho y Unión Europea*, dir. D. J. Liñán Nogueras and P. J. Martín Rodríguez (Madrid: Tecnos 2018), 263 (own translation).

[3] Inter alia, Council of Europe's Parliamentary Assembly, Res. 1821 (2011), of 21 June 2011, "The interception and rescue at sea of asylum seekers, refugees and irregular migrants", and judgments of the European Court of Human Rights (ECtHR) *Hirsi Jamaa v. Italia*, no. 27765/09 ((ECtHR, de 23 February 2012) and *N.D. v. Spain* and *N.T. v. Spain*, no. 8675/15 and 8697/15 (ECtHR, 3 October 2017).

[4] Human Rights Watch, "Frontex Failing to Protect People at EU Borders", *HRW News*, 23 June 2021, https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders

[5] See, for instance, Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford: Oxford University Press, 2018); and Simone Marinai, "The interception and rescue at sea of asylum seekers in the light of the new EU legal framework", *Revista de Derecho Comunitario Europeo*, no. 55 (September-December 2016): 901.

of human rights standards in its mandate and the conduct of operations[6], and even the opening of investigations into Frontex's Executive Director over claims of "harassment, misconduct and migrant pushbacks"[7], which recently ended up with his resignation[8].

Against this complex background, the aim of this paper is to analyse the current state of affairs of the EP's powers to scrutiny the work of AFSJ agencies after the progressive enhancement of their mandates in the last decade, and suggest recommendations to enhance their accountability to fully respect the principles of the rule of law and the values on which the EU is founded (art. 2 of the Treaty on the EU, TEU). Indeed, it aims at understanding to what extent the reforms of the founding statutes of the AFSJ agencies operated in the last decade have served to enhance EP's oversight and, indirectly, reinforced (or not) the transparency and accountability of their activities. On the one hand, the legal and regulatory frameworks and, on the other, the praxis of the Members and Political Groups within the EP will be assessed to evaluate whether the gaps identified in the following sections are a matter of lack of competences or, instead, are part of the habitual conduct of politics by the EP and the rest of the EU Institutions —with the connivance of the Member States (MMSS)— to fulfil other short-term, security-related issues on the EU agenda. Due to the limited extent of this paper, nevertheless, we will not deal with the role of national parliaments in overseeing the activities of AFSJ agencies in junction with the EP —a shared responsibility introduced by the Lisbon Treaty (art. 12 TEU and Protocols no. 1 and 2) which has been duly analysed elsewhere[9].

In our paper, we will consider in particular the external dimension of the AFSJ and the EP's (limited) oversight over it. Indeed, in the last years

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[6] Frontex, "Code of Conduct for return operations and return interventions coordinated or organised by Frontex", 2018, https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_for_Return_Operations_and_Return_Interventions.pdf

[7] Darren McCaffrey, "Frontex: EU's border agency probed over harassment, misconduct and migrant pushback claims", *Euronews*, 12 January 2021, https://www.euronews.com/my-europe/2021/01/12/frontex-eu-s-border-agency-probed-over-harassment-misconduct-and-migrant-pushback-claims

[8] Alice Tidey, "Frontex chief resigns over misconduct and human rights violations probe" *Euronews*, 29 April 2022, https://www.euronews.com/2022/04/29/frontex-chief-resigns-over-misconduct-and-human-rights-violations-probe

[9] Angela Tacea and Florian Trauner, "The European and national parliaments in the area of freedom, security and justice: does interparliamentary cooperation lead to joint oversight?", *The Journal of Legislative Studies* (December 2021): 1; and Aidan Wills and Mathias Vermeulen, "Parliamentary Oversight of Security and Intelligence Agencies in the European Union", European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels, 2011, https://www.dcaf.ch/sites/default/files/publications/documents/study_en.pdf

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we have perceived a considerable increase in the AFSJ policies having an external dimension for which the EU has endorsed some programmes, funding and laws targeting at strengthening its external borders and cooperation with third States on particular issues (e.g., migration and border management), as well as external contacts between the agencies and third States' officials to enhance operational and strategic cooperation on fighting certain illegal cross-border traffics in the "neighbourhood". Concerning the agencies, the evolution of their mandates, the access to and the exchange of information and personal data, and the working and operational arrangements signed by the agencies with third countries seriously challenge the respect for EU values and the rule of law. Of particular concern is that the EP has a limited power to scrutinize these external activities and informal engagements out of the legal framework both ex ante and ex post, as the praxis so far has evidenced. As we will explore further in the following sections, the implementation of the AFSJ external dimension and its further enhancement represent one of the most significant loopholes of parliamentary oversight of the EU integration process, aggravated by the predominance of the Council —and the foreign policies of the EU MMSS— in this particular area of the AFSJ and the increased autonomy of the agencies vis-à-vis the establishment of relations with third parties, indirectly posing a risk to its alleged general principles of the EU's external action (art. 21 TEU), whose analysis clearly exceeds our study.

This paper is structured as follows. After an in-depth review of the reforms operated by the Lisbon Treaty in this area of integration and the praxis followed so far (section II), we will take a closer look at the main sources of conflict in current affairs as regards both domestic and external affairs, proposing some reflections and recommendations to enhance the accountability and transparency of the AFSJ agencies (section III). As a result, we will be in a better position to understand the European politics behind the AFSJ, and how institutions —to some extent— matter in this far-reaching policy goal of the EU for the 21st century taking a critic neo-institutionalism as a prism of analysis[10]. Indeed, EU institutions are relevant for the first time in the European integration process in the AFSJ thanks to the innovations brought through by the Lisbon Treaty, even though that the intergovernmental logic and rules which predominated in the pre-Lisbon period still govern the whole picture, including those assumed

[10] Building upon the following work: Florian Trauner and Ariadna Ripoll, "The Communitarization of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change", *Journal of Common Market Studies* 54, no. 6 (June 2016): 1417-1432.

"communitarized" areas. Nevertheless, they do not always tend to protect the European interests as they are supposed to, but the EU MMSS' —as the "New Pact on Asylum and Migration" evidences[11]. Here, the role of the EP remains crucial to protect human rights and safeguard the European values on which the EU is founded, both within and outside the EU borders. The underlying, basic question here is whether the EP is ready to play that role in the complex EU political system.

II. The legal changes after the Lisbon Treaty and the praxis of oversight afterwards

Until the entry into force of the Lisbon Treaty —and some time after[12], "[t]o gain control over the ongoing activities of the [Justice and Home Affairs Council]-related agencies and ensure their accountability, the EP […] applied different strategies to compensate *ex post* for weak *ex ante* legislative involvement, including formal legal procedures as well as informal channels and practices"[13]. Because, for decades, the EP had the will but not the competences to oversee[14] the whole AFSJ, the Council used extensively its powers to define —following an evident intergovernmental approach— the extent and content of the policies covered by the AFSJ and the roles of the agencies operationalizing it, becoming the "main principal"[15] in a process of "agencification" of the policies covered by this

[11] The whole (legislative and non-legislative) package published by the Commission in September 2020 and currently debated by the Council and the EP is available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en

[12] In addition to the transitional period established in the Protocol no. 36 [2007, OJ, C326, p. 322], "[…] member states […] were eager to define the new legal basis for Europol before the Lisbon Treaty was scheduled to enter into force in order to prevent the EP from using its codecision powers", deliberately postponing thus its full involvement in the establishment of the AFSJ agencies. Florian Trauner, "The European Parliament and Agency Control in the Area of Freedom, Security and Justice", *West European Politics* 35, no. 4 (2012): 792.

[13] Florian Trauner, "The European Parliament…", 787-788.

[14] In this paper we will use interchangeably the terms *control*, *oversight* and *accountability* irrespective their differences concerning their extent and when and by whom they are carried out. Generally speaking, we will take a look at the relationship between an actor and an external agent to whom it has to report and justify its activities, otherwise it might face some kind of consequences. For a detailed analysis on this issue, see for instance Sergio Carrera, Leonhard den Hertog and Joanna Parkin, "The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?" *European Journal of Migration and Law* 15, no. 4 (2013): 337.

[15] Renaud Dehousse, "Delegation of powers in the European Union: The need for a multi-principals model", *West European Politics* (June 2008): 797.

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area of integration "designed to consolidate the predominance of MMSS in the AFSJ"[16]. The only formal say that the EP had was budgetary control through the draft of the annual EU budget and its powers as a discharge authority. The Lisbon Treaty, therefore, opened a new "window of opportunity" for the scrutiny and control of the AFSJ agencies and, in general, the policies covered by this far-reaching objective now fully "communitarized"[17]. As Borrajo Iniesta clearly states:

> The European Parliament has moved from being considered a neglected institution in justice and home affairs to becoming the axis of legislation in this area, where the freedom of definition enjoyed by the political power and the need to respect fundamental rights openly affect all the branches of the leafy tree covered by the area of freedom, security and justice.[18]

1. *The general oversight powers of the European Parliament over the Area of Freedom, Security and Justice*

Nowadays, the EP enjoys legislative, budgetary and supervisory powers that have progressively enhanced its position in the EU political system through successive treaty reforms. As a result, according to the Treaties in force, the EP has become co-legislator on an equal footing with the Council to negotiate the legal framework and funding instruments of the AFSJ policies (e.g., arts. 79.4, 81-84, 177 and 322 of the Treaty on the Functioning of the EU, TFEU). This competence comes in addition to its consultative powers in the adoption of the multi-annual financial framework (art. 312 TFEU), its reinforced budgetary powers concerning the definition of the annual budget (art. 314 TFEU) and the discharge procedure (art. 319 TFEU), and certain competencies in the EU's external action when concluding international agreements (art. 209 and 218 TFEU), for which the EP is asked to give its consent —as we will discuss later.

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[16] Florian Trauner, "The European Parliament…", 785.

[17] Some limits remain, however, in certain areas, such as administrative cooperation (art. 74 TFEU), provisions on passports, identity cards and residence permits (art. 77.3 TFEU), and police cooperation (art. 89 TFEU), where a special legislative procedure applies in which the EP is merely consulted. Moreover, the consent procedure applies to "other specific aspects of criminal procedure" not related to mutual admissibility of evidence, the rights of individuals in criminal procedure or the rights of the victims of crimes (art. 82.2 TFEU), the inclusion of other "Eurocrimes" (art. 83.1 TFEU), and the establishment of the European Public Prosecutor's Office (art. 86 TFEU).

[18] Ignacio Borrajo Iniesta, "El Estado de Derecho…", 279 (own translation).

These steps forward prompted by the Lisbon Treaty have been key to extend the "communitarian" method —and, at least theoretically, its spillover logic— to (most of) the formerly intergovernmental policies covered by the AFSJ. Indirectly, it has also enhanced the role of the EP in their definition, implementation and oversight through a series of parliamentary activities, mainly under the responsibility of the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). On the other hand, the Lisbon Treaty shows certain continuity by confirming previous powers of the EP. As already foreseen in the preceding treaties, Members of EP (MEPs) can also draft "own-initiative reports" and resolutions on issues falling under its competence (art. 225 TFEU)[19], create commissions of inquiry to investigate alleged contraventions or maladministration of EU law (art. 226 TFEU)[20], or to bring proceedings for annulment before the Court of Justice to request the annulment of certain provisions of, or the entire content of, legislative acts (art. 263 TFEU)[21].

As far as EP's oversight is concerned, it mainly takes the form of political debates, exchanges of views, major interpellations for written answer, and oral and written questions to the members of the College of Commissioners —including the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy— in the framework of the ordinary legislative procedure, on a regular basis (e.g., presentation of the annual reports on the progress made in the AFSJ, and the State of the Union address), or when an issue reaches the public policy agenda. Moreover, the EP regularly organizes informal debates and public hearings open to civil society and experts, as well as interparliamentary committee meetings to discuss specific issues of the European agenda with the members of national parliaments. In particular, EP committees arrange hearings and exchanges of views with experts and representatives from the national law-enforcement authorities, judiciary, ministries, Academia and think-tanks and civil society organizations to discuss particular topics high on the political agenda or to deepen the knowledge of MEPs and their teams on a specific issue —especially in the drafting of a complex legislative file. Last but not least, Members of the EP

[19] Additionally, Rule no. 54 of the Rules of Procedure of the EP, 9th Parliamentary term, September 2021. The Rules of Procedure are available at: https://www.europarl.europa.eu/doceo/document/RULES-9-2021-09-13_EN.pdf

[20] At the time of writing, during the ninth parliamentary term, the EP created the Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware. All the information at: https://www.europarl.europa.eu/committees/en/pega/home/highlights

[21] For instance, Case C-133/06, European Parliament versus Council of the European Union, Judgment of the Court (Grand Chamber) of 6 May 2008, ECLI:EU:C:2008:257.

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(MEPs) regularly debate, along with the presidents of the Commission and the EP, the programme of activities with the representative from the Member State holding the presidency of the Council of the EU during the presentation of the priorities for the incoming semester. Contrary to common believe, this debate still serves to settle and control the agenda by the Member State holding the presidency for six months —in junction with the other two countries forming the 'trio of presidencies'[22], and to test the points of view of the different institutions as regards certain politized issues and potential interinstitutional contestations; a question of key importance due to the new role of the European Council after the Lisbon Treaty[23] and the new dynamics opened in the current ninth legislature (2019-2024) because of the difficulties in forming the necessary majorities in the EP to take any action due to the existing political fragmentation and polarization[24].

These political debates, legislative and no-legislative initiatives, and oversight over the whole AFSJ are among the primary responsibilities of the LIBE Committee. Nevertheless, other EP committees with duties on certain AFSJ-related issues also pay attention to, and have a say in, the development and implementation of the AFSJ. This is the case of, for instance, budget control and discharge (Budgetary Control Committee, CONT), constitutional and legal affairs (JURI and AFCO, respectively) and foreign affairs (AFET). Within their competences, they can become responsible too for a legislative initiative, giving their opinion to the legislative procedures led by other committees or drawing a non-legislative report, as the LIBE

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[22] At the time of writing, the latest debate of this kind was held on 6 July 2022, during the presentation of the programme of activities of the Czech Presidency by the country's Prime Minister, Petr Fiala. Generally speaking, during their interventions, the president of the Commission and MEPs expressed their majoritarian support to the measures envisaged by the Czech Republic, whose overall objective was 'to contribute as much as possible to creating the conditions for the security and prosperity of the EU in the context of the European values of freedom, social justice, democracy and the rule of law and environmental responsibility' in the aftermath of the Russian military aggression against Ukraine. In particular, during the debate MEPs highlighted the enhancement of the AFSJ as a priority of the "trio of presidencies" (France, the Czech Republic and Sweden). The priorities of the Czech Presidency are available at its website (https://czech-presidency.consilium.europa.eu/en/programme/priorities/), while the debate is accessible via the following link: https://www.europarl.europa.eu/doceo/document/CRE-9-2022-07-06-ITM-004_EN.html

[23] "The officialisation of the European Council as one of the key EU actors has led to new inter-institutional dynamics and increased the voice of member states.". Ariadna Ripoll Servent, "Conclusions: What future for the Treaty of Lisbon?", *Política y Sociedad* 58, no. 1 (2021): 2.

[24] Ariadna Ripoll Servent, "The European Parliament after the 2019 Elections: Testing the Boundaries of the 'Cordon Sanitaire'", *Journal of Contemporary European Research* 15, no. 4 (December 2019): 331.

Committee itself does on its daily work. Moreover, in the framework of the ordinary legislative procedure, the Conference of Presidents of the EP may arrange a joint committee responsible for giving its joint opinion providing that "the matter falls indissociably within the competences of several committees" and "that the question is of major importance" (art. 58 Rules of the Procedure). Thirdly, in addition to the "regular", standing committees, MEPs may also set up a special committee "on a proposal from the Conference of Presidents" for a short period of time to discuss and decide on a particular issue (Art. 207 Rules of the Procedure). Finally, some issues of relevance on the EU agenda or highly contested/politicized[25] are also addressed by the Plenary for political debate —and not only for ratification of the decisions taken by LIBE or the other relevant committees. For instance, that was the case for the "Return Directive" in 2008, the "SWIFT dossier" and the Passenger Name Recognition deal with US and Australia, or the establishment in 2013 and the current reform of the Schengen evaluation and monitoring mechanism, which has become a dividing issue between the two biggest groups in the EP[26].

With regard to the praxis so far, generally speaking, MEPs out of the two biggest groups in the EP have traditionally held similar positions regarding casting their votes to ensure the key developments of, and the general oversight over, the AFSJ. Indeed, expressing opposite votes is the exception to the rule when it comes to the main policies covered by the AFSJ. Certainly, both the European People's Party (EPP) and the Socialist and Democrats Group (S&D Group) —the (former) "Grand Coalition", which for the current 2019-2024 legislative period represent the 44.74 per cent of the total available seats, have jointly voted for more than a decade in the major legislative AFSJ-related dossiers following the "ordinary legislative procedure". Inter alia, both parties have supported the introduction of the European Travel Information and Authorisation System (ETIAS)[27], the

[25] "[…] contestation […] can occur within political institutions while in politicization a topic becomes the object of public discussion". Tapio Raunio and Wolfgang Wagner, "Contestation over Development Policy in the European Parliament", *Journal of Common Market Studies*, Vol. 59 (2021): 20-21.

[26] "European Parliament rejects EPP attempt to make internal borders within the Schengen area permanent", *S&D Press,* 29 November 2018, https://www.socialistsanddemocrats.eu/newsroom/european-parliament-rejects-epp-attempt-make-internal-borders-within-schengen-area

[27] Data on the final votes in LIBE Committee are available at: https://www.europarl.europa.eu/committees/en/libe/meetings/votes. Data on the final vote in the Plenary are also available for a longer period of time than the previous website at: https://parltrack.org/. For a detailed analysis on the composition of majorities at the EP, see Ariadna Ripoll Servent, *Institutional and Policy Change in the European Parliament. Deciding on Freedom, Security and Justice* (London: Palgrave MacMillan, 2015).

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(unfinished) reform of the "Dublin system", the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, the reform of the European Criminal Records Information System (ECRIS)[28], and the respect of fundamental rights in providing competent authorities with access to centralised registers of bank accounts through the single access point in the fight against money-laundering; a general political agreement which favoured the adoption of the text by the EP at first reading in most of the cases. On the contrary, only a few issues have raised doubts or disagreement between the EPP and the S&D Group. The adoption of stricter rules on data protection[29], the inclusion of gender-based violence as a new area or crime listed in article 83.1 TFEU[30], the Digital Services Act[31] or the extension of the EURODAC database to include the fingerprints of resettled third-country nationals and stateless persons for law enforcement purposes are examples of this latter.

This internal unity in the voting behaviour of both parties —accompanied by other political groups in certain dossiers, especially due to the current fragmentation in the Hemicycle[32]— goes beyond the ordinary legislative procedure, and embraces inter alia "constitutional" affairs to protect its prerogatives against the intromission by other EU Institutions (i.e., the Council), as the case of the negotiations of the Schengen governance

[28] This dossier, however, divided the S&D Group because of the abstention of some of its MEPs.

[29] "Data protection: New rules at risk to be blocked by centre-right MEPs", *S&D Press*, 5 March 2014, https://www.socialistsanddemocrats.eu/newsroom/data-protection-new-rules-risk-be-blocked-centre-right-meps

[30] Andreas Rogal, "MEPs welcome Ursula von der Leyen's announcement to legislate on violence against women", *The Parliament Magazine*, 17 September 2021, https://www.theparliamentmagazine.eu/news/article/meps-welcome-ursula-von-der-leyens-announcement-to-legislate-on-violence-against-women

[31] See the EPP's position on the issue at: https://www.eppgroup.eu/newsroom/publications/epp-group-position-on-the-digital-services-act-dsa. For the S&D Group's position consult their website at: https://www.socialistsanddemocrats.eu/es/channel/digital-services-act-people. The final document was supported *en bloc* by the EPP, the S&D Group, Renew and Les Verts/ALE, in a vote tabled at the Plenary on 5 July 2022 after the groups reached a compromise text.

[32] Even though the number of political groups in the EP has remained almost unchanged since the first one directly elected by the citizens in 1979 (7-10 groups, plus the Non-attached Members), the number of seats that the EPP and the S&D attained declined in the 2019 elections —for the benefit of the Renew Europe group, while the number of seats in the two extremes of the Hemicycle considerably increased, which made possible that the Identity and Democracy group (far-right) became the fifth force in the currents legislative period immediately after the Greens (73 and 74 seats, respectively). Data available at: https://www.europarl.europa.eu/about-parliament/en/in-the-past/previous-elections

demonstrated in 2012[33], as well as on the oversight of the work of the AFSJ agencies, as we will analyse in the following section. Nevertheless, the current fragmentation and the loss of seats by the "Grand Coalition" complicate the political panorama in the near future as far as the EP's internal unity is concerned. With regard to the other EP groups, for instance, Renew Europe has evidenced a more Europhile approach in recent AFSJ-related initiatives[34], although it has voted along the lines of the two biggest political groups for most of the AFSJ-related dossiers. On the contrary, the Identity and Democracy Group (ID) and the European Conservatives and Reformists Group (ECR) —on the extreme right side of the Hemicycle— and the Left group (GUE/NGL) and Les Verts/ALE —on the extreme left side— generally oppose to the main legislative initiatives coming from the Commission if they represent a further step in the integration process or do not take sufficiently into account human rights, respectively. Hence, fragmentation has directly favoured the inclusion of different parties in the leading positions and roles in the EP, such as committee chairs and vice-presidencies, or rapporteurships in key legislative dossiers[35]. However, indirectly, it might raise some concerns with regard to the expected results of the political debate (i.e., reports and opinions "of minimums") internally at the EP because of the assumptions of these important legislative dossiers by some Europhobe and xenophobe MEPs.

In particular, when it comes to the oversight over the external relations the question becomes even more problematic, to say the least. For instance, although the EP is entitled to provide its consent to international agreements concluded by the EU (art. 218 TFEU), the practice has evidenced its secondary role vis-à-vis the (European) Council due to the latter's ploys to avoid Parliamentary involvement; a question that reaches too the consultation procedure in other areas of the development and implementation of the AFSJ, including its external dimension. As Ripoll Servant clearly states:

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[33] In June 2012, the EP suspended its cooperation with the Council in the negotiation of five legislative dossiers linked to the maintenance of internal security due to the Council's unilateral decision to modify the Schengen governance in a clearly restrictive, intergovernmental manner. More information at: https://www.europarl.europa.eu/news/es/press-room/20120614IPR46824/ep-suspends-cooperation-with-council-on-five-justice-and-home-affairs-dossiers

[34] See, for instance, the intervention of its representatives in the following debates: search and rescue in the Mediterranean and the publication of the EU Security Union Strategy. These interventions are available at: https://www.europarl.europa.eu/doceo/document/CRE-9-2019-10-23-ITM-018_EN.html, and https://www.europarl.europa.eu/doceo/document/CRE-9-2020-12-16-ITM-013_EN.html, respectively.

[35] For instance, the Dutch MEP Tineke Strik (Group of the Greens/European Free Alliance) was appointed rapporteur on the reform of the Return Directive and the Spanish MEP Jorge Buxadé Villalba (European Conservatives and Reformists Group) rapporteur on the (new proposal on) Eurodac Regulation.

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> The use of non-legislative instruments (such as the EU-Turkey Statement on asylum-seekers) and intergovernmental treaties (such as the fiscal compact) outside the EU framework mean that the EP has no say on decisions or is restricted to implementing them in follow-up legislation. Moreover, the fact that these successive crises have touched upon core state powers of member states has also helped governments to legitimize their primary role as decision-makers and placed MEPs under the shadow of the European Council and, hence, intergovernmentalism.[36]

In fact, what we observe is the limited power or even the exclusion of the EP in policymaking formulas other than the ordinary legislative procedure as far as the AFSJ or its external dimension are concerned. Indeed, when the EP is merely consulted on an issue of its competence, or under the consent procedure in the event that the Treaties so envisage[37], it is easier for the (European) Council and/or the Commission to take the lead and present its political guidelines or a proposal, respectively. This EP's loss of relevance has happened in those areas of the AFSJ in which the EP is consulted, such as refugee relocation[38], in addition to the consent practice for the conclusion of international agreements which cover its external dimension. Concerning the latter, for instance, the EP consented on the (controversial[39]) return and readmission agreements concluded by the EU with third States[40], "which falls within the scope of Title V of Part Three of the TFEU" (i.e., the AFSJ).

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[36] Ariadna Ripoll Servent, "The European Parliament: Powerful but Fragmented", in *The Institutions of the European Union*, fifth edition, ed. por Dermont Hodson *et al*. (Oxford: Oxford University Press): 24. https://halshs.archives-ouvertes.fr/halshs-03498368/document

[37] In addition to those AFSJ-related areas already mentioned in footnote 17, that is: the establishment of the number of seats of the EP (art. 14.2 TFEU); actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (art. 19 TFEU); the strengthening or addition to the rights of the Citizens of the Union (art. 25 TFEU); the accession to and withdrawal of Member States from the EU (arts. 49 and 50 TFEU, respectively); the negotiation of international agreements (art. 218 TFEU); the setting of the Union's own resources (art. 311 TFEU) and the MFF (art. 312 TFEU); and the extension of EU competencies if any action is considered necessary "to attain one of the objectives set out in the Treaties" (art. 352 TFEU).

[38] On this particular topic, see Maria Chiara Vinciguerra, "Punching Below Its Weight: The Role of the European Parliament in Politicised Consultation Procedures", *Politics and Governance* 9 (2021): 29.

[39] On this issue, see Philipp Stutz and Florian Trauner, "The EU's 'return rate' with third countries: Why EU readmission agreements do not make much difference", International Migration 60 (2022):154; and Florian Trauner, *Return and readmission policy in Europe. Understanding negotiation and implementation dynamics* (London: Routledge, 2018).

[40] The whole list of return and readmission agreements signed by the EU with third countries is available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en

However, because of the "sensitivities" they entail[41] and the complex intergovernmental negotiations they imply, since 2016 "the EU has increasingly refrained from concluding formal EU readmission agreements but asked for more informal, non-legalised readmission arrangements or, simply, return deals"[42]. The progressive "informalisation of cooperation with third countries" in the last years was recently denounced by MEPs, which called on the MMSS "to urge and enable the Commission to conclude formal EU readmission agreements coupled with EU parliamentary scrutiny and judicial oversight", at the same time it criticised the conclusion of bilateral agreements between MMSS and third countries[43] upon which the EU and, in particular, its agencies have operationalized the AFSJ. Therefore, the well-known 2016 "EU-Turkey deal" has just been an example of the practices of the EU Institutions in the "common" migration policy that, on the one side, have precluded the EP from its oversight duties and responsibilities in recent times, and, on the other, reflected the externalisation of control practices to third States not always fulfilling the minimum requirements regarding the protection of human rights; and, thus, contravening the principles, objectives and values guiding the external action of the EU as declared in the Treaties (arts. 2, 3 and 21 TEU). This "risky business" is even more evident in the external action of the AFSJ agencies, whose control is, nowadays, overwhelmingly deficient.

2. *The oversight over the agencies. The main concerns that the legal and praxis evidence*

With regard to the task of effectively overseeing the protection of the rule of law and fundamental rights in the AFSJ, the EP also has a say in the establishment and further enhancement, budget and —therefore, indirectly— personnel, and scrutiny of the activities of the agencies due to the Lisbon provisions and their subsequent normative developments. Now

[41] For instance, the latest formal EU readmission agreement was concluded in 2020 with Belarus, a country ruled by a pro-Russian dictatorship that has "instrumentalised" migration to its advantage. For this reason, which was also condemned by the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe (Report 15382 rev, of the 29 September 2021), the Commission decided to suspend in June 2021 certain articles of the EU's Visa Facilitation Agreement with the Republic of Belarus, after the country's government announced that it would suspend the EU-Belarus readmission agreement. Additionally, the EU signed a legally non-binding readmission arrangement with Afghanistan in 2016, and the country was marked as "secure" weeks before the return of the Taliban to power.

[42] Stutz and Trauner, "The EU's 'return rate' with third countries…", 156.

[43] European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)), paragraph 6.

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the Treaties (art. 85 and 88 TFEU) and the regulations establishing the agencies[44] provide the EP with the capacity to create and strengthen the role of the AFSJ agencies[45], define their personnel and budgets (art. 314 TFEU and agencies' regulations; e.g., art. 59 Frontex Regulation), and —"although the EP does not have uniform powers to summon AFSJ agency directors"[46]— invite the directors of the agencies to report annually on their activities. Currently, for instance, the EP is fully responsible for the establishment of new AFSJ agencies, such as the Anti-Money Laundering Authority (AMLA)[47], in the framework of its faculties within the ordinary legislative procedure, long time vetoed under previous treaties. Indeed, in the last decade it has become a clear supporter of the increasing "agencification" of the AFSJ —along with the Commission, even if the Council urged itself to put in place major reforms of the agencies before the Lisbon Treaty came into force to strengthen its position in the negotiations and guarantee its intergovernmental governance until further reforms.

In the last decade, nevertheless, it has also done so by demanding more sources of control and accountability in exchange for a higher degree of autonomy. For instance, in the latest reform of the European Union Agency for Law Enforcement Cooperation (Europol) Regulation[48], the EP agreed to enhance its potential to process and analyse data —including those coming from private entities, while respecting privacy and under the direct supervision of the European Data Protection Supervisor (EDPS), who will oversee Europol's personal data processing operations, and work together with the agency's Data Protection Officer[49]. This unconditional support to the latest (Council-driven)

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[44] In particular, the case of Frontex according to Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L295, 14 November 2019.

[45] Another one is being discussed at the time of writing these lines to fight money-laundering and terrorism financing. See Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, 2021/0240(COD), COM/2021/421 final, Brussels, 20 July 2021.

[46] Angela Tacea and Florian Trauner, "The European and national parliaments…", 74.

[47] European Commission, Proposal for a Regulation of the European Parliament and the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM(2021) 421 final 2021/0240 (COD), Brussels, 20.7.2021.

[48] Regulation (EU) 2022/1190 of the European Parliament and of the Council of 6 July 2022 amending Regulation (EU) 2018/1862 as regards the entry of information alerts into the Schengen Information System (SIS) on third-country nationals in the interest of the Union, OJ L 185, 12 July 2022.

[49] European Parliament, "Parliament backs giving more powers to Europol, but with supervision", *Press Releases*, Brussels, 4 May 2022, https://www.europarl.europa.eu/news/en/press-room

reform of Europol, which demonstrated —once again— that the EPP and the S&D vote in the same line when it comes to the big AFSJ dossiers, came at the expense of the civil society organizations' opinion, clearly opposed to the expansion of Europol's powers[50], and the opposition of the Greens and The Left in the EP on the same grounds. Similar "suspicions" were expressed by the MEPs with regard to the most recent reforms of Frontex[51] and the European Union Agency for Criminal Justice Cooperation (Eurojust)[52], while other AFSJ-related initiatives were openly supported by the EP with less caution for its part, notwithstanding their alleged potential politization/contestation[53].

As a result of legal changes, the EP has gained an evaluation role ex ante[54], during[55] and ex post[56] of the AFSJ agencies which contrasts with the

[50] Fair Trials, "Europol's expanding mandate: European Parliament must stand against unaccountable and discriminatory policing", 28 April 2022, https://www.fairtrials.org/articles/news/europols-expanding-mandate-european-parliament-must-stand-against-unaccountable-and-discriminatory-policing/

[51] Art. 6, *Accountability*, of the Frontex Regulation.

[52] Inter alia, art. 67 of Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA [2018], OJ L295.

[53] For example, the creation in 2019 of the new database on the past convictions of third country nationals (ECRIS-TCN), to complement the existing European Criminal Records Information System (ECRIS), used to exchange information on the previous convictions of EU citizens. By the same token, the extension of the EURODAC database to include the fingerprints of resettled third-country nationals and stateless persons for law enforcement purposes, and the provision of access to data to Europol, MMSS or even third-country law enforcement authorities. Moreover, in spite of the suspicions over how the Agency carried out its joint return operations and other coordinated activities, "[t]hanks to vote in the European Parliament on 17 April 2019 that followed very speedy negotiations under the co-decision procedure, the objective to provide Frontex with 10,000 staff by 2027 was achieved. At the same time, Frontex also obtained the power to hire its own agents: 1000 out of 5000 by 2021 and the remainder provided by Member States.". Pascal Lamy *et al*., "The European Parliament, another Parliament", *Brief*, Jacques Delors Institute, 17 May 2019, 8, https://institutdelors.eu/en/publications/the-european-parliament-another-parliament/

[54] It is foreseen (art. 15 Eurojust Regulation), for instance, that the College of Eurojust will forward the annual and multiannual programming documents to the European Parliament, along with the Council, the Commission and the EPPO. Concerning Frontex and its inputs to the preparation of the multiannual strategic policy cycle for European integrated border management, article 29 of Frontex Regulation stipulates that the Agency shall prepare general annual risk analyses, which shall be submitted to the EP and the Council and the Commission, as well as, every two years, a strategic risk analysis for European integrated border management. Finally, Europol Regulation also states that the Agency will transmit 'for information purposes' its multiannual programming and annual work programme (art. 51). On the other hand, the appointment of the agencies' directors is subject too to a prior exchange of views with MEPs.

[55] For instance, where a situation requiring urgent action at the external borders arises, the European Parliament shall be informed of that situation without delay as well as of any subsequent measures and decisions taken in response (art. 42 Frontex Regulation).

[56] Art. 67 Eurojust Regulation; art. 6 and 65 Frontex Regulation; art. 51 Europol Regulation.

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previous limitations imposed by the former Treaties and regulations. However, more of the general oversight powers are held hand-in-hand with the national parliaments through an inter-parliamentary committee —with all the negative consequences it might have[57]. This interparliamentary oversight includes the Joint Parliamentary Scrutiny Group (JPSG) on Europol, composed of representatives of the European and of national parliaments (art. 51 Europol Regulation) and meeting twice a year[58]; "an interparliamentary committee meeting" for Eurojust (art. 67 Eurojust Regulation[59]); or general inter-parliamentary cooperation in the case of Frontex (art. 112 Frontex Regulation), the missing "Holy Grail" due to its lack of formalization so far. Furthermore, upon their appointment, the candidate directors are "invited" to make a statement before the competent committee or committees of the EP and respond to the questions posed by MEPs, and the EP has gained access to classified information, personal data and work files of the agencies. Nevertheless, several limitations apply to these innovations, as we will analyse further below.

Additionally, the scrutiny of the activities of the AFSJ agencies includes sending delegations of MEPs to the territories of MMSS, or at the external borders, to identify sources of conflict in the implementation of EU law and fundamental rights, for instance in return operations coordinated by Frontex to avoid inter alia the violation of the non-refoulement principle, or to countries under serious migration pressures[60]. This oversight capacity

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[57] "With regard to legislative scrutiny […] the timing of the meetings and the fluctuating participation of MPs limited the possibility of joint oversight. […Concerning the Joint Parliamentary Scrutiny Group over Europol], the cooperation of [national parliaments] and the EP has not evolved among equals. […] The national parliaments have had a higher level of fluctuation of their participating members, with little follow-up and coordination among themselves. […]". Angela Tacea and Florian Trauner, "The European and national parliaments…", 15.

The same authors have argued that, despite their interest in scrutinizing the AFSJ agencies, "in those cases where national parliaments have been involved in scrutinizing AFSJ Bodies, they have primarily been interested in scrutinizing the work of Europol" (Angela Tacea and Florian Trauner, "The European and national parliaments…", 64), evidencing the politization of the work of some AFSJ agencies.

[58] Without any doubt, the most active of the interparliamentary committees established. It met for the 10th time on 28 February 2022. See the full agenda here: https://www.europarl.europa.eu/cmsdata/244543/Draft%20Agenda%20EN.pdf

[59] The first meeting was held on 1 December 2020. See the agenda at: https://www.europarl.europa.eu/cmsdata/215665/draft-programme.pdf

[60] One of the latest delegations of MEPs paid visit to "one of the EU's most important migration front lines in Greece". Andreas Rogal, "European Parliament delegation completes 'intense agenda' following migration fact-finding trip to Greece", *The Parliament Magazine*, 4 November 2021, https://www.theparliamentmagazine.eu/news/article/european-parliament-delegation-completes-intense-agenda-following-migration-factfinding-trip-to-

includes, among others, Frontex obligation towards the EP to forward it "a detailed evaluation report" every six months "covering all return operations conducted in the previous semester, together with the observations of the fundamental rights officer" (art. 50.7 Frontex Regulation). Furthermore, now the EP has become a reliable co-legislator, the Council has also changed its position concerning the role of MEPs and it might consider their opinions even if it is not necessarily obliged to. For example, in the latest reform of the Schengen evaluation mechanism, the EP obtained from the Council that visits to verify the implementation of EU (border) law and restrictive measures at the internal borders do not need previous notification to the concerned Member State(s) "in cases where the Commission has substantiated grounds to consider that there are serious violations of fundamental rights in the application of the Schengen acquis" [61], although the Treaty provisions stipulate a mere non-legislative, consultation procedure[62].

Last but not least, one of the powers the EP has used the most even before the entry into force of the Lisbon Treaty has been its discharge powers (art. 319 TFEU). In fact, is one of the strongest tools the EP has at its disposal to oversee —ex post, though— the activities of the agencies, since MEPs have demonstrated their will to scrutiny every activity undertaken by the agencies during the year in study and how the EU budget is spent "in accordance with the principles of economy, efficiency and effectiveness"[63]. In this sense, once again, the news brings us to the role of

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greece. In addition to this mission, the LIBE Committee discussed on 14 July 2022 the mission deployed to Vilnius, Lithuania, and Riga in March 2022, authorized by the Conference of Presidents to analyze the situation at the external border due to the migratory pressure provoked by the Belarusian government. Both mission reports are available at: https://emeeting.europarl.europa.eu/emeeting/committee/en/agenda/202207/LIBE?meeting=LIBE-2022-0713_1&session=07-14-09-00

[61] Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013, OJ L 160, 15 June2022.

[62] "[…] the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title [V AFSJ] by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation" (art. 70 TFEU).

[63] "Sound financial management", art. 2 (59) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30 July 2018.

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Frontex and its accountability, since on 4 May 2022, the EP voted to postpone until Autumn the discharge of the Agency's 2020 budget claiming that Frontex was incapable of fulfilling the conditions foreseen in the previous discharge report, as well as the enquiries conducted by the European Antifraud Office (OLAF)[64]; a concern that was raised the previous financial period and prompted the agreement of the two biggest parties in EP (i.e., the EPP and the S&D group).

Against this background, the AFSJ agencies have taken advantage of the legal framework to develop a set of agreements/arrangements and conduct operations within the EU external borders, and in the territories of third States, that clearly pose serious concerns when it comes to their accountability and the transparency of their activities. Furthermore, they have also enjoyed some political connivance at national and EU levels to expand their competences by the promulgation of regulations even beyond the provisions of the Treaties. Hence, for instance, Eurojust, Europol and Frontex have signed cooperation agreements and working arrangements with third countries and partners outside the EU[65] aiming at operationalizing the AFSJ, paying particular attention to fighting cross-border crimes and terrorism and, in particular in recent times, halting irregular migration. Inter alia, these international agreements allow the parties —in rather broad terms— to exchange information and personal data under some circumstances and provided that they ensure the necessary security standards, as well as the secondment of liaison officers, while working arrangements do only provide for the exchange of information and non-personal data. Nevertheless, most of these agreements/arrangements —which are crucial to the establishment and well-functioning of the integrated border management— were signed before current provisions on the role of the EP in their negotiation entered into force, as we will further discuss in the following section. Moreover, as the EP noted with concern, "in some cases the option to carry out joint Frontex return operations is excluded by bilateral agreements between organising or participating MMSS and non-EU countries of destination"[66], building upon bilateral agreements between EU MMSS and third countries and, therefore, at the margins of the EU. This praxis has, thus, left the EP with little marge of

[64] Bulletin Quotidien Europe, no. 12945 - 5/5/2022; Bulletin Quotidien Europe, no. 13002 - 29/7/2022.

[65] All these documents are available at their websites: https://www.europol.europa.eu/partners-collaboration/agreements, https://frontex.europa.eu/we-build/other-partners-and-projects/non-eu-countries/, and https://www.eurojust.europa.eu/states-and-partners/third-countries/international-agreements

[66] European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)), paragraph 6.

manoeuvre to know in detail the content of the arrangements/agreements prior to their signing and subsequent publication, the information eventually exchanged between national authorities and the agencies —or the complex set of supporting networks and liaison officers, and the full extent of the activities carried out jointly on account of these arrangements/agreements, evidencing the limits of the EP's (mainly ex post) oversight; clear limitations from the legal framework and the praxis followed so far that may cause further conflict in the near future and need a further strengthening.

III. **The main sources of conflict and the need for further reforms to enhance agencies' accountability and transparency**

As previously pointed out, everything in the garden is not necessarily rosy. To start with, regardless the well-known limits to the complete "communitarisation" of the AFSJ[67], the Lisbon Treaty has left a clear gap when it comes to the agencies: while there is a particular reference to the EP's oversight of Eurojust and Europol (arts. 85 and 88 TFEU, respectively), there is no mention to Frontex in none of the Treaties, an agency whose activities have been particularly scrutinized and subject to criticism since it became operational[68] in a clear process of contestation/politization of the role of some AFSJ agencies, such as Europol in the 1990s and Frontex in the 2010s. While awaiting the reform of the Treaties to bridge this clear gap, the power to scrutinize Frontex is given to the EP by virtue of the Agency's Regulation (e.g., art. 6 and 65). Nevertheless, in this case, again the news ran faster than the MEPs in declaring its alleged illicit activities concerning return operations of asylum seekers in the Aegean Sea[69]. Hence, whereas the Frontex Scrutiny Working Group (FSWG) "did not find conclusive evidence

[67] See footnote no. 17 for references. Additionally, the EP has only a consultative role in the extension of the application of the Schengen acquis to new EU Member States, such as recently to Cyprus and Croatia.

[68] Inter alia, the most recent published articles: Miguel Ángel Acosta, "Reglamento 2019/1896/UE sobre la guardia europea de fronteras y costas: ¿Frontex 3.0?" *Documento Opinión IEEE* (2019); Sarah Léonard and Christian Kaunert, "The securitisation of migration in the European Union: Frontex and its evolving security practices", *Journal of Ethnic and Migration Studies* 48 (2020): 1417; and Raphael Bossong, "The expansion of Frontex: symbolic measures and long-term changes in EU border management" (SWP Comment, 47/2019). Berlin: Stiftung Wissenschaft und Politik -SWP- Deutsches Institut für Internationale Politik und Sicherheit. https://doi.org/10.18449/2019C47

[69] Julia Pascual and Tomas Statius, "European border control agency Frontex has been covering up illegal returns of migrants", *Le Monde*, 30 April 2022, https://www.lemonde.fr/en/international/article/2022/04/30/frontex-the-european-border-control-agency-has-been-masking-illegal-returns-of-migrants-in-the-aegean-sea_5982031_4.html

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on the direct performance of pushbacks and/or collective expulsions by Frontex in the serious incident cases that could be examined", it also noted some shortcomings when it declared that the Agency "failed to address and follow-up on these violations promptly, vigilantly and effectively"[70]. This event has clearly undermined the credibility of Frontex before the public opinion, the media, the civil society organizations, and the EP itself; a task for the next executive director to work on it to recover the agency's reputation, which should start with increasing the transparency of its activities and rendering public some internal reports on the functioning of the agency. Additionally, a reform of the Treaties to include the agency among the bodies of the EU under the scrutiny of the EP should refrain from further deterioration of its image and enhance the role of the MEPs in the AFSJ.

Another "grey area" in the complex puzzle of the AFSJ agencies is the formal participation of the Commission in their governance and/or administration bodies as an extension of its administrative powers, and the role given to the EP in the appointment of their directors and its governance at large. For years, "control of these agencies has become a focal point of inter-institutional struggles"[71] in the pre-Lisbon era. For that reason, in the subsequent reforms of their founding regulations the supranational logic after the "communitarisation" of the AFSJ, and the scrutiny of their activities, have resulted in the entry of representatives from the Commission in their governing bodies. Hence, the Commission has a representative in the Executive Board of Eurojust (art. 16 Eurojust Regulation), with powers inter alia to propose a list of candidates for the post of Administrative Director; two representatives of the Commission, "each with a right to vote" (art. 101 Frontex Regulation) in the Management Board of Frontex; and one representative in the Management Board of Europol, with the right to vote (art. 10), both of them with similar powers when appointing the director of the agencies and with formal competences when administrative affairs are handled. In the case of the EP, conversely, the relationship with the governing bodies and their appointment has been close to zero. Moreover, besides some general comments in the founding regulations[72], the EP has no

[70] LIBE Committee, "Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations", PE692.887v01-00 (14 July 2021): 6. For a detailed overview of the mechanisms stablished to investigate these alleged violations of human rights, see Micaela Del Monte and Katrien Luyten, "European Parliament scrutiny of Frontex", European Parliamentary Research Service, PE 698.816 (2021).

[71] Florian Trauner, "The European Parliament…", 785.

[72] For instance, Recital 60 of Europol Regulation states "the competent committee of the European Parliament should be able to invite the Executive Director to appear before it prior to his or her appointment, as well as prior to any extension of his or her term of office."

formal power to investigate the candidates for the post of director in his/her appointment procedure, and, if needed, to reject him/her if his/her profile or background does not fit the responsibilities of the post, or to dismiss him/her if serious breaches of EU law are alleged, as it is the case in the appointment of the Commissioners. This shortcoming has been already criticized by the European Council on Refugees and Exiles: "[given] the wide prerogatives enjoyed by the [executive director of Frontex], the Parliament, as a democratic institution, should have a formal role […] in appointing and dismissing" him/her[73]; an old demand that would, once again, call for a reform of the Treaties or the founding statutes of the agencies.

A further point of concern is the influence they have on decision- and policy-making in European politics. Via inter alia their reports, risk/threat assessments and parliamentary debates or hearings, the agencies exert a strong influence on the Institutions to define AFSJ policies and programmes that was already recognised by the Commission, the Council and the Parliament in a joint statement in 2012[74], which served to further enhance their role in the implementation of AFSJ policies and EU law thanks to subsequent reforms of their regulations to strengthen their autonomy. The case of Europol and Frontex in defining the policing cycle and border management exemplify well the influence they exert on the development of AFSJ both domestically and abroad, arguing their expertise and technical capabilities to expand their tasks and functions. Nevertheless, that their expertise might be considered neutral should not be for granted, since their functions, personnel and budget also depend on their "relevance" in the whole institutional picture of law enforcement at the EU level. This way of proceeding in the consolidation of the agencies might create a sort of "Leviathan" that is at odds with the principles of the rule of law and accountability unless contrasted and critically analysed (politically) by MEPs.

Additionally, parliamentary oversight is limited by the restrained access to information and data handled by the agencies, or to the cases they are managing at the time of oversight. Normally, access to these data is subject to

[73] European Council on Refugees and Exiles, "Holding Frontex to account. ECRE's proposals for strengthening non-judicial mechanisms for scrutiny of Frontex", *ECRE's Policy Paper* 7 (2021): 8.

[74] "Agencies also have a role in supporting decision-making process by pooling the technical or specialist expertise available at European and national level and thereby help enhance the cooperation between Member States and the EU in important policy areas. […]". Joint statement of the European Parliament, the Council of the EU and the Commission on decentralized agencies, 19 July 2012.

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internal rules[75] and case-by-case authorisations, which differ considerably in the extent of the access they grant although they follow the same restrictive, distrusting lines. For instance, the article 92 of the Frontex Regulation clearly states that, although "[classification] shall not preclude information being made available to the European Parliament», information exchange should fully respect the «criteria of availability, confidentiality and integrity»" (art. 68.6 Frontex Regulation). Similar provisions are foreseen in Eurojust and Europol regulations (art. 72 and 51, respectively). Moreover, Eurojust Regulation openly claims for the respect of its independence in the handle of cases (Recital 62), clearly limiting parliamentary oversight over its running investigations and access to case work files especially sensitive for a concerned Member State[76]. The same rule applies to Frontex, for which the transfer of personal data is subject to verification "whether such personal data are required for the legitimate performance of tasks within the competence of the recipient"[77]. Finally, after the latest reform, Europol has become more than "a cleaning house for information"[78], due to its capacity to receive personal data directly from private parties and its powers to conduct own-initiative investigations. At the same time, the role of the JPSG and the European Data Protection Supervisor (EDPS)[79] have been enhanced, being the former entitled inter alia to receive annual information on the personal

[75] These internal rules follow, however, the common guidelines provided by the Commission in their Decisions 2015/443 of 13 March 2015 on Security in the Commission, and 2015/444 of 13 March 2015 on the security rules for protecting EU classified information (OJ L72, 17 March 2015); and the Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information (OJ L274, 15 October).

[76] "For accountability purposes, Eurojust shall draw up a record describing the reasons for restrictions that are applied". Art. 2.4 of the College Decision 2020-04 of 15 July 2020 on internal rules concerning restrictions of certain data subject rights in relation to the processing of personal data in the framework of activities carried out by Eurojust (OJ L 287, 2 September 2020).

[77] Recital 21 of Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance), OJ L295, 21 November 2018.

[78] Vigjilenca Abazi, "The Future of Europol's Parliamentary Oversight: A Great Leap Forward?", *German Law Journal* 15, no. 6 (2014): 1127.

[79] The EDPS has publicly criticized the latest reform of Europol because the amendments "weaken the fundamental right to data protection and do not ensure an appropriate oversight of the" Agency, and even open "the possibility to retroactively authorise Europol to process large data sets already shared with Europol prior to the entry into force of the amended Regulation". EDPS, "Amended Europol Regulation weakens data protection supervision", 27 June 2022, https://edps.europa.eu/press-publications/press-news/press-releases/2022/amended-europol-regulation-weakens-data_en

data exchanged with private parties, transfers of personal data to third countries and international organisations, and the number and types of cases where "special categories of personal data" were processed[80] (art. 51.3 Europol Regulation). However, the "consolidated annual activity report" and other information sent to the EP will be provided "without disclosing any operational details and without prejudice to any ongoing investigations"[81]. The latter statement corroborates, generally speaking, the concerns over the protection of the independence of the AFSJ agencies regarding their operational activities and the running of investigations; a suspicion that dates back to the establishment of the agencies and the "different cultures of secrecy with some MMSS having a tendency to overclassify"[82], a daily praxis which weakens the scrutiny powers of the EP and reduces the accountability of the agencies. Stricter rules are, then, needed to provide the EP with access to the full document —not just the public, biased ("consolidated") version of it as so far— of the activity reports of the agencies, including operational data, and to minimize the right of opposition from the generator of the data or information potentially transferable for its scrutiny tasks, in particular when the process of "special categories of personal data" are under investigation because of alleged violations of fundamental rights in a particular case.

A final point to raise is the question of the external dimension of the AFSJ, for which the EP's oversight is kept to a minimum both in the legal framework and the subsequent practice. The lack of transparency and accountability in this area of the EU integration is even more problematic because the "externalisation of internal security measures" under certain AFSJ policies and the activities of the agencies in the last decade "(…) is seen to aggravate deficits in democratic legitimacy and accountability"[83] in some third States with which the EU cooperates on security and border management due to their undemocratic nature, as the case of EU/Italian cooperation against people smuggling with the Gadhafi regime in Libya

[80] These categories of special, sensitive personal data may include personal data in respect of victims of a criminal offence, witnesses or other persons who can provide information concerning criminal offences, or in respect of persons under the age of 18, as well as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership and processing of genetic data or data concerning a person's health or sex life (art. 30 Europol Regulation).

[81] Art. 51.3 of the Europol Regulation as amended by Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022, OJL 169, 27 June 2022.

[82] Vigjilenca Abazi, "The Future of Europol's…", 1127.

[83] Raphael Bossong and Helena Carrapico, "The Multidimensional Nature and Dynamic Transformation of European Borders and Internal Security", in *EU Borders and Shifting Internal Security. Technology, Externalization and Accountability*, eds. Raphael Bossong and Helena Carrapico (Cham: Springer, 2016): 12.

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evidenced; an embarrassing cooperation which was strongly condemned by International Organizations and the doctrine since the early 2010s[84]. In spite of this, the EP scrutiny over the international agreements concluded by the EU and/or the AFSJ agencies, and the activities carried out by them at the external borders —or even outside the EU's territory in neighbouring countries[85] or beyond[86], has been traditionally diminished. Moreover, the most recent practice of signing arrangements to circumvent the EP and some potential vetoes within domestic constituencies at Member State's level has aggravated this situation. The "EU-Turkey deal" to halt migration flows towards the EU, "adopted in the total absence of democratic oversight"[87], exemplifies well how the EU Institutions have opted for more informal, political negotiations to avoid the scrutiny by the EP of the content of the agreement between the EU and third parties.

Some progress has been made, nevertheless, in the latest reforms of the agencies' founding regulations, in addition to the consent procedure regarding international agreements according to the Treaties. Because of the politization/contestation of migration policy and the role of Frontex in the last decade, particular attention is paid to the protection of fundamental rights in the execution of its tasks and its accountability in the latest reform of Frontex. Now, for instance, article 73 of Frontex Regulation clearly stipulates that any status agreement "for actions conducted on the territory of third countries"[88] "shall be concluded by the Union with the third country concerned on the basis of Article 218" of the TFEU; that is, with the previous consent of the EP. As a result, Frontex has already deployed officers and equipment in Albania —on the border with Greece, Montenegro and Moldova to provide technical and operational assistance to

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[84] See footnotes 3, 4 and 5 for full references.

[85] Statewatch, "Montenegro: Frontex launches second operation on non-EU territory", *Statewatch News*, 23 July 2020, https://www.statewatch.org/news/2020/july/montenegro-frontex-launches-second-operation-on-non-eu-territory/

[86] For instance, 2019 Frontex Regulation eliminated the territorial limitations in the deployment of joint operations to neighbouring countries contained in its previous regulations.

[87] Eva Joly *et al*., "Foreword", in *The EU-Turkey Statement and the Greek Hotspots. A Failed European Pilot Project in Refugee Policy*, Yiota Masouridou and Evi Kyprioti, The Greens / European Free Alliance in the European Parliament, 2018, 1.

[88] These "status agreements" are comparable to the Status of Forces Agreements (SOFAs) signed by the EU with third countries before the deployment of any Common Security and Defence Policy (CSDP) mission or operation. Indeed, at the image of the Commission's model envisaged in the own Frontex Regulation (art. 76.1), they include clauses with regard to the conditions for the exercise of executive powers in the host country —including the use of force; task and powers of the team members, as well as their privileges and immunities; suspension and termination of the actions; processing of personal data; and dispute settlement.

local law enforcement authorities in managing borders[89]. Additionally, before their approval by the management board, article 76 of Frontex Regulation states that working arrangements between the Agency and competent authorities of third countries needs prior Commission's approval, and that the EP will be provided "with detailed information as regards the parties to the working arrangement and its envisaged content" before its conclusion, as well as concerning the operational activities involving the deployment of liaison officers to third countries "without delay". Similar provisions apply to the exchange of classified information with the relevant authorities of a third country or ad hoc releases if there is no arrangement, with the only prerequisite of having an "equivalent level of protection".

That said, however, there are still severe loopholes in the oversight that the EP exercises with regard to the agencies in their daily work, with the connivence of the other Institutions and MMSS. First, most of the current working, strategic and operational arrangements signed by the three AFSJ agencies briefly analyzed in this study (i.e., Europol, Eurojust and Frontex) were endorsed well before the entry into force of these provisions. Therefore, neither formal involvement of the EP was required to adopt them, nor was it informed of their content before their approval. Moreover, when the EU or the agencies had no agreement with third states, for instance in the area of migration and border controls, the activities carried out by Frontex have relied on those agreements signed by individual MMSS with third countries, out of EP's oversight powers. This was the case of, for instance, "Joint Operation Hera" in the Canary Islands, which benefited from the beginning (in 2006) from the agreements that Spain signed with Mauritania and Senegal[90]. Third, there is a mammoth problem

[89] At the time of writing, the EU has signed, however, four status agreements, while others are in negotiation with the rest of the Western Balkan countries: Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, OJ L 46, 18 February 2019; Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, OJ L 202, 25 June 2020; Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, OJ L 173, 3 June 2020, p. 3-11; and Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova, OJ L 91, 18 March 2022.

[90] Acuerdo Marco de Cooperación entre el Reino de España y la República de Senegal, hecho en Dakar el 10 de octubre de 2006 (*BOE* no. 170, 15 July 2008, pp. 30878-30879); Aplicación provisional del Acuerdo entre el Reino de España y la República Islámica de Mauritania en materia de inmigración, hecho en Madrid el 1 de julio de 2003 (*BOE* no. 185, 4 August 2003). For an in-depth analysis of these agreements, see: María Asunción Asín Ca-

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of application of the EU (human rights) law and international human rights law in the so-called "hotspots", a situation aggravated by the 2015 alleged "refugee crisis", with serious consequences on the protection of human rights of migrants and refugees on the European soil[91]. And, fourth, the MEPs have generally agreed to the international agreements, or their further development under inter alia the form of status agreements of Frontex, without demonstrating its real capacity to oversee the details of the whole picture due to its growing complexity —to which the EP itself contributes. Therefore, for instance, under an "urgent procedure" (art. 163 Rules of Procedure), the EP gave its consent —without a previous report by the committee responsible— to the conclusion of an international agreement between the EU and Republic of Moldova on operational activities carried out by the Frontex, which is being provisionally applied since its signature, on 17 May 2022. For that reason, the EP's consent to this kind of agreements and arrangements, although "conditional" to include human rights clauses, at the end paves the way for the violation of EU law, its internal rules and code of ethics developing it[92], and its international commitments under international law, evidencing its low profile when it comes to the scrutiny of EU's external action irrespective the policy under investigation.

All these loopholes, in addition to the current preference for informal agreements to deal with "urgent crises", have left little leeway for the EP to provide effective oversight over the implementation and (rapid) development of the AFSJ. As a result, the external dimension of the AFSJ and, in particular, the activities carried out by the agencies at the external borders or within the territory of third States with the EU's support is the "black hole" of EP's oversight. The need for the "de-politization"/"de-contestation" of some dossiers linked to the AFSJ is evident and urgent as this case demonstrates, since the "common" migration and border policies

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brera, "Los acuerdos bilaterales suscritos por España en materia migratoria con países del continente africano: especial consideración de la readmisión de inmigrantes en situación irregular", *Revista de Derecho Constitucional Europeo*10 (July-December 2008): 165-188; and Teresa Fajardo del Castillo, "Los acuerdos de readmisión de los inmigrantes en situación irregular celebrados por España", in *Migraciones y Desarrollo. II Jornadas Iberoamericanas de Estudios Internacionales*, coordinated by Francisco Aldecoa Luzárraga y José Manuel Sobrino Heredia (Madrid: Marcial Pons, 2007): 87-102.

[91] "Subsequent to the implementation of the EU-Turkey statement, Greek hotspots have now become places of de facto detention, where fast-track asylum and return procedures are being carried out with the aim of achieving an expedited return of asylum seekers to Turkey." Eva Joly *et al*., "Foreword", in Yiota Masouridou and Evi Kyprioti, *The EU-Turkey Statement…*", 1.

[92] The most striking example being that of the Frontex Code of Conduct, available at: https://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf

are a source of conflict with neighbouring countries as much as between the MMSS (and the Council), in conjunction with the Commission, and the EP. Hence, the EU should pay particular attention to the external dimension of the AFSJ if it wants to be coherent with the general principles guiding its external action (art. 21 of the Treaty on the EU, TEU; art. 205 TFEU) and become a credible, trustful partner in international affairs.

IV. **Conclusions**

In the last years, some progresses have been made concerning EP's oversight over the AFSJ and its agencies. It has moved from being an almost irrelevant actor in the process of developing the AFSJ and establishing its main constituent elements to its impact as co-legislator in most of the areas covered by the AFSJ; from merely scrutinizing the budget and having recourse to informal means to have a say in the AFSJ-related politics to overseeing the activities of the agencies and gain access to relevant (classified) information and data for its overseeing purposes. In particular, the recent reforms of the founding regulations of the agencies have increased the oversight powers of the EP, making the most of the Lisbon Treaty provisions. However, some serious concerns arise when it comes to the external dimension of the AFSJ, not to mention the still intergovernmental areas of the AFSJ subject to consultation under a special legislative procedure. In the external dimension we perceive a clear imbalance between, on the one hand, the general principles of the rule of law —including accountability and transparency— and the values on which the EU has been founded, which should guide its external action; and, on the other hand, the short-term objectives of the AFSJ directly associated with security and the protection of the internal public order against common threats and risks, such as transnational organized crime and irregular migration, policies clearly MMSS-driven either through the Council or the European Council. Nowadays, therefore, the problem is not having a say in the establishment of the agencies and its impact on the legislative process (ex ante) as it was during the pre-Lisbon period, but to be able of fully controlling the outcomes and results of this work via a coherent oversight role that the EP is still seeking to attain after Lisbon entered into force. Much work needs to be done, including the "de-politization"/"de-contestation" of some dossiers, to enhance the oversight power of the EP in the "black" and "grey areas" of the European integration process briefly identified in this paper to revert a situation that would undermine the international credibility of the EU before its international partners, as well as the European project itself. And, for this task, the

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impulsion of the EP in the coming years is imperative since the Commission is deemed to have adopted Council's opinions on some policies of the AFSJ, such as migration and refugee and the external dimension of the entire AFSJ. The result of the negotiations of the New Pact on Asylum and Migration will be a clear indication of the direction the EU is taking to solve the concerns identified, for good or ill.

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Cooperation Initiatives by EU Member States with Third Countries for the Control of Migratory Flows: The Case of the Memorandum of Understanding Between Malta and Libya

Iniciativas de cooperación de los Estados Miembros de la UE con terceros países en materia de control de flujos migratorios: el caso del memorando de entendimiento entre Malta y Libia

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Abstract: Following the previous informal Italy-Libya and EU-Turkey agreements, Malta concluded its own Memorandum of Understanding with Libya to establish two coordination centres in Tripoli and Malta, fully funded by Malta in May 2020. In our paper, we will frame this non-legally binding agreement

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[1] Research done in the framework of the R&D Project financed by the Ministry of Economy and Competitiveness: «Inmigración marítima, Estrategias de Seguridad y protección de valores europeos en la región del Estrecho de Gibraltar», PID2020-114923RB-100, P.I., M. A. Acosta Sánchez.

within the strategy of the EU and its Member States to cooperate with Libya in the deterritorialisation of migration management to reduce the number of migrants and asylum seekers arriving at Europe's external borders. We will analyse the legal implications, both formal and material concerns, that exist in the application of this Memorandum, starting with the informalisation of cooperation and the deterritorialisation of migration management, and its effects on human rights and the possible international responsibility that it may entail.

Keywords: Externalisation, Memorandum of Understanding Malta-Libya, Migration, Human Rights.

Resumen: *Tras los anteriores acuerdos informales entre Italia y Libia y entre la UE y Turquía, en mayo de 2020, Malta concluyó su propio Memorando de Entendimiento con Libia para establecer dos centros de coordinación en Trípoli y Malta, financiados en su totalidad por Malta. En nuestro trabajo, enmarcaremos este acuerdo jurídicamente no vinculante en la estrategia de la UE y sus Estados miembros de cooperar con Libia en la desterritorialización de la gestión de la inmigración para reducir el número de migrantes y solicitantes de asilo que llegan a las fronteras exteriores de Europa. Analizaremos las implicaciones legales, tanto formales como materiales, que existen en la aplicación de este Memorándum, empezando por la informalización de la cooperación y la desterritorialización de la gestión migratoria, y sus efectos sobre los derechos humanos y la posible responsabilidad internacional que puede conllevar.*

Palabras clave: *Externalización, Memorando de Entendimiento Malta-Libia, Inmigración, Derechos Humanos.*

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I. **Introduction**

The so-called refugee crisis has been a turning point for the European external borders management model. With the premise of combating human trafficking and reducing the number of people that risks their lives in the Mediterranean Sea, the European Union (EU) has prioritised the cooperation with third countries on migration and border management, in what some authors have called an externalisation strategy by the EU and its Member States (MMSS)[2].

Among third States located in North Africa, Libya is key as a gateway to Europe via the central Mediterranean route. The critical political situation in Libya and the proliferation of armed and criminal groups provide the perfect scenario for migrant smuggling activities and human trafficking, recognised as a "systemic" problem[3].

However, informality has become the defining feature of new cooperation mechanisms with third States developed by the EU and its MMSS. In this regard, the paradigmatic example is the 2017 Memorandum of Understanding (MOU) between Italy and Libya, renewed in 2020, to reduce the flow of irregular migrants from Libya by training and developing the capacities of the Libyan Coast Guard. Although the International Criminal Court confirmed the existence of international crimes in Libya, and Human Rights protection international organisms appealed for the suspension of the Memorandum, it has not prevented other States such as Malta from following Italy's lead and signing their own MOU with Libya in May 2020.

Therefore, our paper addresses the following research questions: what is the impact of informal cooperation with Libya on the human rights of migrants and refugees, and to what extent can Malta be held responsible for violating human rights norms. Being the MOU between Malta and Libya our particular case study, the objective is to discuss the contents of this Memorandum and the scope of its bilaterally agreed commitments, framing this unilateral policy of an EU Member State in the current informal policy of EU cooperation. Main legal questions arise not only on the formal aspect of the Memorandum but also on its material aspect. First, it constitutes a soft law norm lacking democratic and judicial guarantees. Secondly, it

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[2] Juan Santos Vara, *La Dimensión Exterior de las Políticas de Inmigración de la UE en tiempos de crisis* (Valencia: Tirant lo Blanch, 2020), 48-49.

[3] UNSMIL and ACNUDH, «Detained and dehumanised. Report of Human Rights abuses against migrants in Libya», 13 December 2016, 14; UNSMIL and ACNUDH, «Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya», 20 December 2018, 55.

lacks guarantees for the respect of international obligations of human rights and international refugee law.

We will first address the European context in which the EU's cooperation policy towards Libya has been framed since the so-called refugee crisis (II). We will then analyse the content of the MOU between Malta and Libya in 2020, with particular emphasis on its formal and material aspects (III). Subsequently, we will analyse the implications of the MOU for the policy of deterritorialisation, characterised by informality and its inadequacy with the rights obligations that may be implied by Malta's responsibility for human rights violations through cooperation with Libya (IV), followed by some conclusions (V).

II. The context: the broader cooperation between the EU, Member States and Libya after the so-called refugee crisis

The informal and individual agreements between the EU MMSS and Libya do not constitute isolated national policy initiatives. However, it fits within the EU's strategy of focusing all its efforts on cooperation with third States to reduce migratory flows that reach Europe's external borders[4]. Within this cooperation, the focus on capacity building, training and funding for the authorities responsible for intercepting migrants in Libyan waters has been and continues to be particularly significant[5].

The 2015 European Agenda on Migration already mentioned of the need to cooperate with Libya in the capacity building and training of the competent Libyan authorities in migration control to reduce the arrival of irregular immigrants at Europe's external borders[6]. Besides, Libya continues to be the focus of attention in the Communication on the New Partnership Framework with third countries in 2016, where the European Commission echoes the problematic situation in Libya and the need for continued political and financial investment in security and border management support[7]. The main

[4] Violeta Moreno-Lax and Mariagiulia Giuffré, «The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows», in *Research Handbook on International Refugee Law,* ed. by Satvinder Singh Juss (Cheltenham: Edward Elgar, 2017), 87.

[5] Miguel Ángel Acosta Sánchez, «La formación de guardacostas libios: hacia un modelo de sinergia de políticas en la gestión integrada de fronteras marítimas europeas», *Revista de Derecho Comunitario Europeo* 64 (2019): 871.

[6] European Commission, «A European Agenda on Migration», COM (2015) 240 final, 13 May 2015, 7.

[7] European Commission, «On the creation of a new Partnership Framework with third countries in the context of the European Agenda on Migration», COM (2016) 385 final, 7 June 2016.

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financial instrument would be the EU Trust Fund (EUTF) for Africa, which since its creation, has been the main financial instrument used to translate the political commitments made with African partners in the area of migration into projects[8].

Furthermore, the 2017 Joint Communication of the European Commission and the EU High Representative identified Libya as the top priority for cooperation on border control and the fight against irregular migration and human trafficking. With the express aim of reducing pressure on affected MMSS such as Italy and Malta, the EU has a comprehensive strategy focused on Libya that addresses four key issues: training, equipment and capacity building, through the various EU initiatives to enable the Libyan Border and Coast Guard to rescue people at sea, including coordinating rescue operations; improving the Libyan authorities' capacities and information exchange systems to deal with people smuggling; improving Libya's capacities to assist refugees and asylum seekers with the support of the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM)[9]; and supporting the Libyan authorities in the management of their southern border[10].

This scenario of promoting cooperation initiatives with Libya facilitates the achievement of two key acts: the Italy-Libya MOU[11] and the 2017 Malta European Council Declaration on the Central Mediterranean Route[12]. Both acts focus primarily on stemming illegal flows to the EU, reducing pressure on Libya's land borders, and working with its authorities to prevent outflows and manage returns.

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[8] European Commission, Fact Sheet, EU Emergency Trust Fund for Africa, North of Africa window. <https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_libya_en.pdf>.

[9] For an analysis of the cooperation between the EU, IOM and UNHCR in Libya see Lorena Calvo Mariscal, «Derechos humanos y la implicación del ACNUR y la Organización Internacional para las Migraciones en la dimensión exterior de la política sobre inmigración y asilo de la UE», *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* 20 (2020): 109-156.

[10] European Commission, «Migration on the Central Mediterranean route Managing flows, saving lives», JOIN (2017) 4 final, 25 January 2017.

[11] 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. Translation available in Odysseus Network website <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

[12] Council of the European Union, «Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route», 3 February 2017. <www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/#>.

Thus, the pillars on which cooperation with Libya is based are twofold: on the one hand, training the competent Libyan authorities in the control of Libya's territorial and maritime borders, as well as interception operations at sea; on the other hand, supporting the creation of a Maritime Rescue Coordination Centre in Libya to establish a Libyan Search and Rescue (SAR) area in which it can take responsibility for the coordination and organisation of further rescue operations.

First, the training of the Libyan authorities has materialised in initiatives within the Area of Freedom, Security and Justice (AFSJ) coordinated by the European Border and Coast Guard Agency (Frontex), as well as within the Common Security and Defence Policy (CSDP). Both EU Operation Commander for the European Union military operation in the Mediterranean (EUNAVFOR MED) Sophia and Irini, with the support of the EU Border Assistance Mission (EUBAM) in Libya Mission, included the specific mandate to develop the capacities and training of the Libyan coast guard and navy and the contribution to dismantling the business model of smuggling and human trafficking networks[13].

Second, the Joint Communication of the then High Representative and the European Commission of January 2017 already called on the Italian Government to assist the Libyan Coast Guard with EU financial support for the establishment of a Maritime Rescue Coordination Centre in Libya, as well as the designation of a Libyan SAR Zone[14]. In August 2017, Libya proceeded to unilaterally declare its own SAR Area, which it withdrew once the IMO advised that, without a Rescue Coordination Centre, Libya would not meet the requirements for international registration of the SAR Area. In December of the same year, following a re-declaration of the SAR Area by Libya, Italy sent a communication to the IMO on the "Libyan Maritime Coordination Centre Project", funded by the European Commission. As a result, the IMO recognised the Libyan SAR Area in June 2018, and Libya hosts a Joint Rescue Coordination Centre (aeronautical and maritime) in Tripoli. Thanks to this, Libya assumes primary responsibility for search and rescue coordination, in an area extending

[13] Montserrat Pi Llorens, «La Unión Europea y la lucha contra los traficantes y tratantes de migrantes en Libia: balance tras el fin de la operación Sophia», *Revista Electrónica de Estudios Internacionales*, 40 (2020): 32.

[14] «Building the capacity of the Libyan Coast Guard aims, as a long-term objective, to a situation whereby the Libyan authorities can designate a search and rescue area in full conformity with international obligations. In this perspective, the EU is providing financial support to the Italian Coast Guard to assist the Libyan Coast Guard in establishing a Maritime Rescue Coordination Centre, a prerequisite for efficiently coordinate search and rescue within Libyan search and rescue zone, in line with international legislation», European Commission, 2017, 7.

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beyond Libya's territorial sea and contiguous zone, up to 100 mm south of Malta's SAR Area[15].

Based on these two pillars, European States' exchange of information with the Libyan authorities is achieved through Libya's participation in the Seahorse project. This is a programme entirely financed by the EU aimed at increasing and strengthening the capacities of the authorities of the North African countries in the field of surveillance and border control of the States of origin and transit of irregular immigration. The objective of this participation is for Libya to receive the necessary orders and information to carry out rescue operations, as recognised in the 2017 Communication of the former High Representative[16].

Therefore, the previous support of the EU and Italy in establishing the Libyan Joint Rescue Coordination Centre has paved the way for the Malta-Libya MOU. This, together with the training of the Libyan authorities in the interception of migrants at sea, constitutes another example of externalisation through the facilitation of interceptions by the Libyan Border and Coast Guard.

III. **The Memorandum of Understanding between Malta and Libya of May 2020**

Malta's geographical location in the middle of the central Mediterranean migratory route and the disproportionate SAR Area it controls has led Malta to pay particular attention to cooperation with both Italy and Libya in the Mediterranean.

As in the Italian case, individual cooperation between Malta and Libya[17] dates back to a period before the outbreak of the Arab Spring in 2011. In 2009, Malta and Libya signed a MOU to cooperate on SAR operations in the Mediterranean region. This MOU provided the political framework within which both states would coordinate any rescue operations occurring in their SAR areas: they agreed to authorise their Coordination Centres to request

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[15] Kiri Santer, «Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli», *European Journal of Migration and Law* 21, 2 (2019): 152.

[16] Matthias Monroy, «A seahorse for the Mediterranean: Border surveillance for Libyan search and rescue zone», *Security Architectures in the EU,* 1 March 2018, <https://digit.site36.net/2018/01/03/border-surveillance-technology-for-new-libyan-search-and-rescue-zone/>.

[17] Montserrat Pi Llorens and Esther Zapater Duque, «La externalización del control de la inmigración irregular a la Unión Europea a través del soft law: los MOU de Italia y Malta con Libia», in *Un mundo en continua mutación: desafíos desde el Derecho Internacional y el Derecho de la UE. Liber Amicorum Lucía Millán Moro*, coord. by Luis Pérez-Prat Durbán y José Manuel Cortés Martín (Navarra: Thomson Reuters Aranzadi, 2022), 755-759.

mutual assistance and provide all information on the situation in distress. The MOU also includes training by the Maltese armed forces and regular meetings[18]. However, the crisis in 2011 and the destruction of Libyan capabilities made the continuation of this MOU impossible[19].

After the so-called refugee crisis, cooperation between Malta and Libya has remained purely informal. Some media reports have revealed that non-normative agreements were secretly negotiated between the Maltese Armed Forces and the Libyan authorities in 2019, providing for the Maltese armed forces to coordinate with the Libyan coast guard to intercept migrants and return them to Libyan territory[20].

The various negotiations between the Libyan and Maltese governments resulted in the signing of the MOU with the Government of National Accord of the State of Libya in combating illegal immigration on 28 May 2020, adopted by the Government of the Republic of Malta and the Government of National Accord of the State of Libya[21]. Its preamble - significantly more succinct than the preamble of the Italy-Libya MOU - refers to the intention to consolidate the historical relations between Malta and Libya based on national laws and international conventions and controls, particularly, the objectives of the United Nations Charter.

The basis of the Memorandum can be found in Articles 1 and 2, which provide two specific commitments to "establish two coordination centres, one in Valletta and the other in Tripoli". These centres, which would be operational as of 1 July 2020, aim to combat illegal migration in Libya and the Mediterranean region. Article 2 establishes the composition of the centres: they will be attended by six officers, three in Valletta (two appointed by the Maltese Government and one by the Libyan Government) and three others located in Tripoli (two appointed by the Libyan Government and one by the Maltese Government). It can be assumed that the coordination centres in Valletta and Tripoli fall under the responsibility of the Maltese and Libyan governments respectively. According to Article 2 of the MOU, the former head of a Maltese

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[18] «MOU Signed in Tripoli: Malta, Libya, to cooperate in search and rescue operations», (*The Malta Independent,* 21 March 2009) <https://www.independent.com.mt/articles/2009-03-21/news/mou-signed-in-tripoli-malta-libya-to-cooperate-in-search-and-rescue-operations-222104/>.

[19] Ángeles Jiménez García-Carriazo, «Small Island, Big Issue: Malta and its Search and Rescue Region – SAR», *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* 7 (2019): 316.

[20] «Exposed: Malta's secret migrant deal with Libya», (*Times of Malta,* 10 November 2019) <https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800>.

[21] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of the Republic of Malta in the Field of Com batting Illegal Immigration, 28 May 2020 <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf >.

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prison, Alex Dalli, was chosen "as the special government representative in Libya" because of his extensive experience in the armed forces to assume responsibility for security matters, including irregular immigration[22].

As we can see, the objectives of the Malta-Libya MOU are apparently more concrete than the Italy-Libya MOU since articles 1 and 2 of the latter envisage broad and generic commitments of financial, technical and operational support from Italy to develop programmes aimed at combating illegal immigration at Libya's borders[23].

It is conceivable that this MOU is made in the framework of Chapter III on cooperation in search and rescue of the SAR Convention of 1979, to which both states are parties. However, the Malta-Libya MOU of 2020 makes no reference to the status of "rescue coordination centres" nor to the coordination of SAR operations in crises. The MOU establishes such coordination centres only for "combating illegal migration in Libya and the Mediterranean". Article 3 stipulates that Malta will fully fund both centres, and their operations will be limited to support and coordination. This coordination centres will facilitate interception, information exchange, and support Libya in taking over the rescue work through authorities funded and equipped with Maltese support. In fact, in the first quarter of 2020 alone, and prior to the MOU itself, the Libyan coastguard prevented 2,000 migrants from reaching the Maltese coast in compliance with its commitments to Malta[24]. Reference is made to an annexe to be prepared between the two parties. This annexe, which has not been published, would contain the working locations of both centres and the contact points between them (Art. 4).

Article 5 develops another of the objectives implicit in the text of the Memorandum. Under the heading of "financial support", this article indicates that Malta will request the European Commission and the MMSS to increase financial support for "securing the southern borders of Libya and the provision of the necessary technologies for border control and

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[22] The election of Mr. Dalli has led to criticism because of his previous management of the prisons for which he was responsible, resulting in his resignation. «Alex Dalli to be government's "special representative" in Libya», (*Times of Malta*, 30 December 2021) <https://timesofmalta.com/articles/view/alex-dalli-to-be-governments-special-representative-in-libya.924715>.

[23] Anja Palm, «The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?», *EU Immigration and Asylum Law and Policy blog,* Odysseus Network, 2 October 2017, <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>.

[24] Violeta Moreno-Lax, Jennifer Allsopp, Evangelia (Lilian) Tsourdi, and Philippe De Bruycker, «The EU approach on Migration in the Mediterranean», *Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies*, European Parliament, PE 694.413 (June 2021): 129.

protection, as well as in the dismantling and monitoring of human smuggling networks, and the reduction of organised crime operations". Also, in coordination with the EU, it will propose funding for additional maritime assets necessary for the interception and monitoring of people smuggling activities in the SAR region in the Mediterranean basin.

Same as the MOU with Italy, reference is only made to 'illegal immigration' as an element to be prevented from the southern borders of Libya itself. It does not contain any provision for what happens to intercepted persons or where they should be transferred to when they disembark. Nor is there any differentiated mechanism for cases in which the operations affect potential refugees, as the text does not distinguish between migrants, asylum seekers and refugees. Unlike the Italy-Libya MOU, there is no article dedicated to respecting international human rights obligations and international refugee law. Only a reference to the fact that their application may not contravene rights and obligations under other international treaties to which they are part (Art. 6).

IV. **Legal implications of the Memorandum. Informalisation, deterritorialisation and human rights**

1. *Informalisation of cooperation and deterritorialisation of border controls and migration management*

The current trend in terms of deterritorialised migration management is towards the implementation of informal or non-binding agreements. This section will look firstly at the use of informal instruments in cooperation with third States, especially with Libya, and secondly at the EU's and its MMSS' policy of deterritorialisation to see how the Malta-Libya MOU continues to reflect this trend.

1.1. Informal instruments for the cooperation with third States in migration and border control management

On one hand, through non-binding agreements, the common objective is often to empower third States and provide them with funding to increase the capacities of their authorities to control migration potentially arriving in Europe[25]. Thus, informality has prevailed in agreements with third countries,

[25] Francina Esteve García, «La externalización del control de los flujos migratorios: La cooperación de la unión europea con Libia y Níger», in *Retos en inmigración, asilo y ciudadanía: perspectiva Unión Europea, internacional, nacional y comparada*, ed. by Diana

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with a visible interest in blurring possible legally binding commitments between the parties and the actors carrying out such agreements[26]. An example of this is the Agreement between the EU and Turkey and the successive Memoranda Italy-Libya and Malta-Libya[27], all of which have in common that they are considered individual agreements between the MMSS and third countries without legally involving the EU[28].

We can consider soft law as those provisions that have a normative character and imply some commitments, but are found in non-legally binding instruments[29]. The Malta-Libya MOU is thus a non-legally binding agreement but has certain legal effects: it commits Malta to establish and fund two coordination centres in Tripoli and Valletta.

The formal aspect of the MOU has led to its rapid and simplified adoption, following several visits by the representative of the Libyan and Maltese governments, respectively. It did not follow any legislative process, although it was subsequently subject to parliamentary questions in the Maltese Parliament, which questioned, among other things, the lack of publicity of the MOU[30].

Likewise, a soft law norm makes it difficult to monitor it both politically and judicially. To such an extent that, if it were to be submitted to ordinary legislative procedures providing for specific control mechanisms, it would probably reveal the critical situation for the human rights of migrants in Libya[31]. As has been raised with the Italian MOU, it is questionable the effectiveness of the Libyan Government of National Accord signing the MOU. Indeed, Fayez Serraj's government cannot

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Marín Consarnau (Madrid: Marcial Pons, 2021): 65. Matina Stevis-Gridneff, «Corruption threatens to land EU funds in the pockets of migrant smugglers», *Global Flows, Migration and Security, Discussion Paper* 39 (2017).

[26] Martino Reviglio, «Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy», *Global Jurist* 20, 1 (2020): 3.

[27] Pi Llorens and Zapater Duque, «La externalización del control de la inmigración irregular a la Unión Europea a través del soft law: los MOU de Italia y Malta con Libia», 759-765.

[28] For the EU – Turkey Statement: "[…] The Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the MMSS of the European Union and the Turkish Prime Minister". Cases T-192/16, T-193/16 and T-257/16, NF and others versus European Council, Order of the General Court of 28 February 2017, ECLI:EU:T:2017:128.

[29] Teresa Fajardo del Castillo, «Soft Law», *Oxford Bibliographies in International Law*, New York: Oxford University Press, 30 January 2014 <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml#>.

[30] «Malta-Libya agreement presented in Parliament» (*Newsbook,* 3 June 2020) <https://newsbook.com.mt/en/malta-libya-agreement-presented-in-parliament/>.

[31] Reviglio, «Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy», 5.

maintain control of the entire Libyan territory due to the political crisis that divides the Libyan country. This also makes it difficult to control the departments and ministries responsible for controlling Libya's maritime areas and assuming the Maltese authorities' technological and training capabilities. Furthermore, the lack of political stability has led to the postponement of the elections scheduled for December 2021[32].

1.2. EU's and its Member States' policy of deterritorialisation

On the other hand, this policy of informalisation is part of a progressive strategy of deterritorialisation of border control and migration management functions by the EU and its MMSS. The current cooperation model seen in Malta's and Italy's informal agreements with Libya is based on the assumption that the aim is to reduce the number of migrants leaving Libya to embark on European territory[33]. To this end, the generic concept of externalisation has been used to refer to the broad European strategy in which these initiatives on immigration control are framed, or in general, to the European migration policy that has effects or is implemented abroad[34].

Two central problems can be found in this generic term. First, its imprecision led some authors to include different policies: from the externalisation of the asylum procedure[35] to the externalisation of EU border control or even the externalisation of the EU's own external borders[36]. Second, it is difficult to distinguish between the subjects that carry out the process of externalising European immigration policy. Whether it is the third States themselves that are responsible for controlling Europe's external borders, whether it is the EU itself that exercises this control from the territory of a third State, or whether it is both the EU States and the third countries of origin and transit that actively cooperate to control and reduce migratory flows towards the European border. However, they all have the

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[32] «Libyan elections postponed, new date expected within 30 days» (*UN News,* 23 December 2021).

[33] Annick Pijnenburg, «Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?», *Human Rights Law Review* 20, 2 (2020): 308.

[34] On this concept, David Cantor *et al*. «Externalisation, Access to Territorial Asylum, and International Law», *International Journal of Refugee Law* 20 (2022): 121-123. Also Nikolas Feith Tan, «Conceptualising externalisation: still fit for purpose?», *Forced Migration Review*, 68 (2021): 8-9.

[35] Silvia Morgades Gil, «The Externalisation of the Asylum Function in the European Union», *GRITIM Working Paper Series* 4 (2010): 25. Also beyond the EU, UNHCR «Note on the "Externalization" of International Protection», 28 May 2021, <https://www.refworld.org/docid/60b115604.html>.

[36] Alison Kesby, «Shifting and Multiple Border and International Law», *Oxford Journal of Legal Studies* 27 (2007): 101.

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common objective of "blocking or interrupting transit to European countries in such a way as to prevent access to their territory for those who [...] aspire to access the EU"[37]. Therefore, such policies would entail a process of both geographical and functional externalisation, by shifting migratory controls outwards and involving, where appropriate, entities outside the Union in their extraterritorial implementation.

Based on the differentiation proposed by Del Valle Gálvez, we refer to the general term of deterritorialisation as practices and policies involving the relocation beyond the external borders of EU MMSS -either on the high seas or on the territory of third countries- of external border control activities (Art. 77 Treaty on Functioning of the European Union/TFEU), asylum policy (Art. 78 TFEU) or immigration management (Art. 79 TFEU)[38]. The purpose is to prevent or reduce the number of migrants entering the territory of EU MMSS. These measures may involve the active cooperation or complicity of third States of origin, transit, and other international organisations[39]. Within this generic concept of deterritorialisation, two concepts could be distinguished, differentiated mainly by whether or not there is a displacement of authorities from an EU Member State or from the EU itself. On the one hand, we would refer to externalisation to describe those deterritorialisation measures that necessarily involve cooperation with third countries of origin and transit, either through agreements or the implementation by the latter of plans and programmes drawn up by the EU or its MMSS. On the other hand, we would use the term extraterritorialisation to refer to those deterritorialisation measures that imply a displacement of European public agents in activities located outside the territory of the MMSS to control a specific situation related to migration or asylum[40]. These policies can be carried out autonomously by the European authorities - in international spaces - or with the consent of the third State.

As we can see, the Malta-Libya MOU of 2020 combines externalisation and extraterritorialisation measures, as it envisages the posting of a Maltese public authority to Libya to control irregular immigration from there. In this

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[37] Ángel Sánchez Legido, «Externalización de Controles Migratorios versus Derechos Humanos», *Revista Electrónica de Estudios Internacionales* 37 (2019): 3.

[38] Alejandro del Valle Gálvez, «Inmigración, Derechos Humanos y Modelo Europeo de Fronteras. Propuestas Conceptuales Sobre 'Extraterritorialidad', 'Desterritorialidad' y 'Externalización' de Controles y Flujos Migratorios», *Revista de Estudios Jurídicos y Criminológicos* 2 (2020): 168-169.

[39] Jorrit J Rijpma and Marise Cremona, «The Extra-Territorialisation of EU Migration Policies and the Rule of Law», *EUI Working Paper LAW*, 1 (2007): 14.

[40] Del Valle Gálvez, «Inmigración, Derechos Humanos y Modelo Europeo de Fronteras. Propuestas Conceptuales Sobre 'Extraterritorialidad', 'Desterritorialidad' y 'Externalización' de Controles y Flujos Migratorios», 169-174.

sense, the difference is essential. The movement of authorities from one State to another State, with its consent, could involve the exercise of extraterritorial jurisdiction and powers of a personal nature. This would make it easier to determine the existence of effective control over rescue operations carried out with the involvement of the Maltese authority operating in Libya, which results in disembarkation in Libyan territory. Based in a functional notion of the concept of jurisdiction, one can take into account effective control over persons or territory for the application of international human rights obligations, especially the European Convention of Human Rights (ECHR) under Article 1, or the International Covenant on Civil and Political Rights (ICCPR) under Article 2, among others international and regional human rights law instruments and sources. But that effective control can also be extended to the operational activities that may reach the threshold of "exercise of public powers", which would constitute the exercise of jurisdiction extraterritorially, as they manifest a degree of deliberation and voluntariness of the State[41].

2. *Malta and Search and Rescue obligations under international law. The human rights situation of migrants and refugees disembarked in Libya*

2.1. Malta, Search and Rescue and life protection's obligations

The duty to protect life at sea is an obligation under the Law of the Sea and international human rights protection treaties[42]. The obligation to rescue persons in distress at sea is enshrined in Article 98.1 of the United Nations Convention on the Law of the Sea, which commits States to ensure assistance, whatever the condition of persons in distress. Furthermore, this article is complemented by the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), and the 1979 International Convention on Maritime Search and Rescue (SAR Convention). The latter incorporated provisions for the coordination of rescues in the SAR Area of Responsibility to be determined by the parties and notified to IMO, as well as the establishment of Rescue Coordination Centres. The SAR Convention was amended in 2004 to impose further cooperation and coordination obligations to ensure that rescuing vessels can disembark persons in "places of safety" for disembarkation.

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[41] Violeta Moreno-Lax, «The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the 'Operational Model'», *German Law Journal* 21, 3 (2020): 414.

[42] Joana Abrisketa Uriarte, *Rescate en el mar y asilo en la Unión Europea. Límites del Reglamento de Dublín III* (Navarra: Thomson Reuters Aranzadi, 2020), 202.

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Malta has formally opposed amendments to the 2004 SAR Convention that would oblige it to assume responsibility for providing a safe place of disembarkation to those in distress rescued in its SAR region. It does not recognise either the provisions of the 2004 IMO Guidelines on the Treatment of Persons Rescued at sea, which, although not legally binding, provide a concept of a safe place of disembarkation. This would be a place where "the survivors' life safety is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met"[43].

The SAR region of a State does not constitute a maritime space in which States automatically exercise jurisdiction over all incidents occurring in the SAR region. However, it is true that in cases where the SAR Region State Coordination Centre is contacted, we can assume that there is an exercise of some functional jurisdiction over persons in distress. This is so insofar as it could trigger the due diligence obligations that the SAR region State must fulfil as it exercises some "spatial control" over that area[44].

Furthermore, the Human Rights Committee's General Comment no. 36 on Article 6 of the ICCPR on the right to life expressly indicated that States Parties have an obligation to respect and protect the lives of all persons who "owing to a situation of distress at sea, find themselves in an area of the high seas over which certain States Parties have assumed de facto responsibility, including compliance with the relevant international rules governing rescue at sea"[45]. Applying a functional approach to the concept of jurisdiction under the Covenant and taking into consideration General Comment no. 36, the Human Rights Committee ruled positively on the existence of jurisdiction in a communication alleging the failure of the Maltese authorities to protect life in the death of more than 200 migrants in distress at sea in Malta's SAR Zone. In this regard, the Committee considered that Malta "exercised effective control over the rescue operation, which could give rise to a direct and reasonably foreseeable causal link between the acts and omissions of the States parties and the final outcome of the operation"[46].

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[43] Jiménez García-Carriazo, «Small Island, Big Issue: Malta and its Search and Rescue Region – SAR», 306.

[44] Efthymios Papastavridis, «Rescuing Migrants at Sea and the Law of International Responsibility», in *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control*, ed. by Tommas Gammeltoft-Hansen and Jens Vedsted-Hansen (London: Routledge, 2016), 168.

[45] UN Human Rights Committee, General Comment n. 36: Article 6 of the ICCPR on the Right to Life, 22, UN Doc. CCPR/C/GC/36 (2018), párr. 63.

[46] Finally, the Committee declared the communication inadmissible for failure to exhaust domestic remedies in the case of Malta. UN Human Rights Committee, Decision adopted under the Optional Protocol, concerning communication no. 3043/2017. CCPR/C/128/D/3043/2017.

2.2. Human Rights implications of the Memorandum and the broad cooperation with Libya

The creation of two coordination centres in Libya and Malta, funded by the latter, read in conjunction with the Maltese objection to amendments to the SAR Convention, leads to more frequent debarkations in Libya in operations controlled or supervised by the Maltese authorities. The MOU, in any case, is not expressly aimed at coordinating rescue operations but at fighting "illegal" immigration, using a term that criminalises all persons in distress at sea without distinguishing between those who may be refugees and potential asylum seekers.

In fact, there have been cases in which the Maltese armed forces have used private vessels to rescue people in distress. Thus, the Maltese authorities would send the coordinates where the boat in distress would be so that they could be intercepted and handed over to the Libyan authorities or disembarked in Libyan ports[47]. The Council of Europe Commissioner for Human Rights has echoed this situation in her report following her visit to Malta in October 2021 and has called on Malta to refrain from issuing instructions to private vessels involving return and disembarkation in Libya, as well as to comply with the obligation to take responsibility for incidents that occur due to the action of its own authorities[48].

Furthermore, the critical situation in Libya is more than evident: neither the Libyan coastguard guarantees a safe rescue, nor do the conditions after disembarkation makes Libya a safe place for disembarkation. Even so, Libya has significantly increased the number of people rescued in the SAR zone declared by the country. From a lack of adequate personnel and naval assets to undertake rescue actions at sea, in 2017, the Libyan Coast Guard intercepted 15,238 migrants and refugees[49]. The number of interceptions/rescues by the Libyan Coast Guard in 2019 was 9,035[50] and 11,265 in 2020[51].

Reports by the Group of Experts on Libya also reflect the appalling allegations that the Libyan authorities responsible for interception/rescue

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[47] «Med: 100 Lives Lost at Sea, Malta Paid for Pushbacks to Libya, EU Seeks to Enhance Cooperation in North-Africa» (*ECRE,* 21 May 2021) <https://ecre.org/med-100-lives-lost-at-sea-malta-paid-for-pushbacks-to-libya-eu-seeks-to-enhance-cooperation-in-north-africa/>.

[48] Commissioner for Human Rights of the Council of Europe, «Report following her visit to Malta from 11 to 16 October 2021», CommDH(2022)1, 5 <https://rm.coe.int/report-of-the-council-of-europe-commissioner-for-human-rights-dunja-mi/1680a5498d>.

[49] UNHCR Flash Update Libya (28 December 2017) <https://reliefweb.int/report/libya/unhcr-flash-update-libya-28-december-2017>.

[50] UNHCR Libya operational update and response dashboard - UNHCR Libya Activities in 2019 <https://data2.unhcr.org/en/documents/details/73290>.

[51] UNHCR Libya Update 18 December 2020) <https://data2.unhcr.org/en/documents/details/83832>.

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actively put the lives of migrants and asylum seekers at risk. Firstly, by obstructing rescue efforts by humanitarian organisations; secondly, through the direct use of firearms, physical violence, threats, racist insults or behaviour that causes these boats to capsize or their occupants to jump into the water without life jackets[52].

Once disembarked in Libya, UNHCR and other NGOs on the ground provide medical assistance and basic necessities "before the Libyan authorities transfer them to a detention centre"[53]. Various reports from international agencies state that the return of any person intercepted or rescued at sea by Libyan officials to immigration detention centres is virtually automatic, systematic and arbitrary[54]. Even the Libyan authorities admit that 99% of the migrants present in detention centres had been intercepted at sea and handed over by the Libyan coastguard[55]. In addition, hundreds of rescued migrants reported to have been sent to detention centres were later listed as missing and probably trafficked or sold to smugglers. Others disappeared in transit from one location to another[56]. Numerous reports from international bodies such as the Human Rights Council and the Office of the Prosecutor of the International Criminal Court have found that the numerous violations against migrants held in detention centres in Libya can be considered crimes against humanity[57].

3. Malta's position on possible human rights violations

3.1. Applicability of the Charter of Fundamental Rights of the EU

The informal nature of agreements with third countries raises questions about the possibility of revising measures established under the EU Charter of Fundamental Rights (EUCHFR), as MMSS and EU institutions and bodies may be understood to be acting outside the legal framework of EU law.

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[52] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations on Libya's initial report CMW/C/LBY/CO/1, 8 May 2019.

[53] Security Council, Report of the Secretary-General on the Implementation of resolution 2437 (2018) S/2019/711, 5 September 2019.

[54] *Inter alia,* Human Rights Council, Report if the Independent Fact-Finding Mission on Libya A/HRC/48/83, 1 October 2021, paras 67-69.

[55] Security Council, Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011) S/2021/229, para 43.

[56] Security Council, United Nations Support Mission in Libya, Report of the Secretary-General S/2019/682, 26 August 2019, para 53.

[57] International Criminal Court, 19th Report of the Prosecutor of the ICC to the UNSC pursuant to UNSCR 1970 (2011), 5 May 2020 <https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf>.

The question at this point is whether the protection of the EUCHFR extends to such extraterritorial effects.

Article 51 of the Charter, it should be recalled, extends the application's scope of the Charter to the institutions, bodies, offices and agencies of the Union and the MMSS only when they are implementing EU law.

As for the applicability of the Charter to the role of MMSS in the informal arrangements that characterise the cooperation between Malta and Libya, it is true that in these cases, MMSS are not implementing EU law. However, the European context in which the MMSS' cooperation initiatives we developed in section II of this paper are framed is relevant. Thus, EU institutions and bodies must respect fundamental rights regardless of the specific legal framework or context in which they act: atypical and informal acts, such as resolutions, recommendations or codes of conduct, as long as they are the product of EU institutions and have legal effects, would also entail the application of the EU Charter[58].

3.2. Possible attribution of responsibility for the commission of wrongful acts

There is extensive literature that addresses the possible international responsibility of the EU and its MMSS for the violation of human rights obligations arising from the activities of deterritorialisation of migration control towards third countries, particularly concerning cooperation with Libya. Below, we will look at Malta's possible responsibility for cooperation with Libya following the Memorandum.

First, to attribute responsibility for violations of international human rights obligations, it needs to be possible to establish the existence of those human rights obligations, which depend on the jurisdiction clauses of those treaties[59]. In the case of the Malta-Libya MOU, we have found that the effective control that Malta can exercise may be sufficient to trigger the jurisdiction of the ECHR and the ICCPR, among other international human rights protection treaties[60].

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[58] Anastasia Poulou, «Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights», *Common Market Law Review* 54 (2017): 1010-1011.

[59] Samantha Besson, «The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to», *Leiden Journal of International Law* 25, 4 (2012): 867. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011), 41-52.

[60] María Nagore Casas, «Los Acuerdos de capacitación a terceros Estados para la contención migratoria: nuevos desarrollos en el concepto de jurisdicción de los tratados de derechos humanos», in *Políticas de asilo de la UE: Convergencias entre las dimensiones interna y externa*, dir. by Joana Abrisketa Uriarte (Pamplona: Thomson Reuters Aranzadi, 2021), 223-250.

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Secondly, although the monitoring bodies of each human rights treaty apply their own standards of attribution, it is also essential to refer to the international norms on the attribution of conduct or responsibility to these States[61]. Thus, to determine the attribution of international responsibility for the commission of wrongful acts to States, we will look to the Draft Articles on Responsibility of States for Internationally Wrongful Acts[62].

In cases where the Maltese authorities are directly involved in violating human rights, the provisions of Articles 4 and 5 of the Draft Articles on State Responsibility would apply[63]. Likewise, it would apply in the case of interceptions at sea by European authorities when they violate human rights obligations at the time of rescue or disembarkation in Libya. Therefore, not only when they are committed directly by a public authority. Article 8 of the Draft Articles refers to "behaviour under the direction or control of the State". Therefore, Malta would also be considered international responsible for ordering private vessels to return rescued persons to the Libyan authorities when this involves the violation of the principle of *non-refoulement*, among other human rights protection standards[64]. Furthermore, it could be considered as a case of personal control by interposition verified by the private operator under his instruction and control attributable to the State party[65].

The Draft Articles also include other cases in which the attribution of responsibility to a State occurs in relation to the wrongful act committed by another State. Thus, one could consider the existence of "direction or control" by European States in their policy of cooperation with Libya for the management of migratory flows, according to Article 17 of the Draft Articles, which attributes responsibility to the State that directs and controls another State in the commission of a wrongful act when it does so with knowledge of the circumstances of the act and if the act would be internationally wrongful if committed by the directing and controlling State[66].

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[61] Sánchez Legido, «Externalización de Controles Migratorios versus Derechos Humanos», 13.

[62] Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

[63] Article 4, Conduct of organs of the State; Article 5, Conduct of a person or entity exercising elements of public authority.

[64] Elspeth Guild and Vladislava Stoyanova, «The Human Right to Leave Any Country: A Right to Be Delivered», *European Yearbook on Human Rights* (2018): 380.

[65] Sánchez Legido, «Externalización de Controles Migratorios versus Derechos Humanos», 17.

[66] Thomas Gammeltoft-Hansen and James C Hathaway, «Non-Refoulement in a World of Cooperative Deterrence», *Columbia Journal of Transnational Law* 53, 2 (2015): 279. Moreno-Lax and Giuffré, «The Raise of Consensual Containment…», 19.

Moreover, the cooperation provided by the EU and its MMSS to the Libyan authorities can be understood as aiding or assisting another State in committing an internationally wrongful act. Article 16 of the Draft Articles on State Responsibility refers to the responsibility of a State that aids or assists another State in the commission of an internationally wrongful act by the latter. For this, the State must do so with knowledge of the circumstances of the internationally wrongful act, which would also be wrongful if committed by the aiding or assisting State.

In the case of cooperation on migration management and border control cooperation, Libya would be autonomously responsible for the commission of an unlawful act and the EU, its MMSS and Malta, in particular, would be responsible for the aid or assistance provided. However, the draft articles do not specify what is meant by "aiding or assisting" another state in the breach of an international obligation. In the view of Moreno-Lax and Giuffré, actions that can be considered within that category may be training, economic assistance, the provision of confidential information or political or legal aid[67]. Moreover, such assistance need not be *essential* to the internationally wrongful act. According to Gammeltoft-Hansen and Hathaway, international responsibility arises when a State knowingly provides material assistance to another state that uses it to commit human rights violations[68].

In this regard, it is true that for aid or assistance to exist, a sufficiently close causal link is required between the support provided and the violation committed by the state committing the wrongdoing. As long as Malta, Italy and the EU provide assistance to the Libyan authorities with the express aim of enhancing the latter's capacities to intercept migrants and refugees and return them to Libya, such a causal link could be fulfilled concerning the principle of non-refoulement and the human rights obligations attached to it[69]. Moreover, such aid or assistance must be given "with knowledge of the circumstances of the internationally wrongful act", meaning that it must be aware that its aid or assistance may facilitate the wrongful act and yet continue to assist in it[70]. Therefore, in the case of Malta and the EU, we understand that the evidence that proves the commission of an unlawful act produced by the disembarkation of people on Libyan territory is

[67] Moreno-Lax and Giuffré, «The Raise of Consensual Containment…», 19-20.

[68] Gammeltoft-Hansen and James C Hathaway, «Non-Refoulement in a World of Cooperative Deterrence», 279.

[69] Annick Pijnenburg, «Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?», 329.

[70] Gammeltoft-Hansen and James C Hathaway, «Non-Refoulement in a World of Cooperative Deterrence», 280.

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deliberately ignored. Despite the continuous denunciations of UN bodies and the Commissioner for Human Rights of the Council of Europe, which call for the immediate interruption of the cooperation that results in the disembarkation of immigrants in Libya, this cooperation continues to be reinforced.

V. **Conclusions**

1. Undoubtedly, the maritime scenario and the external borders in the Mediterranean Sea is where the greatest problems arise regarding the respect and protection of the human rights of immigrants and refugees, revealing the unfeasibility of the current model of surveillance and border control[71]. Maritime migration at sea and its control by European authorities indeed present a wide range of legal problems[72].

In response to the impracticality of maritime borders, the EU and its MMSS have relied on cooperation with third countries, particularly Libya as the main gateway to the Mediterranean Sea. The main consequence of cooperation based on funding the Libyan authorities and empowering Libya to take on rescue operations is the deterritorialisation of migration control functions and the transfer of responsibility for rescue operations to a failed state like Libya, under an appearance of legitimacy created by the European authorities[73]. As noted in previous Office of the United Nations High Commissioner for Human Rights reports, at least since August 2017 when Libya declared the extension of its SAR zone, the EU and its MMSS have gradually reduced their maritime assets in the central Mediterranean, transferring responsibility for SAR operations in international waters to the Libyan coastguard.

2. Malta's geographical position in the Mediterranean, and its disproportionate SAR region, makes cooperation with Libya to reduce the number of migrants that can reach the island essential for the Maltese government itself. However, the MOU between Malta and Libya is part of

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[71] Alejandro del Valle Gálvez, «El rescate de personas en el Mediterráneo: sobre la inviabilidad del modelo de fronteras exteriores europeas en el Mediterráneo», *Revista Española de Derecho Internacional* 72, 1 (2020): 194.

[72] Marcello Di Filippo, «Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea», *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* 1 (2013): 53.

[73] Santer, «Governing the Central Mediterranean through Indirect Rule…», 145.

Europe's strategy of deterritorialising migration control functions through informal arrangements, plans, and funding towards Libya. In fact, the creation of the coordination centres in Tripoli and Malta stems from the Joint Rescue Coordination Centre and the SAR region of Libya recognised by the IMO, thanks to prior and constant operational and financial support from Italy and the EU.

3. The choice of soft law norms such as the MOU is not trivial, especially since a legally binding agreement could lead to major political and legal controversies in light of the human rights situation in Libya. Unlike the Italian MOU, the Malta-Libya MOU expressly combines measures involving the funding and training of Libyan authorities (externalisation) with the transfer of Maltese authorities to Tripoli (extraterritorialisation). This could involve the exercise of extraterritorial jurisdiction and personal powers outside Malta's territory, thus facilitating the possible establishment of effective control and jurisdiction by Malta.

4. Primary law obliges the EU and its MMSS to uphold and promote the values of the Union, including respect for international obligations in the field of human rights and fundamental freedoms. The EUCHFR binds the European institutions in all their actions and the MMSS when they implement Union law. In addition, international human rights standards, notably the ECHR - to which all MMSS are party - and the constitutional traditions of the MMSS constitute general principles of EU law. They will serve as an additional source of interpretation when reviewing the actions and omissions of the EU and its States. International human rights protection treaties can also deploy their obligations extraterritorially, as is the case with the ICCPR and the ECHR. Similarly, although the EUCHFR does not have a jurisdiction clause, it allows for extraterritorial application whenever EU law applies, wherever its institutions and MMSS act. Thus, fundamental rights standards must apply to the EU in all its activities: including those outside the Schengen area or in cooperation with third countries. Compliance with the EUCHFR must take place regardless of where and under whose control these actions take place.

The application of international treaties to protect human rights implies that states must comply with and act following the obligations applicable to them. Therefore, human rights violations occurring as a result of disembarkations in Libya, with the direct support, in this case, of Malta may give rise to the attribution of international responsibility under the Draft Articles on Responsibility of States for the commission of an

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internationally wrongful act. Each situation must indeed be analysed on a case-by-case basis, identifying the degree of a state's involvement in the act that results in the commission of a wrongful act: whether directly or through direction, control, aid or assistance. However, the problem remains the lack of transparency regarding the participation and involvement of the Maltese authorities in the interception operations resulting in disembarking in Libya, in application of the Memorandum. These aspects were to be clarified in an Annex that has not been made public.

5. What is certain is that Maltese authorities are fully aware of the consequences of their constant support to the Libyan authorities in the interception of migrants - which even takes place in Malta's SAR regions[74] - and the subsequent disembarkation on their territory. Reports by the UN High Commissioner for Human Rights, the Human Rights Council, the Office of the Prosecutor of the International Criminal Court, and the Commissioner for Human Rights of the Council of Europe, as well as by NGOs and other civil society entities, all point to a practice that must be suspended until conditions in Libya can be considered safe for the human rights of migrants and refugees.

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Separated Minors or the Dilemma between General and Individual Interest in European Union Migration Law Compliance

Menores separados: el dilema entre el interés general y el interés individual en la aplicación del Derecho Migratorio de la Unión Europea

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Summary: I. Separated Minors: A Distinct Situation among Migrant Children without a Specific Legal Framework.—II. A European Case Law–Based Approach to Separated Children's Protection. 1. The Child's Right to a Family Depends on the Definition of Family. 2. Separation Measures May Encroach on a Minor's Family Life. 3. A Public Interest Can Be at Stake: Fighting against Human Trafficking and Abuses. —III. The Best Interests of the Child: A Solomon Sword between General and Specific Protection of Separated Minors for Enhanced Compliance.—IV. Filling the Void: Proposals Rooted in the EU Perception of Migration and Asylum

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Abstract: Separating children traveling accompanied by a nonfamily adult is a current practice serving the general purpose of fighting against sexual exploitation, minor trafficking, or general crime prevention. However, such a routine response could violate a minor's right to family life or preclude an attempted migration to reunification. Although no specific normative framework exists for this migratory category, we will draw our analysis of the conflicting interests by resorting to human rights case law. On the one hand, the expansion of the legally recognized concept of family must help protect interpersonal bonds not based on biological relationships, according to the European Court of Human Rights and the Court of Justice of the European Union. On the other hand, restrictions to the right to family life can be taken for fighting against crime, although a goal of general prevention may not comply with human rights standards on the limitation of rights. The required balance between conflicting interests can be established by resorting to the best interests of the minor. To conclude, we argue that this category could certainly benefit from a concerted, common legislative action at the level of the European Union when revisiting the migration legal regime, alongside operational measures at national, regional, and local levels.

Keywords: migration law, separated minors, foreign unaccompanied minors, right to family life, best interests of the minor, human trafficking.

Resumen: *La separación de los niños que viajan acompañados de un adulto con el que no tienen un vínculo biológico o familiar en sentido legal supone una práctica habitual como forma de protección frente al tráfico de personas. Sin embargo, puede constituir una vulneración del derecho a la vida de familia de un menor o impedir un intento de reunificación familiar. Los menores separados constituyen una categoría no regulada jurídicamente de forma autónoma. Sin embargo, el examen de los intereses legales contrapuestos puede llevarse a cabo a partir de la jurisprudencia europea de derechos humanos. De un lado, la expansión del concepto de familia sancionado por el Tribunal Europeo de Derechos Humanos y el Tribunal de Justicia de la Unión Europea permite proteger vínculos no exclusivamente biológicos. De otro lado, el objetivo de prevención general —lucha contra el tráfico o la trata— no es suficiente por sí mismo para garantizar el respeto de los requisitos de las limitaciones de derechos. El equilibrio entre interés público e individual debe alcanzarse a través de la individualización del interés superior del menor. Para concluir, se proponen medidas normativas y de aplicación, tanto a nivel de la Unión Europea como nacional, regional y local.*

Palabras clave: *Derecho migratorio, menores separados, menores no acompañados, derecho a la vida de familia, interés superior del menor, tráfico de personas.*

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I. Separated Minors: A Distinct Situation among Migrant Children without a Specific Legal Framework

Unaccompanied foreign minors are a widely studied category in migration studies and law, while "separated minors" are not.[2] Throughout this work, "separated minor" will be used to refer to an underage person migrating together with an adult who is not biologically or legally related as "parent" or "guardian". Without a specialized regime, separated minors are generally considered part of the broader category of foreign unaccompanied migrant children in both international and domestic legal documents and practice. Hence, as current practice directions and policy, they are allegedly "protected" through separation from the accompanying adult when crossing the borders of European Union (EU) Member States (MMSS). This separation measure is generally meant to shield separated minors from human trafficking and similar crimes out of general public interest (public safety, crime prevention) while considering it an abstract realization of the best interests of the minor.[3] While this grants a minor a specific and, apparently, more protective regime, which can be generally perceived as an individual gain, an automatic response endangers a proper consideration of the individual interests of the minor and rejects contemporary and structural changes in the concept of family. A more balanced approach to compliance should be stressed in order to avoid cases in which a minor, through this separation, suffers from a violation of their right to family life, as guaranteed both by article 8 of the European Convention of Human Rights (ECHR) and article 7 of the Charter of Fundamental Rights of the European Union (CFREU). Consequently, this research will highlight the need for a set of rules or, at the very least, clarifying guidelines, that could accompany the never-ending reform of EU migration legislation to abide by human rights standards concerning separated migrant minors.

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[2] Some attention has been given to the topic by the European Union Agency for Fundamental Rights (FRA). See, for instance, *Separated, Asylum-Seeking Children in European Union Member States* (Luxembourg: Publications Office of the European Union, 2011) and *Current Migration Situation in the EU: Separated Children* (Luxembourg: Publications Office of the European Union, 2016). Nevertheless, neither policy definition nor legislative action has been adopted at EU or domestic level since. Academic literature on the specific concept of separated minors is nonexistent.

[3] One of the few EU policy documents in which "separated minors" are mentioned strictly follows this approach. See *Communication from the Commission to the European Parliament and the Council: The Protection of Children in Migration*, COM (2017) 211 final (Apr. 12, 2017), 4.

Some current cases may illustrate the specificity of the situation of these separated children. An immigrant man who lives illegally in France intends to reunite with his son. The child travels from Africa, where the minor lived with his mother, in the company of the father's new partner, a legal immigrant woman. When crossing the Spanish border, the child and stepmother are separated because they do not have a legal or biological bond, despite the letter of acquiescence that the biological mother provided the son with for the purpose of traveling to France. The child currently remains under governmental custody, whereas the stepmother was allowed to continue her travel. The biological father and mother remain unable to reach their son, who lacks legal documents to travel, and there is no readmission agreement between the countries.[4] A second situation is that of a minor and their family leaving their country of origin together: after all adults perish during a sea crossing, the minor is taken care of by a third fellow countryman or woman doing the same journey, with whom the minor is not biologically related. A third case is represented by those minors traveling with an adult considered, in a broad sense, "family" in their original culture, whom upon arrival to EU shores is found to be neither biologically nor legally related to the minor. A fourth case is that of minors traveling with an adult with whom they share a legal bond in the country of origin, which is not known or recognized in EU legislation, such as the Algerian *kafala*. A fifth case is that of a newborn traveling with their commissioning parents from a third country, where surrogate motherhood took place, to an EU country where the contract is void and surrogate parenthood is not yet recognized.

As stated above, there is no legally binding definition of separated minors in international law. Nevertheless, the very concept has been clarified in international soft law documents. General Comment no. 6 (2005) of the United Nations Committee on the Rights of the Child (CRC) on the Treatment of Unaccompanied and Separated Children outside Their Country of Origin states that

> "Separated children" are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from

[4] Recent Spanish practice is described in Cristina Manzanedo Negueruela, "Menores extranjeros acompañados. La problemática invisible de los niños y niñas migrantes acompañados que llegan a la frontera sur española", in "La movilidad humana: entre los derechos y la criminalización", ed. Margarita Martínez Escamilla and José Miguel Sánchez Tomás, special issue, *Revista Crítica Penal y Poder* 18 (2019): 260–26.

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> other relatives. These may, therefore, include children accompanied by other adult family members.[5]

As such, it is clearly differentiated from the concept of "unaccompanied children" (also called unaccompanied minors)—namely, "children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so".[6]

The same differentiation is also made by the Inter-American Court of Human Rights[7] and the United Nations High Commissioner for Refugees (UNHCR).[8] Furthermore, the duality has been acknowledged in Joint General Comment no. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and no. 22 (2017) of the CRC on the general principles regarding the human rights of children in the context of international migration;[9] Joint General Comment no. 4 (2017) of the CMW and no. 23 (2017) of the CRC on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return;[10] and the United Nations' 2018 Global Compact for Safe, Orderly and Regular Migration.[11] Nevertheless, although "unaccompanied minors"

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[5] United Nations Committee on the Rights of the Child (CRC), General Comment no. 6 (2005) on Treatment of Unaccompanied and Separated Children outside Their Country of Origin, paragraph 8, U.N. Doc. CRC/GC/2005/6 (May 17–June 3, 2005).

[6] *Ibid*., paragraph 7.

[7] Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (Aug. 19, 2014), paragraph 49.

[8] See U.N. High Commissioner for Refugees (UNHCR), *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (n. p.: United Nations High Commissioner for Refugees, 2021), 12.

[9] U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint General Comment no. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, paragraphs 5, 9, 32, 33, 36, 38, 40, and 42, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).

[10] U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint General Comment no. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, paragraphs 8, 13, 16, 17, 27, 30, 34, 39, and 40, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

[11] G.A. Res. 73/195, paragraphs 15, 23, 24, 27, and 28 (Jan. 11, 2019).

and "separated minors" are presented as a duality of concepts, they are most often considered jointly when policy recommendations are worded.[12]

Divergently, domestic law—both state and EU law—lacks a specific definition or mention of separated minors, thus including the situation of separated children in the broader condition of unaccompanied minors as a protective and special regime, whether in the case of economic irregular migration or of mobility in search of a protection status.[13]

The normative exclusion of this duality hinders an appropriate recollection of diversified statistics on separated children,[14] contrary to what the European Commission already proposed in 2017 in its communication on the protection of children in migration:

> Following their arrival in the European Union, children in migration should always be identified and registered as children, using a uniform data set across the European Union (for example, to indicate whether a child is unaccompanied, separated or travelling with family, nationality/statelessness, age, sex, etc.).[15]

Moreover, the policy literature of different national and international stakeholders does not clearly consider these two situations apart.[16] In this

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[12] For all, see Joint Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, and the Special Rapporteur on Trafficking in Persons, Especially Women and Children, U.N. Doc. A/72/164 (July 18, 2017), paragraphs 14, 22, 31–32, 53–56, 59, 72–75, 80, and 83. See also G. A. Res. 76/266, Progress Declaration of the International Migration Review Forum, (June 14, 2022), convened to discuss and share progress on the implementation of all aspects of the Global Compact for Safe, Orderly and Regular Migration, paragraphs 11, 32, and 57.

[13] For EU law, see Council Directive 2001/55, article 2.f, 2001 O.J. (L 212) (EC), 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]; Council Directive 2011/95, article 2 (l), 2011 O.J. (L 337) (EU), on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); Council Directive 2013/33, article 2.e, 2013 O.J. (L 180) (EU), laying down standards for the reception of applicants for international protection (recast). Other EU migration rules, outside the especial protection regime are equally restrictive. For Spanish legislation, see article 189, Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, BOE 103, April 30, 2011.

[14] European Union Agency for Fundamental Rights, *Current Migration Situation in the EU*, 2–3.

[15] COM (2017) 211 final (Apr. 12, 2017).

[16] Delegación de ACNUR en España, *Menores no acompañados y la protección de asilo* (Madrid: ACNUR-Ministerio de Empleo y Seguridad Social, n. d.); Anja Radjenovic, *Vulnerability of Unaccompanied and Separated Child Migrants* (Brussels: European Union, 2021).

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vein, most of the EU policy documents adopted after the 2017 Communication of the European Commission on the protection of children in migration do not mention this specific category anymore.[17]

Therefore, the undisputed application of the unaccompanied minors regime, generally transferring the child to the state care system, is elicited without verifying the precise nature and scope of the relationship between the minor and the accompanying adult.[18] Separation from the accompanying adult can lead either to detention and expulsion to the country of origin or to public or private foster placement until the child comes of age in those cases where expulsion is not feasible in the absence of a readmission agreement. An unaccompanied minor's application for a protection statute (asylum, subsidiary protection, or temporary protection) is possible according to the normative framework, although numbers speak of a very low use ratio.[19] Furthermore, this option is hindered when the minor is separated and is dependent on the foster care institution or the guardianship appointment process.

Were the bond with the accompanying adult to amount to a "family" relationship or put at risk the family ties of the child in a third country, a different action other than automatic separation should be adopted in order to avoid the aforementioned consequences. Therefore, attention needs to be given to the expanding case law updating interpersonal links as the cornerstone to determine the child's right to a family and its limits. For this, we shall turn to the Court of Justice of the European Union's (CJEU) and

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[17] See, for all, Conclusions of the Council of the European Union and the Representatives of the Governments of the Member States on the Protection of Children in Migration (June 8, 2017); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM (2020) 609 final (Sept. 23, 2020); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum*, COM (2021) 590 final (Sept. 29, 2021). In European Parliament resolution on the protection of children in migration, May 3, 2018, 2020 O.J. (C 41/41), there is an isolated mention illustrating that data on unaccompanied children encompass undifferentiated data on separated children.

[18] Fundación Abogacía Española, *La protección en Europa de "menores separados" de su acompañante adulto en movimientos migratorios* (Iturria: Fundación Abogacía Española, 2019), 5–6.

[19] María Teresa de Gasperis, Pablo Pérez Pérez, and Sonia Gruben, eds., *Aproximación a la protección internacional de los menores no acompañados en España* (Madrid: La Merced Migraciones, 2009), 30. At EU level, there are no comprehensive statistics of the share of unaccompanied minors lodging applications for protection, let alone separated children. See European Asylum Support Office (EASO), *Annual Report 2018*, section 4.10.1, "Unaccompanied Minors". For information on the increasing trend in applications, see also *Annual Report 2021*, 253.

the European Court of Human Rights' (ECtHR) case law—their decisions being final and binding upon EU MMSS.[20]

II. A European Case Law–Based Approach to Separated Children's Protection

Both international and domestic law fail to provide a common definition of the family link requirement to consider a child "duly" accompanied or "travelling with family". While General Comment no. 6 CRC refers to separated children as those accompanied by "other relatives", "other family members" different from parents, or the "legal or customary primary caregiver", EU law ignores the separated children concept and considers unaccompanied children any minor arriving without "an adult responsible for him or her whether by law or by the practice of the Member State concerned". As such, and according to the restrictive concept in EU legislation, any other family relation as regards the state of origin is not to be considered at all when defining the status of a minor. Nevertheless, European Courts have broadened the family bond concept. This should restrain the application of the unaccompanied minor regime, excluding certain situations in which we are before "separated children" cases and not truly unaccompanied minors.

1. *The Child's Right to a Family Depends on the Definition of Family*

The European law concept of family is quite restrictive and conventional[21] compared to the long tradition of a nonformal approach to family in ECtHR case law.[22] For the last fifteen years, the ECtHR has

[20] For an analysis of the concept of family in Article 17 ICCPR, see William Schabas and Manfred Nowak, *U. N. Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (Kehl, Germany: N. P. Engel, 2019), 475–84; and for its interpretation by human rights treaty bodies, mainly the Human Rights Committee (HRC) and the CRC, see Frances Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied* (n. p.: United Nations High Commissioner for Refugees, 2018), 16–18. For the concept of family in UNHCR practice, see *Ibid*., 34–36.

[21] *Ibid*., 19–20; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to the Rights of the Child* (Luxembourg: Publications Office of the European Union, 2022), 207–2012.

[22] As a starting point, see *Marckx v. Belgium*, App. No. 6833/74, paragraphs 30–34 (June 19, 1979), https://hudoc.echr.coe.int/eng?i=001-57534.

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recognized family ties protected by article 8 ECHR between minors and adults not sharing a legal or biological bond when the relationship is genuine.[23] This court, and in the same vein the CJEU,[24] considers that the family link protected by article 8 ECHR (or article 7 CFREU) is a de facto question rather than a legal one; authorities should thus verify the existence of a real relationship—one of dependence and care. The factors to be weighed up are the role played by the adults and the closeness, duration, and quality of the bond.[25] Once verified, the relationship must be respected and protected.[26] Nevertheless, no unique legal model for a family bond or relationship exists according to ECtHR case law, which allows states a wide margin of appreciation. Therefore, the case law of the international tribunals is of paramount importance to determine whether a specific tie is already considered protected by family boundaries.

Surrogate motherhood cases are among the new situations the ECtHR has analyzed whereby a minor may cross borders accompanied by an adult who is not legally or biologically related (as in the separated

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[23] *Wagner and J. M. W. L. v. Luxembourg*, App. No. 76240/01, paragraph 117 (June 28, 2007), https://hudoc.echr.coe.int/eng?i=001-81328; *Moretti and Benedetti v. Italy*, App. No. 16318/07, paragraph 48 (Apr. 27, 2010), http://hudoc.echr.coe.int/eng?i=001-98441; *Kopf and Liberda v. Austria*, App. No. 1598/06, paragraph 37 (Jan. 17, 2012), http://hudoc.echr.coe.int/eng?i=001-108686; *Paradiso e Campanelli v. Italia*, App. No. 25358/12, paragraphs 148–49 ([GC], January 24, 2017), http://hudoc.echr.coe.int/eng?i=001-170359; *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17, paragraph 59 (May 18, 2021), http://hudoc.echr.coe.int/eng?i=001-209992.

[24] Case C-129/18, *S. M. v. Entry Clearance Officer, UK Visa Section*, ECLI:EU:C:2019:248, paragraphs 69–70 (Mar. 26, 2019).

[25] *Wagner and J. M. W. L.*, paragraph 117; *Moretti and Benedetti*, paragraphs 49–50; *Kopf and Liberda*, paragraph 37; *Nazarenko v. Russia*, App. no. 38438/13, paragraph 58 (July 16, 2015), https://hudoc.echr.coe.int/eng?i=001-156084; *Paradiso e Campanelli*, paragraphs 149, 151, and 153–54. For an analysis, see Idoia Otaegui Aizpurúa, *La relevancia del Tribunal Europeo de Derechos Humanos en la protección de los derechos del menor* (Pamplona: Aranzadi-Thomson Reuters, 2017), 152–64.

[26] European Court of Human Rights (ECtHR), *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* (Strasbourg: Council of Europe/European Court of Human Rights, 2021), paragraph 266, and the case law referred therein. The CJEU [GC] stated in *S. M.* (2019) that "In the event that it is established (…) that the child placed under the Algerian kafala system and its guardians, who are citizens of the Union, are called to lead a genuine family life and that that child is dependent on its guardians, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and (…) in order to enable the child to (…) live with its guardians in their host Member State," paragraph 71. Otherwise, "those guardians are in fact prevented from living together in that Member State because one of them is required to remain, with the child, in that child's third country of origin in order to care for the child", paragraph 72.

minors concept mentioned above). First and foremost, the ECtHR has never been confronted with a claim introduced by a biological mother against any of the states involved (either the state where the surrogacy takes place or the state to where the intended parents fly with the child). Second, the ECtHR has always been concerned with the rights of the child born in a surrogacy relationship. Thus, the Court has underlined the need for protection of the child's right to an identity and a family, as per article 8 ECHR.

There are only two surrogate motherhood ECtHR cases where minors have been separated from their intended parents when arriving at their home country. In both cases, there were no biological bonds between the child and the intended parents and no legal bond according to the home state. In *Paradiso e Campanelli*, national authorities considered the child "in a state of abandonment for the purposes of the law" and gave him in adoption with a new identity, even though there were publicly commissioned reports of the strong commitment of the intended parents to the welfare of the child. This case was first decided by a chamber that found that there was a de facto family relationship between the intended parents and the child. The ECtHR Chamber (2015) found a violation because "national authorities had failed to strike the fair balance that should be maintained between the general interest and the private interests at stake", "without any specific assessment of the child's living conditions with the applicants, and of his best interests".[27] The Grand Chamber (2017) concluded otherwise, as it considered that the duration and quality of the bonds in the specific case did not amount to a de facto family bond. That said, the nonviolation judgment delivered by the Grand Chamber was based on a different appreciation of facts rather than on the legal approach to the de facto family bond.[28] That said, an evolution is shown in a second and more recent case, *Valdís Fjölnisdóttir and Others v. Iceland*. At arrival in Iceland, a child was considered a foreign national (the biological mother was a United States national) and an unaccompanied minor, despite traveling with the intended mothers. The minor was taken into child custody but later given in permanent foster care to one of the intended mothers (since the couple split and subsequent marriages were entered into by both intended mothers), granting equal access to the second mother. No legal adoption was allowed by Icelandic superior courts, and no legal family tie was recognized either, although nationality was granted to the child through

[27] *Paradiso e Campanelli*, paragraphs 75–87.

[28] *Ibid*., paragraph 157.

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an Act of Parliament. The ECtHR (2021) recognized the existence of de facto family bonds between the two intended mothers and the child and—despite no legal recognition of parenthood being allowed by Icelandic legislation or courts—it found no violation whatsoever because the family bond was neither impeded nor disturbed. Considering the wide margin of appreciation granted to the States Parties to the ECHR concerning surrogate motherhood, the nature or specifics of the applied legal regime—permanent foster care with one of the mothers and contact with the second—were not in conflict with article 8 of the convention. Should the child have been separated from both of them, the ECtHR might have delivered a violation judgment.

In the same vein, the CJEU has already accepted a broad understanding of the family bond for purposes of migration and family reunification in the territory of an EU Member State. In *S. M.*, the Grand Chamber (2019) defined a minor in kafala (an Algerian legal guardianship regime) not in the concept of "direct descendant", which would require a biological or adoptive relationship, but as one of the "other family members" of a citizen of the European Union. Notwithstanding the nuance, this legal definition acknowledges that, as one of the "other family members" dependent or member of the household of the EU citizen having the primary right of residence, a minor in a kafala relationship should be granted entry and residence rights so as to "maintain the unity of the family in a broader sense".[29] The ECtHR had previously taken position on the matter, and the CJEU endorsed it: the kafala regime establishes family bonds between a minor and a caring adult, secured by article 8 ECHR.[30] For the ECtHR, this article protects the minor in kafala against arbitrary action by public authorities and requires those authorities, where the existence of a family bond has been proved, to enable that bond to develop and to establish legal safeguards to make it possible for the child to integrate into their family.[31] No separation measures should be adopted in those cases, short of violating the minor's fundamental and legal rights.

Following the aforementioned jurisprudence on surrogate parenthood and kafala, it needs to be concluded that there are several ties that equate to family, either de facto relations or legal bonds in origin not recognized at the national

[29] Case C-129/18, *S. M. v. Entry Clearance Officer, UK Visa Section*, ECLI: EU: C: 2019: 248, paragraphs 69–70 (Mar. 26, 2019).

[30] *Affaire Chbihi Loudoudi and Others v. Belgium*, App. no. 52265/10, paragraph 78 (Dec. 16, 2014), https://hudoc.echr.coe.int/eng?i=001-149111.

[31] *Harroudj v. France*, App. No. 43631/09, paragraphs 40–44 (Oct. 4, 2012), https://hudoc.echr.coe.int/eng?i=001-113819; *Affaire Chbihi Loudoudi and Others*, paragraphs 88–89.

level in the destination country. Consequently, protection of these ties must be ensured, as they inform the right to a family according to article 7 CFREU and article 8 ECHR. Hence, separation of a child currently holding a family bond, whether de facto or not, could amount to a violation of the CFREU or ECHR.

2. *Separation Measures May Encroach on a Minor's Family Life*

The ECtHR has confronted different situations involving separated minors in the sense defined above,[32] concluding that there is a state obligation to carefully research the nature and scope of a family bond prior to any decision on expulsion (refoulement) or separation from the accompanying adult and to determine how those decisions would affect a child's right to family life. In *Mubilanzila Mayeka and Kaniki Mitunga* (2006), a five-year-old minor traveling accompanied by an uncle, both arriving from the Democratic Republic of Congo in transit to Canada, where her mother was awaiting a refugee status, was separated by Belgian authorities and deported back to the country of origin. The ECtHR found that Belgium had failed to protect the right to a family—both of the child and of the mother—under article 8 ECHR when preventing the child to continue the travel along with her uncle.[33] In *Bubullima* (2010), an uncle's minor, provided with a notarized power of attorney granting custody in a third country, was not allowed to claim a regularization permit for the child, as domestic norms only authorized legal or biological parents to act on behalf of a minor. This caused the minor to be separated and detained, awaiting expulsion. Unfortunately, the court was not to decide on the right to a family but on the right to challenge the lawfulness of the detention before a court. Therefore, it did not elaborate on the status of the minor as an unaccompanied or separated child.[34] In *Rahimi* (2011), a minor escaping Afghanistan was in a detention center in Lesbos, Greece, allegedly—according to local authorities—accompanied by an adult cousin, but alone

[32] Not surprisingly, these cases are included in the ECtHR Press Unit fact sheet on "Unaccompanied Migrant Minors Detention" (updated December 2021) and not in the one devoted to "Accompanied Migrant Minors Detention" (updated April 2022), as there is no detached "separated minor" category for the ECtHR Press Unit.

[33] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, paragraphs 75–86 (Oct. 12, 2006), https://hudoc.echr.coe.int/eng?i=001-77447. For this case, see Vicente A. Sanjurjo Rivo, "La protección del desamparo de una menor inmigrante no acompañada y su familia por el Tribunal Europeo de Derechos Humanos: el caso Mubilanzila Mayeka y Kaniki Mitunga contra Bélgica", *Estudios Penales y Criminológicos* 29 (2009): 491–507.

[34] *Bubullima v. Greece*, App. No. 41533/08 (Oct. 28, 2010), https://hudoc.echr.coe.int/eng?i=001-101345.

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by his own telling. Without an appointed tutor, he traveled to the mainland with the assistance of an NGO. The ECtHR accorded the utmost importance to elucidating his personal situation, as the obligations on the state would drastically differ whether he was an unaccompanied minor or not. The court, considering the facts of the case, decided that Greece had followed a random proceeding for deciding the existence of a family tie between the minor and the accompanying adult, acknowledging a violation of article 3 ECHR owing to the conditions to which the child was exposed.[35] This case underscores, on the one hand, that a bond other that parenthood (e.g., being a cousin) is admitted by the ECtHR for a minor not to be unaccompanied and, on the other, that the state is under the obligation to thoroughly investigate the nature of the bond between a minor and an accompanying adult before any measure is adopted. Finally, in *Moustahi* (2020), two brothers, both minors, traveled without the company of an adult family member in a *kwassa* (migrants' boat) along with other fifteen people from Comoros to Mayotte, a French overseas *département* in that archipelago, where their father resided. Upon arrival, the children were registered as traveling with a certain adult (a person by the name of "M. A.") and were consequently detained. The father, provided with the children's birth certificates, tried to get them released to no avail, and they were sent back to Comoros, where their grandmother took them in charge. The ECtHR found France in violation of both the parent's and the children's rights ex-article 8 ECHR, given that the authorities should have delved into the bonds between the children and M. A. in order to ascertain if a family tie truly existed.[36]

In sum, minors crossing borders with an adult who is not the legal parent or guardian or does not have a direct biological relationship are, nonetheless, entitled to the full respect of their right to family according to constant jurisprudence of the ECtHR and the CJEU.[37] That said, the right to family life may lead to maintaining the bond between the accompanying adult and the child, even when it is a temporary company aimed at restoring another family bond for the minor traveling between countries. Be that as it may, the case law underlines the fundamental obligation of national authorities to thoroughly examine the bonds between a minor and an

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[35] *Rahimi v. Greece*, App. No. 8687/08, paragraphs 63 and 67–73 (Apr. 5, 2011), https://hudoc.echr.coe.int/eng?i=001-104366.

[36] *Moustahi v. France*, App. No. 9347/14, paragraphs 111–14 (June 25, 2020), https://hudoc.echr.coe.int/eng?i=001-203163.

[37] Other international human rights bodies, such as the HRC, have also adopted and extended the concept of family. See Nicholson, *The Right to Family Life and Family Unity of Refugees*.

accompanying adult before any separation, internment, or deportation measure is undertaken. The compatibility of such separation measures with the ECHR is not excluded, although this might depend on the specificities addressed in the following section.

3. *A Public Interest Can Be at Stake: Fighting against Human Trafficking and Abuses*

The right to family life is not an absolute one. Restrictions are accepted both at the regional level, in ECHR and EU law, and at the universal level, as determined by the International Covenant on Civil and Political Rights (ICCPR). Such restrictions must satisfy a set of requirements—namely, they must serve a public interest and be provided for by the law, resulting in a necessary and proportionate restriction in the circumstances of the case to attain said goal. It is not the purpose of this paper to elaborate on these elements, which have been widely addressed in scholarly literature. Attention will only be given to the specifics of taking measures in the public interest as justification for restrictions on the right to family life of a separated minor.

According to article 8.2 ECHR, interference with the exercise of the right to respect for family life must be based on

> the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[38]

Prevention of crime is the public interest of choice when it comes to detention and migration policies concerning minors, whether to hinder a career into crime of unaccompanied minors arriving illegally in a country or to fight against human trafficking networks in which a minor might be caught.[39]

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[38] Article 17 ICCPR only states a general prohibition of "arbitrary or unlawful interference with his privacy, family" without clarifying the specific public interest under which a restriction could be implemented. For clarifications on the interpretative problems this wording brings about, see Schabas and Nowak, *U. N. Covenant on Civil and Political Rights*, 462–66.

[39] An analysis centered on the legal regime of detention of minors is a complementary approach to the family rights–based analysis chosen for this paper. See, in that same vein, Joanna Markiewicz-Stanny, "The Rights of the Child and a Problem of Immigration Detention", *Polish Review of International and European Law* 9, no. 2 (2020): 83–106. This approach becomes relevant whenever a separated minor's family relation with the accompanying adult is not recognized and the child is detained, as in the ECtHR case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*.

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Prevention probably represents the main goal for restrictive measures undertaken on unaccompanied and separated minors, which encompass several crimes as well as all modern forms of slavery (e.g., sexual exploitation, domestic servitude, forced labor, recruitment of soldier children, etc.) but could also include forced adoptions, forced marriage of underage girls, or organ trafficking.[40] It truly constitutes an objective threat to migrant minors, especially those traveling alone, as stated in General Comment no. 6 CRC (2005, paragraphs 50–60); Joint General Comment no. 3 CMW, General Comment no. 22 CRC (2017, paragraphs 40–42); Joint General Comment no. 4 CMW, General Comment no. 23 CRC (2017, paragraphs 39–40); and Joint Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, and the Special Rapporteur on Trafficking in Persons, Especially Women and Children.[41]

EU migration policy documents and legislation underline a risk approach to heavy human trafficking and other crimes when addressing the situation of migrant children, especially unaccompanied ones,[42] as separated minors are not generally referred to on their own. Proposals for a new legislative framework on migration and asylum (see section IV) maintain this very approach,[43] as submitted by the European Commission in

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[40] For a definition of human trafficking and discussions on the restricted versus broader concept encompassing a multiplicity of crimes, see Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2012); Waldimeiry Correa da Silva, *Regime Internacional de Enfrentamento ao Tráfico de Pessoas: avanços e desafios para a proteção dos direitos humanos* (Rio de Janeiro: Lumen Juris, 2018). Specifically on the concept of child trafficking, see Helmut Sax, "Child Trafficking: A Call for Rights-Based Integrated Approaches", in *Routledge Handbook of Human Trafficking*, ed., Ryszard Piotrowicz, Conny Rijken, and Baerbel Heide Uhl (New York: Routledge, 2017), 251–60; Kathryn E. Van Doore, *Orphanage Trafficking in International Law* (Cambridge: Cambridge University Press, 2022).

[41] U.N. Doc. A/72/164 (July 18, 2017), paragraphs 17–45.

[42] For all, see COM (2017) 211 final (Apr. 12, 2017); European Parliament resolution on the protection of children in migration, May 3, 2018, 2020 O.J. (C 41/41), paragraph J.3; and the very recent *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum*, COM (2021) 590 final (Sept. 29, 2021).

[43] *Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, COM (2020) 610 final (Sept. 23, 2020). Article 13.4 (c) includes "safety and security considerations, in particular where there is a risk of the minor being a victim of any form of violence and exploitation, including trafficking in human beings" as a factor to be pondered for the assessment of the best interests of the child.

the New Pact for Migration and Asylum 2020.[44] The risks of trafficking along migration routes are high, notably for women and girls, who are exposed to becoming victims of trafficking for sexual exploitation or other forms of gender-based violence. Trafficking networks abuse asylum procedures and use reception centers to identify potential victims.[45] The early identification of potential non-EU victims will be a specific theme of the European Commission's forthcoming approach toward the eradication of trafficking in human beings, as set out in the recent Security Union Strategy.[46]

Nevertheless, neither the general fear of trafficking mafias nor the overall region/country information—i.e., a general prevention goal—can justify a restriction of individual rights (be it the right to family life or the right to security and freedom) as a routine and rigid scheme, even in the case of separated children—i.e., minors accompanied by an adult with whom they share no familial bond. The Inter-American Court of Human Rights set it straight in its advisory opinion on the rights and guarantees of children in the context of migration and/or in need of international protection:

> This does not mean, in any way, that in all cases in which a child is traveling independently and is accompanied by an adult who is not a relative, the corresponding authorities should automatically consider this to be a case of trafficking and return the child to her or his country of origin. In this regard, the strictest diligence is required of the border authorities to identify the different situations that require them to intervene in a timely, adequate and fair manner.[47]

Human rights instruments require, along with a general public interest justifying the nature and scope of the measure in abstract terms, a case-by-

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[44] *Communication of the Commission on a New Pact on Migration and Asylum*, COM (2020) 609 final (Sept. 23, 2020), 2.4 in fine. The new approach should strengthen the current rules of Council Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council framework decision 2002/629/JHA, 2011 O.J. (L 101), 1–11 (EU). For unaccompanied children, see Preamble, paragraph 23, and article 16 ("Assistance, Support and Protection for Unaccompanied Child Victims of Trafficking in Human Beings").

[45] European Union Agency for Law Enforcement Cooperation (Europol), *European Migrant Smuggling Centre 4th Annual Report: 2020* (Luxembourg: Publications Office of the European Union, 2020).

[46] *Communication from the Commission on the EU Security Union Strategy*, COM (2020) 605 final (July 24, 2020).

[47] Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (Aug. 19, 2014), paragraph 93.

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case examination of the existence of the threat and the necessity and proportionality of the measure to protect a minor against that risk, assuming this measure is set out by the law establishing limits to the discretional powers of the state at both administrative and judicial levels.[48]

In that vein, the ECtHR has shown a very restrictive approach to the limitation of the right to family based on a "pressing social need" (e.g., a child's separation from their family—once proved that a legally or de facto family link exists—in a migration context). The necessity requirement (restriction based on a public interest) does not accommodate other close concepts such as "reasonable", "useful", or "desirable" restrictions. The separation measure as a legal restriction becomes admissible only when required by a "pressing social need" and if proportionate to the aim pursued. Any restrictive measure at the national level must be subject to domestic judicial review, which should account for individual circumstances and risk assessment.[49] Although a margin of appreciation is granted to the state, the ECtHR retains the right of review over the analyses made by the national authorities.

Surprisingly, there is no extensive case law on "trafficking in human beings" as a legitimizing basis for restrictions with regard to minors in the HUDOC data base,[50] while the ECtHR has found that a mother being a victim of trafficking is not sufficient reason per se to sever or impede a familial bond with her children, much less to give them up for adoption.[51] When examining the specific case law concerning separated children, both the CJEU and the ECtHR have seldom been confronted with these public policy restrictions to the right to family life. The CJEU, in *S. M.* (GC 2019), stated that "it is also necessary to take account of possible tangible and personal risks that the child concerned will be the victim of abuse, exploitation or trafficking".[52] This pressing social need has been invoked by the parties before the ECtHR in *Rahimi*,[53] although this court has not taken

[48] On the requisite "in accordance with the law" for restrictions on the right to family life, see ECtHR, *Guide on Article 8 of the European Convention on Human Rights*, paragraphs 1–21, and the case law cited therein.

[49] *Ibid*., paragraphs 28–30.

[50] A search for "trafficking in human beings" showed fifty-three judgments, the oldest being *Siliadin v. France*, App. No. 73316/01 (July 26. 2005), https://hudoc.echr.coe.int/eng?i=001-69891. There were seventy-five results for "human trafficking", with the oldest case being *Ramanauskas v Lithuania*, App. No. 74420/01 ([GC], Feb. 5, 2008), https://hudoc.echr.coe.int/fre?i=001-84935.

[51] *Affaire A. I. c. Italie*, App. No. 70896/17 (April 1, 2021), https://hudoc.echr.coe.int/eng?i=001-208880.

[52] Case C-129/18, *S. M. v. Entry Clearance Officer, UK Visa Section*, ECLI:EU:C:2019:248, paragraph 70 (Mar. 26. 2019).

[53] *Rahimi v. Greece*, paragraph 58.

any consideration into the argument. In *Mubilanzila*, instead, the ECtHR asserted that the detention of the minor could hypothetically be justified based on "the interests of national security or the economic well-being of the country or, just as equally, for the prevention of disorder or crime", concluding however that this very detention provoked a violation of the minor's right to family life:

> The effect of the second applicant's detention was to separate her from the member of her family in whose care she had been placed and who was responsible for her welfare, with the result that she became an unaccompanied foreign minor, a category in respect of which there was a legal void at the time. Her detention significantly delayed the applicants' reunification. The Court further notes that, far from assisting her reunification with her mother, the authorities' actions in fact hindered it.[54]

In summary, European Courts have found violations of a minor's right to a family in situations where family reunification was impeded either by not recognizing a non-European legal family bond (kafala) or by not respecting the accompanying adult relationship (extended family) as a caretaker in transit while the child was being safely transferred to or reunited with their legal or biological family, and whereby a separation measure based on a public interest—such as fighting organized crime—did not prove indispensable in the circumstances of the specific case.

III. The Best Interests of the Child: A Solomon Sword between General and Individual Protection of Separated Minors for Enhanced Compliance

The cornerstone of the 1989 United Nations Convention on the Rights of the Child (UNCRC) regarding children's protection is the "best interests of the child" concept, embodied in article 3.1:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[55]

[54] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, paragraph 82.

[55] United Nations, *Treaty Series*, vol. 1577 (New York: United Nations, 1999), 3.

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Both the CRC[56] and legal scholars[57] have stated that the "best interests" clause is both a principle for children's rights interpretation, from which new and specific rights arise, and a procedural rule.[58] It is not an abstract notion, yet it gains significance when applied to the specific circumstances of a case.[59]

Although the "best interests" principle is not present in the ECHR, given that minors' rights are not individualized and the convention dates back to 1950,[60] it has been gaining ground in ECtHR case law since the 1990s[61] as a criterion to be taken into account when pondering the need for separation against conflicting rights[62] or when assessing the need in a democratic society for a measure such as the expulsion of a minor.[63] On the other hand, the CFREU devotes article 24 to the rights of the child, building on the best interests of the child as a "primary consideration" in "all actions relating to children, whether taken by public authorities or private institutions". Accordingly, EU secondary law includes specific and direct references to the best interests of the child—inspired by the 1989 UNCRC—to be considered when applying any measure concerning minors.

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[56] U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint General Comment no. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, November 16, 2017, CMW/C/GC/3-CRC/C/GC/22, paragraph 32.f.

[57] Legal literature on the concept is vast. Among Spanish scholars, attention must be paid to Jorge Cardona Llorens, former member of the CRC (2011–2018): "La Convención sobre los Derechos del Niño: significado, alcance y nuevos retos", *Educatio Siglo XXI* 30, no. 2 (2012): 47–68, at 48, 53–54; and "El interés superior del niño a los 4 años de la aprobación de la observación general 14 del comité de derechos del niño", in *El interés superior del niño en la jurisprudencia internacional, comparada y española*, ed. Susana Sanz Caballero (Navarra: Aranzadi Thomson Reuters, 2017), 99–110.

[58] U.N. Committee on the Rights of the Child (CRC), General Comment no. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (article 3, paragraph 1), U.N. Doc. CRC/C/GC/14 (May 29, 2013).

[59] G.A. Res. 73/195 (Jan. 11, 2019), paragraph 15 (h).

[60] The only mention of minors' rights in the European Convention on Human Rights appears in article 5.1.d, on special rules concerning a minor's detention. Later, article 5 of the 1984 Additional Protocol 7 mentions children's interests when addressing equality between spouses.

[61] The term "best interests of the child" can be found in previous cases but only as a reference to national legislation or arguments put forward by the parties. The first mention in the European Court of Human Rights' reasoning is found in *Hokkanen v. Finland*, App. no. 19823/92, paragraph 58 (Sept. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57911.

[62] *Johansen v. Norway*, App. no. 17383/90, paragraph 78 (Aug. 7, 1996), https://hudoc.echr.coe.int/eng?i=001-58059.

[63] *Maslov v. Austria*, App. No. 1638/03, paragraph 82 (June 23, 2008), https://hudoc.echr.coe.int/eng?i=001-87156.

Nevertheless, this appears to be a time- and vulnerability-sensitive approach, as we barely find a general reference to the concept in the preamble of older and general migratory rules,[64] whereas more modern and specific norms defining a protective status include detailed specifications on the best interests of the minor.[65] At a political level, the "best interests of the child" approach is present in policy documents, although pointing at a general vulnerability approach concerning not only violence, exploitation, and trafficking but also the use of children by parents or other holders of parental responsibility to obtain the possibility of legal entry to the EU.[66]

The very essence of the concept of the best interests of the child lies on the question of determining its concrete meaning in a given case, so as to ponder a minor's right to a family against the need of protection in a risky context. A triple level must be considered when defining and applying a methodology to assess the "best interests" of a certain child, as proposed by Krutzinna: a) the universal child, b) the categorical child, and c) the individual child. Each of these perspectives contributes in a different way to draw the protective conditions.[67] Nevertheless, individualization must always reach the individual "best interest": authorities should not rely on a general best interest approach when adopting specific decisions, but neither on a category-defined one. These should not be based on a general concept or perception of what must be best for a minor (the universal child), a migrant child, or even a separated migrant minor (the categorical child); rather, these decisions should be based on a minor's needs (the individual child) to avoid presumptions about a child's typical needs or assumptions about generally

[64] See preamble to Council Directive 2003/86, 2003 O.J. (L 251/12), 12–18 (EC), on the right to family reunification.

[65] See Council Directive 2011/95, 2011 O.J. (L 337/9) (EU), paragraphs 18, 19, 27, and 38 (Preamble), as well as articles 20 (General Rules) and 31 (Unaccompanied Minors); see also Council Directive 2013/33, 2013 O.J. (L 180/96) (EU), paragraphs 9 and 22 (Preamble) and articles 2.(j) (Definitions), 11 (Detention of Vulnerable Persons and of Applicants with Special Reception Needs), 23 (Minors), and 24 (Unaccompanied Minors); and paragraphs 13, 16, 24, and 35 of the Preamble, along with articles 2.(k), 6 (Guarantees for Minors), 8 (Minors), and 20 (Start of Procedure) in Regulation 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, 2013 O.J. (L 180/31) (EU).

[66] Council of the European Union, Conclusions of the Council of the European Union and the Representatives of the Governments of the Member States on the Protection of Children in Migration, Doc. no. 10085/17 (June 8, 2017).

[67] Jenny Krutzinna, "Who is 'The Child'? Best Interests and Individuality of Children in Discretionary Decision-Making", *International Journal of Children's Rights* 30 (2022): 120–45, proposing a "Model of Individual Child (MIC)" as "a tool for discretionary decision-making".

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perceived threatening situations for migrant children. The European Parliament has expressly acknowledged the need for individualization in its 2018 resolution on the protection of children in migration.[68]

Consequently, the separation decision should be weighed against the eventual risk arising out of organized crime—human trafficking or other—in an individualized manner, too. No general measure is acceptable without a risk assessment. Both the risk and the best interests analysis must be individualized for the minor affected by a potential separation measure.[69] This idea is not clearly underlined by scholars when addressing the general obligations of the state to prevent human trafficking, as they tend to study "prevention through addressing vulnerability" as a general category, describing factors to be taken into account rather than individual situations.[70]

While the determination is undertaken, a separation measure from the accompanying adult is to be considered exceptional, as declared by the ECtHR (see section II.2 above) and the CRC.[71] Nevertheless, accompanying measures such as observation through public services—either in public premises or through institutions (e.g., assisted housing with the help of collaborative NGOs)—should be in place.[72] These very measures may contribute to clarifying the case, observing the relationship between the child and the accompanying adult while keeping the minor protected under control and surveillance. Yet no separation or internment measure should be automatically adopted without prior risk determination and assessment unless there is an imminent or actual danger of being held in a human trafficking network or any other form of criminal activity.

In any event, neither the child's right to be heard (article 12, 1989 UNCRC) nor respect for the non-refoulement principle should be forgotten.[73] The best interests of the child require an individualized analysis of the relationship between the accompanying adult and the minor in order to determine whether it amounts to a de facto family bond, which immediately engages the minor's right to family life, or whether the adult is a temporary guardian transferring the child to a family nucleus, guaranteeing

[68] European Parliament resolution on the protection of children in migration, May 3, 2018, 2020 O.J. (C 41/41), paragraph J.3.

[69] Clearly established in U.N. Doc. A/72/164 (July 18, 2017), paragraphs 80 (b) and 81 (a).

[70] For all, see Gallagher, *International Law of Human Trafficking*, 415–32, and specifically on children, 427–30.

[71] U.N. Committee on the Rights of the Child (CRC), General Comment no. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (article 3, paragraph 1), paragraphs 58–66, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

[72] This idea is supported, in the specific context of human trafficking cases, in U.N. Doc. A/72/164 (July 18, 2017), paragraph 81 (e).

[73] U.N. Doc. CRC/GC/2005/6, paragraph 26.

per se the access of the minor to their family as part of the minor's right to family life according to the aforementioned case law. In the latter case specifically, we should stress the need for the EU Member State in which the child arrives to facilitate transit to the country where a family member is present, provided that it is in the best interest of the minor, *mutatis mutandis* what it is already foreseen for asylum seekers.[74]

Methodologies for risk assessment to identify the best interests of a child have been developed both at the universal level—by the UNHCR, with a periodic review last conducted in 2021[75]—and at EU level—by the former European Asylum Support Office (EASO),[76] replaced since February 2022 by the European Union Agency for Asylum (EUAA).[77] Interestingly, the International Association of Refugee and Migration Judges[78] has developed, under an EASO contract, a judicial analysis on vulnerability indicators. The proposed analysis is aimed at making "judicial training materials" available to courts and tribunals, thus facilitating "the involvement of judicial and other experts in a manner that respected the independence of the judiciary".[79] Yet involvement of special prosecutors for issues concerning minors and migration law at the national level should also be stressed.[80] To date, a 2011 collection of best practices has been published by the EU Agency for Fundamental Rights (FRA).[81] It is time to

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[74] See articles 8.1 and 2, Regulation 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, 2013 O.J. (L 180/31) (EU).

[75] UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*.

[76] European Asylum Support Office (EASO), *Practical Guide on the Best Interests of the Child in Asylum Procedures* (Luxembourg: Publications Office of the European Union, 2019).

[77] Council Regulation 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation No 439/2010, 2021 O.J. (L 468/1) (EU).

[78] This non-for-profit organization is a worldwide association seeking "to foster recognition that protection from persecution on account of race, religion, nationality, membership in a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law". It is based in the Netherlands and works through a network of regional chapters. They publish a series of newsletters concerning EU migration, asylum, free movement, and CJEU cases where case law is systematized and updated regularly. For more information, see https://www.iarmj.org/.

[79] IARMJ-Europe, *Judicial Analysis Vulnerability in the Context of Applications for International Protection* (Luxembourg: Publications Office of the European Union, 2021).

[80] Spanish prosecution covers a variety of special areas, among them minors ("Menores") and migration issues ("Extranjería").

[81] European Union Agency for Fundamental Rights (FRA), *Separated, Asylum-Seeking Children in European Union Member States* and *Current Migration Situation in the EU*.

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revisit the approach and practice of EU MMSS along with their regional and local authorities so as to develop a model based on the methodologies proposed by the UNHCR and the EUAA and the indicators developed for judicial authorities.

IV. Filling a Void: Proposals Rooted in the EU Perception of Migration and Asylum

Since 2017, awareness has been raised among EU institutions about the priority of "protecting all children in migration, regardless of status and at all stages of migration".[82] The 2017 European Commission communication on the protection of children in migration has been to date and by far the only policy document addressing the situation of separated minors, including references to the definition in General Comment no. 6 CRC and the UNHCR guidelines on best interests to individualize migration decisions.

Nevertheless, opportunity for advancement in the normative protection of separated minors is also at hand. The EU is gaining momentum, as proposals for a new migratory compact in EU legislation are being discussed based on the New Pact for Migration and Asylum 2020 and the previous 2016 and 2018 proposals to reform the Common European Asylum System. The new 2020 compact announced by the President of the European Commission Ursula von der Leyen acknowledges the special vulnerability of migrant minors, calling for the best interests of the child and the right to be heard as primary considerations, specifically stressing the need for a more diligent appointment of legal representatives for migrant children (unaccompanied or separated).[83] The new approach focuses on defining a comprehensive framework for all forms of migration, despite the cause and migratory status (ordinary migration versus qualified migration for a protective status), as can be seen in the EU's proposal on asylum and migration management. Therefore, the new framework offers a unique opportunity for including the separated minors' concept and a proposal for a differentiated regime in all migrant contexts.[84]

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[82] COM (2017) 211 final (Apr. 12, 2017).

[83] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM (2020) 609 final (Sept. 23, 2020), paragraph 2.4.

[84] *Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, COM (2020) 610 final (Sept. 23, 2020).

The 2020 New Pact approach embodies a human rights–oriented perspective, which could help and serve our concept, although it fails to address or reference the situation of separated minors. This very avenue is generally followed in the new package of European Commission proposals. In that vein, the *Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders* avoids treating specifically any situation involving unaccompanied or separated minors. It only indirectly addresses this issue under the heading of vulnerabilities.[85]

In a more child-friendly perspective, the *Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management* sets out a number of different elements to be considered to define the best interests of a child under the heading of specific guarantees for minors. This proposal includes specific rules for determining the Member State responsible for an application of protection, entrusting the European Commission with the task of defining "the criteria for establishing the existence of proven family links".[86] If and when implemented, this would constitute a rare opportunity to reframe the family bonds protected, as per the contemporary approach of the ECtHR and the CJEU, and therefore set a legal basis for a specific regime for separated minors.

For its part, the *Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and* Force Majeure *in the Field of Migration and Asylum* excludes unaccompanied children and children under twelve years of age traveling together with their families from being subject to the border procedure and confinement unless there are security concerns, yet no mention is made of separated minors. This undifferentiated approach, however, should be read as encompassing separated children also, clearly excluding them from detention.[87] This represents another opportunity to clarify the specific treatment of children in this situation and in similar contexts, like the current Ukrainian displacements, where a significant number of separated minors have crossed borders seeking refuge and asylum.

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[85] *Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817*, COM (2020) 612 final (Sept. 23, 2020), paragraphs 21, 22, 26, and 27 (Preamble) and articles 6.7 and 9.3.

[86] COM (2020) 610 final (Sept. 23, 2020), articles 13 and 15.

[87] *Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and* Force Majeure *in the Field of Migration and Asylum*, COM (2020) 613 final (Sept. 23, 2020), 12.

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Von der Leyen's New Pact specifically calls for a reinforcement of the European Network on Guardianship, announced in a 2017 communication.[88] Created in 2019, the network is based on previous project-driven experiences and represents a public-private partnership that aims at a stronger role in coordination, cooperation, and capacity-building for guardians. [89] In our opinion, it should become a focal point for analysis and prospective policy development for the specificities of separated children. As such, it must also constitute a solid stakeholder to promote normative and operational changes at both EU and national levels. Yet no mention of the Guardianship Network appears in the new proposals package.

The EU has apparently closed its eyes to the separated minors' situation in the past and appears not to be advancing any further on the new legislative package. Nevertheless, there are some glimmers of hope in EU practice, as time has come to rebuild the European Commission's sensitivity toward this category and legal concept. Already expressed in its communication on "the protection of children in migration", it has since highlighted the efforts to build up best practices examples (FRA) and methodologies both for risk assessment and individualization of the best interests of the child (EASO—now EUAA—along with the UNHCR).

Even though Council Directive 2001/55/EC on temporary protection—recently applied for the first time—does not include the separated minors category and refers only to unaccompanied children in article 2 (f), it leaves a door open to deal with nonbiological, nonstandard legal family bonds when offering such a temporary protection. Specifically, article 15 considers previous existing family bonds in the country of origin for family reunification—there is no mention of such in other EU migration law instruments—on the basis of having lived together as part of the family unit at the time of the events leading up to the mass influx or else being dependent on the family member already settled in an EU country.[90]

Concerns have been raised as a result of the most recent developments in 2022—i.e., the mass exodus of Ukrainian citizens in the context of the

[88] See COM (2017) 211 final (Apr. 12, 2017), recommending a comprehensive set of measures to strengthen their protection at every step of the migratory process.

[89] The European Network on Guardianship (https://www.egnetwork.eu) brings together guardianship authorities and agencies, (local) authorities, and international and nongovernmental organizations in order to promote good guardianship services for unaccompanied and separated children in the EU. As of June 2022, no Spanish public body or private stakeholder is a member.

[90] Council Directive 2001/55 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 O.J. (L 212), 12–23 (EC).

Russian invasion and subsequent war. This has shown an influx of children—many of them unaccompanied minors, and many more separated—traveling in the company of adult women who are not their biological family or legal guardians, but rather extended family, neighbors, parents' friends, and so on.

Operationally and at a domestic level, this current "Ukrainian diaspora" has shed light on the specifics of the category. For what it is a domestic experience in Spain, the Special Prosecutor for Minors has—as of June 2022 and for the very first time—issued instructions concerning the fine points and differentiated treatment of unaccompanied minors and separated children in order to develop special measures for risk assessment, opening up to cooperation with a network of specialized NGOs for the transfer, reception, observation, and assessment of separated minors.[91]

It is within this evolving context that some propositions are to be advanced to cope with the bafflement of European and domestic legislation—current and forthcoming—toward the specifics of the separated minors' living and legal situation.[92]

On a normative level, a triple proviso could be specified in EU migration rules, building on the special situation of separated minors. First, the category of separated minors should be made explicit in EU law and, accordingly, in national legislation, properly defined and clarified, as a differentiated situation from the unaccompanied minor status and regime. Second, the broader concept of family bonds as per jurisprudential developments should be expressly acknowledged in legislation. In this regard, it should not be limited—as it is now—to the sole legal or customary bonds in EU MMSS or to a discretionary extension by the state. It should rather include other ties as prescribed or recognized in the minor's country of origin or transit states by default, or else based in the case law criteria of "dependance and care" throughout a sufficient period of time. Third, in cases of intended reunification either in the context of general migration or protection seekers, arrival Member State obligations should not depend on the legality of the adult family member status in the destination Member State. The best interests of the child may be in opposition to a situation in which the separated minor is considered unaccompanied and, consequently, taken into the state care system or expelled because of the irregular migration status of the adult in the same or another EU Member State,

[91] There is no public record of the internal instruction yet, although it has been mentioned and detailed in public appearances by the Special Prosecutor for Minors himself in June 2022.

[92] For all, see the specificities of the invisibility of separated minors in Punto Nacional de Contacto de la Red Europea de Migración en España, *Estudio sobre el régimen de los menores extranjeros no acompañados tras la determinación de su estatus: España 2017* (Madrid: Red Europea de Migración, 2017).

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despite that very family member being willing and in a position to take care of them. The right to family life, identity, and culture of the separated child must prevail, unless their best interests reveal otherwise.

On an operative level, thorough training on the specifics of this category should be compulsory for migration officers either in police corps or in competent national, regional, and local administrations. Such training should include continuous updating for new jurisprudential developments concerning interpretation of minors' rights and state obligations in a migratory context. A clear and straightforward protocol should be defined at the competent domestic level to assess human trafficking risks and other pernicious threats. Such a protocol must avoid automatic responses, such as separation, unless harmful risk for the minor is proved, for which careful monitoring of the relationship between the separated minor and the accompanying adult should be implemented. This would require a stronger and modeled cooperation between the administrative levels involved—both vertically and horizontally—for disparity of criteria to be avoided in the consecutive steps of the assessment process and the adoption of individualized measures. Finally, a data collection mechanism at national, regional, or local levels through distinct and compulsory registration of separated minors, along with a best practices directory, should be introduced, as neither of them are currently being singularized in migration statistics. Their existence would constitute an invaluable tool to be used in self-directed learning for staff, state transparency and accountability, academic research, and prospective policy analysis.

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"Crisis Rhetoric" and Derogations from the AFSJ: Is EU Asylum Policy Discriminatory or does its Implementation Reflect the Rule of Law?

La "retórica de la crisis" y las derogaciones al ELSJ: ¿Es la política de asilo de la UE discriminatoria o su aplicación refleja el Estado de Derecho?

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Summary: I. Introduction.—II. Securitization of Migration and the 'Crisis Narrative'.—III. Comparison of Crisis Rhetoric. 1. The European Migration Crisis 2015/16: "What if they are terrorists?". 2. The Belarus Border Crisis 2021/22: "This is a new form of war, a hybrid attack!". 3. The Ukraine Refugee Crisis 2022 and ongoing: "We have to protect our European family!".—IV. Parallels in Law. 1. The European Migration Crisis 2015/16: Collapse of the CEAS. 2. The Belarus Border Crisis 2021/22: Enhanced fortification at the Border. 3. The Ukraine Refugee Crisis 2022 and ongoing: A Temporary Protection Regime.—V. Conclusions: Reflections on Effects and Consequences.

Abstract: This paper analyses the language of EU leaders and its influence on the implementation of EU asylum law by triggering derogations, exceptions and amendments. It compares this process with regards to the 2015 refugee crisis, the Belarus border crisis and the current Ukrainian crisis to portray how the reaction to similar facts differs and, hence, to show how EU asylum policy suffers from a lack of rule of law. As the crisis in Ukraine unfolds, one can observe how strongly the narrative of EU leaders differs regarding these refugees compared to those from, e.g., Syria and Afghanistan in previous years. It shows a "U-turn" of the EU's agenda since 2015. Hence, it has become clear that the problem lies less in sufficient contingencies for a sudden influx, but rather a feeling – or lack – of solidarity. From a legal perspective, there is no distinction between the responsibility for asylum applicants based on their nationality. To the contrary, refugee protection builds on the prohibition of discrimination. This has potentially negative implications for the rule of law in the EU. Hence, this paper investigates

how EU leaders "talk" their way into applying or not applying EU law and even create EU law at their will simply by describing the arrivals as a security threat, a "hybrid attack" or instead as neighbors in need, as "family".

Keywords: Crisis, refugees, CEAS, enforcement, discrimination

Resumen: *Este artículo analiza el lenguaje de los líderes de la UE y su influencia en la aplicación de la legislación de la UE en materia de asilo al provocar derogaciones, excepciones y modificaciones. Compara este proceso con respecto a la crisis de los refugiados de 2015, la crisis fronteriza de Bielorrusia y la actual crisis ucraniana para retratar cómo difiere la reacción ante hechos similares y, por tanto, para mostrar cómo la política de asilo de la UE adolece de una falta de Estado de Derecho. A medida que se desarrolla la crisis de Ucrania, se puede observar cómo difiere la narrativa de los líderes de la UE con respecto a estos refugiados en comparación con los de, por ejemplo, Siria y Afganistán en años anteriores. Muestra un «giro de 180 grados» de la agenda de la UE desde 2015. Por lo tanto, ha quedado claro que el problema no radica tanto en las contingencias suficientes para una afluencia repentina, sino en el sentimiento —o la falta— de solidaridad. Desde el punto de vista jurídico, no hay distinción entre la responsabilidad de los solicitantes de asilo en función de su nacionalidad. Por el contrario, la protección de los refugiados se basa en la prohibición de la discriminación. Esto tiene implicaciones potencialmente negativas para el Estado de Derecho en la UE. Por lo tanto, este documento investiga cómo los líderes de la UE «hablan» para aplicar o no aplicar el derecho de la UE e incluso crean el derecho de la UE a su antojo simplemente describiendo a los que llegan como una amenaza para la seguridad, un «ataque híbrido» o, en cambio, como vecinos necesitados, como «familia».*

Palabras clave: *Crisis, retórica, asilo, migración, SECA, aplicación, discriminación*

I. **Introduction**

If there is anything the aftermath of the 2015 'refugee crisis' has shown, it is probably that mass influx situations are by no means as exceptional as the European public discourse portrayed them back then. Although the number of arrivals to the European Union (EU) had dropped by spring 2016[1], the situation remained fragile. In 2020, Turkey was threatening to break their deal with the EU and to stop preventing refugees from arriving to Greece[2]. In 2021, the international forces withdrew from Afghanistan causing applications of Afghans to rise again and Belarus purposefully brought refugees to the Polish, Lithuanian and Latvian borders[3]. Finally, in 2022, Russia invaded Ukraine and caused another massive displacement crisis[4].

How we talk about these different incidents with different causes and characteristics in Europe seems to vary. And this matters, also from a legal perspective, because the respective semantics either cause or at least accompany different legal responses. Especially, the unfolding of the Ukrainian crisis pointed out, how strongly the storytelling of EU leaders differs regarding these refugees compared to those from, e.g., Syria and Afghanistan in previous years. The contrast is particularly obvious in view of the recent 'emergency' at the Belarusian border. In the latter case, the long emerging trend of securitization of asylum issues hand in hand with the fortification of the EU external borders was continued. In March 2022, the concerns of many EU Member States (Member States), particularly those who have been most vocal before, about their lack of resources to receive refugees seemed to have vanished in the face of the war in Ukraine. The EU has even found consensus to activate the Tempo-

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[1] "Annual Asylum Statistics," EUROSTAT Statistics Explained, March 18, 2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Annual_asylum_statistics.

[2] Achilles Skordas, "The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law (Part I)," *EU Immigration and Asylum Law and Policy* (blog), May 5, 2020, http://eumigrationlawblog.eu/the-twenty-day-greek-turkish-border-crisis-and-beyond-geopolitics-of-migration-and-asylum-law-part-i/.

[3] "Broad Increase in Applications for Asylum, Including by Afghans," Text, EUROPEAN ASYLUM SUPPORT OFFICE, August 18, 2021, https://www.easo.europa.eu/news-events/broad-increase-applications-asylum-including-afghans; Madeline Roache, "Death at the EU Border: Migrants Pay the Price of Belarus's 'Hybrid Warfare,'" *OpenDemocracy*, November 15, 2021, https://www.opendemocracy.net/en/odr/death-at-the-eu-border-migrants-pay-the-price-of-belaruss-hybrid-warfare/.

[4] "Timeline: The Events Leading up to Russia's Invasion of Ukraine," *Reuters*, March 1, 2022, sec. Europe, https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/.

rary Protection Directive (TPD)[5], which had been declared dead letter before and was supposed to be replaced under the Commissions' proposals for a "New Pact on Migration and Asylum"[6].

This constitutes a U-turn of the EU's agenda since 2015. Hence, it has become clear that the problem lies less in sufficient contingencies for a sudden large-scale influx, but rather a feeling – or absence – of solidarity[7]. From a legal perspective, there is no distinction between the responsibility for asylum applicants based on their nationality. To the contrary, refugee protection builds on the prohibition of discrimination[8].

This has potentially negative implications for the rule of law in the EU. It seems that Member States, such as Austria, Hungary or Poland, have relied on the 'crisis narrative' – legally – for internal border closures and – illegally – for evading obligations to receive asylum applicants under Art 72 of the Treaty on Functioning of the European Union (TFEU). The framing of facts to fulfil certain legal thresholds has gone far in the last years, with i.a. Poland demanding EU support for border fences and the EU actually beginning to fulfil these demands in the face of a 'hybrid threat'. The drastically different handling of the new crisis in Ukraine puts a sense of hypocrisy on this framing.

Hence, this paper seeks to investigate how EU leaders 'talk' their way into applying or not applying EU law and even create EU law at their will simply by describing the arrivals as a security threat, a 'hybrid attack' or instead as neighbors in need, as 'family'. This paper demonstrates the language of EU leaders and compares the parallels in the implementation (or non-implementation) of EU asylum law by triggering derogations, exceptions and amendments. It compares this process with regards to the 2015 refugee crisis, the Belarus border crisis and the current Ukrainian crisis to portray how the reaction to similar facts differs and, hence, to show how EU asylum policy suffers from a lack of rule of law.

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[5] Directive 2001/55/EC of 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 212/12 (Temporary Protection Directive, TPD).

[6] See Commission, 'Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum' COM (2020) 613 final.

[7] See further Eleni Karageorgiou and Gregor Noll, "What Is Wrong with Solidarity in EU Asylum and Migration Law?," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 26, 2021), https://doi.org/10.2139/ssrn.3974596.

[8] Compare Julia Kienast, Nikolas Feith Tan and Jens Vedsted-Hansen, "Preferential, differential or discriminatory? EU protection arrangements for persons displaced from Ukraine" (ASILE) (blog), April 27, 2022, https://www.asileproject.eu/preferential-differential-or-discriminatory-eu-protection-arrangements-for-persons-displaced-from-ukraine/

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II. **Securitization of Migration and the 'Crisis Narrative'**

The securitization of migration is a trend that can be observed since several decades[9]. Whereas in the very beginning of border regimes and the control of access to state territory trade and health concerns were at the forefront[10] nowadays migration is frequently viewed as a balancing act between human rights and security concerns[11].

A general assumption of potential security threats connects border and migration control to asylum. There is little to argue with, when it comes to control over territorial access, since internal security is one of the key domains of sovereign states. However, the subtle connection of asylum and security seems to work to the detriment of persons who seek protection in Europe. For example, the threat that asylum seekers will participate in terrorist acts seems low in view of the probability of attacks in general and the convictions of forced migrants[12]. In the few cases that occurred, it was usually years after entering the territory and, thus, did not stand in direct connection to the border crossing[13]. Yet, the public fear persists[14].

At this point, politicians can use the emotionally charged atmosphere[15]. Just like in terrorism, the notion of a 'migration crisis' allows politicians to benefit from the public support created by fear and

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[9] See already Julia Kienast, "Forced Migrants as a Security Threat: Challenging Criminalization Trends in Austria under Presumed Links of Asylum and Terrorism," in *Terrorism and Asylum*, ed. James C. Simeon, International Refugee Law Series (Leiden, Boston: Brill NV, 2020), 343–72.

[10] Jovan Pešalj, 'The Mobility Control of the Ottoman Migrants in the Habsburg Monarchy in the Second Half of the Eighteenth Century' in Harald Heppner and Eva Posch (eds), *Encounters in Europe's Southeast: The Habsburg Empire and the Orthodox World in the Eighteenth and Nineteenth Centuries*, vol 5 (Winkler 2012) 55.

[11] Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press, 2016), 3, https://doi.org/10.1093/acprof:oso/9780198776833.001.0001.

[12] Compare statistics elaborated in Kienast, "Forced Migrants as a Security Threat: Challenging Criminalization Trends in Austria under Presumed Links of Asylum and Terrorism."

[13] Elspeth Guild, "Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19," *European Journal of Migration and Law* 23, no. 4 (December 21, 2021): 394, https://doi.org/10.1163/15718166-12340111.

[14] Fritz Plasser and Franz Sommer, *Wahlen Im Schatten Der Flüchtlingskrise: Parteien, Wähler Und Koalitionen Im Umbruch*, Schriftenreihe Des Zentrums Für Angewandte Politikforschung, Band 33 (Wien: Facultas, 2018), 52.

[15] Plasser and Sommer, *Wahlen im Schatten der Flüchtlingskrise*, 86; Nils Coleman, 'From Gulf War to Gulf War - Years of Security Concern in Immigration and Asylum Policies at European Level', in *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe*, ed. Elspeth Guild and Anneliese Baldaccini (Boston: Brill Nijhoff, 2007), 83 f.

perceived loss of control. Additionally, the social process of 'othering' plays an important role in this area for allowing the unequal treatment of migrants due to the reduction of solidarity[16]. In Austria, for instance, migration was a constant topic in the 2017 election campaigns and often convoluted with vague security concerns[17]. The image of a dangerous situation to be dealt with by the government or other leaders can be a very powerful tool in this sense[18]. Politicians can easily rely on it and, thereby, prioritize an issue on their agenda and in their communications, sometimes even create legislation and specialised institutions[19]. Therefore, this fear and the demand to deal with the perceived security threat by the electorate can cause the encroachment on individual rights, which otherwise would not find broad public support[20].

Especially, the term 'crisis' has proven itself as an effective tool here, since it is a very wide term without any defined legal meaning in most jurisdictions, and it has, thus, become a frequently used term[21]. The various existing understandings, usually refer to some sort of danger that must be urgently addressed[22]. In addition, the term 'mass influx' is only vaguely defined in legal instruments and, hence, has a similar quality as 'crisis'. There is no clear definition, e.g. at which number of asylum applications a situation arises to a 'mass influx'. The UNHCR Executive Committee

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[16] See David L. Altheide, "Terrorism and the Politics of Fear," *Cultural Studies ↔Critical Methodologies* 6, no. 4 (2006): 419 f; for the social process of "othering" and how it is regulating discourse see Michael Schwalbe *et al*., "Generic Processes in the Reproduction of Inequality: An Interactionist Analysis," *Social Forces* 79, no. 2 (December 2000): 434 ff.

[17] Plasser and Sommer, *Wahlen Im Schatten Der Flüchtlingskrise*, 149.

[18] *Ibid*. 86 f. In election campaigns, the opposition frequently uses this tool as well, either to deny the competence of the governing politicians or to emphasise their own competence to handle the crisis.

[19] Tom Cockcroft, "Late Modernity, Risk and the Construction of Fear of Crime," in *Crime, Media and Fear of Crime*, ed. Gorazd Meško *et al*. (Ljubljana: Tipografija, 2009), 19 f; Altheide, "Terrorism and the Politics of Fear," 418 ff, 432 ff; Mike Berry, Inaki Garcia-Blanco, and Kerry Moore, "Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries" (Report prepared for the United Nations High Commission for Refugees (UNHCR), December 2015), 7 ff, https://www.unhcr.org/56bb369c9.pdf.

[20] See Altheide, "Terrorism and the Politics of Fear," 417, 426 ff; Ruth Wodak, *The Politics of Fear: What Right-Wing Populist Discourses Mean* (London: Sage, 2015), 5; Sonia Suchday, Amina Benkhoukha, and Anthony F. Santoro, "Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective," in *Psychology of Fear, Crime, and the Media: International Perspectives*, ed. Derek Chadee, Researching Social Psychology (New York, NY: Routledge, Taylor & Francis Group, 2016), 107 ff.

[21] See Klaus Merten, 'Krise, Krisenmanagement und Krisenkommunikation' in Ansgar Thießen (ed), *Handbuch Krisenmanagement* (2nd edn, Springer VS 2014) 156.

[22] Arjen Boin, Magnus Ekengren, and Mark Rhinard, *The European Union as Crisis Manager: Patterns and Prospects*. (Cambridge: Cambridge University Press, 2013), 5.

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(ExCom) in its Conclusion 100 attempts a definition of mass influx and characterises it by considerable numbers of people arriving over an international border with a rapid rate of arrival and an inadequate absorption or response capacity in host States as well as individual asylum procedures that are unable to deal with the assessment of such large numbers[23]. Yet, this definition leaves open what constitutes a considerable number or a rapid rate and, therefore, does not give a clear-cut frame for when to apply these guidelines[24]. Hence, in a displacement crisis, which causes increased asylum applications to Europe, politicians have a wide playing field with these terms. This seems to create a particular challenge for the rule of law in this legal field, as is to be demonstrated in the chapters below.

A thorough semantic analysis of all statements and developments in media coverage of the three incidents covered would go beyond the scope of this paper. For this reason, the next chapter is rather to be seen as a summary of the overall narrative of the three incidents as observed by the author[25].

III. **Comparison of Crisis Rhetoric**

1. *The European Migration Crisis 2015/16: "What if they are terrorists?"*

The security narrative as set out above picked up particularly after the terrorist attacks on 9/11, 2001. At that point, the media landscape developed in a new manner and drastically influenced public perception and politics since then[26]. Similarly, media attention on migration has increased in new ways since 2015[27]. EUROSTAT shows that in 2015 and

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[23] UNHCR ExCom Conclusion No 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004).

[24] See Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 Melbourne Journal of International Law 595, 603.

[25] Since two of the incidents are still ongoing and started fairly recently, analysis from communications sciences might be underway. For an analysis of media coverage in 2015/16 see Michael Haller, 'Die „Flüchtlingskrise" in den Medien: Tagesaktueller Journalismus zwischen Meinung und Information' (Otto Brenner Stiftung 2017). Berry, Garcia-Blanco, and Moore, "Press Coverage."

[26] See e.g. Altheide, "Terrorism and the Politics of Fear," 423 ff; Suchday, Benkhoukha, and Santoro, "Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective"; Jennifer S. Lerner *et al*., "Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment," *Psychological Science* 14, no. 2 (March 2003): 144–50.

[27] Plasser and Sommer, *Wahlen Im Schatten Der Flüchtlingskrise*, 140 ff.

2016, the EU received respectively approximately 1.2 million asylum applications[28]. Especially, in autumn 2015, these persons arrived with a rapid rate and media attention was very much focused on these occurrences, including pictures that showed the dramatic scenes[29].

The fear of security loss is only one of several attached to migration, which generally has an 'intimate relationship'[30] to fear[31]. However, it is particular regarding its influence on the law and its enforcement regarding the link to border controls as mentioned above[32]. For instance, the Institut de Publique Sondage d'Opinion Secteur (IPSOS) conducted a survey in 2017, which found that 59 percent of the persons interviewed thought that terrorists pretended to be refugees to enter their country[33]. Amongst other factors, this is connected to the overly simplified way in which information on such incidents is disseminated[34].

The focus on security rather than on humanitarian issues is also reflected in the EU's management of the 2015/16 Crisis. By way of example, a statement by (then) First Vice-President, Frans Timmermans, and Migration and Home Affairs Commissioner, Dimitris Avramopoulos, on 27 August 2015 shows this approach. It reads:

> *The news of the 50 migrants found asphyxiated in the hull of a ship last night, and the lost souls of 20 or more migrants discovered abandoned in a truck on an Austrian highway today are frankly shocking.*

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[28] Annual Asylum Statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844

[29] See e.g. William Spindler, "2015: The Year of Europe's Refugee Crisis," UNHCR, December 8, 2015, https://www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html.

[30] For the "intimate relationship" of fear and terrorism see Suchday, Benkhoukha, and Santoro, "Globalization and Media: A Mediator between Terrorism and Fear: A Post-9/11 Perspective," 98 ff.

[31] Magdalena Pöschl, "Migration Und Mobilität," Gutachten für den 19. Österreichischen Juristentag, 2015, 9 ff sets out these different fears with regards to Austria, including: (1) fear of poverty; (2) fear of infiltration by outer enemies (foreign-policy); (3) fear of security loss; (4) fear of foreign diseases or the exploitation of the health system; (5) financial fears; and (6) fear of 'otherness' (cultural perspective). For similar observations in Germany see Jürgen Bast, *Aufenthaltsrecht und Migrationssteuerung*, Jus Publicum 207 (Tübingen: Mohr Siebeck, 2011).

[32] See further Guild, "Schengen Borders and Multiple National States of Emergency."

[33] IPSOS, "Global Views on Immigration and the Refugee Crisis" (IPSOS, September 2017), 22, 24, https://www.ipsos.com/sites/default/files/ct/news/documents/2017-09/ipsos-global-advisor-immigration-refugee-crisis-slides_0.pdf; see also James Dennison and Andrew Geddes, "OP-ED: Are Europeans Turning against Asylum Seekers and Refugees?," *European Council on Refugees and Exiles (ECRE)* (blog), November 17, 2017, https://www.ecre.org/op-ed-are-europeans-turning-against-asylum-seekers-and-refugees/.

[34] Wodak, *The Politics of Fear*, 12.

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> *These are sinister, criminal acts, carried out by smugglers with no scruples whatsoever. (…)*
>
> *The Commission put that European response on the table - from increasing our presence at sea, to cooperating with countries of origin and transit, to clamping down on smuggling networks, making returns more effective and implementing the recently adopted common EU asylum rules whilst showing solidarity with frontline countries – we have to address the issue from all angles. We already announced that further proposals will come soon*[35].

There are many press releases and statements from that time and, generally, they emphasize the necessity to interject migrants at sea, to cooperate with countries of origin and transit, to fight smuggling networks, to make returns more effective and to show solidarity with 'frontline Member States'. These statements and measures show, how the focus is set on the perspective of a state or government dealing with unwanted arrivals. If attention is paid to the suffering of arriving persons, it is often in the context of pointing out the malice of smugglers. Although the entanglement of asylum with the topics of terrorism and external border controls only fully fledged after the attacks in France in November 2015[36], the earlier Commission Opinion finding internal border closures in Germany and Austria legitimate already relied on the terrorism argument[37]. As set out in the section above, this security narrative is frequently engaged with on the national level and, in particular, by right-wing populist politics[38]. Pushing this emergency theme in daily rhetoric holds the advantage for governments that they can more or less legitimately rely on derogations that hold exceptions, for instance, for threats to public order and public security or similar. How this played out during the 2015/16 crisis will be discussed below in Chapter IV.1.

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[35] "Statement by First Vice-President Frans Timmermans and Migration and Home Affairs Commissioner Dimitris Avramopoulos," Text, European Commission, August 27, 2015, https://ec.europa.eu/commission/presscorner/detail/en/statement_15_5544; see further "Refugee Crisis," Text, European Commission, September 9, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_15_5596.

[36] As addressed e.g. in "Remarks of Commissioner Dimitris Avramopoulos at the Press Conference on the Preparation of the 20 November JHA Council," Text, European Commission, November 18, 2015, https://ec.europa.eu/commission/presscorner/detail/en/speech_15_6125.

[37] Commission, 'Opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)' C (2015) 7100 final.

[38] See in detail Kienast, "Forced Migrants as a Security Threat: Challenging Criminalization Trends in Austria under Presumed Links of Asylum and Terrorism."

2. *The Belarus Border Crisis 2021/22: "This is a new form of war, a hybrid attack!"*

Although there were several other incidents in which asylum applications rose again since spring 2016[39], the Belarus Border Crisis since autumn 2021 highlights a particularly interesting aspect of the crisis narrative[40]. It was truly a humanitarian tragedy unfolding at the Belarusian border with Latvia, Lithuania and Poland, for which these states declared a national state of emergency. Migrants were deliberately brought to these borders by the Lukashenko regime in order to put pressure on the affected Member States and, thus, on the EU as a whole. Since the respective Member States were determined not to give in to this intimidation attempt by the Belarus regime, the affected migrants were effectively caught between the borders without humanitarian assistance in European winter[41].

The number of persons arriving to the EU borders with Belarus were not even close to the 'mass influx' threshold that the EU experienced in 2015/16. This time, approximately 50,000 attempts to cross the border were estimated.[42] Yet, the circumstances of their arrival, i.e. the intent of Belarus politics, made this situation into a crisis for EU leaders. The proposal for a Council Decision makes this clear with its opening sentence: '*The European Council Conclusions of 21 and 22 October 2021 underlined the EU's non-acceptance of any attempt by third countries to instrumentalise migrants for political purposes*'[43].

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[39] "Asylum Quarterly Report," March 23, 2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_quarterly_report.

[40] See already Julia Kienast, "„Krise" an der belarussischen Grenze und wie die Kommission das Feuer weiter anfacht," *Blog Asyl* (blog), February 16, 2022, https://www.blogasyl.at/2022/02/krise-an-der-belarussischen-grenze-und-wie-die-kommission-das-feuer-weiter-anfacht/.

[41] Madeline Roache, "Death at the EU Border"; Florian Hassel, "Polen und Belarus: Tote im Grenzgebiet," Süddeutsche.de, December 9, 2021, https://www.sueddeutsche.de/politik/belarus-polen-1.5484464; Balkan Investigative Reporting Network, "Polish Forest Full of Fear," accessed May 23, 2022, https://balkaninsight.com/polish-forests/.

[42] According to Izabela Surwillo and Veronika Slakaityte, 'Fortifying the EU's Eastern Border Countering Hybrid Attacks from Belarus | DIIS' <https://www.diis.dk/en/research/fortifying-the-eus-eastern-border-countering-hybrid-attacks-from-belarus> accessed 22 May 2022 there were ca 50,000 irregular attempts to cross the border from Belarus between August 2021 and March 2022. Similar numbers are listed in Commission, 'Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland' COM (2021) 752 final, 2.

[43] Commission, 'Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland' COM (2021) 752 final, 1.

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The new wording to describe this situation was particularly drastic, as it was called a 'hybrid attack'[44]. This spin leans on military jargon and, thus, again engages with the security narrative in the context of asylum[45]. Recital 5 of the proposal even states that the instrumentalization of protection seekers by Belarus constitutes a 'real threat' and endangers the security of the Union. Whether these assumptions correspond to the factual situation may be questioned. The language chosen implies the Commission's desire to legitimize its actions with a considerable negative impact on the people at the border by framing asylum seekers as a 'weapon' and emphasizing the exceptional nature and danger of its own situation.

3. *The Ukraine Refugee Crisis 2022 and ongoing: "We have to protect our European family!"*

The crisis at the Belarus' border was still ongoing at the outbreak of the war in Ukraine. Especially Poland, one of the primary countries of arrival for Ukrainians, has a much different approach to them leading to a schizophrenic situation at their border. On the Belarus site, refugees from the Middle East are fended off with all means. At the Ukrainian borders, humanitarian assistance is at the forefront[46]. A spokesperson for Poland's special services ministry has been asked on this situation and reportedly stated that the situation on the border with Belarus is 'an artificial migratory movement created by Lukashenko's regime and orchestrated by Belarusian services' and that it cannot be compared to 'the movement of those fleeing from war waged by Russia against Ukraine'[47].

Accordingly, European politicians surprised many observers of EU migration and asylum policy in early March 2022[48]. With the Russian

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[44] Commission, 'Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland' COM (2021) 752 final.

[45] See Agata Kleczkowska, "What Does the 'Hybrid Attack' Carried out by Belarus against the EU Borders Mean in Reality? An International Law Perspective," *EJIL: Talk!* (blog), December 13, 2021, https://www.ejiltalk.org/what-does-the-hybrid-attack-carried-out-by-belarus-against-the-eu-borders-mean-in-reality-an-international-law-perspective/.

[46] Amandas Ong and Nils Adler, "Worlds Apart: 24 Hours with Two Refugees in Poland," May 22, 2022, https://www.aljazeera.com/features/2022/5/22/worlds-apart-24-hours-with-two-refugees-in-poland.

[47] "Poland's Two Very Different Borders," POLITICO, April 14, 2022, https://www.politico.eu/article/poland-two-very-different-borders-ukraine-belarus-war-refugees/.

[48] Amongst many commentators, see in particular Meltem Ineli-Ciger, "5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022 – EU Immigration and Asylum Law and Policy," *EU Immigration and Asylum Law and Policy* (blog), accessed March 7, 2022, https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/.

invasion of Ukraine,[49] the winds completely changed from the Belarusian border crisis. Although the number of displaced reaching the EU border certainly qualifies as a 'mass influx' – with 6.5 million people having fled Ukraine so far and a majority of them to Europe[50] – the securitization narrative remained silenced, and the fortification approach was foregone.

Instead, the narrative of solidarity with 'people like us', our European family, good people, our neighbors and similar notions shaped the public discourse[51]. For example, a Polish high official stated that the different approach was due to the large Ukrainian diaspora already living and working in Poland and the strong cultural connection. He also noted that the Ukrainians were trying to show more European values in an effort to integrate better, which he did not perceive with refugees from the Middle East and Africa[52]. This and further statements by European politicians painted a picture of deliberate discrimination or – from the perspective of Ukrainians – preferential treatment of refugees with European origin[53].

IV. **Parallels in Law**

1. *The European Migration Crisis 2015/16: Collapse of the CEAS*

The Common European Asylum System (CEAS), and within it the Dublin system, have been criticized for its unfair distribution mechanism even before 2015. However, at that point the Dublin mechanism had been declared as 'dead' by experts[54], Member States at the beginning of popular

[49] "Timeline."

[50] See UNHCR, "Ukraine Refugee Situation," Operational Data Portal, accessed May 22, 2022, https://data2.unhcr.org/en/situations/ukraine.

[51] Joshua Berlinger, "Does the Ukraine Exodus Reveal a 'Shocking Distinction' on Refugees?," euronews, March 1, 2022, https://www.euronews.com/2022/03/01/does-the-ukraine-exodus-reveal-a-shocking-distinction-on-refugees-in-some-parts-of-the-eu.

[52] "Poland Ready to Take More Ukrainians, Deputy PM Says," POLITICO, March 28, 2022, https://www.politico.eu/article/poland-ready-to-take-more-ukrainians-deputy-pm-says/.

[53] Julia Kienast, Nikolas Feith Tan, and Jens Vedsted-Hansen, "Preferential, Differential or Discriminatory? EU Protection Arrangements for Persons Displaced from Ukraine," *Asile* (blog), April 27, 2022, https://www.asileproject.eu/preferential-differential-or-discriminatory-eu-protection-arrangements-for-persons-displaced-from-ukraine/.

[54] Compare e.g. Constantin Hruschka, "Dublin Is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission – EU Immigration and Asylum Law and Policy," *EU Immigration and Asylum Law and Policy* (blog), accessed May 23, 2022, http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/; Marcello Di Filippo, "Dublin 'Reloaded' or Time for Ambitious Pragmatism?,"

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migration routes simply let the arriving migrants pass on to the North and a 'race to the bottom' with respect to reception conditions and procedures just fuelled this dynamic.[55]

The Commission's main response in 2015/16 was the 'European Agenda on Migration'[56], which included several legal proposals and operational measures. These can be categorized according the management of the crisis internally, securing the external border, and cooperation on the international level.

For internal crisis management, a relocation mechanism was introduced to assist Italy and Greece[57], including the establishment of 'hotspots'[58] and the proposal to develop a genuine EU Agency for Asylum (EAA)[59]. For the reform of the CEAS, a total of seven proposals were made to tackle the seemingly irreconcilable division of the EU on the topic of asylum[60]. Most importantly these proposals include a

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EU Immigration and Asylum Law and Policy (blog), accessed May 23, 2022, http://eumigrationlawblog.eu/dublin-reloaded/; Hungarian Helsinki Committee, "Summary of Bans on/Stopping of Dublin Returns to Hungary - 2016," December 14, 2016, http://www.helsinki.hu/wp-content/uploads/Summary-bans-Dublin-transfers.pdf.

[55] See e.g. Vladislava Stoyanova and Eleni Karageorgiou, eds., *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*, International Refugee Law Series (Brill Nijhoff, 2018); Jens Vedsted-Hansen, "Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?," in *Reforming the Common European Asylum System: The New European Refugee Law*, ed. Vincent Chetail, Philippe De Bruycker, and Francesco Maiani, vol. 39, Immigration and Asylum Law and Policy in Europe (Leiden Boston: Brill Nijhoff, 2016), 317–52.

[56] Commission, 'A European Agenda on Migration' (Communication) COM (2015) 240 final.

[57] 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; 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; Commission, 'Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary' COM (2015) 451 final.

[58] Commission, 'Progress Report on the Implementation of the hotspots in Greece' (Communication) COM (2015) 678 final; Commission, 'Progress Report on the Implementation of the hotspots in Italy' (Communication) COM (2015) 679 final.

[59] Regulation (EU) 439/2010 of 19 May 2010 of the European Parliament and of the Council establishing a European Asylum Support Office (EASO) [2010] OJ L 132/11; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' COM (2016) 271 final (EAA); Commission, 'Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' COM(2018) 633 final.

[60] Commission, 'Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy' (Press release, 13 July 2016) IP/16/2433.

common procedure[61], uniform standards of protection and rights[62] and the harmonisation of reception conditions[63] – i.a. by casting the provisions in the form of regulations instead of directives. In October 2019, the European Commission states that *'[t]here was real progress towards a preliminary agreement on five of the seven proposals. But a majority of Member States insisted on a package approach, so a way forward needs to be found on key elements of the Dublin Regulation and the Asylum Procedure Regulation'*[64]. In 2022, the reform of the CEAS is still not achieved, although major steps have been taken in the legislative path of the proposals, including the additional proposals and further amendments to the 2016 proposals[65].

For the safeguarding of the external borders more progress could be made. The Commission proposed the establishment of a new European Border and Coast Guard (EBCG) already working since October 2016[66]. Moreover, several sea operations were launched[67]. The focus in the external

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[61] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' COM (2016) 467.

[62] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final.

[63] Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)' COM (2016) 465 final.

[64] Commission, 'Progress Report on the Implementation of the European Agenda on Migration" (Communication) COM (2019) 481 final 18.

[65] Compare progress on "Migration and Asylum Package: New Pact on Migration and Asylum Documents Adopted on 23 September 2020," Text, European Commission, accessed May 22, 2022, https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.

[66] Regulation (EU) 2016/1624 of 14 September 2016 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1; the legal basis for the EBCG was again renewed with Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1.

[67] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122/31; Council Decision (CFSP) 2015/1926 of 26 October 2015 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 281/13; Council Decision (CFSP) 2020/471 of 31 March

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borders control relied on combating migrant smuggling on the basis of the 'EU Action Plan against Migrant Smuggling'.[68] Europol set this combat as a priority[69] and the EU established a comprehensive data collection system[70].

2020 repealing Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED Operation Sophia); Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED Operation Irini).

[68] Commission, 'EU Action Plan against Migrant Smuggling (2015 – 2020)' (Communication) COM (2015) 285 final.

[69] Europol, 'Europol Launches the European Migrant Smuggling Centre' (Press Release, 22 February 2016) <https://www.europol.europa.eu/newsroom/news/europol-launches-european-migrant-smuggling-centre> accessed 20 May 2022.

[70] See Chris Jones, 'Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status' (Statewatch and PICUM 2019) <https://picum.org/wp-content/uploads/2019/11/Data-Protection-Immigration-Enforcement-and-Fundamental-Rights-Full-Report-EN.pdf> accessed 23 May 2022. Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member State by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) COM (2016) 272 final; Regulation (EU) No 1052/2013 of 22 October 2013 of the European Parliament and of the Council establishing the European Border Surveillance System (Eurosur) [2016] OJ L 295/11; Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 [2018] OJ L 236/1; Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] OJ L 327/20; Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA [2019] OJ L 135/27; Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 [2019] OJ L 135/85.

The most impactful measure to reduce the number of arrivals, however, was the negotiation of the EU-Turkey Statement[71]. Under this agreement, Turkey would prevent new arrivals by land and sea and take back all persons crossing irregularly from Turkey into Greek islands – in return, for substantial financial aid, a resettlement scheme for Syrians from Turkey[72]. Furthermore, a proposal for a resettlement programme was introduced to allow refugees qualifying for protection and waiting at the borders a legal and safe way to asylum in the EU[73]. To prevent further migration movements to the EU, a Trust Fund for Africa with €4.5 billion[74] and a partnerships with third countries[75] were sought.

In conjunction, the proposals and measures show that most efforts were oriented towards the enforcement of external border controls and the combat of migrant smuggling. Furthermore, the EU aimed for a balance of burdens amongst Member States and a reduction of secondary migration under the umbrella of solidarity[76]. Most certainly, they rather constituted a reform attempt of the CEAS instead of targeted emergency measures.

2. *The Belarus Border Crisis 2021/22: Enhanced fortification at the Border*

As set out above, the Commission called the arrivals of the migrants at the EU border a 'hybrid attack' in its proposal to the Council for a decision on provisional emergency measures for Latvia, Lithuania, and Poland under

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[71] 'EU-Turkey Statement (Press Release)' (*European Council – Council of the European Union*, 18 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 23 May 2022.

[72] Commission, 'Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey' C (2015) 9490.

[73] European Council, 'Conclusions of the Representatives of the Governments of the member states meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection' (Conclusions) Council Doc 11130/15, 22 July 2015; Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' COM (2016) 468 final.

[74] Commission, 'Decision of 20.10.2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa' C (2015) 7293 final. Critical hereof are Carling and Talleraas (n 40) 30 ff.

[75] Commission, 'On establishing a new Partnership Framework with third countries under the European Agenda on Migration' (Communication) COM (2016) 385 final.

[76] For a broader and critical overview on the EU's responses see Sergio Carrera *et al*., "The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities" (Centre for European Policy Studies, December 16, 2015).

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Article 78(3) TFEU[77]. And what to do if one finds themselves under attack, some sort of war seemingly? Fortification constitutes a long-proven measures of defense. This was also the response at the Polish border to Belarus. Pushbacks, surveillance technology and physical barriers were engaged to secure the EU's Eastern border[78].

In contrast, the emergency measures under Article 78(3) TFEU back in 2015 for Italy and Greece looked very different as recalled in the section above. The relocation of up to 160,000 protection seekers from particularly affected states was amongst the chosen means back then. This would have been a viable path for the Belarus situation too – especially in view of the unfulfilled quotas from 2015[79].

The proposal for the Belarus border crisis, however, provides for various deviations from current law legitimizing fortification measures of the affected Member States[80]. It foresees a registration period up to four weeks and exclusively at designated registration points at the border[81]. It also provides that contested border procedures may be conducted with regard to, both, the admissibility and the merits of the applications concerned[82] and allows for applicants to be held at the border for up to 16 weeks. During this period, the first instance procedure and any appeals would be settled. At the same time,

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[77] Commission, 'Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland' COM (2021) 752 final.

[78] Surwillo and Slakaityte, "Fortifying the EU's Eastern Border Countering Hybrid Attacks from Belarus | DIIS."

[79] 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; United Nations High Commissioner for Refugees, "UNHCR Calls for the EU Relocation Scheme to Continue," UNHCR, accessed May 22, 2022, https://www.unhcr.org/news/press/2017/9/59ca64354/unhcr-calls-eu-relocation-scheme-continue.html.

[80] "Joint Statement: Call on the EU: Restore Rights and Values at Europe's Borders | European Council on Refugees and Exiles (ECRE)," accessed May 23, 2022, https://ecre.org/joint-statement-call-on-the-eu-restore-rights-and-values-at-europes-borders/; "EU Eastern Borders: Commission Emergency Proposal Comes Under Fire, MEPs Visit Rights-Free Border Zone, Supreme Court Rules on Polish Media Ban | European Council on Refugees and Exiles (ECRE)," January 21, 2022, https://ecre.org/eu-eastern-borders-commission-emergency-proposal-comes-under-fire-meps-visit-rights-free-border-zone-supreme-court-rules-on-polish-media-ban/.

[81] Currently, registration has to take place within three working days at the competent authority or six working days if the application was lodged with an authority that is not competent, according to Article 6 APD. See Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (Asylum Procedures Directive, APD).

[82] PRO ASYL, "The 'New Pact': new border procedures, more detention, no solution to old problems" (Frankfurt: PRO ASYL, November 30, 2020), https://www.proasyl.de/material/the-new-pact-new-border-procedures-more-detention-no-solution-to-old-problems/. This is de lege lata only permitted under limited conditions, especially with regard to the merits (cf. Art 31 (8) and 41 (1) APD).

the automatic suspensive effect of appeals or the right of residence would be limited during the appeals period. The emergency measures would also allow for a lower standard of material benefits than Articles 17 and 18 of the Reception Conditions Directive[83]. Admittedly, even these low standards would have been an improvement on the reality at the Belarusian border, since the reception conditions were not upheld[84].

Moreover, this proposal disregards the critical stance of Members of the European Parliament (EP) on related proposals in the 'New Pact', which are still under negotiation[85]. The EP's Committee on Civil Liberties, Justice and Home Affairs (LIBE) only published its first reading amendments to the related drafts that contain numerous comments regarding the envisaged border procedures.

In addition, in December 2021, the Commission sent further proposals for an amendment to the Schengen Borders Code[86] and a related permanent emergency mechanism for the 'instrumentalization' of migrants[87] into the ordinary legislative procedure. This suggestion of a general regulation largely coincides with that for the emergency measures in favour of Latvia, Lithuania and Poland, but would make such emergency measures permanently available. It is therefore questionable to what extent the exceptional nature of the measures would remain.

3. *The Ukraine Refugee Crisis 2022 and ongoing: A Temporary Protection Regime*

As stated above, although the Belarus border crisis was still ongoing when Russia invaded Ukraine on 24 February 2022[88], the reaction to the

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[83] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 (Reception Conditions Directive, RCD).

[84] Compare e.g. Balkan Investigative Reporting Network, "Polish Forest Full of Fear."

[85] Shortly after the proposal on the emergency measures in December 2021, the Commission sent two further proposals for the Schengen Borders Code into the ordinary legislative procedure, which caused ECRE to diagnose the European asylum system with a reductio ad absurdum. See "ECRE Weekly Bulletin 21/01/2022," accessed May 22, 2022, https://mailchi.mp/ecre/ecre-weekly-bulletin-21012022?e=1a3376bb31#Edito.

[86] Commission, 'Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders' COM (2021) 891 final.

[87] Commission, 'Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum' COM (2021) 890 final.

[88] "Timeline."

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new 'refugee crisis' could not have been more different. For the first time since its entering into force in 2001, the TPD was activated to receive Ukrainians on a group basis [89].

The implementing Council Decision meant that EU borders would be kept open to those falling under its scope: Ukrainian nationals living in Ukraine at the time, those covered by international protection in Ukraine at the time and their families[90]. Although this process did not go without difficulties, as e.g. instances of discrimination at the border have been reported[91], it was an outstanding new path for the EU and its Member States as a reaction to mass displacement.

It remains to be seen what the final experience with this approach will be from an EU perspective as well as from the concerned individuals'. However, the benefits of using this regime in the reception of large groups of displaced are evident from the outset: easier and faster processing of persons falling under the scope, since under this regime no complicated individual procedure must take place[92]; and an automatic burden-sharing function amongst the Member States, especially since there was an agreement not to apply Article 11 TPD in case of 'secondary movement'[93]. Initially, the set of rights granted to persons under the TPD also seems more generous compared to those of asylum applicants. This is, however, not the case in comparison to those with refugee status and, for this reason, after a certain time has passed, it might become preferential to get a recognized status under the EU asylum rules[94].

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[89] See Ineli-Ciger, "5 Reasons Why."

[90] See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71/1 (Council Implementing Decision for Ukraine).

[91] See Sergio Carrera *et al*., "The EU Grants Temporary Protection for People Fleeing War in Ukraine," *CEPS* (blog), March 14, 2022, 7 ff, https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/.

[92] However, the TPD still allows for persons under its scope to make asylum claims under the asylum procedure. See Arts 17, 19 TPD.

[93] See e.g. Jessica Schultz *et al*., "Collective Protection as a Short-Term Solution: European Responses to the Protection Needs of Refugees from the War in Ukraine – EU Immigration and Asylum Law and Policy," *EU Immigration and Asylum Law and Policy* (blog), March 8, 2022, https://eumigrationlawblog.eu/collective-protection-as-a-short-term-solution-european-responses-to-the-protection-needs-of-refugees-from-the-war-in-ukraine/; Daniel Thym, "Temporary Protection for Ukrainians: The Unexpected Renaissance of 'Free Choice' – EU Immigration and Asylum Law and Policy," *EU Immigration and Asylum Law and Policy* (blog), March 7, 2022, https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/.

[94] Kienast, Tan, and Vedsted-Hansen, "Preferential, Differential or Discriminatory?"

Currently, we are still observing some issues regarding the implementation of the TPD and its implementing decision in the Member States. In Austria, for example, some unresolved issues at the time concern the access to work and slow processes in terms of the issuing of residence permits and work permissions. However, for the concerned persons, this approach still seems to be much preferable compared to the approaches taken in previous migration crises. In particular, this is the case, because the risk of *refoulement* and group expulsion is averted, but also the access to assistance by the state and civil society is provided.

V. **Conclusion: Reflections on Effects and Consequences**

What could be observed during the 2015/16 period is the resort to the semantics of crisis and emergency. Although these terms are wide in their general meaning, they nudge into a very specific direction in legal terms. The CEAS itself has several specific rules for large-scale arrivals in addition to the TPD.[95] Also, the Schengen Borders Code holds the possibility to temporarily reintroduce internal border controls, in the case of serious threats to public policy or internal security[96].

In addition to that, however, EU primary law reserves to the Member States the maintenance of law and order and the safeguarding of internal security in Article 72 TFEU[97]. Some Member States have relied on this provision to derogate from the CEAS as a whole, which has been denied by the Court of Justice of the EU (CJEU)[98]. However, it means that national politicians have an incentive to frame large-scale arrivals – which do not *per se* constitute a threat to public order or national security – in a way that the situation seems to fulfil the threshold of Article 72 TFEU and the exceptional provisions of the Schengen Borders Code, if they aim at disregarding EU asylum rules and closing the internal borders. Naturally, there is always room to interpret legal provisions. However, if this interpretation goes beyond the sound methods of treaty interpretation and

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[95] See e.g. Art 6 (5), 14 (1), 31 (3) lit b, 43 (3) APD.

[96] See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L 77/1 (Schengen Borders Code), arts 25 ff. This exemption has been relied on excessively by, i.a., Austria, as the CJEU recently held in the joined cases C-368/20 *NW v Landespolizeidirektion* Steiermark and C-369/20 *NW v Bezirkshauptmannschaft Leibnitz* (GC) ECLI:EU:C:2022:298.

[97] Treaty on the Functioning of the European Union [2016] OJ C 202/1 (TFEU), art 72.

[98] CJEU Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland, Hungary and Czech Republic* EU:C:2020:257, paras 134 ff.

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Member States simply follow the intentions of national politics in this regard, it poses a serious risk to the rule of law in the EU asylum *acquis*.

The proposal for emergency measures with regard to the Belarus border crisis is somewhat different as it works within the framework of EU law, as is to be expected from the EU institutions. Yet, also here it has been reported that the EU measures did not go far enough for the concerned Member States, which actually asked the EU to fund a border wall instead[99]. The narrative of a 'hybrid attack' is in line with the framing of a security threat as explained above.

What is more, these emergency measures are to be taken in the form of a Council decision. According to Article 78 (3) TFEU, the EP will only be involved through a consultation procedure. Due to the many overlaps with the proposals of the 'New Pact' currently in the ordinary legislative procedure, the procedure appears to be a democratically problematic attempt to bypass concerns expressed by the EP or the – admittedly lengthy – ordinary legislative procedure. Again, this can raise concerns regarding the rule of law in the EU asylum *acquis*.

Furthermore, the proposal repeatedly emphasizes that it is in line with the fundamental rights and principles of the Union as well as obligations under international law. This is doubtful in view of the *de facto* access to asylum procedures, the likelihood of restrictions on freedom of movement in connection with border procedures, the lack of safeguards for vulnerable groups, the restriction of procedural rights, dwindling standards of reception, insufficient access by advisory and monitoring bodies, and the increased risk of pushback and *refoulement* at EU borders[100].

Sticking to the proposal further does not seem to make sense beyond the human rights concerns. It shall also be remembered that parallel asylum systems do not seem feasible and might increase the chronic implementation deficiencies of EU asylum law[101]. In terms of foreign policy, no improvement

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[99] "EU - Migration über Belarus: Polen blockiert Ausnahmeregelung," *Wiener Zeitung Online*, January 31, 2022, https://www.wienerzeitung.at/nachrichten/politik/europa/2136138-Migration-ueber-Belarus-Polen-blockiert-Ausnahmeregelung.html; Alexandra Brzozowski, "Twelve Member States Ask Commission to Finance 'physical Barriers' as Border Protection Measures," *Www.Euractiv.Com*, October 8, 2021, sec. Justice & Home Affairs, https://www.euractiv.com/section/justice-home-affairs/news/twelve-member-states-ask-commission-to-finance-physical-barriers-as-border-protection-measures/.

[100] Compare statements by human rights experts in "EP Committee on Civil Liberties, Justice and Home Affairs: Exchange of Views on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland, with the Participation of Margaritis Schinas and Ylva Johansson," European Commission - Audiovisual Service, January 31, 2022, https://audiovisual.ec.europa.eu/en/video/I-216368.

[101] "ECRE Weekly Bulletin 21/01/2022."

can be expected *vis-à-vis* Belarus as a result of this measure alone, since the crisis mode demonstrated once again how easily the Union and its Member States can be blackmailed. Moreover, the attempts of affected Member States to avert irregular migration and the associated breaches of law at the borders paint a picture of a disunited and weak Union that hardly takes its own values and its own legal system seriously.

Now at this point, the EU's reaction to the new displacement crisis of Ukrainians gives a glimpse of hope. Despite the wildly different measures in comparison to the other two incidents having been called out as preferential treatment of Ukrainians and despite the difficulties of implementing the Council Decision and the TPD –, at last the EU is following its own rules on the governance of mass influx for the first time since 2001[102]. It is still too early to predict, whether the EU will continue to make use of the TPD in the future (also for non-Europeans) and discard its plans to retract the Directive in the New Pact. However, we might witness a moment of collective learning if the approach proves to be a success.

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[102] Kienast, Tan, and Vedsted-Hansen, "Preferential, Differential or Discriminatory?"

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Building Solidarity in the Field of Asylum: From an Abstract Principle to an Effective Policy?

La construcción de la solidaridad en el ámbito del asilo: ¿De un principio abstracto a una política eficaz?

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Abstract: Solidarity is widely present in European Union legislation. Several primary law provisions reflect its articulation, simultaneously assuming it as a value, an objective and a principle. Article 80 TFEU provides that the principle of solidarity and fair sharing of responsibility between Member States is the "guiding principle" of all common Union policies on border management, asylum, and immigration. Despite all this, solidarity has so far lacked a clear definition and meaning, appearing rather as an "amorphous concept". Indeed, political narrative recognises solidarity as "the glue that holds our Union together". However, in practice and as far as asylum is concerned, the conception according to which "solidarity must be given voluntarily, it must come from the heart, it cannot be forced" seems to prevail.

By critically reviewing the relevant literature and the CJEU's jurisprudence, this paper pursues a twofold purpose: examining the doctrinal debates on the nature, scope and (abstract or binding) character of the solidarity principle; and gauging the role that the CJEU may be playing towards an effective solidarity, uncovering the constitutional bases that prevent from continuing to treat solidarity, in its multiple manifestations and policy areas, in particular that of asylum, as little less than the stone guest.

Keywords: solidarity principle, Article 80 TFEU, CEAS, solidarity a la carte, CJEU.

Resumen: *La solidaridad está ampliamente presente en la legislación de la Unión Europea. Varias disposiciones de Derecho primario reflejan su articulación, asumiéndola simultáneamente como un valor, un objetivo y un principio. El artículo 80 del TFUE establece que el principio de solidaridad y de reparto equitativo de la responsabilidad entre los Estados miembros es el «principio rector» de todas las políticas comunes de la Unión en materia de gestión de fronteras, asilo e inmigración. A pesar de todo ello, la solidaridad ha carecido hasta ahora de una definición y un significado claros, apareciendo más bien como un «concepto amorfo». En efecto, la narrativa política reconoce la solidaridad como «el pegamento que mantiene unida a nuestra Unión». Sin embargo, en la práctica y en lo que respecta al asilo, parece prevalecer la concepción según la cual «la solidaridad debe darse voluntariamente, debe salir del corazón, no puede ser forzada».*

Mediante la revisión de la pertinente literatura y la jurisprudencia del TJUE, este trabajo persigue un doble objetivo: examinar los debates doctrinales sobre la naturaleza, el alcance y el carácter (abstracto o vinculante) del principio de solidaridad; y calibrar el papel que el TJUE puede estar desempeñando en pro de una solidaridad efectiva, desvelando las bases constitucionales que impiden seguir tratando la solidaridad, en sus múltiples manifestaciones y ámbitos políticos, en particular el del asilo, poco menos que como un convidado de piedra.

Palabras clave: *principio de solidaridad, artículo 80 TFUE, SECA, solidaridad a la carta, TJUE.*

I. **Introduction**

> "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity" (Robert Schuman, 1950).

More than any other global risk, the Covid-19 imposed crisis has highlighted and accelerated the urgent need to establish and implement a sort of "pandemocracy". According to this term's coiner[1], like all global risks and challenges that may be considered "pandemocratic events", the coronavirus crisis makes us all equal. At the same time, it reveals existing deep inequalities and generates others (especially socio-economic inequalities between societies) to the point of severely compromising fundamental rights, as well as testing or even undermining democracies, security and peace.

Forced displacement (internal or cross-border) is indeed and can be a real manifestation of this. That is why normative and institutional mechanisms for refugee protection and assistance at national, regional and global levels should shift to forms of cooperative intelligence that "pandemocracy" and the protection of human rights require. This should find in solidarity its necessary expression and cardinal principle.

This text borrows and aligns with the definition of international solidarity in the following terms:

> the union of interests or objectives among the countries of the world and social cohesion among them, based on mutual dependence among States and other international actors, in order to preserve order and the very survival of international society, as well as to achieve collective objectives requiring international cooperation and joint action[2].

While it is widely affirmed and assumed as a structural principle and fundamental value of the international order and of the overall international refugee protection regime, solidarity is generally reduced to a mere political principle of a more or less abstract nature, the implementation of which hinges solely on the discretion and voluntarism of States.

On this basis, using a critical review of the relevant literature and the case law of the Court of Justice of the European Union (CJEU), this paper

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[1] Daniel Innerarity, *Pandemocracia: una filosofía de la crisis del coronavirus* (Madrid: Galaxia Gutemberg, 2020).

[2] Consejo de Derechos Humanos, 'Derechos humanos y solidaridad internacional. Nota de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos' (22 Jul 2009) UN Doc A/HRC/12/27, para 3.

seeks, on the one hand, to examine the doctrinal debates on the nature, scope and character (abstract or binding) of the principle of solidarity. On the other hand, it purports to gauge the role that the Court of Justice, through its decisions, may be playing for the construction of an effective solidarity, in particular within the Common European Asylum System (CEAS).

As for structure, this writing is diveded into two sections. Without losing sight of the fact that its main interest is in the EU's common asylum policy as envisaged in Article 78 of the Treaty on the Functioning of the European Union (TFEU), it starts by taking a brief look at the invocation of solidarity in the international refugee regime. This is so given that, presumably, there are strengths and weaknesses, synergies and influences (positive and negative) that, in one way or another, may be occurring between the general and regional regimes, in particular that of the EU. The second section examines the extent to which solidarity assumed as general principle, cardinal value and foundation is or is not being translated into effective measures in the field of EU asylum law and policy, and what role the CJEU may be playing in this regard.

II. **Solidarity in the international refugee regime: a brief overview**

1. *A structural principle and fundamental value*

The term solidarity as such is not explicitly mentioned at all in the core instruments of international refugee law, the 1951 Convention relating to the Status of Refugees (Refugee Convention)[3] and the 1967 Protocol thereto[4]. This, however, does not mean that the concept of solidarity is absent from both the spirit and the letter of these legal instruments and the international refugee protection regime. Quite the contrary, it has been present since the very inception of this regime. Indeed, the Refugee Convention recognises in its preamble (recital 4) the international nature and scope of the refugee problem. It correlatively acknowledges that satisfactory solutions to this problem cannot be achieved unless States act in concert in a true spirit of international cooperation.

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[4] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

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This understanding is in line with the notion of solidarity that is consubstantial with the United Nations (UN) itself. In fact, its Charter[5] establishes as one of the UN's overarching purposes the achievement of international cooperation in solving "international problems of an economic, social or humanitarian character" (Article 1.3). And, accordingly, it provides for the obligation of member States (MMSS) to "take joint and separate action in cooperation" with the UN (Article 56).

In that sense, solidarity has aptly been regarded as a structural principle of international law[6], along with the principles of human dignity, subsidiarity, equality, sovereignty, proportionality, democracy and the rule of law[7]. Meanwhile, all indications are that, despite its strong moral implications as a value-driven principle, in most of the branches of international law solidarity remains a mere aspiration. Yet, in certain areas, it is deemed to have gained significant levels of implementation[8]. This could be the case in the area of international refugee protection.

That said, in an international society marked by inequalities between States, whose disparity of individual interests often overrides the common good and the collective interest, it is not easy to determine the significance and dimensions (self-centred or altruistic) of solidarity that is predicated of the overall international legal order. This difficulty is not dispelled even by the description of solidarity as a fundamental value essential to international relations, contained in the UN Millennium Declaration in the following terms: "Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most"[9].

What, at least from a theoretical perspective, is not so difficult to glimpse in this complex, multidimensional and diffuse solidarity concept is its dual addressee: the States and the populations. This is understandable given the fact that "sacrosanct" national sovereignty is eroded by

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[5] Charter of the United Nations (adopted 26 June, entered into forcé 24 October 1945) 1 UNTS XVI (the UN Charter).

[6] Rüdiger Wolfrum and Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2010).

[7] Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), 345-498.

[8] Holger P. Hestermeyer, 'Reality or Aspiration? – Solidarity in International Environmental and World Trade Law', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, edited by Holger P. Hestermeyer et al, (Martinus Nijhoff 2012), Vol. 1, 45-63.

[9] United Nations Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2, par. 6.

international recognition and protection of human rights, and both stand as constitutional principles of the contemporary international order[10].

On this basis lies the essence of the international paradigm of solidarity, which, in the field of international refugee protection, comprises two levels of manifestation: prescriptive and operational. The first expresses the duty of solidarity with and on behalf of refugees, whereby states must act cooperatively to find appropriate solutions for their protection and assistance. The second, in turn, obliges States to cooperate with each other through effective responsibility-sharing mechanisms to assist communities hosting refugees[11]. This two-pronged approach to solidarity is usually expressed in terms of responsibility-sharing and burden-sharing, understood as being the two constitutive elements of solidarity.

The prevailing interpretation has been that both terms require two main types of action. On the one hand, providing financial assistance to countries of asylum, to help them care for and maintain refugees. And, on the other hand, the distribution of refugees between states. Hence, whenever it has been possible to implement them, both actions have basically taken the form of two mechanisms: the provision of financial contributions to United Nations High Commissioner for Refugees (UNHCR) to support its mission in countries hosting large refugee flows - usually developing countries which, in 2021 for example, hosted 86% of the world's refugees[12]; and international resettlement.

Convinced of the value of international solidarity as the key to the protection of refugees and the resolution of their problems, the UNHCR[13] highlights several regional and ad hoc good practice examples, which demonstrate the existence, within the international community, of a general commitment to international solidarity expressed through the above indicated dual mechanism. It also calls for the need not only to learn from such examples of good and successful experiences, but also to give international solidarity a comprehensive approach. As such, this approach should address the causes and consequences of refugee movements, as well as take into account "the economic, environmental, social, political and

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[10] José Antonio Carrillo Salcedo, *Soberanía de los Estados y derechos humanos en Derecho internacional contemporáneo* (Madrid: Tecnos, 1995), 21.

[11] Salvatore F Nicolosi and Solomon Momoh, 'International Solidarity and the Global Compact on Refugees: What Role for the African Union and the European Union?', *Journal of African Law*, 66, 1 (2022): 28, doi:10.1017/S0021855321000528.

[12] United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2021* (16 June 2022), accessed on 28 July 2022, https://www.unhcr.org/publications/brochures/62a9d1494/global-trends-report-2021.html.

[13] UNGA, International solidarity and burden-sharing in all its aspects: national, regional and international responsibilities for refugees (7 September 1998) UN Doc A/AC.96/904.

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security implications that refugee and returnee populations have on host countries and countries of origin". The UNHCR therefore considers that international solidarity programmes aimed at assisting and protecting refugee and returnee populations should be linked to political processes, development and environmental programmes, as well as to peacekeeping and peacebuilding activities, including reconciliation, rehabilitation, reconstruction and reintegration projects[14].

2. *Solidarity crisis and the response of the Global Compact on Refugees*

The above gives rise to acknowledge the significant efforts in both prescriptive and operational solidarity building that, in relation to refugee protection, have so far taken place especially in the regional contexts of the African Union (AU) and the European Union (EU). Thus, while in the African region solidarity has been elaborated and assumed as an institutionalised representation of African humanism, emphasising fraternity, reciprocity and compassion[15], at the EU level solidarity is assumed to be the 'soul' of the regional project[16] and, intimately linked to 'fair sharing of responsibility', has been established (under Article 80 TFUE) as a guiding principle governing common policies on asylum, immigration and border controls.

In the meantime, such efforts do not appear to have yielded effective and transformative results neither for refugees nor for States hosting them in large numbers. On the contrary, although the global number of refugees and asylum seekers has been rising steadily, reaching 27.1 million and 4.6 million respectively by the end of 2021[17], it would not be appropriate to speak of a refugee crisis. Rather, what we are witnessing is an installed crisis of international solidarity on both a regional and global scale.

The so-called "sanctuary cities"[18] and other significant initiatives promoted by civil society in a number of places around the world, particularly in Europe and the Americas, give rise to the hope that "the

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[14] *Ibid*.par. 28.

[15] Nicolosi and Momoh, 'International Solidarity and the Global Compact on Refugees…', 33-34.

[16] European Commission, '2021 State of the Union Address by President von der Leyen – Strengthening the soul of our Union' (15 September 2021), accessed on 21 May 2022, https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_21_4701.

[17] UNHCR, *Global Trends: Forced Displacement in 2021*, 2.

[18] See among others David Kaufmann, Nora Räss, Dominique Strebel and Fritz Sager, 'Sanctuary Cities in Europe? A Policy Survey of Urban Policies in Support of Irregular Migrants', *British Journal of Political Science* (2021), 1-10, doi:10.1017/S0007123421000326;

future of international solidarity for refugee protection will be coauthored by various actors, not simply constituted through state action"[19]. Nevertheless, it seems evident that solidarity based on the states' action and collective responsibility to protect refugees is experiencing a real crisis. This ultimately results in effective unprotection for the vast majority of asylum-seekers and refugees, as well as the helplessness of States and communities hosting them. In fact, long-term refugee camps and protracted refugees situations have become "normalised" and are no longer uncommon whatsoever. In the meantime, States continue to increasingly adopt and put in place restrictive border closure and migration control policies - including the externalisation of asylum management - with the aim of containing and limiting as much as possible the access of asylum seekers to their territories or, at least, to asylum procedures[20]. In light of this, Aleinikoff and Zamore[21] argue that the international refugee regime, designed after the Second World War to provide protection and assistance to people displaced by conflict and violence, is fundamentally broken and in need of urgent reform, placing refugee rights and responsibility sharing for their protection at the heart of this regime.

All that said, it would not be unwise to consider that the acknowledgement of the aforementioned solidarity crisis and the political will affirmation to overcome it was at the origin of the Global Compact on Refugees, which was endorsed by all UN MMSS in December 2018[22]. Indeed, in its background displayed in paragraphs 1-4, after acknoledging that predicament of refugees is a common concern of humankind, this remarkable document states that it is fundamental to translate the solidarity principle into concrete and practical measures. It also notes that "there is an urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees", because "refugees and host communities must not be left behind". Then it notes that, while not legally binding, this Global Compact "represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries".

Blanca Garcés Mascareñas, 'Ciudades santuario: una perspectiva global', *Anuario Internacional CIDOB* (June 2019), 46-52.

[19] Obiora Chinedu Okafor, 'Cascading toward "De-Solidarity"? The Unfolding of Global Refugee Protection', *Third World Approaches to International Review*, 2 (2019), 4-5.

[20] Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009).

[21] T. Alexander Aleinikoff and Leah Zamore, *The Arc of Protection: Reforming the International Refugee Regime* (Stanford University Press 2019).

[22] UN, *Global Compact on Refugees* (New York: UN, 2018), accessed on 28 July 2022, https://www.unhcr.org/5c658aed4.pdf.

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Founded on the fundamental principles of humanity and international solidarity, the Global Compact on Refugees "seeks to operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities" (paragraph 5). Morover, it pursues the following four interrelated and interdependent objectives: "(i) alleviating pressures on host countries; (ii) promoting refugee self-reliance; (iii) expanding access to solutions involving third countries; and (iv) fostering conditions in countries of origin conducive to return in safety and dignity" (paragraph 7). These goals are expected to be achieved through the mobilization of political will, a broadened base of support, and arrangements that facilitate more equitable, sustained and predictable contributions among States and other relevant stakeholders.

Disigned in the New York Declaration for Refugees and Migrants[23] and integrated into paragraph 10 of the Global Compact on Refugees, the Comprehensive Refugee Response Framework is heralded as "a milestone for global solidarity and refugee protection"[24] today. As a multi-stakeholder and whole-of-society approach, it presumably seeks to articulate a major transformation in traditional models of refugee hosting, through the early inclusion of refugees in host communities, enabling them to achieve economic self-relience and to contribute to the local economy and development.

It is worh noting that, despite their apparent innovative and transformative character, both the Global Compact on Refugees and its companion Comprehensive Refugee Response Framework largely evolved from and were influenced by policies adopted to handle the so-called "refugee crisis" occurred in Europe in 2015 and 2016. In this regard, Crawford and O'Callaghan argue that, while such policies envisage the return of refugees to their countries of origin and resettlement in third countries, the central motivation (and condition) that was and still is behind the solidarity they advocate lies in the local and sustained refugees' integration in host countries, within their regions of origin and away from destination countries in the Global North[25].

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[23] New York Declaration for Refugees and Migrants, (19 September 2016) UN Doc A/RES/71/1.

[24] UNHCR, *Bringing the New York Declaration to Life. Applying the Comprehensive Refugee Response Framework (CRRF)* (UNHCR, January 2018), accessed on 20 May 2022, https://www.unhcr.org/593e5ce27.pdf.

[25] Nicholas Crawford and Sorcha O'Callaghan, 'The Comprehensive Refugee Response Framework Responsibility-sharing and self-reliance in East Africa', *HPG Working Paper* (ODI September 2019) 1, accessed on 28 July 2022, https://cdn.odi.org/media/documents/12935.pdf.

Following this reasoning, we would arguably be witnessing a far-reaching political arrangement on burden- and responsibility-sharing for international protection which, nonetheless, takes no account whatsoever neither the human rights of refugees nor the interests of the poor countries and communities hosting the vast majority of them. In this regard, James Hathaway[26] peremptorily considers the Global Compact on Refugees and its Comprehensive Refugee Response Framework to be a pitifully "tepid" response to a reality that demands clear decisive action. It is also a "thin" approach to international protection reform, at a time when it is clear that both refugees and the poor countries that receive most of them deserve and need a robust approach. Hathaway argues that, "rather than proposing, for example, a binding optional protocol to remedy the operational deficiencies of the Refugee Convention, the refugee agency has instead drafted a highly partial Compact, applying to undefined 'large' movements of refugees". And he concludes by stating:

> I think we need to call out this 'Compact' for what it really is – a 'cop-out'. We should be clear that we do not need a Compact 'on' refugees, in which refugees are simply the object, not the subject, of the agreement. It is high time for a reform that puts refugees – all refugees, wherever located – first, and which recognizes that keeping a multilateral commitment to refugee rights alive requires not caution, but rather courage.[27]

At this point, it is compelling to note that, even after the Global Compact on Refugees has been "adopted", the disjuncture that, as Alexander Betts points out[28], has existed since the creation of the modern refugee system "between a strongly institutionalised norm of 'asylum' and a weakly institutionalised norm of 'responsibility-sharing'", still persists, and may even have been reinforced. As Betts notes,

> While States' obligations towards refugees who are within their territory or jurisdiction are relatively clearly defined, States' obligations to support refugees who are on the territory of another State are much weaker. Consequently, while law has shaped asylum, politics has defined responsibility sharing. This has long led to a major power asymmetry within the refugee system in which geography and proximity to crisis de

[26] James C Hathaway, 'The Global Cop-Out on Refugees', *International Journal of Refugee Law*, 30(4) (2018), 591, 594, doi:10.1093/ijrl/eey062.

[27] *Ibid*. 604.

[28] Alexander Betts, 'The Global Compact on Refugees: Towards a theory of change?', *International Journal of Refugee Law*, 30(4) (2018), 623, doi:10.1093/ijrl/eey056.

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> facto define State responsibility. Distant donor countries' commitments to provide money or resettlement have been viewed as largely discretionary.[29]

Building on the above, it appears pertinent to emphasise that international solidarity is a structural principle of the contemporary international legal order and, in particular, of the refugee regime. As such, "this principle is the cornerstone of our responsibility to protect people and uphold their rights", in particular refugees. It is also "an essential component of justice, fairness, equity and equality" and should also be considered "a cornerstone of the construction of international relations in the 21st century"[30]. Nonetheless, it seems clear that in refugee protection general regime, solidarity has not yet passed the test of being transformed from a mere principle into effective burden- and responsibility-sharing policies. Contingent upon individual States discretion and voluntarism, the operationalisation of the solidarity principle at global level remains an unresolved task. So what is happening in this regard at the EU regional level?

III. **Solidarity in the field of EU asylum law and policy**

1. *A general principle, cardinal value and foundation*

Similar to what was stated above in relation to the international legal order and the general international refugee regime, solidarity is also widely established and accepted as a value-laden general principle in the EU legal system. A number of its primary law provisions do reflect solidarity legal articulation as a value, an objective and a principle.

In this regard, it should be noted that, after expressing in its preamble (paragraph 6) the States Parties' desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions", in its Article 2 the Treaty on European Union (TUE) acknowledges that along with pluralism, non-discrimination, tolerance, justice, and equality between men and women, solidarity is and should prevail as one of the characteristics of a society that shares values common to the MMSS of the UE. In turn, Article 3 (paragraph 3) TUE provides that the EU "shall promote economic, social and territorial cohesion, and solidarity among Member States".

Solidarity is enshrined in Article 21(1) TEU as one of the guiding principles of the EU's external action. And, in relation to the construction of the

[29] *Ibid*. 623.

[30] Consejo de Derechos Humanos (n 3) paras 15-19.

common foreign and security policy, Article 24 TEU (paragraphs 2 and 3) proclaims the need for "mutual political solidarity" among MMSS.

Furthermore, in Article 67(2) the TFEU links common asylum, immigration and external border control policies to solidarity between MMSS. What is more, Article 80 TFEU provides that these policies and their implementation "shall be governed by the principle of solidarity and fair sharing of responsibility, including financial responsibility, between the Member States", the implementation of which shall require the adoption of appropriate measures where necessary.

Article 122 TFEU states that EU decisions in the economic policy area - "in particular if severe difficulties arise in the supply of certain products, notably in the area of energy" - shall be taken "in a spirit of solidarity between Member States". In the same vein, Article 194 TFEU sets out the so-called "principle of energy solidarity", which must govern the establishment and functioning of the common energy market.

In addition, by stating that "the Union and its MMSS shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster", Article 222 TFEU stipulates the so-called "solidarity clause", which the EU must activate in contexts of crises deriving from terrorist attacks or natural or man-made disasters.

Among the primary law provisions founded on solidarity, mention should also be made of the EU Charter of Fundamental Rights, whose Title IV (Articles 27-38) brings together a number of rights - rights concerned with employment, industrial relations and social and environmental protection - under the heading of solidarity.

In view of the above, solidarity is considered "a regular feature of EU law", which "plays different roles in different fields, ranging from constitutional-institutional to more substantive functions". Accordingly, it is also seen as "a proactive means" to give effect to the Treaties' goals, thus reinforcing economic and social cohesion in the EU[31].

In reality, it would not be unreasonable to say that there is a broad consensus in both academic, political and judicial spheres around the recognition of solidarity as a founding principle of the EU project and the law thereof. "Solidarity is the glue that holds our Union together," Jean-Claude Juncker once remarked[32]. In turn, the Court of Justice of the EU (CJEU), in

[31] Dirk Vanheule, Joanne van Selm and Christina Boswell, *The implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration* (European Parliament 2011) 6.

[32] European Commission, *State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends* (Strasbourg, 14 Sept 2016), accessed on 22 May

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its judgment in Case C-848/19 P (Germany v. Poland), held that the principle of solidarity is the foundation on which the entire legal system of the Union rests. And as such "it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the EU and the MMSS are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties"[33]. Elaborating on this same sense of the recognition of solidarity as a cardinal value of the EU, Advocate General Bot considered that, for this very reason, "the requirement of solidarity remains at the heart of the process of integration pursued by the Treaty of Lisbon"[34]. Advocate General Sharpston, in turn, asserted that "solidarity is the lifeblood of the European project". And in an attempt to dismantle the misinterpretation of solidarity as a one-way street, stated:

> Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European 'demos'is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.[35]

Notwithstanding the aforementioned consensus in the political and judicial spheres, it should be noted, as Advocate General Campos Sánchez-Bordona does, that there is persistent dissent in the academic debate "between those who refuse to recognise solidarity as having the status of a legal principle (or, at least, as a general principle of law) and those who advocate its status as a constitutional or structural principle, or a general principle of law, closely linked to loyal cooperation, the features of which have been more clearly defined"[36].

The key to such debate is whether or not the solidarity underlying various provisions of primary law and expressed both in terms of the "spirit of solidarity" and the "principle of solidarity" is to be understood as a purely political concept and, therefore, not a legal criterion from which rights and obligations for the Union and its MMSS can be directly derived.

2022, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_3043.

[33] Case C-848/19 P *Federal Republic of Germany v. Republic of Poland* [2021] ECR II-598, para 41.

[34] Cases C-643/15 and C-647/15 *Slovak Republic, Hungary v Council of the European Union* [2017] ECR II-618, Opinion of AG Bot, para 19.

[35] Case C-715/17 *European Commission v Republic of Poland, Republic of Hungary and Czech Republic* [2019] ECR II-917, Opinion of AG Sharpston, para 253.

[36] Case C-848/19 P *Federal Republic of Germany v Republic of Poland* [2019] ECR II-218, Opinion of AG Campos Sánchez-Bordona, para 64.

2. *Solidarity, from an abstract principle to an effective policy on asylum?*

In his truly remarkable and famous Declaration, delivered on 9 May 1950, Robert Schuman stated that "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity"[37]. It is certainly a founding declaration charged with programmatic strength, from which effective developments in both legislative and political spheres are to be expected. Yes, reading this Schuman's statement one can easily realise the extent to which, in the aftermath of the Second World War, the mothers and fathers of the EU conceived and devised solidarity as the core and soul, principle and driving force of the Community project. Nonetheless, apparently this declaration has not been enough to avoid a kind of interpretative drift of solidarity as a mere abstract concept, with the result that in almost all EU policy areas, solidarity has often been treated as less than the stone guest.

Such political (mis)treatment of solidarity is to a large extent nourished by the fact that, although it is widely present in legislation and also in the early case law of the Court of Justice, solidarity is characterised by a lack of a clear meaning[38]. As such, it appears rather as "an amorphous concept" whose contours change according to the legal fields and actors involved, and generating different levels of commitment or lack thereof[39]. For a long time, the Court of Justice does not seem to have contributed to overcoming this situation, since, although it has used the principle of solidarity in its case law, it has avoided determining its profiles in a general manner, having done so only partially and on an ad hoc basis "usually in the context of litigation in which State measures contrary to that principle were being judged"[40].

The "insistent" assertion of the supposed abstract nature of the principle of solidarity has been particularly evident in the area of common asylum policy. In this regard, it is worth recalling the words of Jean-Claude Juncker, who, while acknowledging that "solidarity is the glue that holds our Union together" and that "the word solidarity appears 16 times in the Treaties that all our Member

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[37] European Commission, *The Schuman Declaration of 9 May 1950* (Publication Office, 2016), accessed on 27 July 2022, https://data.europa.eu/doi/10.2775/619932..

[38] The difficulty of inferring from the provisions of primary law "a full and all-encompassing definition of solidarity in EU law" has also been acknowledged by Advocate General Campos Sánchez-Bordona in his aforementioned Opinion on Case C-848/19 P, para 60.

[39] Kim Talus, 'The interpretation of the principle of energy solidarity - A critical comment on the Opinion of the Advocate General in OPAL', Energy Insight, 89 (2021), 1-10, accessed on 23 May 2022, https://www.oxfordenergy.org/wpcms/wp-content/uploads/2021/04/Insight-89-The-interpretation-of-the-principle-of-energy-solidarity-.pdf .

[40] Opinion of AG Campos Sánchez-Bordona (n 37), para 65.

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States agreed and ratified", asserted: "I am convinced much more solidarity is needed. But I also know that solidarity must be given voluntarily. It must come from the heart. It cannot be forced"[41]. The Juncker's declaration obviously adds on to the supposed abstract character of solidarity two other "essential" features, according to its dominant political interpretation: discretionality and voluntarism, which make its assumption and implementation as a legal principle and binding criterion practically impossible.

It should be mentioned that, uttered in the context of managing the misnamed "refugee crisis" and on the eve of the first UN Summit on Refugees and Migrants[42], Juncker's words quoted above clearly contradict the binding nature of the decisions on relocation of asylum seekers, which were imposed on 14 and 22 September 2015[43] by qualified majority in the European Council against the opposition of the Visegrad Group MMSS and Romania. It is worth recalling that the exceptional arrivals of migrants and applicants for international protection in Italy and Greece in 2015 led the EU institutions to adopt these two concrete measures of solidarity towards these MMSS. Moreover, by adopting them, the aim was to reinforce internal solidarity within the EU and to show the commitment of all EU MMSS to share the migratory burden with the two Mediterranean countries.

Both decisions derogated from the application of certain provisions of Regulation (EU) 604/2013[44] and obtained their legal basis in Article 78 TFEU, which empowers the EU to adopt laws that benefit MMSS overwhelmed by a sudden influx of asylum seekers, an in Article 80 TFEU, which, let us recall, lays down that such decisions must be governed by the principle of solidarity and fair sharing of responsibility among MMSS.

It appears that, with its recent case law, the Court of Justice has begun to reverse this dominant interpretative trend, which understands solidarity as a mere abstract principle, based on voluntarism and from which no politically and judicially enforceable obligations of any kind derive. In this regard, both the judgment of 2 April 2020 in joined cases C-715/17,

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[41] European Commission, *State of the Union Address 2016…* (n 33).

[42] Held in New York on 19 September 2016, this summit gave rise to the New York Declaration on Refugees and Migrants, which in turn led, in 2018, to the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees.

[43] Council Decision (EU) 2015/1523 of 14 September 2015 on the establishment of provisional measures in the area of international protection for Italy and Greece (OJ 2015, L 239/146); and 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 (OJ 2015, L 248/80).

[44] Regulation (EU) 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 (OJ 2013, L 180, p. 31).

C-718/17 and C-719/17 Commission v Poland, Hungary and Czech Republic (on the temporary relocation mechanism for applicants for international protection, adopted by the above-mentioned 2015 Decisions)[45] and the already mentioned judgment of 15 July 2021 in case C-848/19 P Germany v Poland are particularly relevant.

Faced with the MMSS of the Visegrad Group (Poland, Hungary, the Czech Republic and Slovakia), which have persistently and decisively refused to comply with the above relocation decisions and even challenged their legality, the Court confirmed the applicability of the duty of solidarity between EU MMSS. The Court of Justice rules that Poland, Hungary and the Czech Republic had failed to fulfil their obligations under EU law by refusing to apply the temporary mechanism for the relocation of applicants for international protection, citing, inappropriately, either their responsibilities for maintaining public order and safeguarding internal security or the alleged malfunctioning and ineffectiveness of that mechanism. It should be emphasised that the Court of Justice considers the temporary relocation mechanism for applicants for international protection in question as an example and concrete expression of the principle of solidarity referred to in Article 80 TFEU. In so doing, the Court of Justice firmly and resolutely upholds the values and principles of the EU, including the principle of solidarity. Furthermore, it seems to establish that the principle of solidarity between MMSS in the area of EU asylum policy can be a source of EU obligations susceptible to judicial enforcement.

Likewise, in case C-848/19 P Germany v. Poland (on the principle of energy solidarity), the Court of Justice carries out and fosters a judicial interpretation of the legislation that could be considered historic for three reasons. First, because it rescues the principle of solidarity from vagueness, abstraction and consequent ineffectiveness. Secondly, because it reveals the nature and scope of the principle of solidarity, the correct location of which must be the entire legal system of the Union, within which this principle is called upon to operate and to which it must confer unity and coherence. Third, because this interpretation is in stark contrast to the previous case law of the Court of Justice itself on the principle of solidarity, which seems to have been characterised by a lack of willingness to use arguments of solidarity with firmness and clarity.

The content of the judgment in this case (C-848/19 P) may be summarised basically by stating that the Court of Justice dismisses the appeal brought by Germany in its entirety and does so by refuting its argument concerning the alleged abstract nature of the principle of solidarity. Germany submits that that

[45] Joint Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* [2020] ECR-257.

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principle is a purely political concept and not a legal criterion from which rights and obligations can be derived directly for the Union and its MMSS. At most, solidarity (applied to the field of the common energy policy) would only determine an obligation of mutual assistance in situations of disaster or crisis. The Court states that this principle underlies the entire legal system of the Union and that it is closely linked to the principle of loyal cooperation. It also considers that the principle produces per se binding effects and that the legality of any act of the Union's institutions and MMSS - forming part of its common energy policy and, by extension, of other policy areas - is to be assessed in light of the principle of solidarity.

IV. **Conclusions**

Persistent distress suffered by both refugees and the poor communities that host the vast majority of them denotes the existence not of a refugee crisis per se, but rather the existence of a long-standing crisis of international solidarity, both regionally and globally.

Despite their apparent novelty and stated ambition to address this crisis by promoting solidarity in the service of durable and sustainable solutions to refugee and asylum state problems, the Global Compact on Refugees and its Comprehensive Refugee Response Framework seem far from resolving the original major flaw in the overall refugee regime: the absence of a common operational mechanism capable of ensuring the equitable sharing of protection burdens and responsibilities among states. Worse still, both policy arrangements resemble more a 'self-centred solidarity' in favor of the destination countries of the Global North than a solidarity mechanism that puts the human rights of refugees and the interests of poor host countries at its core.

Considering that the solidarity approach adopted in the Global Compact on Refugees and the accompanying Comprehensive Refugee Response Framework largely mirrors the migration policies adopted to address the misnamed 'European refugee crisis' of 2015, there is little room for optimism about the EU's potential contribution to the establishment and effective implementation of a global solidarity system for refugee protection.

Yet, at the regional level, there is room for hope that the interpretative efforts of the Court of Justice could already be promoting the understanding and deepening, assumption and correct enforcement of the principle of solidarity in heterogeneous areas and in its linkage to both horizontal relations (between MMSS, between institutions, between peoples or generations and between MMSS and third countries) and vertical relations (between the Union and its MMSS). In fact, the enormous current and potential challenges facing the EU in areas as diverse and interconnected as the management of

international protection and migration, energy, the fight against the devastating effects of the war in Ukraine, the climate emergency and pandemics, among others, demand no less. Meanwhile, a kind of 'à la carte' solidarity that is being forged in the framework of the New Pact on Migration and Asylum, presented by the Commission in September 2020, is perplexing and could continue to weigh down other areas of the EU project. In this sense, the impact of the Court of Justice's contribution to overcoming the supposedly merely abstract and voluntarist nature of solidarity and the construction of effective solidarity policies in the field of asylum and beyond remains to be seen.

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Addressing Migrant Smuggling in the European Union. Challenges for a Non-Criminalized, Coordinated and Effective Response

Abordar el tráfico de migrantes en la Unión Europea. Desafíos para una respuesta no criminalizada, coordinada y efectiva

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Abstract: Migrant smuggling is a highly complex criminal phenomenon. Clearly cross-border in nature, smuggling frequently involves the participation of organized criminal groups. A coherent approach to these activities requires a clear and correctly implemented regulation, in the case of the EU the reference regulation is the 'Facilitators' package'. In the present contribution several controversies that this framework entails will be pointed out, especially the excessive criminalization and the neglect of the human rights perspective.

Furthermore, the eradication of smuggling requires the sum of efforts and coordinated action of different actors such as national authorities and European agencies. In this paper some actions carried out by Europol in the Mediterranean will be studied. Focusing on the role of this law enforcement agency in the hotspots, the contribution of the information gathered and the benefits for Eurojust will be evaluated.

Keywords: Smuggling, organised criminal groups, hotspots, Europol, Eurojust

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Resumen: *El tráfico ilícito de migrantes es un fenómeno delictivo de alta complejidad. De naturaleza eminentemente transfronteriza, el tráfico de personas conlleva con frecuencia la participación de grupos delictivos organizados. Un enfoque coherente en la lucha contra estas actividades requiere una regulación precisa y correctamente implementada, en el caso de la UE, la regulación de referencia es el «paquete de facilitadores». En la presente contribución se señalarán varios puntos controvertidos que conlleva este marco, en especial, la excesiva criminalización y el descuido de la perspectiva de los derechos humanos.*

Además, la erradicación del tráfico de personas requiere la suma de esfuerzos y la acción coordinada de diferentes actores como autoridades nacionales y agencias europeas. En este trabajo se estudiarán algunas actuaciones llevadas a cabo por Europol en el Mediterráneo. Centrándose en el papel de este organismo en los hotspots, se evaluará la contribución de la información recopilada y los beneficios que esta conlleva para Eurojust.

Palabras clave: *tráfico de personas, grupos de crimen organizado, hotspots, Europol, Eurojust*

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I. By Way of Introduction: Migrant Smuggling and Organized Criminal Groups

Migrant smuggling in the European Union (EU) is one of the most complex criminal activities from the point of view of investigation and criminal prosecution. The Mediterranean 'crisis' has contributed to draw attention to this phenomenon. According to data from the International Organization for Migration (IOM), 1,140,797 people arrived to the EU territory by sea since 2015, at least 14,430 persons have drowned or are missing in the Mediterranean[2]. Due to different factors, including the restrictions derived from the COVID-19 pandemic[3], the numbers in 2021 are well below those recorded in 2015 or 2016. In fact, in 2021 the arrival of 144,423 people was recorded[4]. Europol stated that more than 90% of the people who arrive irregularly in the Union through the Mediterranean routes have received the support of a criminal network[5].

The main activity of smugglers is to exploit the despair and vulnerability of migrants with the sole objective of economic gain. In fact, it is a growing criminal practice in the territory of the EU, which is experiencing the emergence of new criminal groups inactive until now in this field[6]. The huge profits, together with the limited information on the financial and laundering flows of the economic proceeds of crime, make smuggling of persons a really attractive activity for these criminal groups.

The organized crime groups that control migrant smuggling in the EU have sophisticated *modus operandi*. These illegal migration networks are designed with the aim of being present at the different stages of the process, being able to offer the 'services' required at each stage, such as transportation, accommodation or forgery of documents[7]. During their journeys to the EU migrants pay high fees[8] for services that endanger their physical and

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[2] IOM, "Flow Monitoring. Migration Flows to Europe", accessed 15 of May 2022, https://migration.iom.int/europe/arrivals/.

[3] IOM, *World Migration Report 2022*, (2022), 91.

[4] In 2016, 387,739 people arrived to EU territory by sea, while 5,143 deaths or disappearances were reported. IOM, "Flow Monitoring".

[5] Europol, *Migrant smuggling in the EU,* (February 2016), 5.

[6] Europol, *Serious and Organised Crime Threat Assessment, Crime in the age of technology*, (2017), 15.

[7] *Ibid*., 50.

[8] In 2019, the smuggling fees were from 300 to 5,000€ depending on the route (2,300€ average per person), see Europol, *Migrant Smuggling. The profits of smugglers*, (2019), 1. In 2021, the smuggling fees for the central route increased to 12,000€ average per person, see Europol, *European Migrant Smuggling Centre. 6th Annual Report,* (2022), 12. The European Commission has also pointed out "that prices of smuggling services can generally reach EUR 20 000 per individual", see "A renewed EU action plan against migrant smuggling (2021-2025)", 29 of September 2021, COM (2021) 591 final, 5.

psychological integrity. Moreover, they are exposed to being exploited in some of the stages of their trip or upon arrival.

Usually, migrant smuggling groups have a network structure with an enormous adaptability and responsiveness to changes in their environment[9]. The size of the networks clearly affects their *modus operandi* and payment methods. On the one hand, the large international networks offer migrants complete closed packages from the country of origin to the country of destination. In these cases, the migrant makes a single payment and the money hardly leaves the country of origin. On the other hand, regional networks are small in size and tend to operate autonomously and support their activities on independent individuals who act as drivers, migrant recruiters, document forgers or organizers. It is common for these freelancers to work with more than one network at the same time.[10] These are flexible networks, capable of quickly adapting to changes in their environment, for example by modifying routes or creating new hotspots and hubs. The operation of these groups generally means that the migrant's payments are made in different countries and for each service received. In both cases, the leaders run the network from a distance and only maintain contact with a very limited number of people. In addition, the role of migrants in trafficking is increasing, for example on the central route to Italy the same migrants are in charge of manning the boat until the moment of rescue.[11] This technique allows the organizers of the trip to remain far from any direct operation, thus avoiding their arrest.

The characteristics pointed out so far show that the prosecution of the crime of migrant smuggling is complex for several reasons. Indeed, the structures and links between groups and networks are difficult to detect. Furthermore, the flexibility of organized groups makes them almost immune from police arrest since they are capable to easily recover in a short lapse of time.

In addition, the facilitation of irregular migration carried out by the criminal networks can be diverse. At least 3 groups of activities have been identified as forms of smuggling in the EU territory. Firstly, transporting or managing the transportation of a non-national person to enter or transit a country. Secondly, fabricating and/or providing fake documents. Finally, arranging marriages of convenience or sham marriages. Furthermore,

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[9] Europol, *European Union serious and organised crime threat assessment. A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime*, (Brussels: Publications Office of the European Union, 2021), 68.

[10] Europol, *Migrant smuggling in the EU*, 9.

[11] United Nations Office on Drugs and Crime (UNODC), *The Concept of 'Financial or Other Material Benefit' in the Smuggling of Migrants Protocol*, (2017), 38.

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smuggling activities are clearly associated with other crimes such as money laundering and trafficking in human beings[12].

For all the above, the study of the approach adopted by the EU in the fight against migrant smuggling is of special interest. To this end, first an analysis of the current legal framework will be carried out, delving into the difficulties that it entails. Secondly, some actions carried out in the Mediterranean will be pointed out, focusing attention on those in the field of cooperation in criminal matters and the actions executed by Europol and Eurojust. Lastly, some improvement proposals will be made for a more effective prosecution of the crime of migrant smuggling.

II. The 'Facilitators' Package' as a Legal Framework: What to Pursue as Migrant Smuggling

Throughout the last two decades, the fight against smuggling has been configured as an essential objective for the achievement of the Area of Freedom, Security and Justice (AFSJ). The identification of smuggling as an 'eurocrime' or its inclusion in the spheres of competence of both Europol and Eurojust considerably facilitates its prosecution in the territory of the Union.

The regulation of migrant smuggling from a criminal point of view in the EU consists of the well-known 'Facilitators' Package'. That is, Directive 2002/90/EC that establishes a definition of the crime of migrant smuggling[13] and Framework Decision 2002/946/JHA created with the aim of strengthening the criminal framework that pursues it[14].

The main objective of both instruments is to reinforce the system of sanctions that repress the facilitation to clandestine immigration. The package provides a common definition at EU level of what facilitation is. Likewise, it harmonizes the legislation of the Member States (MMSS) with respect to sanctions, the responsibility of legal persons; and the jurisdiction over offenses related to facilitating clandestine immigration.

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[12] Eurojust, *Report on Eurojust's casework on migrant smuggling*, (2018), 10.

[13] Council Directive (EC) 2002/90 defining the facilitation of unauthorised entry, transit and residence (Official Journal of the European Union, L 328, 5 of December 2002, 17), hereinafter the Facilitation Directive.

[14] Council Framework Decision (JHA) 2002/946 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Official Journal of the European Union, L 328, 5 of December 2002, 1), hereinafter Facilitation Framework Decision.

Said European regulation is not exempt from controversy[15] for moving away from the international framework provided by the Protocol Against the Smuggling of Migrants by Land, Sea and Air, which Supplements the United Nations Convention Against Transnational Organized Crime (hereinafter the Protocol)[16]. Some aspects of the differences established in the definition of smuggling, the treatment of the profit motive and the inclusion of specific protection guarantees for smuggled persons will be analysed below.

1. *The definition of smuggling and the economic benefit as a requirement*

The Facilitators' Package criminalizes any assistance to irregular migrants, that is to say, to nationals of third States who enter, transit or reside in the territory of the Union. According to Directive 2002/90/EC, both support for entry and transit[17], as well as assistance through economic benefit for irregular residence[18], can be considered 'facilitation' behaviours. The Directive only refers to the 'economic benefit' in cases of facilitating irregular residence. This conception is not in line with the definition of trafficking provided by Article 3 of the Protocol, which requires as a *sine qua non* condition the existence of 'an economic or material benefit' for the criminalization of the assistance[19]. The inclusion of the 'benefit' understood in a broad way, reinforces the content of art. 5 of the Protocol according to which smuggled migrants should not be criminally prosecuted[20].

The dissociation between 'facilitation' and 'benefit' is especially worrying, since it can lead to the criminalization of humanitarian tasks, mutual

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[15] See Council of Europe Commissioner for Human Rights, *Criminalisation of migration in Europe: Human rights implications* (4 February 2010). See also Mark Provera "The Criminalisation of Irregular Migration in the European Union", *CEPS Papers on Liberty and Security in Europe*, n.º 80 (Brussels: 2015); Valsamis Mitsilegas, "The Criminalisation of Migration in the Law of the European Union. Challenging the preventive Paradigm" in *Controlling Immigrations Through Criminal Law. European and Comparative Perspectives on 'Crimmigration'*. Ed. by Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (Oxford: Hart Publishing, 2021), 25-46.

[16] UNGA Resolution, A/RES/55/25 (15 of November 2000).

[17] Facilitation Directive, art 1(1).

[18] *Ibid*. art 1(2).

[19] According to the *travaux préparatoires*, the inclusion of 'financial or material benefit' characterizes migrant smuggling in front of other non-punishable facilitation behaviours, see UNGA, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1, (3 of November 2000), para. 88.

[20] UNODC, *The Concept of 'Financial…*, 13.

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aid between asylum seekers, and even between members of the same family. In fact, on numerous occasions the European Agency for Fundamental Rights (FRA) has highlighted the problem of criminalizing certain behaviours related to irregular migration from a human rights perspective[21]. It is true that the Facilitation Directive grants the MMSS the possibility of including a 'humanitarian clause', however it turns out to be non-mandatory and lacks a common definition. As the FRA pointed out in 2014, support for arrival and transit for humanitarian reasons was only exempt from persecution in 8 MMSS. In 2016, several MMSS claim to have modified their regulations due to the increase in refugee flows[22]. However, other studies showed that civil organizations fear that their work assisting migrants will be sanctioned[23]. In any case, the inclusion of 'benefit' as an essential element to all forms of assistance is necessary, or at the very least, a clear exemption to humanitarian aid is urgently needed.

The Framework Decision is committed to considering economic benefit as an aggravating circumstance. In effect, said regulation obliges the MMSS to establish no less than maximum 8 years' prison sentences with maximum sentences when there is economic benefit, in cases of belonging to an organized criminal group or, when the lives of migrants have been put in danger. However, unlike the Protocol, it does not include cases involving degrading or inhuman treatment.

2. *About the need to treat smuggled human beings as victims*

The omission of the degrading or inhuman treatment is especially worrying if the new tendencies of certain organized criminal groups in which there are flagrant violations of human rights are taken into account. The current situation implies that the majority of migrants who arrive in the territory of the Union are victims of crimes, such as physical attacks, rape or even exploitation. This reality requires a regulation that contains a sensitive

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[21] See Fundamental Rights Agency (FRA), *Fundamental rights of migrants in an irregular situation in the European Union* (Vienna: 2011); FRA, *Fundamental Rights at Europe's southern sea borders* (Vienna: 2013); FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them* (Vienna: 2014).

[22] Milan Remác and Gertrud Malmersjo, *Combating migrant smuggling into the EU. Briefing Implementation Appraisal* (Brussels: European Parliamentary Research Service, April 2016), 7.

[23] Michael Collyer, "Cross-Border Cottage Industries and Fragmented Migration" in *Irregular Migration, Trafficking and smuggling of human beings. Policy Dilemmas in the EU*. Ed. by Sergio Carrera and Elspeth Guild, (Brussels: Centre for European Policy Studies, 2016), 18.

approach to the protection of migrants, understanding them as victims[24]. A brief comparison between the provisions regarding the smuggling of migrants and the trafficking of human beings, points to a differentiated treatment among the victims of said crimes.

Indeed, while the Facilitators' Package does not refer to the victims, Directive 2011/36/EU on trafficking in human beings[25] incorporates them as a central point of protection[26]. Although these are distinct phenomena, it is undeniable that trafficking and smuggling are clearly related. In order to characterize trafficking in human beings against smuggling, different factors of special relevance are considered. Such analysis is centred on the cross-border phenomena, the purpose of the acts carried out, the consent of the victims, the protected legal interest or the source of economic benefit for the organized crime group.

It is frequently noted that trafficking and smuggling affect different legally protected interests. This distinction justifies a differentiated treatment between victims that is more than questionable. In the case of crimes related to trafficking, depending on the *modus operandi* of the criminal organization, related crimes can be perpetrated such as: rape or sexual abuse, injuries, forced abortion, child pornography, torture, murder, kidnapping, forced marriage, retention of documentation, labour exploitation and even corruption. Therefore, different legal rights linked to the victim can be protected, such as, for example, dignity, physical integrity or sexual indemnity. For its part, smuggling is qualified as a crime without a victim, a characteristic that derives from the high interest of the migrant in the success of

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[24] See *inter alia*, Tom Obokata, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law", *International Journal of Refugee Law*, n.º 2, vol. 17 (2005): 394-415; Matilde Ventrella, "Recognizing Effective Legal Protection to People Smuggled at Sea, by Reviewing the EU Legal Framework on Human Trafficking and Solidarity between Member States", *Social Inclusion,* n.º 1, vol. 3, (2015): 76-87; Alessandro Spena, "Human Smuggling and irregular immigration in the EU: from complicity to exploitation?", in *Irregular Migration, Trafficking and smuggling of human beings. Policy Dilemmas in the EU*. Ed. by Sergio Carrera and Elspeth Guild, (Centre for European Policy Studies, 2016), 33-40.

[25] Directive (EU) 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal of the European Union, L 101, 15 of April 2011, 1), hereinafter THB Directive.

[26] On the approach of the THB Directive see Katarzyna Gromek-Broc "EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?", *Nova et Vetera*, n.º 20, vol. 64 (2011): 227-238; Marta Ortega, "La trata de seres humanos en el derecho de la Unión Europea" in *Técnicas y ámbitos de coordinación en el espacio de libertad, seguridad y justicia*. Coord. by Franciso Javier Donaire and Andreu Olesti, (Marcial Pons, 2015), 181-196; Mirentxu Jordana, "La lucha contra la trata en la UE: los retos de la cooperación judicial penal transfronteriza", *CIDOB d'Afers Internacionals,* n.º 111 (2015): 57-77.

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the criminal activity. Consequently, from a legal-criminal point of view, the object of protection of the norm is not the migrant, but the State regulation of migratory flows. This approach leaves in the background the grievances that the migrant may have suffered and contributes to dehumanizing the phenomenon.

Although in the case of trafficking the borders crossing is not an essential element, the practice indicates that a considerable number of victims of trafficking cross some border. In the case of irregular entries, the confusion between trafficking victims and smuggled persons continues to be a difficult challenge to overcome. Likewise, it should be remembered that THB Directive does not require exploitation to materialize for certain acts to be qualified as trafficking. According to art. 2.1, situations of trafficking may include threats, coercion, kidnapping, fraud, deception, including abuse of power or vulnerability of the victim. In fact, the Directive clarifies that the consent of the victim becomes irrelevant if any of these means have been used. In considerable cases, the victim of trafficking may have shown an initial consent to be introduced into the territory of a given country. As Frontex reports confirm, many people start their itinerary hiring the services of criminal groups without being aware that, upon arrival at their destination, they will become victims of exploitation, that is, trafficking. In this as in other situations, initial consent becomes worthless due to coercion, deception or abuse carried out by traffickers.

Migrants in an irregular situation are hardly treated as victims of a crime but as criminals. The fear of being arrested, fined or returned refrain them from reporting crimes, including serious crimes against themselves. This circumstance hinders their effective protection and generates distortions in the victim's self-perception as such or reaffirms their erroneous perception. This reality entails to lack of access to justice and also to impunity on the part of the perpetrators. Beyond that the protection of all victims should be considered one of the central objectives of the fight against organized crime in the Union.

From the point of view of criminal prosecution, another dimension is added to the importance of detecting victims: in most cases, said victims are witnesses of illicit actions and, therefore, they can be a key element in issuing a conviction. In this regard Directive 2004/81/EC[27] contemplates the possibility that the victims of both crimes who cooperate with the au-

[27] Council Directive (EC) 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (Official Journal of the European Union, L 261, 6 of August 2004, 19), hereinafter Residence Directive.

thorities in criminal investigations can obtain a residence permit. However, it should be noted that while in trafficking the permit is mandatory, in cases of smuggling it is discretionary. In fact, according to data from the European Commission, only 10 MMSS have exploited the possibility of granting a residence permit for victims of smuggling[28].

Finally, it should be noted that the rights included in the Directive 2012/29/EU[29] apply to all victims of crime in a non-discriminatory manner, regardless their residence status. According to these provisions, the victim will be any natural person who has suffered any damage, especially physical or mental injuries, emotional damages or economic damage, caused by action or omission in violation of state criminal law. Bearing in mind the current situation in the Mediterranean, it is really difficult not to think that at least some people who are smuggled should not be considered as victims.

For all these reasons, there is the necessity to rethink the Facilitators' Package, including a human rights approach, as was done in the case of trafficking several years ago.

3. *The shortcomings in the transposition of the Facilitators' Package*

Regarding to the transposition of the Facilitators' Package, considerable differences between the provisions of the MMSS should be noted. The Framework Decision points out that the member countries must take measures to penalize the 'facilitation' behaviours described in the Directive through effective, proportionate and dissuasive penalties that may include extradition. Other measures may accompany these penalties, such as the confiscation of the means of transport used to commit the crime. The translation of these provisions into national regulations illustrates the existence of different approaches regarding

[28] These are Austria, Belgium, the Czech Republic, Greece, Estonia, Luxembourg, Malta, Portugal, Romania and Sweden. Some States require that the smuggling conduct be carried out by an organized group, in others countries to be a victim of the aggravated type defined according to national law is a requirement. See European Commission, "Communication on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities", 17 of October 2014, COM (2014) 635 final, 3.

[29] Directive (EU) 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Official Journal of the European Union, L 315, 14 of November 2012, 57), hereinafter Victims' Directive.

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irregular entry and stay in EU territory[30]. More than half of the MMSS considered irregular entry into their territory deserving of imprisonment, while others punished it with a fine, only Spain, Malta and Portugal did not establish any penalty. Irregular stay could carry a prison sentence in 11 MMSS, in another 14 a fine, while in Portugal, France and Malta there was no punishment. Except in Slovenia, the facilitation of irregular entry to the EU territory carried prison sentences and/or fines. And in turn, the facilitation of the stay was not punishable in Ireland, it carried a fine in 7 MMSS and could result in a prison sentence in the rest[31]. Penalties for the same behaviour vary substantially from one MS to another, ranging from small fines to prison terms of up to 15 years[32]. Only 8 MMSS include in their national legislations an exception from punishment for facilitating unauthorised entry and/or transit in order to provide some form of humanitarian assistance[33].

For all the above, it can be affirmed that the margin of discretion left to the member countries in the Facilitators' Package translates into inconsistencies in its application that may affect its effectiveness. In 2015, the Commission draw attention to the need of an urgent review of the Facilitators' Package[34]. Yet, in 2017, the Commission considered a legal revision to be unnecessary. Several NGO reports suggest that since 2015 acts carried out for humanitarian purposes have been increasingly criminalised[35]. Even accepting the lack of reliable and comparable national criminal statistics, in 2020 the Commission decided to launch a guidance to the MMSS on the implementation of the Smuggling Directive.

It is still early to evaluate the impact of such guidelines (the Commission intends to report on their implementation in 2023)[36], but not

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[30] See Sergio Carrera (coord.), *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, (European Parliament Study, 2016), 29.

[31] Remác and Malmersjo, *Combating migrant smuggling…*, 6.

[32] European Commission, "Report based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence", 6 of December 2006, COM (2006) 770 final, 7.

[33] European Commission, "Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence", 23 of September 2020, C (2020) 6470 final.

[34] European Commission, "EU Action Plan against migrant smuggling (2015-2020)", 27 of May 2015, COM (2015) 285final, 3.

[35] International Amnesty, *Punishing Compassion. Solidarity on Trial in Fortress Europe*, (2020), 25.

[36] COM (2021) 591 final, 18.

performing the review of the Facilitators' Package is a missing opportunity to reach a regulation that really focuses on the persecution of smugglers and the protection of their victims.

III. The cooperation in criminal matters: the role of Europol and Eurojust fighting smuggling at the European Union level

The fight against migrant smuggling has taken on a huge role in the last decade. Indeed, human smuggling has been identified as a case of serious and organized cross-border crime that should be eradicated[37].

Smuggling is characterized by considerable complexity. As Europol points out, almost half of these groups are 'poly-criminals' involved also in trafficking in human beings, drug trafficking, excise fraud, firearms trafficking and money laundering[38]. Likewise, organized groups are highly specialized and operate offering various services along the migrant route.

Due to the cross-border nature of smuggling, the actions of criminals can be dispersed and affect territories of different States. In these cases, part of the members of the organized group are not in the same State as the smuggled people or the proceeds of crime. Addressing a case requires the cooperation of several jurisdictions, since evidence must be collected and arrests and surrenders of certain suspects or seizures of goods must be executed in different territories. In addition, the collaboration of the victims of smuggling may be essential if their testimonies are to be heard at the time of the trial. A fact that, as has been seen, is sometimes not easy for various reasons, such as the victim being expelled from the territory of the Union or after deciding not to collaborate with the authorities.

Various obstacles must be added, such as the differences between penal systems or conflicts of jurisdiction, which are closely linked to the exercise of state sovereignty. The heterogeneity in penal systems is identified from a practical point of view as one of the greatest obstacles for the investigation and prosecution of cross-border crime. This causes legal and procedural obstacles to arise, such as those related to taking evidence, the different degree of witness protection that exists in each State or the procedural guarantees in taking witness statements.

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[37] European Commission, "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe", 22 of November 2010, COM (2010) 673 final, 11. Along the same lines, see European Commission, "EU Security Union Strategy (2021-2025)", COM (2020) 605.

[38] Europol, *EU Serious and Organised crime Threat Assessment. A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime*, 2021, 68.

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As shown below, cooperation in criminal matters in the EU seeks to increase the criminal prosecution of this type of crime through the joint and coordinated work of the Union agencies.

1. *Brief reference to some tools of EU cooperation in criminal matters*

With the objective of achieving an AFSJ, the EU has adopted different legal and institutional instruments. These tools allow the maximum potential of criminal matters cooperation to be exploited, such as the European Arrest Warrant or the Joint Investigation Teams (JITs). Among the institutional instruments, the European Union Agency for Law Enforcement Cooperation (Europol) and the European Union Agency for Criminal Justice Cooperation (Eurojust) are particularly relevant, providing all the support that the State authorities in charge of criminal prosecution may require. While Europol is responsible of coordinating the police authorities through its National Units, Eurojust is in charge of the coordination between the judicial authorities[39]. However, both agencies must work together coordinating the received requests from the MMSS.

The functions that Eurojust carries out in the judicial field are not a reflection of the tasks that Europol assumes in the police field. The main objectives of Eurojust mainly consist in three types of actions. In the first place, Eurojust is in charge of the coordination of judicial actions and investigations that affect two or more MMSS. The performance of Eurojust is always conditioned by the request presented and the information that has been provided by the State authorities. Secondly, Eurojust seeks to improve cooperation between the competent authorities of the MMSS. In other words, Eurojust facilitates the execution of both requests and decisions also with respect to the instruments that give effect to the principle of mutual recognition. Finally, Eurojust must provide support seeking greater efficiency in investigations and prosecutions by organizing coordination meetings between national authorities.

Europol's main task is to facilitate exchanges of information between MMSS. The agency works through a network of Liaison Officers and National Units who have access to all databases in their State. In order to fulfil its broader mandate, Europol organizes its information in its own databases. However, it must be taken into account that Europol has a

[39] A detailed analysis of Eurojust and Europol common work is included in Mirentxu Jordana Santiago, *El Proceso de Institucionalización de Eurojust y su Contribución al Desarrollo de un Modelo de Cooperación Judicial Penal de la Unión Europea*, (Marcial Pons, 2018), 142 *et seq*.

limited capacity in terms of access to external databases, and in general it is at the expense of the information that the police of the MMSS provide it. The national authorities retain the ownership of the data and may decide not to share it with certain MMSS or other Europol partners. In addition to facilitating exchanges of information, Europol is also responsible for providing MMSS with analytical information in its areas of competence through strategic reports[40].

According to article 49.5 of the Eurojust Regulation, relations between Eurojust and Europol must be based on 'close cooperation' always in pursuit of their objectives and avoiding 'useless duplication'. For this reason, the efforts of the agencies focus on maintaining cooperation to increase effectiveness and avoid duplication in their actions through regular exchanges of information and coordination of activities. The collaboration between the two agencies also extends to the preparation of joint reports or documents, the organization of training activities and the designation of contact points. In this sense, the contributions that Eurojust regularly makes to Europol's strategic reports such as the OCTA or the TE-SAT must be highlighted.

Information exchanges play a major role in the agencies' joint work. Europol provides Eurojust with reports on the findings of the data analysis, whether of a specific result, of a general nature or of a strategic nature. If an information provided by Eurojust matches with the information stored in Europol's systems, Europol supplies Eurojust with its data and the analytical results. When judicial follow-up is necessary in an Eurojust case, Europol make available the necessary data and analysis, in particular hit notifications and cross-match reports; as well as operational reports and strategic reports. In all these cases, Europol must obtain permission from the national authority that has provided the information. Besides, Eurojust will be responsible for promoting the provision of data to Europol among the judicial authorities. Furthermore, Eurojust may provide Europol with data resulting from a general analysis. In this case, Eurojust will be in charge of requesting permission from the corresponding National Members to provide Europol with the content of the Eurojust file. In turn, it will provide information to Europol on the cases that may be within its competence or in which its experience may be needed; in particular, when the request for assistance may be related to the purpose of one of the Europol Analysis Project.

[40] Such as the well-known OCTA (EU Organized Crime Threat Assessment), IOCTA (Internet Organized Crime Threat Assessment) or TE-SAT (EU Terrorism Situation & Trend Report).

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Eurojust role with respect to Europol's Analysis Projects is to promote a follow-up at the judicial level. This includes facilitating the identification and coordination of the competent national authorities, solving problems related to the execution of European Arrest and Surrender Orders, organizing actions to obtain evidence in different MMSS, or finally, promoting the initiation or reopening of investigations to national level. The association of Eurojust with Europol's Analysis Projects also entails the invitation of Eurojust experts to participate in the activities of a certain Europol analysis group. This participation consists to be invited to the work meetings of the analysis group; be informed by Europol of the development of the Analysis Project; or to receive –as well as transmit– data and analytical results related to a specific case from Eurojust. Regarding the role of Europol in the strategic or coordination meetings of Eurojust, in general, Europol must be invited to the meetings, and may it request to be invited to those Eurojust meetings that are related to some analysis file.

Beyond the institutional tools, a reference to the JITs must be done. Due to their impact on criminal investigations, it is common to link JITs to police cooperation[41]; however, they are also an important part of judicial cooperation, especially, of course, in the investigation initial stages.

JITs are established through an agreement between the competent authorities of two or more States with the aim that a specific group of law enforcement professionals cooperate operationally. The JIT is born linked to a specific case, only for a certain period of time and with certain participants. Although the character of the JIT is essentially operational, its members will not necessarily be police authorities of the MMSS, but also judges, prosecutors, members of Europol or Eurojust, representatives of the European Anti-Fraud Office (OLAF), among others.

The creation of a JIT seeks to respond to the need to resolve the difficulties encountered by a specific State in carrying out investigations. In general, these are considerably complex investigations with strong transnational components and in which connections with other States frequently appear. On some occasions, there is the possibility that the JIT is created due to the existence of parallel investigations in different MMSS that require coordinated and common action.

The activity of the JIT can be carried out on the territory of all the MMSS that have created it. However, with respect to the law applicable to

[41] An interesting analysis of the JITs from the police cooperation point of view can be found in Tom Schalken and Maarten Pronk, "On Joint Investigation Teams, Europol and supervision of their joint actions", in *Crime, Criminal Law and Criminal Justice in Europe*, ed. by Hans-Jörg Albercht and André Klip (Leiden: Martinus Nijhoff Publishers, 2013), 423-437.

investigations, a kind of principle of territoriality applies[42]. This means that the JIT's actions in the territory of a particular MS will be led by the competent authority involved in the investigation in that State, and that the JIT's practice will be based on national law. Therefore, when the activity of the JIT changes to the territory of another MS, the authorities that assume the leadership of the JIT as well as the law applicable to its activities also change.

The greatest advantages of the JITs consist in the possibility of exchanging information between their members or collecting evidence without the need to activate mutual legal assistance through letters of request. However, this possibility is restricted by various conditions. Thus, in general, the results obtained by the JIT may not be used beyond the purposes for which the team was created. However, the States Parties to the JIT may agree otherwise. In the event that through the information obtained it is desired to discover, investigate or prosecute other infractions, prior authorization must be obtained from the MS in which the information was obtained, which may deny the request if it considers that other criminal investigations could be jeopardized. This issue can be truly limiting when investigating cases of smuggling carried out by organized poly-criminal groups. Although the number of JITs being created is increasing, it cannot be said that they are extremely popular. The low use of the JITs seems to respond to different reasons, such as the lack of knowledge of the instrument by the authorities of the MMSS; problems of admissibility of evidence; or the financial costs of setting up and running the team.

2. *The fight against smuggling in the Mediterranean*

The smuggling of people from Africa to Europe has increased considerably over the last two decades, becoming a key element in the EU agenda on border management in the Mediterranean area. Among other actions, it was decided to reinforce border control under the coordination of the European Agency for the management of external borders (Frontex)[43]. Following the Lampedusa tragedy and after the end of the Italian Mare Nostrum rescue operation, two Frontex-coordinated operations were

[42] See André Klip, *European Criminal Law: An Integrative Approach,* (Intersentia, 2016) 447 *et seq*.

[43] Recently strengthened by Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 (Official Journal of the European Union, L 295, 14 of November 2019, 1).

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launched: Triton off the Italian coast and Poseidon off the Greek coast, expanding the agency's surveillance functions to maritime rescue. Nowadays, Frontex maintains three operations in the Mediterranean: Themis (Central Mediterranean), Poseidon (Eastern Mediterranean) and Indalo (Western Mediterranean).

Following a new tragedy in April 2015, both the European Agenda on Security[44] and the European Agenda on Migration[45] began to highlight the links between deaths at sea and organized criminal groups dedicated to migrant smuggling. The EUNAVFOR MED operation was born from this approach, an eminently military operation with the main objective of detecting, capturing and destroying vessels that could be used by traffickers[46]. In March 2020, replacing the Sophia operation, the EU launched the Irini military operation, aiming to contribute to the disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling by planes.

From the perspective of criminal cooperation, in 2015 Europol's efforts were focused on creating a maritime intelligence team known as Joint Operational Team (JOT) Mare[47]. Hosted at Europol, this initiative aimed to identify and track smuggling networks in the Mediterranean by combining Europol's intelligence resources and MMSS' capabilities to carry out coordinated and targeted intelligence actions against smugglers. At the same time, attempts were made to ensure exchanges of information with Frontex and Interpol. Following the demands of the Council[48], in less than a year, Europol launched the European Migrant Smuggling Centre (EMSC); reinforcement was sought by integrating the objectives of JOT Mare through access to the main hotspots[49].

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[44] European Commission, "The European Agenda on Security", 28 of April 2015, COM (2015) 185 final.

[45] European Commission, "A European Agenda on Migration", 13 of May 2015, COM (2015) 240 final.

[46] See *inter alia,* Giuliana Ziccardi, "The EUNAVFOR MED Operation and the use of force" *American Society of International Law*, n.º 19, vol. 27, (2015); Félix Vacas Fernandez, "The European operations in the Mediterranean Sea to deal with migration as a symptom", *Spanish yearbook of international law,* n.º 20 (2016): 93-117.

[47] Europol, *Joint Operational Team launched to combat irregular migration in the Mediterranean*, (17 March 2015), accessed 12 of April 2022 https://www.europol.europa.eu/media-press/newsroom/news/joint-operational-team-launched-to-combat-irregular-migration-in-mediterranean.

[48] Council of the European Union, "Measures to handle the refugee and migration crisis", 9 of November 2015, doc. n.º 13880/15, para. 10.

[49] See David Fernández Rojo, "Los "hotspots": expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol", *Revista de Derecho Comunitario Europeo*, n.º 61 (2018).

The deployment of JOT Mare in the context of a hotspot serves several purposes clearly linked with gathering information. The presence of Europol in the hotspots is expected to improve the collection of intelligence from agencies active in the field, such as Frontex, with the main objective of identifying organized criminal groups and secondary movements in order to initiate and support criminal investigations. In fact, Europol provides on-the-spot support by direct cross matching of data gathered at the arrival of migrants with its information databases. This procedure could take long and sometimes during the debriefings the migrant could be under restrictions on free movement or in closed facilities.

According to the agency, the presence on the ground of certain Europol teams supporting the authorities of the host MS turns out to be a very useful tool for gathering information at very early stages of investigations. In its first year of life, the EMSC identified more than 17,000 new suspects (an increase of 25% compared to 2015) and opened more than 2,000 investigations[50]. Among other milestones, such as the identification of more than 500 forged or stolen documents and the monitoring of some 500 vessels likely to be used in smuggling, and the increase in operational information exchanges by 34% should be highlighted[51]. In 2021, the EMSC has received 4,889 new cases[52].

Although Eurojust is not physically in the hotspots, it has liaison magistrates in Italy and Greece who identify and refer to Eurojust those cases that are likely to be coordinated at Union level[53]. In its latest annual report, Eurojust claimed to register 292 cases (170 new cases, 122 ongoing from previous years) and supported 11 JITs (4 new and 7 ongoing)[54]. However, it is not clear how many cases are nourished by the information obtained in the debriefing of migrants at the external border. And surprisingly, only Italy and Slovenian liaison prosecutors confirmed having opened a few cases based on this kind of information[55]. In turn, the Agency itself remarks that several differences between MMSS about the legal validity and doubts of the judicial use in criminal proceedings of the information obtained in the hotspots[56]. On one hand, the statements can be classified as evidence or intelligence, and also sometimes both depending

[50] Europol, *European Migrant Smuggling Centre. Activity Report, First Year*, (January 2017), 6.

[51] *Ibid*., 14.

[52] Europol, *European Migrant Smuggling Centre. 6th Annual Report,* 8.

[53] Eurojust, *Annual Report 2016. Criminal Justice across borders*, (2017), 33.

[54] Eurojust, *Annual Report 2021. 20 years of criminal justice across borders*, (2022), 45.

[55] Eurojust, *Judicial use of information following the debriefing of migrants at external borders*, (27 October 2021), 1.

[56] *Ibid*., 3.

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on the circumstances. On the other hand, the legal status of the migrant debriefed is not uniform in all the EU territory. In some MMSS migrants are considered suspects, other consider them witnesses and other are applying a mixed concept[57]. These differences, and especially mixed situations, can raise suspicions and discourage the migrant's cooperation with the authorities. Moreover, in case of a prosecution, there is a risk of violating the right to effective judicial protection of the accused depriving the opportunity to challenge and question witness against them[58].

All these actions contribute to a deeper understanding of the phenomenon of migrant smuggling, to obtaining evidence and information on specific matters and ultimately to a more effective prosecution, but some loose ends remain. The Action Plan against migrant smuggling (2015-2020) highlighted the need to focus on disrupting the 'business model' and reinforcing financial investigations. According to Europol data, in 2016 less than 10% of migrant smuggling investigations produced intelligence on financial transactions or money laundering activities[59]. Although the impetus provided by the European Multidisciplinary Platform Against Criminal Threats (EMPACT) and its policy cycle has begun to bear fruit, there is still much work to be done[60].

The strengthening of financial investigations has clear advantages for a more effective prosecution of crime. Said investigations can contribute to demonstrate the existence of a 'benefit' that, as has been pointed out, is conceived as an aggravating circumstance in most MMSS. The importance of establishing the 'benefit' responds not only to achieving higher penalties, but also to the possibility of discovering information necessary to identify and dismantle high-income migrant smuggling criminal organizations. The financial investigation can contribute to uncovering the interactions between the members of the organized group, being able to determine their role, as well as the relationship with other groups and networks[61]. In addition, the study of financial flows can be a good tool for detecting and differentiating cases of smuggling from those of human trafficking[62].

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[57] *Ibid*., 7.

[58] See ECtHR, App. n.º 26766/05 and 22228/06, *Al-Khawaja and Thaery v. UK,* (15 December 2011).

[59] Europol, *Migrant smuggling in the EU,* 9.

[60] Council of the European Union, "General Factsheet. Operational Action Plans (OAPS) 2020 Results", 2, accessed 5 of May 2022, https://www.consilium.europa.eu/media/50206/combined-factsheets.pdf.

[61] See UNODC, *The Concept of 'Financial…,* 34.

[62] See Organisation for Security and Co-operation in Europe, *Leveraging Anti-Money Laundering Regimes to Combat Trafficking in Human Beings* (2014).

Given some of the advantages, the lack of an economic focus in some investigations remains unknowable. The economic persecution of migrant smuggling entails dealing with numerous obstacles, some of which are intrinsic to criminal cooperation, such as language differences, the slowness in the mechanisms for transmitting requests; the absence of follow-up practices on the execution of requests for judicial assistance; or the requirement of dual criminality. Other obstacles derive from the need to cooperate with third States, such as the lack of response to requests for financial information contained in mutual legal assistance requests due to the contacts and importance of some of the high-level smugglers in their countries of origin[63]. All these issues continue to be solved, the impact of the new financial and operational tools (as the tailored anti-smuggling operational partnerships stablished as a priority in the new EU Action Plan 2021-2025)[64] remain to be seen. In any case, human smuggling will hardly be eradicated if the economic element is not understood as a central piece of all the criminal investigations.

IV. **Final Considerations**

The criminal prosecution of migrant smuggling is a challenge for the European Union that has a difficult solution. Several EU reports show that there is a considerable number of organized criminal groups with an infinite number of *modus operandi* and an exceptional ability to adapt to change.

An analysis of the current regulation on the crime of migrant smuggling points to the urgency of reforming the Facilitators' Package. Indeed, there are significant discrepancies between European regulations and the United Nations Trafficking Protocol. These differences reveal the gaps in the European acquis that blur the real smuggling problem and affect the efficiency of the provisions. The Facilitators' Package lead to discrepancies in transposition into domestic law and has contributed to the criminalisation of the migration phenomena. The Directive fails to remind the MMSS of the international obligation to assists persons in distress at the sea. Taking into account the legislative evolution of the last decade, some guidance note by the Commission will be not enough to solve the issues regarding fundamental rights, a rewording of the Directive is needed. Therefore, a redrafting of the Directive is necessary. Specifically, to extend the requirement of 'economic or material benefit' to all aspects of assistance to migrants and introduce a true 'humanitarian clause' without conditions.

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[63] UNODC, *The Concept of 'Financial…*, 27.

[64] COM (2021) 591 final.

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Beyond clarifying punishable conduct, the introduction of a fundamental rights perspective is also needed regarding migrants. Efforts should also focus on reinforcing the content of Facilitation Framework Decision with the criminal framework for action in cases of trafficking of human beings, for example by bringing it closer to the content of THB Directive. In any case, any victim should be able to enjoy the status conferred in the Victim's Directive.

Undoubtedly, the presence of Europol in the hotspots implies access to a huge amount of intelligence by said agency. This reality together with the creation of the EMSC show an evident growth in the number of cases of smuggling registered by Europol. However, if we focus on the cases in which open judicial investigations reach Eurojust, a direct impact on the proliferation of prosecuted due to the presence of Europol in the hotspots cannot be easily assessed. Much of the information collected by Europol is useful in police investigations but cannot be admitted as evidence. In this sense, a harmonization of the nature of the statements made by migrants is essential. It is also necessary to incorporate practices that are respectful with human rights. For instance, to establish completely transparent procedures in which the legal status of the migrant debriefed is known.

In addition, an effective prosecution of smuggling requires the development of efficient investigation techniques, as well as coordinated work between the MMSS and the EU agencies (particularly Europol and Eurojust) that attack financial flows. An approach to the actions initiated in response to the 'crisis' in the Mediterranean show the need to strengthen cooperation in this regard. Unfortunately, not much information or data is available on the results obtained. However, if the ultimate goal of the Union is to put an end to migrant smuggling, cooperation is essential to allow the confiscation and freezing of smugglers' assets.

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Modern Slavery and Migrant Smuggling: A Sustainable Development Perspective

La esclavitud moderna y el tráfico ilícito de migrantes: una perspectiva desde el desarrollo sostenible

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Summary: I. Introduction.—II. Modern slavery: the clandestine nature of human exploitation. 1. Regulating modern slavery.—III. People smuggling in modern times. 1. Regulating migrant smuggling. —IV. Modern slavery and migration in the context of sustainable development.—V. Conclusion.

Abstract: Modern slavery—denoting acute exploitation of people for personal or commercial gain—is said to affect nearly 50 million people around the globe, making it a global issue that requires coordinated cross-sectoral and integrated responses. Some efforts have been made to that effect, including through an emerging legislative regulation at domestic and regional levels. Migrants, in particular those with unsettled status, are particularly vulnerable to modern forms of slavery due to manifold enabling circumstances, including the lack of, or capacity to offer them, protection or limited access to legitimate forms of employment or social protection. However, global responses to migrant smuggling and irregular migrants are in stark contrast to the commitments made to address modern slavery. The increasing focus on the securitisation of migration obscures the underlying social, economic and political 'push' factors that fuel modern slavery. Thus, a more comprehensive response is needed that examines the issues of migration management, market regulation and development more widely. This paper uses a comparative lens to examine global developments in regulating labour-related forms of modern slavery vis-à-vis migration management in the context of achieving sustainable development goals.

Keywords: modern slavery, migrant smuggling, irregular migration, migration management, sustainable development

Resumen: *La esclavitud moderna —que denota la explotación aguda de personas para beneficio personal o comercial— afecta a casi 50 millones de personas en todo el mundo, lo que la convierte en un problema mundial que requiere respuestas coordinadas intersectoriales e integradas. Se han hecho algunos esfuerzos en este sentido, incluso mediante una nueva normativa legislativa a nivel nacional y regional. Los migrantes, en particular los que no están en situación regular, son especialmente vulnerables a las formas modernas de esclavitud debido a las múltiples circunstancias que los favorecen, como la falta de protección o la capacidad de ofrecerla, o el acceso limitado a formas legítimas de empleo o protección social. Sin embargo, las respuestas globales al tráfico de migrantes y a los migrantes irregulares contrastan fuertemente con los compromisos asumidos para abordar la esclavitud moderna. La creciente atención a la securitización de la migración oculta los factores sociales, económicos y políticos subyacentes que alimentan la esclavitud moderna. Por lo tanto, es necesario dar una respuesta más amplia que examine las cuestiones de la gestión de la migración, la regulación del mercado y el desarrollo en general. Esta reflexión desarrolla un enfoque comparativo para examinar la evolución mundial de la regulación de las formas de esclavitud moderna relacionadas con el trabajo en relación con la gestión de la migración en el contexto de la consecución de los objetivos de desarrollo sostenible.*

Palabras clave: *esclavitud moderna, tráfico de migrantes, migración irregular, gestión de la migración, desarrollo sostenible.*

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I. **Introduction**

The term 'modern slavery' (or 'modern-day slavery', 'contemporary slavery' or 'neo-slavery') has been gaining popularity in recent years, with a number of countries passing legislation to address and prevent its different forms. Even though there is no internationally agreed definition of it, modern slavery is widely understood to cover different forms of acute human exploitation, ranging from forced or bonded labour, human trafficking, forced marriage and forced organ harvesting to orphanage trafficking. More recently, governments have shifted their attention to the private sector recognising the pervasiveness of modern slavery in global supply chains.

Various enabling factors have been identified as increasing risks of modern slavery, with migrants[1] being considered highly vulnerable, particularly when their legal status is unsettled. Migrant smuggling, whereby the migrant's irregular entry to another country is facilitated usually with their consent for financial or other material gains, heightens the risk of exploitation in the destination country. Modern slavery is also highly profitable, with US$150bn in profits every year being generated from forced labour alone,[2] and migrant smuggling is estimated to bring a profit between US$5 to 7bn worldwide per year.[3] Thus, even though one can take place without the other one, in that not every smuggled migrant will necessarily become a victim of modern slavery and not every victim of modern slavery is a migrant, these practices are mutually reinforcing by creating conditions conducive to both practices flourishing. Also, in many instances, the same criminal networks operate across smuggling and acute exploitation,[4] which, in practical terms, further blurs the line between these two legally different operations.

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[1] In this paper, the term 'migrant' follows the understanding provided by the International Organisation for Migration (IOM), that is any person who is moving or has moved across an international border or within a country, temporarily or permanently, away from their habitual place of residence for a variety of reasons and regardless of their legal status or whether the movement is voluntary or involuntary (see IOM, *Glossary on Migration* (Geneva: IOM, 2019, 132-133)); with the term 'international migrant' denoting someone who changes their country of usual residence.

[2] International Labour Office (ILO), *Profits and Poverty: The Economics of Forced Labour* (Geneva: ILO, 2014).

[3] United Nations Office on Drugs and Crime (UNODC), *Global Study on Smuggling of Migrants* (New York: UNODC, 2018). However, estimating the profits from people smuggling is a contested issue as many 'smugglers' are paid in-kind and offer smuggling services for altruistic rather than financial reasons, see Chapter III below.

[4] European Union Agency for Law Enforcement Cooperation (Europol), *EU Serious and Organised Crime Threat Assessment*, *A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime* (Luxembourg: Publications Office of the European Union, 2021).

Despite modern slavery and migrant smuggling being mutually reinforcing practices, there is a growing gap in protection in relation to increasing regulatory interventions for modern slavery and that offered to irregular migrants. Many irregular migrants do not fall under the established legal categories for protection, which exposes them to additional hardship or denial of assistance. Yet, most irregular migrants face dangers and human rights infringements, the tackling of which requires inter-state and inter-agency cooperation, including better information and data sharing, as well as improving consistency and compatibility between international, regional and national legislation and law enforcement activities. Therefore, migrant management at the national and regional levels is not separate from or inconsequential to fighting modern slavery and other forms of human exploitation.

In the context of the global sustainable development agenda, providing universal goals and targets with an aim to eradicate poverty, reduce inequality within and between countries and ensure sustainable use of ecosystems, migration is recognised as key to achieving a sustainable future for all. The commitment to sustainable development, therefore, incorporates "international migration [as] a multi-dimensional reality of major relevance for the development of countries of origin, transit and destination which requires coherent and comprehensive responses" and involves "full respect for human rights and the humane treatment of migrants regardless of migration status".[5]

This paper provides an overview of the legal developments in relation to modern slavery and its regulation (Chapter II), followed by a brief examination of the modern practice of people smuggling, including in the European Union (EU) context (Chapter III), to then turn to examine how the sustainable development agenda necessitates better coordination between migration management and market regulation to advance human development outcomes (Chapter IV), with the Conclusion (Chapter V) summarising the findings.

II. **Modern slavery: the clandestine nature of human exploitation**

Modern slavery is believed to affect some 49.6 million people around the globe at any given time,[6] which makes it a bigger problem today than ever in

[5] United Nations General Assembly (UNGA) Res 70/1, (21 October 2015) UN Doc A/RES/70/, 29.

[6] ILO and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (ILO, 2022).

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history. The majority of those in forced labour are believed to be trapped in the private economy, across different sectors and geographical locations.[7] Certain industries, such as agriculture, construction, manufacturing, fishing and domestic services, are considered high risk for modern slavery practices throughout their operations and supply chains, making the private sector an important driver in facilitating as well as addressing modern slavery.

International migrants are particularly vulnerable to modern slavery,[8] as they are predominantly recruited for industries prone to a higher risk of exploitation, and, consequently, they are targeted by unscrupulous smugglers, traffickers or recruitment agents. In response to what is recognised to be a major global problem, states often respond by introducing policies aiming at limiting international migration expecting that it will prevent the exploitation of migrants within their national borders. The opposite, however, is often happening in that increased securitisation of migration leads to an escalation in demand for smuggling services. Those who might willingly arrange their passage to another country often became victims of exploitation and abuse, including sexual violence, by the 'facilitators' of migration[9] and fall prey to traffickers en route or when they reach the destination.

Thus, for a long time, governments' prevention policies focused predominantly on raising awareness and educating at-risk groups, including in the countries of origin, of the dangers of irregular migration. However, despite high financial and resource investment in such campaigns, their impact has been limited or at best unknown. For instance, a recent systematic review of anti-human trafficking interventions has revealed that such campaigns have a negligible positive impact but often carry negative consequences, including exacerbating stigmatisation, marginalisation and discrimination of the most vulnerable, in particular migrant women.[10]

1. *Regulating modern slavery*

A number of international and regional programmes have been launched to facilitate inter-state collaboration and partnerships. These

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[7] *Ibid*.

[8] See also Krzysztof Kubacki *et al*., 'Vulnerable communities and behaviour change: a case of modern slavery in supply chains', in *Beyond the dark arts: Emerging issues in social responsibility and ethics in marketing and communication*, ed. by L Brennan, L Parker, K Kubacki, Jackson M, Chorazy E and D Garg (World Scientific Publishers, 2022).

[9] Mixed Migration Centre, *Mixed Migration Review 2018. Highlights. Interviews. Essays. Data*. Ed. by C Horwood, R Forin and B Frouws (Geneva: Mixed Migration Centre, 2018).

[10] Natalia Szablewska and Krzysztof Kubacki, 'Anti-human trafficking campaigns: a systematic review', *Social Marketing Quarterly* 24, No 2 (2018): 104-112.

include the 2017 Call to Action to End Forced Labour, Modern Slavery and Human Trafficking, instigated by Australia, Canada, New Zealand, the United Kingdom (UK), the United States (US) and others, which has resulted in the adoption by these governments of the Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains,[11] aiming to eradicate slavery from the economy.

At a regional level, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, established in 2002 and comprising 49 members including United Nations (UN) agencies, offers a strategic platform for collaboration between governments and businesses to tackle forced labour, human trafficking and modern slavery in the region. In 2018, the Bali Process Government and Business Forum focused on developing recommendations for ending these transnational crimes across the Indo-Pacific region, including in public and private supply chains.

By focusing on reducing demand, whether in relation to forced labour, exploitative services (including in the sex industry) or 'donors' in the context of the orphanage industry or organ trafficking, and by utilising the corporate social responsibility framework,[12] a number of states have introduced, or are in the process of developing, domestic regulatory frameworks pertaining to modern slavery in business operations and supply chains.

In an attempt to consolidate human trafficking and other slavery offences in its domestic legislation, the UK was the first country to introduce comprehensive modern slavery legislation (Modern Slavery Act 2015),[13] which is modelled on the California Transparency in Supply Chains Act 2010,[14] a sector-specific legislation focusing on retailers and manufactures operating in the US state of California. In 2016, the then UK Prime Minister Theresa May stated that "[w]e need a radically new, comprehensive approach to defeating this vile and systematic international

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[11] See United States Department of State, *Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains*, 24 September 2018, accessed 30 September 2022, https://www.state.gov/wp-content/uploads/2019/03/286369.pdf

[12] In particular under the UN Global Compact, *The Ten Principles of the UN Global Compact*, 2000, accessed 23 May 2022, https://www.unglobalcompact.org/what-is-gc/mission/principles; UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* 2011, accessed 23 May 2022, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; Organization for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD, [1977] 2000); ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Geneva: ILO 5th ed, 2017).

[13] *Modern Slavery Act 2015* (2015 c. 30).

[14] *California Transparency in Supply Chains Act 2010* (SB 657)

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business model at its source and in transit",[15] recognising that rather than it being a problem of few exploiters in the industry, modern slavery is a global issue that requires a systemic change to the business models and the wider business culture.

Australia followed suit and passed equivalent legislation at the federal (Cth)[16] and the state of New South Wales (NSW)[17] levels in 2018 (with the latter coming to force on 1 January 2022). The UK Act and Australian Act (Cth) require entities with annual turnover above certain thresholds (which differ) to audit their supply chains and report on modern slavery risks,[18] thus they aim to increase transparency in supply chains and corporate reporting. The specific modern slavery legislation operates alongside other mandatory human rights 'due diligence' laws,[19] like the French Duty of Vigilance Act 2017, the Dutch Child Labour Due Diligence Law 2019, the German Act on Corporate Due Diligence in Supply Chains 2021 (commencing on 1 January 2023) and the Norwegian Transparency Act 2021 (commencing on 1 July 2022). Similar legislation has been also considered in a number of other countries and jurisdictions, including Canada,[20] New Zealand[21] and Hong Kong.[22] In 2021, the EU Directive on mandatory human rights and environmental due diligence was proposed,[23] with the European Commission releasing the draft proposal in February 2022,[24] which lays the foundations

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[15] Theresa May, 'My Government will lead the way in defeating modern slavery', *The Telegraph*, 30 July 2016, accessed 23 May 2022, https://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/

[16] *Modern Slavery Act 2018* (No. 153, 2018).

[17] *Modern Slavery Act 2018* (No. 30, 2018).

[18] Modern Slavery Act 2015 (UK) s 54; Modern Slavery Act 2018 (Cth) Part 1(3); see also Modern Slavery Act 2018 (NSW) which applies to government entities, including state-owned corporations in NSW (Part 1(3)(h)).

[19] Requiring companies to account for how they address their adverse human rights impacts.

[20] See Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff 2021* and Bill C-243, *An Act respecting the elimination of the use of forced labour and child labour in supply chains 2022*.

[21] See, for example, Szablewska *et al*., *An Opportunity for Impact: Recommendations for Regulating Modern Slavery in Supply Chains in Aotearoa New Zealand*, 2022, ISBN: 978-0-473-63292-2, accessed 23 May 2022, https://modernslaveryrecommendations.nz/Recommendation%20paper%20-%20An%20Opportunity%20for%20Impact.pdf.

[22] The Modern Slavery Bill was put for consideration before the Legislative Council in 2018, but due to mass expulsion and resignations of pro-democracy opposition lawmakers since 2020, doubts are cast on whether anti-slavery legislation will go ahead any time soon.

[23] See European Parliament Res 474/02, (10 March 2021), P9 TA(2021)0073.

[24] European Commission, Framework Decision on Strengthening the Penal Framework for Preventing the Facilitation of Unauthorized Entry and Residence' was the first attempt to regulate smuggling (EC 2002/946/JHA, 2002).

for corporate sustainability due diligence, and would require businesses to respect human rights and the environment in their global value chains.

Undeniably, the plight of modern slavery victims has captured public imagination worldwide and galvanised a coordinated global response. This has led to considerable policy and legislative action in regulating modern slavery in operations and supply chains (of the private sector in particular) at the international, regional and domestic levels. With the outbreak of the COVID-19 pandemic in 2020, the most vulnerable and already exploited have been exposed to the heightened risk of modern slavery and there have been disruptions to the response efforts.[25] However, dealing with this complex socio-economic problem fuelled by processes of globalisation cannot be separate from migration and its management if we are to find a sustainable solution to the problem of social and economic vulnerability that ensnares people in modern slavery.

III. **People smuggling in modern times**

People (also refer to as 'human' or 'migrant') smuggling is not a new phenomenon, and the practice has existed ever since political borders have been established and territorial sovereignty became entrenched, with nation-states deciding whom they permit to enter (or in some circumstances to leave) and on what grounds by regulating migration flows. The progressive escalation of restrictions on transnational mobility has, in turn, increased the demand for services in people smuggling. For example, before Spain and Italy introduced Schengen Visas for North Africans in the early 1990s, there was a relatively free flow of migration between North Africa and Southern Europe, but the augmentation of migration regulation increased irregular migration in the Mediterranean region, which then amplified further border securitisation.[26] Thus, it is the criminalisation and penalisation of smuggling that are relatively new, and they have been on a rise worldwide.

The dominant narratives and attitudes toward people smuggling have also changed over time. Historically, people smugglers were perceived as 'enablers' and often as 'saviours' of those who were escaping the persecution of oppressive regimes, such as Jews escaping Nazi Germany during the Second World War or from East Germany, and elsewhere in

[25] See, for example, James Cockayne and Angharad Smith, 'The Impact of COVID-19 on Modern Slavery', *Our World*, 2 April 2020, accessed 23 May 2022, https://ourworld.unu.edu/en/the-impact-of-covid-19-on-modern-slavery.

[26] Ilse Van Liempt, 'A Critical Insight into Europe's Criminalisation of Human Smuggling', *Swedish Institute for European Policy Studies* 3 (2016): 1-12.

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the Eastern Block, to West Germany during the Cold War. Today, fairly similar reasons motivate migrant smuggling, that is conflict, economic desperation, poverty and states' restrictions on human mobility, yet "[s]mugglers are nowadays…perceived much more as criminals than before".[27] The change of rhetoric on why people decide to turn to smuggling (both those being smuggled and those engaging in smuggling) has further affected legal and political responses in that regard.

1. *Regulating migrant smuggling*

Human trafficking, like many other forms of modern slavery, and human smuggling are part of what are considered to be mixed-migration flows, defined by the International Organization for Migration (IOM) as "[c]omplex migratory population movements…as opposed to migratory population movements that consist entirely of one category of migrants".[28] From a legal perspective, the difference between one and the other was consolidated in 2000 when the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol),[29] supplementing the Convention against Transnational Organised Crime, was enacted. The Trafficking Protocol established the distinction between a trafficking victim (whether transported domestically or internationally) and migrant smuggling, which requires crossing an international border as prescribed under the Protocol Against the Smuggling of Migrants by Land, Air and Sea (the Smuggling Protocol).[30] Under the Trafficking Protocol, consent of a trafficked person is considered not relevant,[31] as one cannot consent to their own exploitation, but which is usually assumed in the context of smuggling. Despite neither smuggled nor trafficked persons being criminalised for the fact of being smuggled or trafficked, smuggling is often perceived as a 'victimless' crime (i.e., it is a crime against a state), whereas human trafficking, or other forms of modern slavery, never is. In reality, being smuggled often leads to similar consequences in that violence, including sexual abuse, kidnapping and robbery against smuggled migrants

[27] *Ibid*., 3.

[28] IOM, *Glossary on Migration* (Geneva: IOM, 2011), 63.

[29] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 UNTS 319.

[30] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2241 UNTS 507.

[31] Trafficking Protocol, art 3(b).

by their smugglers is estimated to account for between 50 and 76 per cent of reported incidents.[32]

In Europe, the French government's proposal in 2000 to the European Commission, on a Framework Decision on Strengthening the Penal Framework for Preventing the Facilitation of Unauthorized Entry and Residence,[33] was the first attempt to regulate smuggling. It was part of an agenda to "combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings" and aimed to supplement "other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children".[34]

In the Asia and Pacific region, the 2015 Bay of Bengal migrant smuggling crisis that involved thousands of migrants from Myanmar and Bangladesh who got stranded at sea or whose bodies were uncovered in mass graves in South Thailand, prompted the Association of Southeast Asian Nations (ASEAN) to focus on combating the crime of migrant smuggling in the region[35] and triggered ASEAN to consider migrant smuggling as a transnational crime falling under its purview.[36]

At the international level, people smuggling is seen predominantly as an issue of transnational organised crime,[37] which has consequences for the level of support deemed appropriate for smuggled persons, as well as the assessment of their culpability. However, not all 'smugglers' are part of criminal groups and many are friends, family and community members or migrants and asylum seekers themselves who become facilitators of irregular or clandestine migration in an attempt to realise mobility goals.[38] Likewise, not all smuggled migrants are the same and the experiences—including exposure to violence and abuse—of those with larger economic

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[32] Mixed Migration Centre, *Mixed Migration Review…*, 122-123.

[33] Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, 2002/946/JHA (Official Journal of the European Communities, L. 328/1, 2002).

[34] *Ibid*., paras (2) and (5) respectively.

[35] For more information see https://asean.org/.

[36] UNODC, *Migrant Smuggling in Asia and the Pacific: Current Trends and Challenges* (Bangkok: UNODC, 2018).

[37] It needs to be noted, however, that smuggling does not require the involvement of organised crime to be punishable, see UN Convention against Transnational Organised Crime, Art 34(2); Smuggling Protocol, Art 4.

[38] See, for example, Gabriella Sanchez, 'Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research', *Journal of Migration and Human Security* 5, No 1 (2017): 9-27; Luigi Achilli, 'The Smuggler: Hero or Felon?' Policy brief, Migration Policy Centre (Florence: European University Institute, 2015); IOM, *Egyptian Unaccompanied Migrant Children: A Case Study on Irregular Migration* (Cairo: IOM, 2016).

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and social capital differ, often significantly, from those who are poorest and most vulnerable.[39] Thus, the migrant smuggling landscape is much more diverse than often assumed and presented by law enforcement or in the media. Despite these lived experiences, the framing of the problem as one of organised crime affects how the motivations of smugglers are assessed, which has informed corresponding legal responses.[40]

The increase in land border regulation has prompted a shift in smuggling activities towards sea crossing, in particular in Europe since 2009.[41] There have been multiple reports in recent years of maritime migrant smuggling ending with boats capsizing never reaching their destinations as well as an increase in the use of 'ghost ships', where the crew abandons the vessel before it reaches its destination, forcing a rescue operation to save those onboard. One example involved a cargo ship *Ezadeen*, flying under a Sierra Leone flag, with 450 people onboard, mainly Syrian asylum seekers, which was intercepted by the Italian coastguards in 2015.[42]

Another regional example is that of Australia which, under its Operation Sovereign Borders,[43] intercepts vessels in international waters, justifying it on the grounds of the rise in maritime migrant smuggling, and often pushes or tows boats back to Indonesian's territorial waters.[44] This policy has been widely criticised by the international community for putting the lives of migrants at risk and Australia flouting its international obligations,[45]

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[39] Daniel E Martinez, 'Coyote Use in an Era of Heightened Border Enforcement: New Evidence from the Arizona-Sonora Border', *Journal of Ethnic and Migration Studies* 42, No 1(2015):103-19.

[40] For an overview of the legal framing of people smuggling see Natalia Szablewska, 'Human Smuggling and Human Trafficking', in *International Conflict and Security Law: A Research Handbook*, ed. by S Sayapin, R Atadjanov, U Kadam, G Kemp, N Zambrana Tévar, N Quénivet (TMC Asser Press, 2022).

[41] UNODC, *Global Study*…

[42] J Hooper, 'Abandoned ship Ezadeen with 450 migrants on board being towed to Italy', *The Guardian*, 2 January 2015, accessed 23 May 2022, www.theguardian.com/world/2015/jan/02/abandoned-cargo-vessel-migrants-towed-italy-traffickers.

[43] For more information see http://osb.homeaffairs.gov.au.

[44] This also violates Indonesia's territorial sovereignty, see UNGA, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions*, 15 August 2017, UN Doc A/72/335, in particular para 33.

[45] For an overview of Australian refugee and asylum seekers policy see Kaldor Centre for International Refugee Law, 'Australia's Refugee Policy: An Overview', 2020, accessed 23 May 2022, https://www.kaldorcentre.unsw.edu.au/publication/australias-refugee-policy-overview; also Natalia Szablewska, 'Illegal immigrants, asylum seekers and Australia's international obligations: the debate goes on', *Australian Law Journal* 88, No 10 (2014): 707-714; Natalia Szablewska and Ratana Ly, 'Regional collaborative responses to the global migration crisis: refugee law, human rights and shared state responsibility', *Australian Law Journal* 91, No 3 (2017): 186-197.

including under the Smuggling Protocol and the principle of non-refoulement[46] that bars states from returning an alien to a place where they are likely to face persecution or their life would be threatened.[47]

There have been many more examples in recent years where migrant smuggling has resulted in migrants' lives being lost,[48] which is often a result of the absence of rescue or insufficient assistance offered by states, despite international obligations in this regard under different international law regimes, including international human rights law, international refugee law and international maritime law.[49]

The response of states to migrant smuggling and protection offered to irregular migrants is in stark contrast to the pledges and commitments made to address modern slavery. Yet, irregular migrants—facing harsh responses in relation to the lack of compliance with the requirements for legal entry into the host state—fuel the supply side of modern slavery, making the crime more difficult to detect, investigate and address.

Migrants in irregular situations should not face or fear repercussions for reporting violence, abuse or exploitation, which is also recognised under pillar three of the EU's action plan against migrant smuggling (2021-2025) on preventing exploitation and ensuring the protection of migrants,[50] which prescribes that a migrant who is a victim of crime is to be offered support and protection in all circumstances. However, the reality differs, and the increasing securitisation of migration obscures the underlying social, economic and political 'push' factors that fuel the crime of modern slavery. The next section, therefore, looks at how migration management and the regulation of modern slavery cannot be conceptually and practically seen as separate, but are rather part of the wider efforts to achieve sustainable development.

IV. **Modern slavery and migration in the context of sustainable development**

The United Nations (UN) 2030 Agenda for Sustainable Development (2030 Agenda), comprising 17 goals and 169 targets, aims to overcome

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[46] It must be noted that Australia has denied that the principle of non-refoulement has extra-territorial application or that it applies outside the territorial seas, see *CPCF v. Minister for Immigration and Border Protection* (Judgment) [2015] HCA 1.

[47] See, for instance, the Convention on the Status of Refugees (1951) 189 UNTS 150, Article 33(1).

[48] See, for instance, UNODC, *Global Study…*

[49] See Szablewska, *Human smuggling…*

[50] European Commission, *A Renewed EU Action Plan against Migrant Smuggling (2021-2025)*, 29 September 2021, COM(2021) 591.

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inequality, poverty and climate crisis among others. It is considered to be based on three core elements that require harmonisation, that is economic growth, social inclusion and environmental protection.[51] The Sustainable Development Agenda builds on the preceding UN Millennium Developments Goals (MDGs) (2000-2015), based on the UN Millennium Declaration,[52] which consisted of eight goals and 21 targets, ranging from reducing extreme poverty and promoting gender equality, to reducing child mortality and ensuring environmental sustainability.[53] As much as MDGs were an important stepping stone in galvanising global commitment to "spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty",[54] none of the goals and its targets referred directly to migrants, or migration, or (modern) slavery as issues that required particular attention to achieving the overarching objective.

In contrast, the UN Sustainable Development Goals (SDGs) focus specifically on ending modern slavery in all its forms, albeit forms of modern slavery are defined narrowly focusing predominantly on children (targets 8.7 and 16.2) and women and girls (target 5.2), whereas in some regions, like the Middle East, it is men who are the predominant victims of forced labour.[55] In the context of migration, achieving SDGs requires addressing the key objectives of the Global Compact for Migration.[56] There are ten indicators that are migration-specific, and SDG 10 on reducing inequalities, in particular target 10.7, focuses on facilitating "orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies". Thus, 'managing' migration requires effective collaborative international governance among all countries.

Migrants represent 3.5 per cent of the world population, yet it is estimated that they contribute nearly 10 per cent of the global gross domestic product (GDP).[57] There have been further studies showing a

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[51] See Sustainable Development Agenda, https://www.un.org/sustainabledevelopment/development-agenda-retired/#:~:text=For%20sustainable%20development%20to%20be,being%20of%20individuals%20and%20societies.

[52] UN, *United Nations Millennium Declaration* (New York: United Nations, Dept. of Public Information, 2000).

[53] For the final report, see UN, *The Millennium Development Goals Report*, 2015, accessed 23 May 2022, https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf

[54] UN, *United Nations…*

[55] UNODC, *Global Report of Trafficking in Persons* (Vienna: UNODC, 2020)

[56] See Global Compact for Safe, Orderly and Regular Migration, https://refugeesmigrants.un.org/migration-compact

[57] IOM and McKinsey & Company, *More than numbers - How migration data can deliver real-life benefits for migrants and governments* (IOM and McKinsey & Company, 2018)

positive correlation between labour migration and increasing GDP per capita levels and a further improvement in living standards and welfare.[58] Thus, overall, migration is socio-economically beneficial, and the benefits increase with better integration of migrants in the destination countries. However, despite all the evidence and data, anti-immigration sentiment has been rising worldwide. There are manifold reasons for this, including perceived economic and cultural competition, racial/ethnic and religious attitudes, or fear of crime.[59]

Such attitudes are not only not supported by data, but also migration is recognised as a driving force for the 2030 Agenda. Thus, it is not only about fulfilling the promise of "leaving no one behind" but, in a more substantive sense, migration contributes to the SDGs implementation across all goals; or, putting it differently, effective migration governance is key to achieving the SDGs.[60] Migration and development are closely linked,[61] in that development-related factors, whether conflict, climate crisis or labour markets, can and do impact migration drivers and patterns. On the flip side, poorly managed migration has its consequences for development gains. The 2030 Agenda adopts a whole-of-government approach to achieve coordinated policy on migration governance. In practical terms, it requires reaching beyond immigration policies and their implementation and ensuring that migration governance is integrated across the different sectors and agendas. Strengthening coherence between migration and development agendas can not only improve development outcomes but also migration outcomes.[62]

As discussed earlier, the link between migration and modern slavery is also widely recognised.[63] The UK appointed its first Migration and Modern

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[58] Graţiela Georgiana Noja *et al*. 'Migrants' Role in Enhancing the Economic Development of Host Countries: Empirical Evidence from Europe', *Sustainability* 10, No 3 (2018): 894; Evert-Jan Quak, 'The effects economic integration of migrants have on the economy of host countries', Institute of Development Studies, 5 April 2019, accessed 23 May 2022, https://assets.publishing.service.gov.uk/media/5d41b51e40f0b60a85e75468/571_Economic_Impacts_International_Migration_Host_Countries.pdf

[59] See, for example, Anastasia Gorodzeisky and Moshe Semyonov, 'Unwelcome Immigrants: Sources of Opposition to Different Immigrant Groups Among Europeans', *Frontiers in Sociology* 4 (2019): 24; Valentino et al, 'Economic and Cultural Drivers of Immigrant Support Worldwide', *British Journal of Political Science* 49, No 4 (2017): 1201–1226.

[60] IOM, *Migration and the 2030 Agenda: A Guide for Practitioners* (Geneva: IOM, 2018).

[61] See, for example, UNDP, 'Despite dangers, majority of irregular migrants from Africa to Europe would still travel: UNDP report', 21 October 2019, accessed 23 May 2022, https://www.undp.org/press-releases/despite-dangers-majority-irregular-migrants-africa-europe-would-still-travel-undp.

[62] See also IOM, *Migration…*

[63] See, for example, Fiona David, Katharine Bryant and Jacqueline Joudo Larsen, *Migrants and their vulnerability to human trafficking, modern slavery and forced labour* (Geneva: IOM, 2019)

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Slavery Envoy in 2019, whose aim is to support the government in coordinating its efforts with other countries to tackle modern slavery, which explicitly acknowledges the impact that modern slavery has on migrants. There are multifaceted reasons for the heightened vulnerability of migrants to modern slavery, which include restrictive migration policies that increase irregular migration. Thus, tackling migrant smuggling by increasing securitisation and targeting irregular migrants for their illegal entry is not only ineffective but, in practical terms, facilitates modern slavery. The globalisation of the economy and labour markets, as well as poverty, are the root causes of modern slavery.[64] Thus, aiming to diminish poverty and decrease inequalities, as set out in the sustainable development agenda, requires re-thinking approaches to managing migration, including the irregular type.

In 2019, Europe hosted the largest number of international migrants (82 million).[65] Despite the efforts taken by and resources (including an average budget of €900 million per year)[66] provided to the EU Border and Coast Guard Agency (Frontex), established in 2004,[67] irregular migration to Europe has continued to increase in 2022 (marking a 78 per cent increase from a year before and 23 per cent increase from 2020).[68] Also, more dangerous routes are more frequently utilised now than before, which indicates that the dangers of irregular migration are not a sufficient barrier to those on the move, which is expected when facing acute desperation and insecurity. As climate-induced (irregular) migration will continue to increase, so will the exposure to modern slavery of those escaping the consequences of climate change.[69] It is essential, therefore, that in fulfilling their obligations towards SDGs, states ensure that migrants are considered

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[64] See, for example, Todd Landman and Bernard W. Silverman, 'Globalization and Modern Slavery', *Politics and Governance* 7, No 4 (2019): 275–290; William Avis, *Key Drivers of Modern Slavery*, K4D Helpdesk Report 855 (Brighton: Institute of Development Studies, 2020).

[65] IOM and McKinsey & Company, *More than numbers…*

[66] See also European Court of Auditors, 'Frontex's support to external border management: not sufficiently effective to date', Special Report, 2021, accessed 23 May 2922, https://www.eca.europa.eu/Lists/ECADocuments/SR21_08/SR_Frontex_EN.pdf.

[67] Council Regulation (EC) No 2007/2004, (26 October 2004), OJ L 349, 25.11.2004, 1.

[68] As reported in Frey Lindsay, 'EU Border Agency Says Irregular Migration Continues to Increase in 2022', *Forbes*, 17 February 2022, accessed 23 May 2022, https://www.forbes.com/sites/freylindsay/2022/02/17/eu-border-agency-says-irregular-migration-continues-to-increase-in-2022/?sh=35d8893f5b85.

[69] See, for example, Anti-Slavery International and Institute for Environment and Development, 'Climate-Induced Migration and Modern Slavery: A Toolkit for Policy-Makers', September 2021, accessed 23 May 2022, https://www.antislavery.org/wp-content/uploads/2021/09/ClimateMigrationReportSep2021_low_res.pdf.

across development sectors, and migration governance is the key focus of the international community when pursuing inclusive, integrated and sustainable development.

V. **Conclusion**

Modern slavery, including in global supply/value chains, has been attracting international attention, with a number of countries introducing or in the process of developing legislative responses to what is a truly global problem. However—despite the various domestic, regional and international efforts—the number of modern slavery victims has been growing, which has been further exacerbated by global shocks, like the COVID-19 pandemic and recent conflicts.

Even though global migration rates are considered to have been steady since the 1990s,[70] the number of undocumented or irregular migrants, as well as forced displacement of people, is on the rise worldwide. Migrant smuggling is often a "stepping stone to human trafficking",[71] when the person cannot pay the smuggler or is trapped in economic exploitation,[72] and often results in people being sold for forced labour. Therefore, efforts to address modern slavery need to account for irregular migration in its wider socio-economic context. It requires adopting a more comprehensive lens, rather than simply using a national security perspective focusing on border militarisation, and shifting attention onto human security that balances the protection of sovereignty (or state security) with upholding the human rights of all irrespective of their legal status to offer contextually relevant solutions to human mobility.

There is also a bidirectional relationship between migration and sustainable development. Irrespective of the migration context, SDGs targets are universal and can be achieved only with cooperation by the

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[70] See, for example, Jonathan J Azose and Adrian E Raftery 2019, 'Estimation of emigration, return migration, and transit migration between all pairs of countries', *Proceedings of the National Academy of Sciences* 116, No 1 (2019):116-122; in the US context, see Katharine M Donato and Blake Sisk, 'Children's Migration to the United States from Mexico and Central America: Evidence from the Mexican and Latin American Migration Projects', *Journal on Migration and Human Security* 3, No 1(2018): 58-79.

[71] UN Security Council (UNSC) 2312 (2016) Res, (6 October 2016), UN Doc S/RES/2312, 12.

[72] Caritas, 'Trafficking in Human Beings in Conflict and Post-Conflict Situation', 2015, 6, accessed 23 May 2022, http://antitrafficking.am/wp-content/uploads/2015/10/2research_action_trafficking_in_human_beings_and_conflicts_en_10_juin_2015_pdf.

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different sectors and agencies, as well as with coherent partnerships between all states. Whether in relation to migration management or modern slavery, a more harmonised global approach is needed that would recognise the multi-dimensional nature of migration as well as the complexity of globalised modern slavery. Moreover, shifting the predominant focus from the downstream approaches targeting the individual onto the wider systemic problems, including by making global businesses accountable for directly or indirectly contributing to modern slavery, is instrumental if we are to get any closer to achieving the SDGs. Consequently, policies and approaches aiming to address modern slavery need to take into consideration (irregular) migration across governance sectors as critical for achieving sustainable development as a universal, transformative and integrated aim.

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