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ORIGINAL ARTICLE

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From migration crisis to migrants' rights crisis: The centrality of sovereignty in the EU approach to the protection of migrants' rights

Alan Desmond*

Leicester Law School, Fielding Johnson Building, University of Leicester, University Rd., Leicester, LE1 7RH, United Kingdom
Email: alan.desmond@leicester.ac.uk

Abstract

The long-simmering process of sidelining and side-stepping migrants' rights protection while attempting to regulate cross-border movement of people was heated up by the 2015 migration crisis and has recently been brought to the boil with the crisis-fuelled adoption of the UN Global Compact for Safe, Orderly and Regular Migration (GCM) in 2018. The GCM represents an endorsement at the international level of soft-law, goal-setting frameworks for international co-operation on migration as it pertains to migrants' rights, and a corresponding disavowal of any role for binding legal obligations in this field. Focusing on the EU, I argue in this article that states' sovereign powers in the realm of control of non-EU migration have been largely undiluted by the development of the international system of human rights protection. I show how the 2015 migration crisis galvanized multilateral international co-operation on the part of the EU and its member states in the field of non-EU migration in a way that entrenched EU states' sovereign self-interest by institutionalizing a soft-law approach, thereby producing a crisis from the perspective of migrants' rights protection. I also argue, however, that the migration crisis facilitated a resurgence of state sovereignty in the EU to the detriment not only of migrants' rights, but also of internal EU co-operation and co-ordination. Finally, I suggest that in times of crisis supranational courts are particularly susceptible to being recruited to EU states' rights-restrictive approach to international migration.

Keywords: Global Compact for Migration; international migration law; migrants' rights; migration crisis

1. Introduction

After briefly explaining the focus of the article in this Introduction, I move in Section 2 to place the 2015 migration crisis in the wider crisis context besetting the EU over the past 15 years and to argue that EU states' sovereign powers of control of non-EU migration, largely undiluted by the international system of human rights protection, are buoyed in times of crisis. In Section 3 I argue that states' human rights-avoidant approach to international migration is maintained partly through states' tendency, firstly, to ignore multilateral treaties elaborated for the express purpose of protecting migrants' rights and, secondly, to co-operate on the regulation of international migration and protection of migrants' rights in informal venues that produce non-binding

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outcomes. This process of sidelining and side-stepping migrants' rights protection while co-operating on cross-border movement of people was accelerated by the 2015 migration crisis and has recently reached its logical endpoint. The integration of migration into the Sustainable Development Agenda 2030[1] and the crisis-fuelled adoption of the UN Global Compact for Safe, Orderly and Regular Migration (GCM)[2] in 2018 amounts to what I have termed 'the post-2015 migrant rights protection regime',[3] an unapologetic endorsement at the international level of soft-law, goal-setting frameworks for international regulation of migration and migrants' rights protection, and a corresponding disavowal of any role for binding legal obligations in this field. I argue therefore that the migration crisis galvanized the EU and its member states to engage in multilateral international co-operation in the field of migration in a way that entrenches EU states' sovereign self-interest by institutionalizing a soft-law approach, thereby producing a crisis from the perspective of migrants' rights protection.[4]

In Section 4 I also show, however, how migration crisis may facilitate a resurgence of state sovereignty in the EU to the detriment not only of migrants' rights, but also at the expense of internal EU co-operation, resulting in member states shirking their EU law obligations and in a lack of EU unity on the international stage. In Section 5, I broaden the inquiry of the impact of the migration crisis beyond soft law and internal EU co-operation to show how that crisis has seen supranational courts inveigled into diluting the obligations that are binding on European states in respect of international migrants. I argue here that states in Europe are essentially aided and abetted in their quest for retention of sovereign discretion in the realm of migration control by supranational courts that act to relieve states of their human rights duties vis-à-vis migrants, particularly in times of crisis. A central contention of the article is that the migration crisis has been instrumentalized by EU states to arrogate and exercise ever greater powers of migration control, often in defiance of legal obligations.[5] While states' dogged protection of their sovereign powers of migration control may either attenuate or amplify co-operation amongst states, its outcome when it comes to migrants points only in one direction, namely, that of a reduction in rights protection.

The EU regime on free movement of EU citizens is itself a form of international regulation of migration and I illustrate in Section 4 how this regulatory framework has been challenged by the turn to sovereignty occasioned by the 2015 migration crisis. It is, however, non-EU migrants, or international migrants to the EU who stand to lose most in the migrants' rights crisis I identify in this article: mobile EU citizens enjoy a comparatively high standard of protection under EU law far beyond that afforded to international migrants by the minimum standards enshrined in international human rights treaties.[6] EU citizens exercising their free movement rights within the EU will

[1]Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015) (Agenda 2030).

[2]Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195 (2019).

[3]A. Desmond, 'A New Dawn for the Human Rights of International Migrants? Protection of Migrants' Rights in light of the UN's SDGs and Global Compact for Migration', (2020) 16(3) *International Journal of Law in Context* 222.

[4]While my contention in this article is that soft-law frameworks are finding favour for multilateral co-operation on international migration and migrants' rights protection, there is also evidence that informal arrangements are being preferred by the EU for bilateral co-operation on international migration. See A. Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges', (2020) 39(1) *Yearbook of European Law* 569.

[5]Instrumentalization of crisis by states to accumulate greater power is not, of course, confined to the realm of migration. See, e.g., the emergency legislation adopted by Hungary in response to the COVID-19 pandemic in 2020 that would have essentially allowed the government to rule indefinitely by decree: Act XII of 2020 on the Containment of the Coronavirus. See Hungarian Helsinki Committee, 'Background Note on Act XII of 2020 on the Containment of the Coronavirus', available at www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf. See also M. Dunai, 'Hungarian PM's Power to Rule by Decree to End on June 20: Government', *Reuters*, 26 May 2020, available at www.reuters.com/article/us-health-coronavirus-hungary-emergency-idUSKBN2321VF.

[6]See, however, an account of the increasingly restrictive approach taken in recent years to the free movement of economically inactive EU citizens in M. Jesse and D. Carter, 'The "Market Insider": Market-Citizenship and Economic Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2021), 282.

be little troubled in practical terms by a dilution in the standards of human rights protection for international migrants.

For the purposes of definitional and conceptual clarity, a number of further explanations are necessary. While the division between 'refugee' and 'migrant' is far from distinct in reality,[7] with the GCM acknowledging that refugees and migrants are entitled to the same universal human rights and fundamental freedoms (GCM, paragraph 4), the differentiation between the categories of forced and voluntary migrant is deeply entrenched in international law, with each category being governed by separate legal frameworks. Those subjected to enforced migration may rely on the robust catalogue of rights codified in the Refugee Convention[8] which has been incorporated into EU law and expanded upon by the various pieces of binding legislation that make up the Common European Asylum System. For so-called voluntary migrants, however, whether they move legally or via irregular means or channels, their ability to rely on the primary international human rights instrument elaborated for their protection is severely limited by the conspicuously small complement of states parties to that instrument, namely, the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN ICRMW).[9]

Despite the formal enforced/voluntary dichotomy, it is the enforced migration-related crisis of 2015 that gave rise to developments contributing to what I characterize as a migrants' rights crisis. I therefore discuss reactions to and consequences of the 2015 crisis, which largely concerned enforced migrants with legitimate claims to international protection,[10] while focusing on the international law implications of that crisis for voluntary migrants who are often formally more vulnerable than individuals who may invoke the protection of international refugee law in the territory of states in which they seek refuge. It is important to underline that the distinction between these two categories of migrant and migration is in many respects fluid and overlapping, meaning that contraction of human rights protections for 'voluntary' migrants will also affect many people who seek protection under international refugee law. Individuals whose applications for international protection are denied often remain as irregular migrants in their destination state. Individuals migrating via irregular channels, whether they have legitimate protection needs under international refugee law or whether they are on the move in search of a better life, are indiscriminately subjected to the same deterrence practices developed by states in the Global North over recent decades.[11]

Some of the arguments advanced in this article apply with equal force to non-EU states, such as the aversion to ratification of multilateral treaties focused on migrants' rights protection and a preference for soft law as a mechanism for addressing migrants' rights protection. My focus, however, is on the EU, an important migration destination that is at the same time the most closely integrated regional bloc with the most highly developed and complex system of human rights protection in the world. Whether other regions are experiencing the same resurgence of state sovereignty at the expense of migrants' rights protection is beyond the scope of this article. The potential for rights dilution I highlight will, however, adversely affect international migrants beyond the European legal space.

[7]R. Hamlin, *Crossing: How We Label and React to People on the Move* (2021).

[8]1954 Convention relating to the Status of Refugees,189 UNTS 137.

[9]2003 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3 (ICRMW).

[10]Over 75% of the 911,000 migrants who reached Europe's shores between 1 January and 7 December 2015 were fleeing conflict and persecution in Syria, Afghanistan or Iraq. See W. Spindler, '2015: The Year of Europe's Refugee Crisis', *UNHCR*, 8 December 2015, available at www.unhcr.org/uk/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html.

[11]J. Hathaway and T. Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence', (2015) 53 *Columbia Journal of Transnational Law* 235; T. Gammeltoft-Hansen and N. Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', (2017) 5(1) *Journal on Migration and Human Security* 28.

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2. State sovereignty and migration crisis

State sovereignty is a 'highly malleable concept'[12] that may nonetheless be defined in broad terms as the right of states to do as they see fit on their own territory without interference from other states,[13] including controlling human movement across their borders into their territory.[14] In the aftermath of the Second World War the states of the international community, in an effort to underpin international peace and stability,[15] entered into a multiplicity of agreements, international organizations and regional integration initiatives that significantly shifted the balance of their plenary competence[16] from more to less. The partial cession of state sovereignty in the interests of international co-operation is particularly pronounced in the context of the EU. Member states have conferred powers on the EU, via the organization's foundational treaties, to make supranational law that supersedes conflicting domestic legislation[17] across a wide range of areas including movement of people across the Union's constituent states and the entry and expulsion of non-EU citizens.[18] Indeed, those treaties explicitly impose an obligation on member states of the EU to co-operate on migration, asylum and borders policy on the basis of the principle of solidarity and fair sharing of responsibility.[19] This has led some commentators to identify in the EU project the beginning of a late or post-Westphalian era.[20]

When it comes to international migration of people, however, the extent to which states have ceded their sovereign powers of migration control in practice is open to question. Arendt's observation in 1951, that nowhere is sovereignty more absolute than in matters of emigration, naturalization, and expulsion,[21] arguably still holds true today despite the advent of globalization and the development of the international human rights regime. Indeed, more than 50 years after Arendt's diagnosis, Catherine Dauvergne memorably characterized states' control of the movement of people as 'the last bastion of sovereignty',[22] with governments responding to loss of control in realms such as economic policy, trade and military matters by flexing ever more vigorously their sovereign muscle in the migration control arena. Despite the constraints imposed on state sovereignty by the international human rights standards elaborated under the auspices of the UN from 1948 onwards,[23] the human rights claims of migrants often fall in the face of states' sovereign

[12]C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (2006), at 2.

[13]Crawford describes it as the 'more-or-less plenary competence' of states, J. Crawford, *The Creation of States in International Law* (2007), at 32. A recent legal dictionary defines it as the 'right of a state to self-government; the supreme authority exercised by each state'. B.A. Garner (ed.), *Black's Law Dictionary*, (2019).

[14]R. Perruchoud, 'State Sovereignty and Freedom of Movement', in B. Opeskin, R. Perruchoud and J. Redpath-Cross (eds.), *Foundations of International Migration Law* (2012), 123, at 124.

[15]See 1945 Charter of the United Nations, 1 UNTS XVI, at Ch. IX.

[16]See Crawford, *supra* note 13.

[17]*Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, Case 26/62, [1963] ECR 1; *Costa v. ENEL*, Case 6/64, [1964] ECR 585.

[18]Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C202/1 (2016). See, specifically, Art. 3(2) TEU; Art. 21 and Titles IV and V TFEU; Art. 45 of the Charter of Fundamental Rights of the European Union. EU competence concerning non-EU citizens is not, however, absolute. See E. Neframi, Directorate General for Internal Policies of the Union (European Parliament), *Division of Competences between the European Union and its Member States Concerning Immigration* (2011).

[19]See TFEU, ibid., Art. 80 TFEU.

[20]See, e.g, A. Moraczewska, 'The Schengen Area as an Illustration of the Late Westphalian Order', (2018) 3 *Przegląd Europejski* 45.

[21]H. Arendt, *The Origins of Totalitarianism* (1968), at 278, citing L. Preuss, 'La Dénationalisation imposée pour des motifs politiques', (1937) 4 *Revue Internationale Française du Droit des Gens*, at Nos. 1, 2, 5. *The Origins of Totalitarianism* was first published in 1951.

[22]C. Dauvergne, *Challenges to Sovereignty: Migration Laws for the 21st Century* (2003), at 8–9.

[23]The non-binding 1948 Universal Declaration of Human Rights, UNGA Res 217 A(III) (UDHR) has been translated into binding UN human rights treaties. The UDHR was also a key point of reference for the elaboration of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

exclusionary powers.[24] In the realm of international migration, migrants' rights emerge as matters of secondary importance when they clash with states' sovereign self-interest.[25] This is true even in the context of the EU, where states' desire to have the final say on their treatment and reception of non-citizens has brought the Union to the brink of crisis.[26] The (lack of) EU co-operation on international migration over the past decade, both internally and externally, reveals the resilience of sovereignty and the fragility of EU co-operation on migration, particularly in times of crisis.

Even the most cursory review of the EU and international law scholarship produced in recent years in the English language suggests that we have been living through an era of multiple overlapping crises.[27] I use the term crisis in two distinct, but related senses. Firstly, to mean events that disrupt situations of stability and normality[28] and thereby result in an emergency[29] and, secondly, to mean events and developments that expose gaps and inadequacies in the law.[30] The crisis at the centre of this article is the 2015 migration crisis during which over a million migrants arrived by sea in the EU, primarily in Greece and Italy, with many of them subsequently making their way across Europe and the EU.[31] While it may be plausibly argued that the characterization of this migration as a crisis is largely a construction of media and political discourse that serves political ends,[32] it is nonetheless an event that disrupted normality and stability in the EU on a variety of fronts, as discussed in Section 4.

It is important to point out that the migration crisis does not exist in isolation from other crises, but instead feeds off and feeds into other crisis events. The migration crisis unveiled a solidarity crisis in the EU,[33] and was exacerbated by the earlier financial crisis, with Italy and Greece, the two countries at the frontline of migrant arrivals in 2015, amongst the states most ravaged by the

[24]L. Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention', (1991) 25 *International Migration Review* 737; M.-B. Dembour, *When Humans Become Migrants* (2015).

[25]Note that while I argue that state sovereignty takes priority, I am not suggesting that there is a complete absence of meaningful restrictions on exercise of that sovereignty. For an illustration of EU law and international law limitations on states' sovereign decisions over migration against the background of the migration crisis see A. Farahat and N. Markard, 'Forced Migration Governance: In Search of Sovereignty', (2016) 17(6) *German Law Journal* 923.

[26]See, e.g., the suggestion of Luxembourg's foreign minister that Hungary should be expelled from the EU because of its treatment of migrants. M. Chambers and M. Dunai, 'EU Should Expel Hungary for Mistreating Migrants, Luxembourg Minister Says', *Reuters*, 13 September 2016, available at www.reuters.com/article/us-europe-migrants-hungary-asselborn-idUSKCN11J0OR. See also Section 4, *infra*.

[27]But what else would it tell us, given that international law discourse is all about containing, making, and surviving crises. See J. D'Aspremont, 'International Law as a Crisis Discourse: The Peril of Wordlessness', in M. Mbengue and J. D'Aspremont (eds.), *Crisis Narratives in International Law* (2021), 69. See also H. Charlesworth, 'International Law: A Discipline of Crisis', (2002), 65(3) *Modern Law Review* 377, who argues that the tendency to focus on crises for the development of international law impoverishes the discipline. As I show in the present article, it also impoverishes international human rights protection for migrants.

[28]C. Heller et al., 'Crisis', in N. De Genova and M. Tazzioli (eds.), *Europe/Crisis: New Keywords of the 'Crisis' in and of 'Europe'* (2016), available at www.nearfuturesonline.org/europecrisis-new-keywords-of-crisis-in-and-of-europe-part-2/; L. Hadj Abdou, '"Push or Pull"? Framing Immigration in Times of Crisis in the European Union and the United States', (2020) 42(5) *Journal of European Integration* 643.

[29]J. White, *Politics of Last Resort: Governing by Emergency in the European Union* (2019).

[30]This is in line with Chimni's characterization of the use of the term 'crisis' in mainstream international law scholarship to refer primarily to 'events or episodes that expose gaps and inadequacies in particular domains of international law'. B.S. Chimni, 'Crisis and International Law: A Third World Approaches to International Law Perspective', in Mbengue and D'Aspremont, *supra* note 27, at 40.

[31]J. Clayton and H. Holland, 'Over One Million Sea Arrivals Reach Europe in 2015', *UNHCR*, 30 December 2015, available at www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reacheurope-2015.html.

[32]M. Krzyżanowski, A. Triandafyllidou and R. Wodak, 'The Mediatization and the Politicization of the "Refugee Crisis" in Europe', (2018) 16 *Journal of Immigrant & Refugee Studies* 1, at 2. For sustained critical analysis of the framing of the migration developments in 2015 as a crisis see C. Hocquet, *The EU, Migration and Crisis: A Critical Redescription* (2022), unpublished PhD thesis, University of Birmingham.

[33]L. Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law', (2020) 22(1) *European Journal of Migration and Law* 60.

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Eurozone crisis and therefore all the more acutely lacking the capacity to adequately receive and process migrants arriving *en masse*. The migration crisis nourished much pro-Brexit debate and it feeds into the rule of law crisis, with member states flouting legal obligations in their desire to control their borders. International migrants are amongst the groups most adversely impacted by the fallout from the ongoing global health crisis and, looking to the near future, the climate crisis will also entail further migration crisis. These crises have produced a further as-yet undiagnosed crisis consisting in gaps and inadequacies in international law as it pertains to migrants' rights protection. It is to this migrants' rights crisis that I now turn.

3. International co-operation on migration and the protection of migrants' rights: Soft law trumps treaties[34]

There is abundant evidence of states' reluctance to co-operate on international migration while being explicitly bound by human rights obligations and answerable to supranational supervision. Treaties elaborated for the primary and explicit purposes of protecting migrants' rights secure strikingly low numbers of ratifications.[35] This is most egregiously illustrated by the fate of the 1990 ICRMW, a core international human rights instrument that puts in place a framework for international co-operation on migration while ensuring the protection of migrants' rights.[36] The ICRMW, while significant for being the most comprehensive treaty in the field of international migration and human rights, has been beset by a singularly chequered ratification record. Following adoption by the UN General Assembly in 1990, the ICRMW lay dormant for nearly 13 years before entering into force in 2003, the longest wait from adoption to activation endured by any of the core UN human rights instruments.[37] Over 30 years after its adoption, it has been ratified by just 58 states, most of which are located in the Global South. By contrast, the UN Convention on the Rights of the Child (CRC),[38] adopted a year ahead of the ICRMW, entered into force less than 12 months after its adoption and currently has 196 states parties. Even the two most recent universal human rights instruments, namely, the conventions on the rights of persons with disabilities[39] and on protection against enforced disappearance,[40] quickly overtook the ratification record of the ICRMW after their adoption in 2006. It is particularly telling that no EU member state has yet ratified the ICRMW.[41]

[34]Section 3 draws on arguments I advance in identification of what I term 'the post-2015 migrant rights protection regime' in Desmond, 'A New Dawn for the Human Rights of International Migrants?' (see note 3, *supra*).

[35]E.g., 11 states, six of which are in the EU, have ratified the 1983 European Convention on the Legal Status of Migrant Workers (ETS No. 93) 1496 UNTS 3 (1983), which is open for signature to all 47 Council of Europe member states; nine states, six of which are in the EU, have ratified the 1997 Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144) 2044 UNTS 737 (1997), which is open for signature to all states; 53 states, nine of which are in the EU, have ratified ILO 1949 Convention concerning Migration for Employment (Revised) (No. 97), while 28 states, five of which are in the EU, have ratified ILO 1975 Migrant Workers (Supplementary Provisions) Convention (No. 143), both of which are open for signature to all 187 member states of the ILO.

[36]See ICRMW, note 9, *supra*. For obligations on states parties to co-operate on international migration see generally Part VI of the ICRMW on promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families, and specifically Arts. 45, 64, 65, 67, 68.

[37]For the full list of core international human rights instruments see OHCHR, The Core International Human Rights Instruments and Their Monitoring Bodies, available at www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

[38]1990 UN Convention on the Rights of the Child, 1577 UNTS 3 (1990) (UN CRC).

[39]2008 UN Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (2008).

[40]2010 UN International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3 (2010).

[41]For discussion of the EU's attitude towards the ICRMW see A. Desmond, 'The Triangle that Could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review', (2015) 17 *European Journal of Migration and Law* 39; A. Desmond, 'A Vexed Relationship: The ICRMW vis-à-vis the EU and its Member States', in A. Desmond (ed.), *Shining New Light on the UN Migrant Workers Convention* (2017), 295.

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When it comes to multilateral international co-operation on migration, states prefer the political arena[42] and informal dialogue and voluntary, non-binding processes that avoid monitoring and oversight[43] and produce instead recommendations and best practice.[44] This sovereigntist affinity for vehicles that facilitate international co-operation on migration without imposing legal restrictions on states' sovereign powers to control migration has recently been endorsed and institutionalized at the international level by a number of important developments, namely, the adoption in 2015 of the Sustainable Development Agenda 2030 and of the GCM in 2018 which indicate that states' co-operation on migration is arguably slipping its mooring from binding international human rights law, a mooring which was in any case, as illustrated above, never particularly secure.

The Sustainable Development Agenda elaborates a framework for international co-operation to realize the human rights of all persons by 2030.[45] It represents the first time that explicit commitments on migration are integrated in the global development agenda[46] and commits the world's states to 'cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status'.[47] The Agenda expressly pledges to protect migrants' rights in pursuit of two of the 17 Sustainable Development Goals (SDGs): ensuring decent work and reducing inequalities.[48] Indeed, most of the SDGs and their related targets are of direct relevance to migrants, even where their particular needs are not explicitly articulated.[49] Failure to realize goals such as gender equality and decent work for migrants means that the objective of the Agenda to achieve the SDGs 'for all' will not have been achieved.

A defining feature of Agenda 2030, which both underscores and facilitates the resilience of state sovereignty in the field of migration, is that it is essentially a goal-setting framework. However laudable the Agenda's explicit commitments on migration and migrants' rights might be, it is not possible to compel states to live up to those commitments or to take specific measures for their achievement. Unlike core UN human rights treaties which have dedicated bodies of independent experts who monitor the compliance of states parties with the treaties they have ratified, the review framework for implementation of the SDGs is essentially voluntary.[50] It is therefore perhaps unsurprising that in 2022 only 44 states conducted a Voluntary National Review, with just 41 countries signing up to conduct one in 2023.[51] Dealing with migration in a 'development

[42]C. Dauvergne, 'Introduction', in C. Dauvergne (ed.), *Research Handbook on the Law and Politics of Migration* (2021), 6 notes the increasing overlap between migration law and migration politics.

[43]See, e.g., Desmond (2017), *supra* note 41, at 299–304; UN Special Rapporteur on the Human Rights of Migrants, F. Crépeau, Report by the Special Rapporteur on the Human Rights of Migrants: Global Migration Governance, UN Doc. A/68/283 (2013), at 22, para. 121.

[44]M. Geiger and A. Pécoud, 'The Politics of International Migration Management', in M. Geiger and A. Pécoud (eds.), *The Politics of International Migration Management* (2010) 1, at 13–14.

[45]See Agenda 2030, *supra* note 1.

[46]E. Percy Kraly and B. Hovy, 'Data and Research to Inform Global Policy: The Global Compact for Safe, Orderly and Regular Migration', (2020) 8 *Comparative Migration Studies* 1, at 2; M. Klein Solomon and S. Sheldon, 'The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration', (2018) 30(4) *International Journal of Refugee Law* 584.

[47]See Agenda 2030, *supra* note 1, para. 29.

[48]Ibid., specifically, Goals at 8.8, 10.7, 10.c.

[49]E. McGregor, 'Migration, the MDGs and SDGs: Context and Complexity', in T. Bastia and R. Skeldon (eds.), *Handbook on Migration and Development* (2020), 284.

[50]See Agenda 2030, *supra* note 1, paras. 72, 74, 80, 84.

[51]UN, High-Level Political Forum on Sustainable Development, available at hlpf.un.org/countries. For analysis of the pitfalls of the optional and voluntary nature of SDG monitoring from the perspective of migrants' rights see J. Holliday, 'Incongruous Objectives? Endeavouring to Realise Women Migrant Workers' Rights through the Global Development Agenda', (2020) 16(3) *International Journal of Law in Context* 269.

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setting' may therefore serve to facilitate states in their efforts to 'isolate their border and migration practices from the reach of international human rights law'.[52]

The non-binding nature of Agenda 2030 is shared by a closely related document which, though anchored in the Sustainable Development Agenda, was borne of the 2015 migration crisis, like many of the immigration law developments discussed in this article. The events of 2015 served as a catalyst for the international community to come together in 2016 under the auspices of the UN to adopt the New York Declaration for Refugees and Migrants.[53] The Declaration articulated the commitment of the international community to protect people on the move, a commitment crystallized in the drafting of the GCM which was endorsed by the UN General Assembly in 2018.

Acclaimed by the UN itself as 'the first-ever UN global agreement on a common approach to international migration in all its dimensions',[54] the GCM seeks to foster international co-operation on migration so as to maximize its overall benefits while also addressing its challenges for countries of origin, transit and destination. It aims to reduce 'irregular and involuntary migration by addressing conditions that prevent people from achieving the SDGs; and ensure that migration that occurs does so in a safe, orderly and regular manner'.[55] The co-operative framework for ensuring safe, orderly and regular migration rests on the GCM's ten guiding principles and its 23 Objectives, the latter to be realized through implementation of a total of 187 related actions which provide concrete examples of the measures states may take to realize the Objective in question.[56]

Some commentators have positively evaluated the GCM and its potential to promote more consistent and effective protection of migrants' rights.[57] I am concerned in this article, however, that the GCM, as an epitome of the turn to soft law for the protection of migrants' rights, may result in the dilution of that protection. In addition to its non-binding nature, deference to state sovereignty pervades the GCM. It 'upholds' the sovereignty of states and 'reaffirms' their sovereign right 'to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law' (GCM, paragraphs 7, 15, 27). The motivation of states in drawing up the GCM as a blueprint for international co-operation on migration is evident from the relegation of the three specialized treaties on migrant workers[58] to the document's footnotes. This arguably reflects a desire to downplay their relevance, in stark contrast to the more widely ratified control-focused protocols on trafficking and smuggling,

[52]E. Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: To What Extent Are Human Rights and Sustainable Development Mutually Compatible in the Field of Migration?', (2020) 16(3) *International Journal of Law in Context* 239, at 239, 240, 249.

[53]2016 New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1 (2016).

[54]See, e.g., Intergovernmental Conference on the Global Compact for Migration, available at www.un.org/en/conf/migration/global-compact-for-safe-orderly-regular-migration.shtml; and UN Refugees and Migrants, available at www.refugeesmigrants.un.org/migration-compact. This claim is questionable, given the existence of the UN ICRMW, as argued in Desmond, 'A New Dawn for the Human Rights of International Migrants?', *supra* note 3; and M. Grange and I. Majcher, 'Using Detention to Talk about the Elephant in the Room: The Global Compact for Migration and the Significance of its Neglect of the UN Migrant Workers Convention', (2020) 16(3) *International Journal of Law in Context* 287.

[55]T.A. Aleinikoff and S. Martin, *Making The Global Compacts Work: What Future for Refugees And Migrants?* (2018), at 15.

[56]Detailed discussion of the background to and content of the GCM is provided in V. Chetail, *International Migration Law* (2019), at 322–35.

[57]J. Gest, I. Kysel and T. Wong, 'Protecting and Benchmarking Migrants' Rights: An Analysis of the Global Compact for Safe, Orderly and Regular Migration', (2019) 57(6) *International Migration* 60. See also F. Crépeau, 'Towards a Mobile and Diverse World: "Facilitating Mobility" as a Central Objective of the Global Compact on Migration', (2018) 30 *International Journal of Refugee Law* 650; K. Allinson and N. Busuttil, 'Translating the Global Compact for Migration for Implementation by Practitioners', (2022) 36(2) *Journal of Immigration, Asylum and Nationality Law* 117.

[58]See UN ICRMW, *supra* note 9; see ILO Conventions 1949 and 1975, *supra* note 35.

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'which appear openly in the body of the GCM text and in respect of which there are explicit calls to promote their ratification, accession and implementation (GCM, paragraphs 25(a), 26(a)).'[59]

3.1 From migration crisis to crisis for migrants' rights: The consequences of the centrality of sovereignty to renewed international co-operation on migration

3.1.1 A crisis for migrants' rights protection? Attenuating rights and amplifying the fragmentation of international migration law

Soft law is made up of statements, agreements and documents that, though important and influential, are not binding.[60] States cannot, therefore, be legally compelled to comply with soft-law agreements. It is this very lack of binding obligation that makes soft law so appealing to states as a means of governance and regulation of issues that cross international borders. Soft-law instruments entail a loss of less autonomy for co-operating states than would 'hard legal acts'[61] such as treaties. Soft law does not inevitably entail a contraction in rights protection for international migrants. It may act as a precursor to binding multilateral agreements protective of human rights: the ICRMW itself was preceded by the UN's adoption of the Declaration on the Human Rights of Individuals who are not nationals of the country in which they live in 1985.[62] Similarly, soft-law documents may generate far-reaching normative and practical developments to the benefit of people on the move, as has been the case with the Cartagena Declaration in the context of Latin America.[63] In the case of the GCM itself, commentators have already identified ways in which it may be deployed by lawyers and courts at the national level to bring domestic immigration law and policy into line with minimum international standards on migrants' rights protection.[64] At the same time, however, soft law may result in curtailment of rights, the danger I am concerned with in this article. It is the GCM's very lack of binding legal obligation that facilitates gaps and inadequacies in international law for the protection of migrants' rights, contributing to the migrants' rights crisis I identify in this article. Amongst the risks inhering in soft law is the danger that it may undermine binding rules of international law and weaken their legal authority in the long run.[65] This risk is very much in evidence in the context of the GCM.

The vast range of issues covered in the Compact precludes a detailed discussion of the rights dilution potential of each of its provisions and omissions. In this subsection I will illustrate my concerns with three brief examples, namely, labour rights; the right to leave a country; and immigration detention of children.[66] Some of the Compact's provisions are not in line with the interpretation of human rights and labour standards developed by the relevant international

[59]R. Cholewinski, 'The ILO and the Global Compact for Safe, Orderly and Regular Migration: Labour Migration, Decent Work and Implementation of the Compact with Specific Reference to the Arab States Region', (2020) 16(3) *International Journal of Law in Context* 304, at 311.

[60]There is a voluminous literature and much disagreement on what constitutes soft law. For the purposes of the present article, I adopt the binding/non-binding dichotomy to distinguish hard law from soft law, as outlined in, e.g., W. Reinicke and J. Martin Witte, 'Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2003), 75, at 76.

[61]A. Peters, 'Soft Law as a New Mode of Governance', in U. Diedrichs, W. Reiners and W. Wessels (eds.), *The Dynamics of Change in EU Governance* (2011), 21, at 33.

[62]General Assembly, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, UNGA Res 40/144 (1985).

[63]Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–3 (1984–85). Discussion of the impact and legacy of the Declaration is provided in, e.g., L. Lyra Jubilut, M. Vera Espinoza and G. Mezzanotti (eds.), *Latin America and Refugee Protection: Regimes, Logics, and Challenges* (2021).

[64]See, e.g., Allinson and Busuttil, *supra* note 57.

[65]See Chetail, *supra* note 56, at 292–4.

[66]For discussion of the risks attaching to the GCM's omissions relating to non-discrimination and *non-refoulement* see Gest et al., *supra* note 57, at 64–5.

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supervisory bodies.[67] For example, the GCM's requirement that basic labour rights be afforded to migrant workers engaged in *contractual* labour (GCM, paragraph 22(i)) could result in – and be used by states to justify – withholding such rights from irregular migrants in contravention of the requirements of international human rights and labour treaties.[68] As I indicate in Section 3.1.2, it is unclear whether the review process for states' implementation of the GCM will suffice to head off this kind of risk of rights dilution.

An even more striking assault on the rules of international migration is the conspicuous omission from the GCM of the right to leave any country, 'the most truly universal rule on migration'.[69] This may be partly explained by the Compact's 'development setting' and the fact that brain-drain mitigation efforts, one of the three main tools deployed to harness migration for development, presuppose 'that the human right to leave a country can be curtailed, possibly indefinitely'.[70] In any event, its absence from the Compact may be used by states to restrict this fundamental right.[71] Any criticism of such restriction directed at states during review of GCM implementation, to be discussed presently, may be convincingly deflected by pointing to the non-inclusion of the right to leave in the Compact.

Closely related to the risk of rights-dilution is the GCM's potential to aggravate the already fragmented nature of international migration law[72] and international human rights standards. While an early advocate of the GCM suggested it could 'bundle agreed norms and principles into a global framework agreement',[73] the document adopted in 2018 bundled together *some* of the agreed rules concerning international migration. Apart from baldly excluding some rules, such as the aforementioned right to leave any country, the GCM also enshrines less migrant-friendly incarnations of existing rules, as illustrated by its approach to immigration detention of children.

While there are competing scholarly views as to the permissibility of immigration detention of children under international human rights law,[74] and inconsistency in the approach taken by UN human rights bodies,[75] the adoption of the GCM presented an opportune moment to solidify in international human rights law the complete prohibition on such detention articulated in the second of the two joint general comments adopted in 2017 by the UN Committees on Migrant Workers (CMW) and on the Rights of the Child.[76] This Joint General Comment has been characterized as the apogee of the evolution towards a complete prohibition on the immigration detention of children.[77] It might therefore have been expected that the GCM would reiterate this

[67]See Cholewinski, *supra* note 59, at 311.

[68]Ibid., at 313.

[69]V. Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law', (2020) 16(3) *International Journal of Law in Context* 253, at 255.

[70]See Guild, *supra* note 52, at 240, 249.

[71]See Chetail, *supra* note 69, at 256.

[72]V. Chetail, 'The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration* (2014), 9. Fragmentation is not confined to international migration law. See, e.g., International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006).

[73]UN Special Representative, Report of the Special Representative of the Secretary-General on Migration, UN Doc. A/71/728 (2017), para. 87.

[74]See, e.g., the argument that immigration detention of children is prohibited outright in C. Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children', (2019) 19 *Human Rights Law Review* 1. For the argument that it is permissible as a last resort see G. Neuman, 'Detention As a Last Resort: The Implications of General Comment No. 35', in M. Crock and L. Benson (eds.), *Protecting Migrant Children: In Search of Best Practice* (2018), 381.

[75]See Smyth, ibid.

[76]Joint General Comment 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 23 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, CMW/C/GC/4-CRC/C/GC/23 (2017), para. 5.

[77]See Smyth, *supra* note 74, at 21.

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absolute prohibition. Indeed, the 2016 report of the UN Secretary General that called for the elaboration of the GCM urged states to ensure that children, as a matter of principle, are never detained for purposes of immigration control[78] and a report submitted by the UN Secretary General to inform the elaboration of the GCM specifically recommended that states should focus on ending immigration detention of children.[79]

The GCM, however, aspires only to 'working to end the practice of child detention in the context of international migration' (GCM, paragraph 29(h)). The GCM thus approaches the child's right to liberty, a civil right entailing immediate obligations, 'as if it were a socio-economic right to be realised progressively over time, or worse, as a matter of soft law or best practice'.[80] Simultaneously, the GCM undermines the development of international human rights law, applying the brakes to the 'emerging consensus on the complete prohibition of immigration detention of children'[81] and perpetuating fragmentation and incoherence in relation to the elaboration of protection standards for some of the most acutely vulnerable individuals.[82]

3.1.2 Letting states off the hook? Monitoring respect for migrants' rights in a post-crisis international community

The process in place for review of its implementation deepens the risk that the GCM may result in attenuation of international standards for migrants. Evaluation of progress on implementation is to be state-led (GCM, paragraph 48), with a global review of such progress to occur every four years, beginning in 2022, at the International Migration Review Forum (IMRF). This Forum will serve as the primary inter-governmental platform for states to discuss and share progress on implementation of all aspects of the Compact and each Forum will result in a Progress Declaration (GCM, paragraph 49).[83] Follow-up and review of progress are to be supported by the establishment of a 'groundbreaking'[84] new network called the UN Network on Migration (GCM, paragraph 45). The Network comprises around forty members of the UN system with migration-related mandates and will rely on the International Organisation for Migration (IOM) as its co-ordinator and secretariat (GCM, paragraph 45(a)).

The key role assigned to the IOM gives further cause for concern. The organization lacks a human rights mandate and has been criticized in the past for displaying a greater appetite for supporting state activity in migration regulation than migrants' rights.[85] Its involvement is therefore unlikely to act in any way as a bar to state implementation of the GCM that, while GCM-compliant, falls short of international standards. The informal exchange of best practice conducted during the non-binding IMRF may provide states with further incentives not to report

[78]UN Secretary General, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, UN Doc. A/70/59 (2016), para. 101(b)(ii).

[79]UN Secretary General, Making Migration Work for All, UN Doc. A/72/643 (2017), para. 59.

[80]See Smyth, *supra* note 74, at 16.

[81]UN Special Rapporteur on the Human Rights of Migrants, 'Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them, UN Doc. A/75/183 (2020), para. 79.

[82]I discuss the question of immigration detention of children in international human rights law in more detail as part of a comparative analysis of the protection standards of the GCM and ICRMW in A. Desmond, 'From Complementarity to Convergence: The UN Global Compact for Migration and the UN Migrant Workers Convention', (2022) 55(1) *World Comparative Law* 83.

[83]Regional reviews of the GCM took place in May 2022. In relation to, e.g., immigration detention of children, the Progress Declaration eschews acceptance of any duty to take measures to end such detention by pledging simply to 'consider, through appropriate mechanisms, progress and challenges in working to end the practice of child detention in the context of international migration'. Progress Declaration of the International Migration Review Forum 7 June 2022, available at migrationnetwork.un.org/system/files/resources_files/Final-%20IMRF%20Progress%20Declaration-%20English.pdf.

[84]See Klein Solomon and Sheldon, *supra* note 46, at 589.

[85]More detailed critique of IOM's role is provided in Desmond, *supra* note 3, at 233–5.

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to UN human rights treaty bodies[86] such as the CMW, or with justification during the dialogue with such bodies for failure to meet international standards in their treatment of migrants.

Chetail takes the view that the conclusion of the GCM, an international agreement on a notoriously contentious topic, is an achievement in and of itself and the fate of the ICRMW supports Chetail's stance that the alternative 'was not between a binding instrument and a non-binding instrument, but between a non-binding instrument and no instrument at all'.[87] But might no instrument at all have been the better outcome from the perspective of migrants' rights protection? Given the concerns outlined in the foregoing paragraphs, has the GCM inaugurated a migrants' rights protection regime that is essentially a ploy for states 'to strengthen their own position, to the detriment of others'?[88] Such questions may lead many international migrants to agree with the argument advanced by Jan Klabbers nearly a quarter century ago that 'not only do we not need soft law, we do not even want it either ... soft law is, actually, detrimental'.[89] Certainly, there is the possibility that soft law in the form of the Agenda 2030 and the GCM will operate to the detriment of migrants' rights protection.

The risk of rights dilution created by the GCM and its review process has been recognized, at least implicitly, in the decision of the CMW in November 2020 to adopt a General Comment on the convergence of the ICRMW and the GCM. One of the goals of the proposed General Comment is to assist states 'in implementing their commitments contained in the Global Compact, in particular so as to ensure that they do not fall short of the obligations contained in the Convention and other international human rights instruments'.[90] This kind of initiative is as urgently necessary as it is unlikely to be sufficient to prevent the backsliding on rights protection and fragmentation of international human rights law I identify in this article.

4. Solidarity in crisis: EU unity and co-operation on migration

In this section I will examine three recent developments that illustrate how pursuit of sovereign self-interest by EU member states has undermined the EU's Common European Asylum System, freedom of movement within the EU, and EU external representation. The first two developments demonstrate not only the resilience of state sovereignty in the context of international migration, but also exemplify the depth of the challenge to internal EU co-operation and co-ordination posed by the 2015 migration crisis and thereby help to explain the enthusiasm of the EU and its member states for soft-law developments such as the GCM as a response to that crisis. The third development illustrates how state sovereigntist concerns around international migration can scupper EU efforts to present a unified approach to the GCM, itself a response to the 2015 migration crisis and a source of the migrants' rights crisis identified in this article. While I am concerned primarily here with migration-related crisis, the EU has been shaken by a number of crises in recent decades,[91] and it is important to point out that there is a temporal and material overlap between the challenges caused to the EU by migration and a variety of other crises which feed into and sustain each other.

[86]There are long-standing problems with non-reporting by states to the UN human rights treaty monitoring bodies. See, e.g., UN Secretariat, Timely, Late and Non-Reporting by States Parties to the Human Rights Treaty Bodies, HRI/MC/2015/5 (2015).

[87]See Chetail, *supra* note 69, at 267.

[88]J. Klabbers, 'The Undesirability of Soft Law', (1998) 67 *Nordic Journal of International Law* 381, at 387.

[89]Ibid., at 382–3.

[90]UN CMW, Draft General Comment No. 6 on the Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration: Concept Note, Guiding Questions and Call for Submissions, at 4, available at www.ohchr.org/en/calls-for-input/2022/call-submissions-concept-paper-and-draft-outline-its-draft-general-comment-no.

[91]These include crises concerning Brexit, the euro, rule of law, the climate apocalypse, and COVID-19. See F. Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms* (2020), at 59–75.

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4.1 Scalding the Common European Asylum System: State sovereign self-interest brought to the boil by crisis

Since it gained law-making power in the field of immigration and asylum with the entry into force of the Treaty of Amsterdam in 1999, the EU has developed a Common European Asylum System, a central pillar of which is what is known as the Dublin Regulation.[92] This Regulation sets out the criteria for determining which EU member state[93] is responsible for examining an asylum application, with the default position being that such responsibility lies with the first EU state of entry. The combined effect of geographical happenstance and the Dublin Regulation was to place a disproportionate burden on a small number of countries such as Greece, Italy and Malta in terms of reception of asylum-seekers and examination of their claims. The responses of EU states to the operation of the Dublin system, and to measures taken to sustain it, illustrate the persistent potency of state sovereign self-interest and its capacity to hobble inter-state co-operation even in as integrated a regional bloc as the EU, whose legal framework explicitly encodes the principles of solidarity and fair sharing of responsibility.[94]

Following the arrival of over a million migrants to the EU in 2015[95] particular pressure was placed on the principal EU states of first entry, namely, Italy and Greece. In response to those countries' need for assistance, the Council of the EU adopted two emergency temporary relocation decisions[96] on the basis of Article 78(3) TFEU,[97] requiring member states to accept the transfer from Italy and Greece of a total of 160,000 applicants for international protection. A number of states in Central and Eastern Europe expressed vehement opposition to the relocation obligation, with Slovakia and Hungary, supported by Poland, taking a legal challenge against one of the Council Decisions that generated a lengthy ruling from the Grand Chamber of the Court of Justice of the EU (CJEU) in 2017.[98] While Slovakia and Hungary advanced legal arguments in contestation of the Decision, their opposition was essentially political[99] and is better understood not so much by reference to the legal grounds submitted to the CJEU but in light of the considerations typified by Poland's claim that the obligation to accept asylum-seekers would place a

[92]Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person, OJ L180/31 (2006).

[93]The Regulation also binds four non-EU Schengen states, namely, Iceland, Liechtenstein, Norway, and Switzerland.

[94]While Art. 3 TEU places a general obligation on the EU to promote solidarity among member states, Art. 67(2) TFEU obliges the EU to frame a common policy on asylum, immigration and external border control, based on solidarity between member states. Article 80 TFEU provides that EU immigration and asylum policies 'and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. See TEU and TFEU, *supra* note 18. The principle of solidarity and fair sharing of responsibility entails broad political discretion for states, as noted by K. Hailbronner and D. Thym, 'Legal Framework for EU Asylum Policy', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law: A Commentary* (2016), para. 43. It did, however, play a role in the CJEU ruling against Slovakia and Hungary in 2017, discussed below.

[95]See UNHCR, *supra* note 31.

[96]Council of the European Union, 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, OJ L 239/146 (2015); and Council of the European Union, 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 L248/80 (2015).

[97]Article 78(3) TFEU provides:

> In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

[98]*Slovak Republic and Hungary v. Council of the European Union*, [2017], Joined Cases C-643/15 and C-647/15.

[99]B. de Witte and E.L. Tsourdi, 'Court of Justice Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council', (2018) 55(5) *Common Market Law Review* 1457, at 1458.

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disproportionate burden on ethnically homogeneous countries with populations culturally and linguistically different from the migrants to be relocated on their territory.[100]

The resilience of state sovereign self-interest in the face of EU law solidarity and responsibility-sharing obligations is illustrated by the fate of the Council Decisions and the CJEU ruling that rejected the arguments of Slovakia and Hungary and upheld the impugned relocation decision. Of the 160,000 individuals to be compulsorily transferred from Greece and Italy, only 34,705 appear to have been relocated.[101] Furthermore, despite the 2017 ruling from the CJEU, Poland, Hungary, and Czechia continued to flout their obligations under the temporary emergency relocation mechanism, resulting in yet another loss for those states before the CJEU in 2020.[102] Defiant in the face of defeat, the recalcitrant EU states justified their (non)action by reference to national interests and anti-immigrant rhetoric.[103] The fate of the Council's relocation decisions is far from the only compliance and implementation deficit blighting the CEAS,[104] but it is an especially conspicuous symptom of the willingness of EU states to flex their sovereign muscle in the face of EU law obligations, with times of crisis encouraging a particularly showy flexing of that muscle. It is simultaneously symptomatic of another of the EU's contemporaneous crises, with the inability to effectively enforce legal norms contradicting 'the very essence of rule of law'.[105] The attitude and behaviour of some states in the face of their obligations under the Council Decisions illustrate how the intertwining of law and politics may imperil the rule of law.[106]

The temporary emergency relocation mechanism instituted by the aforementioned Council Decisions constituted a de facto crisis-fuelled deviation from the normal operation of the Dublin Regulation. The same perceived crisis has also occasioned states at the frontline of migrant arrivals to take measures precluding the normal operation of the Dublin system without the imprimatur of the EU institutions. In 2018, Italy and Malta began the practice of closing their ports to private rescue vessels with migrants on board.[107] Refusing to allow migrants rescued at sea to

[100]See Slovakia and Hungary, *supra* note 98, para. 302. See also M. Karnitschnig, 'Orban Says Migrants Threaten "Christian" Europe', *Politico Europe*, 3 September 2015, available at www.politico.eu/article/orban-migrants-threaten-christian-europe-identity-refugees-asylum-crisis/.

[101]European Court of Auditors, Special Report, Asylum, Relocation and Return of Migrants: Time to Step Up Action to Address Disparities between Objectives and Results, Luxembourg: European Court of Auditors, 2019, at 21, available at www.eca.europa.eu/Lists/ECADocuments/SR19_24/SR_Migration_management_EN.pdf. Migrants were relocated to 22 EU states and three associated countries (Liechtenstein, Norway and Switzerland). Hungary and Poland did not relocate any migrants while Czechia had relocated 12. The slightly higher total figure of 34,712 was provided in media reports of the 2020 CJEU ruling against Czechia, Hungary, and Poland, e.g., J. Rankin, 'EU Court Rules Three Member States Broke Law over Refugee Quotas', *Guardian*, 2 April 2020, available at www.theguardian.com/law/2020/apr/02/eu-court-rules-three-countries-czech-republic-hungary-poland-broke-law-over-refugee-quotas.

[102]*Commission v. Poland, Hungary and the Czech Republic*, 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17. Slovakia was not a target of the infringement proceedings which generated this ruling because, following the 2017 judgment from the CJEU, it offered temporary shelter to around 1,200 people who had filed for asylum in neighbouring Austria. See E. Zalan, 'Court: Three Countries Broke EU Law on Migrant Relocation', *EU Observer*, 2 April 2020, available at www.euobserver.com/migration/147971.

[103]See, e.g., M. Stevis-Gridneff and M. Pronczuk, 'E.U. Court Rules 3 Countries Violated Deal on Refugee Quotas', *New York Times*, 2 April 2020, available at www.nytimes.com/2020/04/02/world/europe/european-court-refugees-hungary-poland-czech-republic.html. One of the main discursive shifts in Europe during the migration crisis was the 'ever-more obvious endorsement of anti-immigration rhetoric and/or of a harshened stance on openness toward refugees' by many countries' mainstream political movements and parties. See Krzyżanowski et al., *supra* note 32, at 7.

[104]D. Thym, 'The "Refugee Crisis" As A Challenge Of Legal Design and Institutional Legitimacy', (2016) 53(6) *Common Market Law Review* 1545, at 1551.

[105]K. Lane Scheppele, D. Vladimirovich Kochenov and B. Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', (2020) 39(1) *Yearbook of European Law* 3, at 31.

[106]See Dauvergne, *supra* note 42, at 6.

[107]Amnesty International, 'Italy/Malta: Stop Playing with Refugee and Migrants' Lives by Closing Ports', *Amnesty International*, 14 August 2018, available at www.amnesty.org/en/latest/news/2018/08/italy-malta-stop-playing-with-refugee-and-migrants-lives-by-closing-ports/.

disembark is likely to have been a breach of EU asylum law.[108] The measure was, however, successful in that it effectively strong-armed a number of EU member states into voluntarily accepting migrants disembarked following search and rescue operations in the high seas who came under the responsibility of Italy and Malta.[109] Both states also instrumentalized the ongoing global health crisis to revert to a policy of non-disembarkation.[110] In April 2020 Italy, followed quickly by Malta, declared, in conspicuously similar language, that it was not possible to provide places of safety on their respective territories to persons rescued at sea without compromising the national effort to contain the spread of the virus and care for those infected.[111] These pandemic-related port closures by Italy and Malta resulted in migrants being stranded at sea,[112] potentially putting lives at risk,[113] and arguably fell foul of international human rights and maritime law and international health regulations.[114] While undoubtedly a manifestation of dissatisfaction with the operation of the Dublin system, they also manifest the willingness of EU member states to invoke crisis as a justification for showy displays of sovereignty in the context of international migration and obligations owed to other states and migrants themselves.

4.2 Schengen

The pooling of sovereignty and the tightly woven regional integration achieved in the name of the project of European Union is exemplified by the abolition of internal EU borders in what is known as the Schengen zone,[115] a development that has been acclaimed by the EU as one of its greatest

[108]EU procedural rules concerning international protection applications apply equally to all applications regardless of whether they are made in the territory, at the border, or in the territorial waters of a member state. See Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, OJ L 180/60 (2013), Art. 3(1). See also para. 26 of the Preamble to the Directive. For the view that closure of the Italian ports was 'not illegal under maritime, human rights and European law' see E. Cusumano and K. Gombeer, 'In Deep Waters: The Legal, Humanitarian and Political Implications of Closing Italian Ports to Migrant Rescuers', (2020) 25(2) *Mediterranean Politics* 245.

[109]Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism, 23 September 2019. For discussion of the joint declaration see S. Carrera and R. Cortinovis, 'The Malta Declaration on SAR and Relocation: A Predictable EU Solidarity Mechanism?', (2019) 14 *CEPS Policy Insights*.

[110]Human Rights Watch, 'Port Closures Cut Migrant and Refugee Lifeline', 9 April 2020, available at www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline. For more detailed discussion of the response to irregular migration and migrants' rights in Europe during the pandemic see A. Desmond, 'The European Approach to Irregular Migration in Pandemic Times: The More Things Change, the More they Stay the Same?', in Czech et al. (eds.), *European Yearbook on Human Rights* (2021), 285.

[111]See Decreto no. 150 del Ministro delle infrastrutture e dei trasporti, del Ministro degli affari esteri e della cooperazione internazionale, del Ministro dell'interno e del Ministro della salute del 7 Aprile 2020, available at www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf; Statement of the Maltese Authorities, 9 April 2020, available at www.gov.mt/en/Government/DOI/Press%20Releases/PublishingImages/Pages/2020/April/09/pr200648/PR200648a.pdf.

[112]See, e.g., L. Tondo, M. Stierl and M. Blackall, 'UN Refugee Agency Calls on EU Nations to Let in Migrants Rescued in Mediterranean', *Guardian*, 29 August 2020, available at www.theguardian.com/world/2020/aug/29/banksy-european-authorities-ignoring-pleas-crew-migrant-rescue-vessel.

[113]UNHCR, 'News Comment on Search and Rescue in the Central Mediterranean by the Assistant High Commissioner for Protection at UNHCR, the UN Refugee Agency, Gillian Triggs', 1 May 2020, available at www.unhcr.org/mt/13871-news-comment-on-search-and-rescue-in-the-central-mediterranean-bythe-assistant-high-commissioner-for-protection-at-unhcr-the-un-refugee-agency-gillian-triggs.html.

[114]See A. Farahat and N. Markard, *Closed Ports, Dubious Partners: The European Policy of Outsourcing Responsibility Study Update* (2021).

[115]The Schengen area comprises Iceland, Liechtenstein, Norway, Switzerland, and all EU member states with the exception of Ireland, Bulgaria, Croatia, Cyprus, and Romania. The Schengen *acquis*, the rules governing the Schengen area, initially developed on an intergovernmental basis outside of the framework of the EU, became a matter of EU competence by virtue of a protocol to the Treaty of Amsterdam: Protocol No. 2 Integrating the Schengen Acquis into the Framework of the European Union, OJ C340/93 (1997). For an overview of the *acquis*, see the annex to Protocol No. 2.

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achievements.[116] The practical operation of the borderless Schengen zone came under sustained pressure, however, in the wake of the 2015 crisis, with border controls being re-imposed by countries traditionally at the forefront of EU integration such as Belgium, France and Germany.

It is important to point out that the temporary re-introduction of checks at internal borders is permitted under the Schengen Borders Code.[117] Where there is a serious threat to public policy or internal security, a state may as a matter of last resort re-impose border controls, if such re-introduction is likely to adequately remedy the threat in question, and only for as long as is strictly necessary to respond to that threat.[118] On this basis, internal border controls had been temporarily re-instated by Schengen states prior to the 2015 migration crisis for a range of events including major intergovernmental summits and sports fixtures.[119] More recently, internal border checks have been invoked across the Schengen zone as part of efforts to contain the spread of COVID-19.

In response to the movement across the EU of many of the hundreds of thousands of migrants who had arrived by sea to Greece and Italy in 2015, a number of Schengen states began to re-introduce and prolong internal border checks, initially on the basis of a 'big influx of persons seeking international protection' and subsequently due to the 'security situation in Europe and threats resulting from the continuous significant secondary movements'.[120] This latter reason was provided to justify prolonging internal border checks by Norway until 11 May 2019 and by Austria until 12 November 2019. In light of this sustained re-instatement of internal border controls, which requires the existence of a serious threat within the Schengen zone, use of the descriptor '2015' for the migration crisis seems inapposite. Indeed, while the rollout of most internal checks since 2020 has been justified by reference to the COVID-19 pandemic, the 'situation at the external borders' has been invoked as a reason by both Austria and Germany to keep internal border checks in operation until 11 November 2021.

The extensive re-introduction and prolongation of internal border checks as a result of migration concerns, at least partly the result of a specific concern not to have to receive individuals seeking international protection, indicates the latent sovereign potency that continues to underpin even the post-Westphalian European Union. A perceived migration crisis can produce a crisis in European integration, undoing decades of hard-won advances by normalizing the re-introduction of internal border checks.[121] It may not be possible to definitively ascertain whether the 2015 migration crisis posed a serious threat to public policy or internal security within the Schengen zone such as to justify prolonged reinstatement of internal border checks,[122] but

[116]European Commission, available at home-affairs.ec.europa.eu/policies/schengen-borders-and-visa_en; Recital 22 of 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 (Schengen Borders Code), OJ L 77/1 (2016).

[117]A detailed overview of the framework for temporary re-introduction of border checks in Schengen, and its activation in response to the migration crisis, is provided in P. Thalman, 'Schengen, Migration – and the Resurrection of the Westphalian Nation-State?', in C. Rauchegger and A. Wallerman (eds.), *The Eurosceptic Challenge National Implementation and Interpretation of EU Law* (2019), 109.

[118]See Schengen Borders Code, *supra* note 116, at Arts. 25–30.

[119]European Commission, 'Member States' Notifications of the Temporary Reintroduction of Border Control at Internal Borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code', available at www.home-affairs.ec.europa.eu/system/files/2022-12/Full%20list%20of%20MS%20notifications%20of%20the%20temporary%20reintroduction%20of%20border%20control%20at%20internal%20borders_en.pdf.

[120]Ibid.

[121]For a somewhat different perspective see F. Berrod, 'The Schengen Crisis and the EU's Internal and External Borders: A Step Backwards for Security Oriented Migration Policy?', (2020) 1(2) *Borders in Globalization Review* 53.

[122]See Thalman, *supra* note 117.

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populist 'national politicking'[123] in response to the migration crisis saw Schengen states depart for an extended period from one of the EU's 'main achievements'.[124]

4.3 Cracks in EU unity: The Global Compact for Migration

The enthusiasm of individual states for informal, soft-law agreements for multilateral co-operation on international migration is shared by the EU.[125] It is therefore hardly surprising that the EU was quick to commit itself and its member states to the GCM,[126] taking as active a role in the elaboration of the Compact as its status as a non-state entity allowed.[127] The EU's involvement in the negotiations of the Compact was led by the European Commission as representative of the EU and its member states. Its desire to speak with one voice to support and adopt the Compact, however, was undermined by a lack of EU unity. This illustrates how, in the realm of multilateral international co-operation on migration, even soft-law initiatives may fall victim to populist sovereignty-based manoeuvring on the part of individual states whose political parties invoke crisis narratives about unrestricted immigration[128] to justify their opposition to even 'the softest of soft law'.[129]

The European Commission's efforts to obtain authorization to conclude the GCM on behalf of the EU[130] were scuttled by legal obstacles,[131] but also by opposition to the GCM from individual EU member states. Hungary was first out of the starting blocks in its criticism of the Compact,[132] with the EU delegation delivering statements on the GCM on behalf of 27, rather than 28, member states[133] after May 2018. Hungary's statements opposing the GCM revealed a surface crack, in what had initially been EU unity vis-à-vis the GCM,[134] that quickly expanded into a deep fissure, with only 19 of the EU's member states ultimately voting in favour of the GCM in December

[123]Ibid.

[124]*NW v. Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, 26 April 2022, Joined Cases C-368/20 and C-369/20, paras. 65, 74. The CJEU in this case essentially found that Austria fell foul of the Schengen Borders Code by re-introducing border controls from 11 November 2017 for a number of successive six-month periods on its own initiative in the absence of a new threat justifying such re-introduction.

[125]R. Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements', (2021) 44(1) *West European Politics* 72, at 79–81; J. Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU', in S. Carrera, J. Santos Vera and T. Strik (eds.), *Constitutionalizing the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (2019), 21; F. Casolari, 'The Unbearable "Lightness" of Soft Law: On the European Union's Recourse to Informal Instruments in the Fight against Illegal Immigration', in F. Ippolito, G. Borzoni and F. Casolari (eds.), *Bilateral Relations in the Mediterranean: Prospects for Migration Issues* (2020), 215; C. Molinari, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns', (2019) 44(6) *European Law Review* 824.

[126]Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the Commission, OJ C 210/01 (2017).

[127]P. Melin, 'The Global Compact for Migration: Lessons for the Unity of EU Representation', (2019) 21 *European Journal of Migration and Law* 194, at 197–8; T. Molnár, 'The EU Shaping the Global Compact for Safe, Orderly and Regular Migration: The Glass Half Full or Half Empty?', (2020) 16(3) *International Journal of Law in Context* 321.

[128]See, e.g., Statement of Hungary during the Vote on the GCM in the General Assembly on 19 December 2018: UN General Assembly, 60th Plenary Meeting, UN Doc. A/73/PV.60 (2018), at 3.

[129]The characterization of the GCM in K. Newland, 'The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement', (2018) 30 *International Journal of Refugee Law* 657, at 660.

[130]Commission Proposal for Council Decisions Authorizing the Commission to Approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the Area of Immigration Policy, COM (2018) 168 final (2018).

[131]See Melin, *supra* note 127.

[132]Hungarian Delegation at the UN, 'Security First: Proposals by Hungary to the UN's Global Compact on Migration', March 2018, available at ensz-newyork.mfa.gov.hu/assets/91/89/30/afcddc20c5314d7d87fd4f3874e36932e7bb016f.pdf.

[133]See Melin, *supra* note 127, at 203.

[134]There is disagreement as to how long precisely the common EU position might be said to have endured. Contrast M. Gatti, 'EU States' Exit from the Global Compact on Migration: A Breach of Loyalty', *EU Immigration and Asylum Law and Policy*, 14 December 2018, available at www.eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-a-breach-of-loyalty/ and P. Melin, 'The Global Compact for Migration: Cracks in Unity of EU Representation', *EU Law Analysis*, 11 December 2018, available at www.eulawanalysis.blogspot.com/2018/12/the-global-compact-for-migration-cracks.html.

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2018.[135] Of the five states that voted against the Compact in the UN General Assembly, three (Czechia, Hungary, and Poland) were EU members, while there were five EU member states (Austria, Bulgaria, Italy, Latvia, Romania) amongst the 12 countries that abstained from voting.

Amongst the EU member states opposed to the GCM, the most trenchant criticism was offered by Hungary, which tapped into a crisis narrative, casting the GCM as a threat to the sovereign right of states to control their borders that 'will contribute to launching new, massive migratory flows all over the world, which will put the entire globe at enormous risk'.[136] The Compact was the cause of political crisis in a number of EU countries.[137] Slovakia's Foreign Minister threatened to resign in response to a vote against the GCM in the Slovak national parliament,[138] while Belgium's government collapsed following its endorsement of the Compact.[139]

In addition to national level crises the failure of the EU to maintain a common position on the GCM resulted in a crisis for the unity of EU representation on the international scene.[140] The anti-GCM statements and actions of countries like Hungary may have constituted a dereliction of their duties to respect the principle of sincere co-operation in EU external actions, and to refrain from actions likely to impair the EU's effectiveness as a cohesive force in international relations, as required by Articles 4(3), 24(3), and 34(1) TEU.[141] What is remarkable here is not so much that migration matters can touch a sovereign nerve so as to stymie intra-EU and international co-operation on migration, but that such a dramatic reaction was engendered by an aspirational international agreement that is not legally enforceable against states and that ultimately, as I argued earlier, puts in place an international co-operation regime that allows states to backslide, side-step and water down international human rights standards for migrants.

5. State sovereignty v migrants' rights: Judicial checks on EU state excesses?

The tension between migrants' rights and states' sovereign powers of migration control tend to resolve in favour of the latter. Europe's supranational courts play a key role in this resolution.[142] While there are some widely celebrated key rulings handing consequential victories to migrant applicants, it appears that most cases taken by or on behalf of international migrants before international courts produce decisions in favour of states.[143] Even in the case of ground-breaking rulings favouring migrant applicants, subsequent judgments tend to row back on the aspects of the initial, seminal decision that posed particular difficulties for states. The well-known *Zambrano* ruling from the CJEU[144] and the *Hirsi* ruling from the European Court of Human Rights (ECtHR)[145] are cases in point.

In *Zambrano* the Grand Chamber of the CJEU deployed the institution of EU citizenship enshrined in Article 20 TFEU to effectively oblige EU states to confer a legal status on unlawfully present migrants on account of the rights of their non-mobile or static EU citizen children. This

[135]The Compact was endorsed by 152 of the UN's 193 member states. 24 countries failed to vote, of which seven subsequently informed the UN Secretariat that they had intended to vote in favour. See UN Doc. A/73/PV.60 (2018), *supra* note 128, at 14–15.

[136]Ibid., at 3.

[137]E. Schaart, 'Under Far-Right Pressure, Europe Retreats from UN Migration Pact', *Politico*, 30 November 2018, available at www.politico.eu/article/migration-un-viktor-orban-sebastian-kurz-far-right-pressure-europe-retreats-from-pact/.

[138]'Slovak Foreign Minister Withdraws Resignation after Migrant Pact Row', *Reuters*, 7 December 2018, available at www.reuters.com/article/us-slovakia-politics-idUSKBN1O60X8.

[139]'Belgian PM Announces Resignation in Crisis Started by Migrant Row', *Euractiv*, 19 December 2018, available at www.euractiv.com/section/elections/news/belgian-pm-announces-resignation-in-crisis-started-by-migrant-row/.

[140]See Melin, *supra* note 127.

[141]Ibid., at 207–11.

[142]See, e.g., Dembour, *supra* note 24.

[143]This is certainly true in the case of the ECtHR. See Dembour, ibid., at 21.

[144]*Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, [2011] ECR I, Case C-34/09, at 1177.

[145]*Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, no 27765/09[GC], [2012] ECHR.

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might at first appear to belie the view that the CJEU tends to eschew challenges to member states on especially sensitive issues such as migration,[146] particularly given that the ruling went against the position advocated by the eight intervening member states and the European Commission that the situation was to be treated as a wholly internal one and therefore fell outside of the scope of EU law.[147] Subsequently, however, the CJEU began to apply the *Zambrano* ruling in a manner which privileges state powers of migration control over the sanctity of EU citizenship.[148]

It is clear from the development of the post-*Zambrano* line of case law concerning the irregular migrant parents of non-mobile EU citizen children[149] that a moment or narrative of crisis is not a prerequisite to the adjudication of migrants' claims in favour of states. Times of crisis do, however, turbo-charge the rate at which supranational courts, 'influenced by the current political sentiments',[150] loosen the human rights obligations imposed on states vis-à-vis migrants. This is illustrated by important recent rulings from the ECtHR, delivered in the shadow of the migration crisis, which seem to depart from the promise of the 2012 Grand Chamber ruling in *Hirsi*. *Hirsi* concerned migrants intercepted by the Italian authorities on the high seas as part of the push-back campaign initiated in 2009 to return migrants to Libya before they could reach European territorial waters.[151] The Grand Chamber had appeared to deal a death blow to EU efforts to avoid ECHR obligations through externalizing immigration control by, firstly, requiring compliance with ECHR duties including Article 3 ECHR even in the case of migrants intercepted in the high seas, and, secondly, by requiring under Article 4 of Protocol 4 to the ECHR an individual identification and assessment of migrants' personal circumstances before expelling them from the jurisdiction of the Council of Europe.[152] Indeed, in May 2012, the Italian Government announced that, in the light of the ruling, it would no longer seek to return migrants to Libya.[153]

With the passage of time, however, *Hirsi* appears to be a high-water mark for migrants' rights protection and the ECtHR, despite repeated insistence that the challenges posed by migration flows cannot justify practices that are incompatible with states' ECHR obligations,[154] seems increasingly willing to interpret and apply those obligations in a way that relieves states of onerous potential duties. The Grand Chamber in *Khlaifia*, for example, overturned the Chamber finding and held that failure to provide irregular migrants with an individual interview prior to their deportation from Italy did not violate the prohibition of collective expulsion codified in Article 4 of Protocol 4 to the ECHR. While there is a requirement under Article 4 for a migrant to have a genuine and effective possibility of submitting and having examined in an appropriate manner arguments against expulsion, this requirement does not necessarily entail an individual

[146]G. Beck, *The Legal Reasoning of the European Court of Justice* (2013), at 351–2.

[147]See *Zambrano*, *supra* note 144, para. 37.

[148]See, e.g., C. Berneri, *Family Reunification in the EU* (2017), at 101–9, 116; H. Kroeze and P. Van Elsuwege, 'Revisiting *Ruiz Zambrano*: A Never Ending Story?', (2021) 23(1) *European Journal of Migration and Law* 1, at 5–6.

[149]See, e.g., *Iida v. Stadt Ulm*, 8 November 2012, Case C-40/11; *O., S. & L. v. Maahanmuuttovirasto*, 6 December 2012, Case C-356/11; *Ymeraga & Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, 8 May 2013, Case C-87/12; *Alopka & Others v Ministre du Travail, de l'Emploi et de l'Immigration*, 10 October 2013, Case C-86/12.

[150]C. Lingaas, 'Judicial Responses to the Migration Crisis: The Role of Courts in the Creation of a European Identity', in G.C. Bruno, F.M. Palombino and A. Di Stefano (eds.), *Migration Issues before International Courts and Tribunals* (2019), 1, at 4, 23.

[151]M. Giuffre, *The Readmission of Asylum Seekers under International Law* (2020), at 244. This push-back campaign exemplifies the deterrence paradigm mentioned at the outset of the article. See note 11, *supra*.

[152]See *Hirsi*, *supra* note 145, paras. 81, 178–81, 185.

[153]See remarks of Interior Minister, Anna Maria Cancellieri to a committee of the Italian Senate (Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani), 16 May 2012, at 7, available at www.senato.it/service/PDF/PDFServer/DF/283163.pdf.

[154]See, e.g., *Hirsi*, *supra* note 145, paras. 122, 176, 179; *Khlaifia and Others v. Italy*, Judgment of 15 December 2016, no 16483/12[GC], [2016] ECHR, para. 241.

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interview.[155] In the same case, the Grand Chamber also departed from the finding of the Chamber, in what has been characterized as an unfortunate setback for migrants' rights,[156] and held that the detention conditions endured by the irregular migrant applicants did not constitute inhuman or degrading treatment for the purposes of Article 3 ECHR, essentially reaching this conclusion because of the 'situation of extreme difficulty facing the Italian authorities at the relevant time'.[157]

More recently, the Grand Chamber, again overturning an earlier Chamber decision, found no violation of Article 4 of Protocol 4 in the case of two applicants who had been amongst 600 people who attempted to scale the fences separating Spain's North African enclave of Melilla from Morocco in August 2014.[158] While the Court accepted that the applicants, having been forcibly transferred from Spanish territory to Morocco in handcuffs, had been expelled for the purposes of Article 4 Protocol 4, it held that the expulsions did not violate the prohibition on collective expulsion. The Grand Chamber reached this conclusion by reasoning that the lack of individual removal decisions in the case of the applicants was attributable to their own conduct. Instead of availing of the existing legal procedures for lawful entry in to Spanish territory which would have provided a genuine and effective possibility of submitting arguments against expulsion, the applicants had deliberately placed themselves in an unlawful situation that endangered public safety.[159] *N.D. and N. T.* was the first time the ECtHR addressed the applicability of Article 4 of Protocol 4 to the forcible return of migrants from a land border in the context of a large-scale unauthorized attempt at entry. If the Court can be said to have endorsed pushbacks at sea borders in *Khlaifia*, its Grand Chamber ruling in *N.D. and N.T.* may be said to have given a stamp of approval to violent pushbacks at Europe's land borders.[160]

The ECtHR's willingness to countenance the EU's pushback policies coheres with the reluctance of that same institution, and the CJEU in Luxembourg, to impose any obligation on states to issue humanitarian visas at diplomatic posts outside the EU to migrants fleeing persecution. In two remarkably similar cases, *X and X* v. *Belgium*[161] and *M.N.* v. *Belgium*,[162] both supranational bodies spurned the opportunity to develop an obligation for states under EU law or the ECHR to issue a visa that would allow a family to travel to an EU or Council of Europe member state in order to make an application for asylum. It is noteworthy that the CJEU ruling had been preceded by an Opinion from AG Mengozzi who, taking a strict approach to the prohibition on torture and inhuman and degrading treatment, argued that Belgium was obliged to issue a short-term visa under the EU Visa Code where there were serious grounds to believe that refusal would directly result in the applicants being subjected to a treatment prohibited by Article 4 of the Charter and would prevent them from their only legal route to enjoy their right to apply for international protection. The rulings in both of

[155]Ibid., para. 248.

[156]P. Pinto de Albuquerque, 'The Rights of Migrants and Refugees under the European Convention on Human Rights: Where Are We Now?', (2018) 13 *The Irish Yearbook of International Law*.

[157]See *Khlaifia*, *supra* note 154, para. 185.

[158]*N.D. and N.T. v. Spain*, Judgment of 13 February 2020, nos. 8675/15 & 8697/15[GC], [2020] ECHR, paras. 24–27.

[159]Ibid., paras. 201, 231.

[160]S. Jones, 'European Court under Fire for Backing Spain's Express Deportations: ECHR Accused of "Ignoring Reality" in Ruling on Men who Entered North African Enclave', *Guardian*, 13 February 2020, available at www.theguardian.com/world/2020/feb/13/european-court-under-fire-backing-spain-express-deportations.

[161]*X and X v. Belgium*, 7 March 2017, Case C-638/16 PPU. Insightful commentary on the case is provided in, e.g., E. Brouwer, *The European Court of Justice on Humanitarian Visas: Legal Integrity vs. Political Opportunism?* (2017); T. Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice', (2018) 31(2) *Journal of Refugee Studies* 216.

[162]*M.N. and Others v. Belgium*, Decision of 5 May 2020, no 3599/18[GC], [2020] ECHR.

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these cases betray a keen judicial sensitivity to the practical and political difficulties states would have faced in the event of a finding for the applicants.[163]

States are not, of course, entirely dependent on judicial indulgence of their migration control endeavours. In the face of rulings that appear to significantly restrict their sovereign room for manoeuvre in the name of human rights obligations owed to migrants, states learn from their losses in court in order to strategically chart a different course to reach their original goal of evading legal responsibility for migrants, the initial defeat in court being a temporary setback rather than a reconfiguration of states' attitude and behaviour. In response, for example, to the *Hirsi* finding that migrants intercepted or rescued by a state's vessel on the high seas are the legal responsibility of that state, the EU and its member states entered into agreements with third countries to prevent migrants even boarding boats bound for Europe.[164] This of course contains a number of dangers from the perspective of migrants' rights, given the human rights record of some third countries. It is therefore difficult to resist the impression that in the struggle between state sovereignty and migrants' rights, the former will ultimately win out over the latter, with or without the assistance of the courts. Supranational judicial sympathy for states' migration control endeavours is, however, more readily available in times of crisis which see courts bending 'to the demands of *realpolitik*'.[165]

6. Conclusion

It is clear from the foregoing that the resilience of state sovereignty vis-à-vis migration contains a number of dangers. Firstly, it may galvanize multilateral co-operation on international standards that results in backsliding or avoidance when it comes to protection of migrants' rights. It may, furthermore, perpetuate the fragmentation and incoherence of international legal standards concerning the protection of migrants, including the most acutely vulnerable such as child migrants. Secondly, it may stymie (legally required) interstate co-operation to the detriment of migrants, as shown by the fate of the EU's temporary emergency relocation mechanism. Developments involving migration and migrants are particularly susceptible to being characterized and packaged as crisis and emergency events, which are then instrumentalized to justify amplification of states' migration control powers and legal measures that result in attenuation of the protection of migrants' rights. In times of crisis, supranational courts appear particularly sympathetic to state migration control practices that could be found to be in breach of human rights obligations, but typically are not. The issue of international migration and migrants' rights is so susceptible to populist national politicking that it has the power to engender internal and external crisis for the EU, with EU unity on the international scene crumbling in the face of adoption of the GCM and freedom of movement within the Schengen area being severely curtailed following the 2015 migration crisis.

[163]While I argue that these rulings are consistent with a traditional pattern of supranational judicial deference to states in the migration realm, others take a different view. See, e.g., the argument that the ECtHR's decisions in *N.D. and N.T. v. Spain* and *M.N v. Belgium* – not to scrutinize, respectively, the enhanced border controls and externalization practices that currently define EU asylum policy – mark 'the provisional endpoint of an impressive period of interpretative dynamism on the part of the ECtHR' in D. Thym, 'The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy', (2021) 32(4) *International Journal of Refugee Law* 569.

[164]See, e.g., J. Greenberg, 'Counterpedagogy, Sovereignty, and Migration at the European Court of Human Rights', (2021) 46(2) *Law and Social Inquiry* 518; B. Ryan, 'The Migration Crisis and the European Union Border Regime', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (2019), 197.

[165]This is the observation made of the approach taken by the European General Court to the 2016 EU-Turkey Statement in E. Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*', (2017) 2 *European Papers* 257.

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It is not of course all black and white. It has not been a unilinear scenario of rights restrictions and rulings decided in favour of states since the beginning of the migration crisis. The CJEU's 2017 and 2020 rulings against Hungary and Slovakia are a case in point. But here, even while the rulings went against states, their practical impact to the benefit of migrants is questionable. This illustrates the intertwining of law and politics in the realm of international migration, and how it may imperil the rule of law.[166] The 2015 migration crisis may now be over, but its reverberations continue to echo, providing the background noise to the migrants' rights crisis currently underway, whose symptoms include an intensified turn to soft law on the part of the EU in concluding international agreements relating to migrants' rights protection, and the rights-restrictive thrust of supranational migration-related jurisprudence. Careful scrutiny of the GCM review and implementation processes in the years ahead may well reveal inaction and backsliding on migrants' rights, but any gaps and inadequacies in the law[167] for protection of migrants' rights that emerge will be unlikely to jolt the EU, its member states, or the international community more broadly into the levels of anxious activity as the other crises experienced by the EU over the past two decades.

[166]See Dauvergne, *supra* note 42, at 6.

[167]The use of the term 'crisis' in mainstream international law scholarship, as characterized by Chimni, *supra* note 30.

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