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Selected developments in human rights and democracy in 2018: Migration and asylum in Europe

Lorenzo Durante Viola,* Cristina Pugnale,** Federica Russo, Tamara Siwczyk**** and Paloma Torres Lopez********

Abstract: *2018 marks a milestone year with respect to the socio-legal and political aspects surrounding the issue of migration due to the adoption of the two Global Compacts (the Global Compact on Refugees and the Global Compact on Safe, Orderly and Regular Migration). In the first part this article gives an insight into the content of the Global Compact on Migration (GCM), which led to a loss of unity of European Union representation. The article further analyses two highly controversial topics from the Global Compact, namely, the so-called 'climate migrants' and 'migrants in vulnerable situations'. Notwithstanding its soft law nature, the examination of the GCM reveals that both groups received recognition at a global level for the first time. Furthermore, the article analyses how these divergent positions on migration are being reflected in the EU's policy making. The article finds that, instead of lifting the unequal migratory burden from some member states through harmonisation, EU policies have had the main aim to prevent migrants from entering into EU jurisdiction. Crucial developments in this context are the criminalisation of search and rescue NGOs, the transfer of search and rescue responsibilities to third countries and the outsourcing of migration-related responsibilities. Overall, the lack of progress in reforming the common European asylum system resulted in the externalisation of the EU migration policies through bilateral and multilateral agreements with transit countries. Finally, although the issue of migration requires political responses, the protection of refugees and migrants has increasingly relied upon judicial institutions.*

* BA in International Studies (University of Trento); MA in European Studies (Université Libre de Bruxelles); MA in Human Rights and Democratisation (EIUC/Global Campus of Human Rights);Trainee at the Office of the European Union Special Representative for Human Rights, Mr Eamon Gilmore; lore.durante@gmail.com

** BA in International Diplomatic Sciences (University of Trieste); MA in Human Rights and Democratisation (EIUC/Global Campus of Human Rights); Human Rights Trainee at European Network of National Human Rights Institutions (ENNHRI); cris.pugnale.cp@ gmail.com

*** Master Degree in Law (Federico II of Naples University); MA in Human Rights and Democratisation (EIUC/Global Campus of Human Rights); Legal Advisor for asylum seekers and migrants (Marseille); federica.russo.m@ gmail.com

**** Magistra Iuris in Law (University of Vienna), MA in Human Rights and Democratisation (EIUC/Global Campus of Human Rights); Legal Counsellor for asylum seekers at Verein Menschenrechte Österreich; tamara.siwczyk@gmail.com

***** LLM (Universidad Pontificia Comillas); MA in Human Rights and Democratisation (EIUC/Global Campus for Human Rights); Children on the move Protection Officer at Save the Children and Associate Professor at Universidad Pontificia Comillas; palomatorreslopezl@gmail.com

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1 Introduction

In 2000 a high-profile smuggling incident caused the death of 58 migrants who, after a long journey through several countries – including three European Union (EU) member states – suffocated in the back of a truck. Their bodies were found in the British harbour of Dover. Similarly, on 23 October 2019 39 migrants were found frozen to death in the back of a refrigerated lorry in East England. Today, like 20 years ago, people seeking safer havens and better living conditions are still dying at the EU's external borders. Despite some positive developments, these episodes basically reflect the EU and its member states' longstanding failure to comprehensively address migration and refugee protection as an inherently global and transnational phenomenon.

The year 2018 is likely to go down in history as a milestone year for its great potential impact on migration-related issues. The Global Compact on Migration, the first soft law instrument to address migration globally and comprehensively, was adopted by the international community in December 2018 bringing new challenges to the attention of the international community. Simultaneously, the EU and its member states have continued developing new controversial migration and asylum policies in an attempt to address the main migration issues with which southern member states are regularly confronted.

This article critically analyses such major developments with a special focus on those areas that were disproportionately affected by migrant inflows in 2018, namely, the southern EU member states. The first part presents the Global Compact on Migration (GCM) and two of its most controversial outcomes, namely, the concept of 'climate migrants' and the notion of 'migrants in vulnerable situations'. In addition it sheds light on the EU member states' contradicting stances regarding the adoption of the GCM. Hence the article examines the issue of the loss of unity of the EU throughout the negotiation process. The second part assesses the main developments that hinder an agreement on a common EU approach to migration and asylum policies such as search and rescue and the externalisation of borders and migration management to third countries. In addition, recent case law of the EU and member states on legal responsibility for migration-related human rights violations is briefly addressed. The conclusion highlights the transversal connections between the selected developments.

2 The Global Compact on Safe, Orderly and Regular Migration: The stance of the European Union

The adoption of the United Nations (UN) Global Compacts on Migration and Refugees is one of the latest major migration-related developments and will help make the year 2018 go down in history as a milestone with regard to the protection of refugees and migrants (UNGA 2018). The process leading to the elaboration and adoption of the two Global

Compacts was set in motion by Annex I and II of the 2016 New York Declaration for Refugees and Migrants which, for the first time, brought together the international community to discuss the impelling need to jointly and comprehensively address migration (IOM 2018). The New York Declaration, adopted by all 193 UN member states, is a political declaration establishing a set of commitments upon which the Global Compact on Migration (GCM) builds. Unlike its counterpart on refugees, the GCM was more controversial and, for the different reasons analysed below, raised much concern and opposition from several state delegations.

The GCM is a 'non-legally binding, cooperative framework' (para 7) which lays down 23 main objectives reflecting commitments and a range of actions (policy instruments and best practices), as well as guidelines for implementation, and follow-up and review mechanisms (UNGA 2018). The main fundamental idea behind the GCM is that '[m]igration … is a source of prosperity, innovation and sustainable development' (para 8) but, because of the inherent transnational nature of human mobility, it is not possible for a country to 'address the challenges and opportunities of this global phenomenon on its own' (para 11) (UNGA 2018).

After almost two years of intergovernmental negotiations and consultations, the GCM was eventually adopted by 152 UN member states in Marrakesh, Morocco, on 10 December 2018. Yet, a significant number of states withdrew from the final phase of negotiations – an important factor that cannot be underestimated.

In this part, the article analyses such unfortunate developments with a special focus on the European regional level. The most controversial aspects of the Compact, namely, the GCM's inclusion of climate migrants and the new concept of 'migrants in vulnerable situations', will in particular be analysed. This functions to introduce some points that raised the concern of several participating member states. A specific national case will be considered in order to present more in depth the main arguments EU member states put forward against the Compact. In this sense, the Italian case is believed to be particularly relevant to the purpose of the article and sufficiently representative of various reasons behind member states' opposition to the GCM.

2.1 Shedding light on the nexus between climate change and migration

According to the IOM and IDMC, 17,2 million new displacements took place due to disasters and 764 000 people were displaced due to drought in 2018 alone (Ionesco 2019). At the same time, the year 2018 has marked an important year for the development of the protection and visibility of persons affected by natural disasters and the adverse effects of climate change.

As noted, the New York Declaration resulted in the adoption of two milestone global compacts, one of which was the GCM adopted in December 2018 (Piper 2018: 323). Although the GCM's main objective is to address the drivers of migration, some states argued against the inclusion of the issue of climate migrants in the Compact. In any event, climate-related migration was included in the final instrument, and for the first time the nexus between the adverse effects of climate change and migration (the so-called disaster-migration nexus) was recognised on a global multilateral level (Kälin 2018: 665).

The GCM acknowledges that people may be forced to migrate due to either sudden natural disasters or slow-onset processes that result in the uninhabitability of their homes. Some scholars argue that the term 'refugee' should not be applicable to 'climate migrants' in these situations because it exclusively means persons seeking refuge. In this regard it should be noted that the Refugee Convention of 1951 grants legal protection to persons that are being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, without including displacement in the context of environmental factors. The IOM and several other scholars prefer the term 'climate migrants' since it is able to cover not only cases in which people are forced to leave their homes immediately but also cases in which migration occurs at the early stages of slow-onset climate change effects (Behrman 2018: 6).

The GCM further enshrines the commitment of states to strengthen resilience and prevent displacement as a first step, but also to develop disaster preparedness strategies and to ensure access to humanitarian assistance. However, the crucial objective of the Compact is to enhance and facilitate regular migration pathways when people are forced to migrate (Kälin 2018: 666). When these people migrate not only internally but are displaced across borders, they will require international protection either temporarily or permanently (Kälin 2018: 664).

Furthermore, it is crucial to bear in mind that climate migration is a highly complex, heterogeneous and, most importantly, multi-causal phenomenon. According to the Refugee Convention, in order to be granted asylum, the applicant is required to flee due to the fear of persecution for *one* of the above-mentioned reasons. Yet, climate change-related mobility can be multi-causal. For example, a drought in a war-torn and failed state such as Somalia will affect its citizens differently than a drought in a country in the global north (Pilkey 2016: 129). Therefore, the reasons for leaving one's home country according to climate change can consist of multiple factors, such as a combination of drought and poverty or other vulnerability-related factors.

While the GCM has shed light on a topic that was in urgent need of being addressed, some human rights defenders condemned the soft law nature of the Global Compact. Nevertheless, the GCM could become the ground on which binding law may be interpreted or created in any follow-up process. Paradoxically, this was also an argument advanced by states for withdrawing from voting for the Compact, since many state representatives argued that they wanted to foreclose the possibility of being legally bound on the basis of customary law, which can be developed through soft law (Gammeltoft-Hansen 2017: 9).

It appears that the GCM's recognition of the nexus between migration and the adverse effects of climate change is a step in the right direction, but nevertheless more needs to be done and sooner than later.

2.2 Migrants and refugees: An out of date dichotomy? The concept of 'migrants in vulnerable situations' in the GCM

The GCM and the Refugee Compact are the result of simultaneous but

separate processes.[1] Moreover, while the Refugee Compact was drawn upon the well-established body of international refugee law, the GCM could not rely on an equally solid legal framework. Indeed, even though migrants are entitled to a wide range of existing rights and human rights protections irrespective of their administrative status, migration had never before been comprehensively and globally addressed by the international community (McAdam 2018: 573). In this sense, the GCM constitutes an unprecedented effort at the global level to develop a comprehensive response to a phenomenon as complex as human mobility. The Preamble to the GCM explicitly acknowledges the importance of this instrument by affirming that the GCM 'is a milestone in the history of the global dialogue and international cooperation on migration' (UNGA 2018: para 6).

The first international document to explicitly question the traditional dichotomy between refugees and migrants is the GCM's predecessor, the New York Declaration for Refugees and Migrants (UNGA 2016a). The New York Declaration first affirms that all refugees and migrants are rights holders, regardless of their administrative status. Then, the Declaration makes clear that '[t]hough their treatment is governed by separate legal frameworks, refugees and migrants have the same universal rights and fundamental freedoms' (UNGA 2016a: para 6). Most importantly, it acknowledges that refugees and migrants 'face many common challenges and have similar vulnerabilities, including in the context of large movements' (UNGA 2016a: para 6). The concept of 'migrants in vulnerable situations' had recently been developed at the UN level and was fully endorsed by the New York Declaration. This doctrine intended to protect the human rights of those migrants in vulnerable situations falling outside the legal category of refugees and, therefore, the scope of application of international refugee law.

Overall, the GCM accords with the New York Declaration's approach but adopts a more subtle wording likely to accommodate UN member states' concerns. While acknowledging the existence of the same rights and fundamental freedoms for both migrants and refugees, the GCM emphasises that 'migrants and refugees are distinct groups governed by separate legal frameworks' and that '[o]nly refugees are entitled to the specific international protection defined by international refugee law' (UNGA 2018: para 4). Thus, the New York Declaration and the GCM contain substantially similar provisions, which differ slightly from a more formal perspective.

The vulnerability of migrants other than refugees and their equal need for protection was ultimately among the most contested points of the GCM's negotiation phase. Similarly, the purported equivalence of migrants and refugees in the GCM was a common argument put forward by member states in their opposition. Yet, as was demonstrated above, the GCM's wording clearly differentiates migrants from refugees, rebutting this assertion. In addition, the elaboration of two separate compacts setting up 'complementary international cooperation frameworks that fulfil their respective mandates' (para 3) aligns with the existing international legal framework and dominant understanding of migration, which places

1 The drafting of the GCM was state-led while the Refugee Compact was facilitated and coordinated by the UN High Commissioner for Refugees (UNHCR).

refugees on one side and the broader category of migrants on the other (UNGA 2018).

2.3 The role and position of the European Union: Why has the European Union lost its unity of representation before the Global Compact?

As the UN Modalities Resolutions on the intergovernmental negotiations makes clear, the process of negotiations and consultations culminating in the adoption of the GCM was meant to be open, transparent, participative and inclusive (UNGA 2017). In particular, according to the UN document, the consultations would include regional groups (paras 5, 17) and examine 'regional and sub-regional aspects of international migration' (para 22(a)) (UNGA 2017). All relevant stakeholders were encouraged to contribute throughout the entire preparatory process through the 'participation in global, regional and sub-regional platforms' (para 7), as well as 'regional and sub-regional consultative processes' (para 22 (b)) (UNGA 2017). Therefore, as a major regional organisation, the EU had the opportunity to play an important role during the preparatory process of the GCM.

The EU mainly participated in the GCM negotiation process 'through the delivery of EU statements by the Union delegation at the UN', as provided by article 221 of the Treaty on the Functioning of the European Union (TFEU) (Melin 2019: 195, 203). Within the EU, however, the institutional organ leading the negotiation and drafting phase on behalf of EU member states was the European Commission pursuant to article 17 of the TFEU. This provision establishes that the Commission shall be responsible for the EU's external representation, with the exception of the common foreign and security policy. Yet, the growing discontent with the GCM by a considerable number of EU member states raises the legitimate question of whether the Commission could credibly ensure the unity of EU representation before the UN community of states.

Until May 2018 all EU member states, except Hungary, had actively participated in the consultation and negotiation process.[2] Given its government's long-standing anti-immigration position, Hungary's withdrawal from the negotiations did not come as a surprise. Hungary, however, was only the first of a long line of member states that abandoned the negotiations. Between July and November 2018, seven other member states withheld their endorsement of the GCM: Austria, Bulgaria, Czech Republic, Poland, Latvia, Romania and Italy. Additionally, the adoption of the GCM caused heated political debates in several other member states, such as Germany, France, Croatia, Estonia, The Netherlands, Slovenia and Belgium. In Belgium disputes over the GCM led to a virulent political crisis and the resignation of the Belgian Prime Minister, Charles Michel.

The potential of so many dissenting opinions to undermine the unity of EU representation and the European Commission's role is clear for a number of reasons. First, the TFEU establishes important principles that should guide member states in their actions and practices, irrespective of their potentially temporary political posturing. According to articles 4(3)

2 This clearly emerges from an EU Statement issued in May 2018 on behalf of 27 EU MSs during the GCM's fourth round of negotiations (EU Statement 2018).

and 34(1) of the TFEU, member states are obliged to coordinate their actions in international organisations and at international conferences pursuant, among others, to the principle of sincere cooperation. Accordingly, member states should uphold or at least refrain from contradicting the EU's agreed-upon common stance. In this regard, the fact that such a common position was agreed upon in Brussels behind closed doors and the lack of transparency that accompanied this make it difficult to determine whether any actual internal coordination resulted from a mutual agreement among all member states (Melin 2019: 207). In any event, the sudden withdrawal from the GCM by some member states seems to have resulted in a violation of the principle of sincere cooperation. For instance, the decision of the Austrian government, which was then holding the EU Council Presidency to withhold its support to the GCM, caused harsh reactions and has been criticised for failing to fit into its leading institutional role. Although in the last phase of negotiations the Commission was officially acting only 'on behalf of 27 member states thereby excluding the position of Hungary' (Melin 2019: 203), the subsequent withdrawal of such a considerable number of EU member states had inevitably undermined the role of the Commission and made the EU lose its unity of representation before the GCM.

The UN Modalities Resolution also demanded the effective participation of parliaments (UNGA 2017: paras 6, 8, 30). In this sense, the European Parliament is a major human rights actor within the EU system, and has since 2000 been pushing for a more comprehensive and holistic approach to migration.[3] In 2014 the European Parliament adopted a resolution 'on the situation in the Mediterranean and the need for a holistic EU approach to migration' (EP 2014). Finally, with another resolution in April 2018, the EP took a strong public stance by openly and fully embracing the GCM, its objectives, commitments and follow-up mechanisms (EP 2018).

Finally, this part analyses the stance of Italy which, as in the case of most of the other leavers, demonstrated support for the GCM until a very late phase of the negotiation process. In September 2018 the Italian Prime Minister, Giuseppe Conte, delivered a speech before the UN General Assembly where he clearly expressed Italy's support to the GCM. However, only two months later, before the virulent opposition from his government's right-wing political party, Conte referred the decision concerning the GCM's endorsement to the Italian Parliament which eventually rejected it.

Italy's main arguments against the Compact include the alleged introduction of a human right to migrate; the lack of a clear distinction between regular and irregular migration and between refugees and migrants; the establishment of new obligations for states capable to undermine their national sovereignty; and the likely increase in migration flows the Compact's endorsement would purportedly cause. These arguments can easily be dismantled by only a cursory reading of the GCM's text. First, the Compact rests on existing international frameworks and human rights standards and due to its non-binding nature cannot

3 In 2000, during the drafting process of the EU's anti-smuggling legislation, the so-called Facilitators Package, the European Parliament affirmed that '[a] common immigration and asylum policy for the Member States can only be efficient if it is comprehensive and covers all essential means of obtaining admittance' (LIBE 2000).

create new obligations on states. Second, there is no such mention of a new right to migrate and of a state's duty to receive migrants. By contrast, the GCM explicitly upholds states' national sovereignty while determining their migration policies (UNGA 2018: para 15(c)). Moreover, as demonstrated above, the existence of two separate instruments dealing with refugees and migrants respectively clearly retains the traditional dichotomy between migrants and refugees.

The majority of the other leavers used arguments similar to those of Italy while justifying either their abstention or direct opposition to the Compact. The former Commission president, Jean-Claude Juncker, while commenting on the increasing number of EU member states abandoning the Compact, stated that 'those countries that decided they are leaving the UN migration compact, had they read it, they would not have done it. [This] gives you the idea that many people do not actually know what is in there' (Carrera 2018: 2). The UN Special Representative for International Migration, Louise Arbour, also harshly condemned the leavers' decision by affirming that this 'reflects very poorly on those who participated in negotiations … it's very disappointing to see that kind of reversal so shortly after a text was agreed upon' (Carrera 2018: 2).

2.4 Concluding remarks

It may be argued that the elaboration of the Global Compacts on Migration and Refugees led the international community to take important steps forward but, at the same time, this process also confirmed the reluctance of states to progressively address issues as delicate as migration and border management.

Overall, the crucial significance of the GCM lies in the acknowledgment of the causal link between climate change and the fact that people migrate out of their home countries due to its inhabitability. Despite its soft law nature, the GCM can still have a norm-filling and interpretative role, but most importantly it constitutes the first legal step to tackle the issue of climate change-related migration for the future. Also, a (timid) step towards the extension of protection to migrants other than refugees is remarkable from a human rights perspective.

It nevertheless remains unfortunate that the EU was not able to keep a united stance when upholding the Global Compact on Migration. While the UN Modalities Resolutions had pushed for the effective participation of parliaments, at the European level the European Parliament does not seem to have had a strong voice during the negotiations. Despite the European Parliament's open support for the GCM, eventually five EU member states abstained from voting (Austria, Bulgaria, Italy, Latvia and Romania), while three member states were firmly opposed to the GCM (Czech Republic, Hungary and Poland). Although it is not clear to what extent all EU member states could initially display their position around the GCM, the leavers' behaviour could allegedly result in the violation of the principle of sincere cooperation enshrined in the TFEU. Finally, considering the superficial and fatuous arguments on which the leavers justified their positions and the impelling need to globally and comprehensively address migration, the recalcitrance of member states is alarming and demonstrates their potential to undermine the effective impact of the GCM in Europe.

3 Migration and asylum in Southern Europe: Stuck between inter-governmental politics and European Union policy making

The controversial tension between the EU and its member states in relation to their position towards migration analysed in the previous part is also reflected in the EU's own migration policy. With the so-called 'migration crisis' of 2015, the Common European Asylum System (CEAS) proved obsolete in addressing the substantially changed nature of migration flows. Consequently, in the 2015 European Agenda on Migration, the European Commission highlighted the need to move from a system disproportionately affecting frontline member states and encouraging secondary movements towards a fairer system in order to ensure the equal sharing of responsibility (Tsirogianni 2018: 13).

Although the general perception is that the negotiations for the CEAS reform launched in 2016 have been deadlocked, five of the seven proposals at stake have reached the trilogue negotiations between the European Parliament and the Council (Pollet 2019). However, the inability to reach an agreement on the reform of the Dublin Regulation, particularly regarding the criteria for the identification of the EU member state responsible for examining an asylum application and provisions such as 'safe third country', border procedures and solidarity, keeps the whole EU asylum *acquis* blocked (Nicolosi 2019). Meanwhile, member states supported by the EU have focused on keeping migrants away from their borders by implementing externalisation policies through agreements with transit third countries (Frelick 2016: 206), stepping up border security and dismantling search and rescue (Fine 2019: 8).

In this vein, the June 2018 European Council was expected to be 'the last chance to resolve the deadlock on the solidarity chapter of the Commission's proposal for a Dublin IV Regulation' (ECRE 2018: 3) and finally have the package adopted before the May 2019 European Parliament elections. However, the meeting was overshadowed by the need to address the Italian government's refusal to allow the disembarkation of migrants and Malta's ban on non-governmental organisations (NGOs) to operate at sea (ECRE 2018: 4). Far from giving the final push for the CEAS reform, the Council proposed two new concepts, namely, 'controlled centres' and 'regional disembarkation platforms' (European Council 2018b: para 5), which represents 'a new addition to the externalisation 'toolkit' which will be analysed below.

This part addresses the most relevant developments that took place throughout 2018 in the field of EU migration and asylum policies that have been – and still are – the main obstacles to a move towards a common EU approach based on human rights, solidarity and accountability. The first part focuses on Search and Rescue and particularly on the implementation of policies aimed at criminalising search and rescue NGOs, restricting European search and rescue capacities and transferring search and rescue responsibilities to third countries. The second part critically examines further developments on externalisation policies adopted by the EU and its member states in order to limit the arrival of migrants and outsourcing their migration-related responsibilities. Finally, legal developments regarding the responsibility of the EU and member states are considered in light of recent case law and cases pending before regional and international courts.

3.1 The shrinking space of search and rescue in the Mediterranean

Search and rescue in the Central Mediterranean has for some time been a matter of dispute among Southern EU member states. The disagreement has mainly concerned the nature and scope of obligations under international maritime, refugee and human rights law and has primarily involved Italy and Malta, due to their different interpretations of the 'place of safety' concept and the overlap of their respective search and rescue regions (Trevisanut 2010). In recent years the changing geopolitical context and the increased inflow of migrants from the Mediterranean Sea have substantially transformed the framework in which search and rescue takes place (Cuttitta 2018).

The developments analysed below, namely, the criminalisation of search and rescue NGOs, the disengagement of the EU and its member states from search and rescue and the shifting of search and rescue responsibilities to Libya, have to be seen in the context of a 'broader strategy of *contained-mobility*', that is, aimed at 'deterring, limiting and filtering asylum seekers' movements at different stages of their various mobility trajectories' (Carrera 2019b: 9). In this regard, serious concerns have been raised about compliance by the EU and member states with their obligations under international law, the European Convention on Human Rights (European Convention), but also EU law and national constitutions.

A major turn concerning the search and rescue operational framework relates to the March 2018 Italian elections, which resulted in the leader of the far-right League party, Matteo Salvini, becoming Interior Minister. Salvini pledged to completely stop the inflow of migrants from the Central Mediterranean. A crucial component of his tactic was to ban search and rescue NGOs, accused (without evidence) of being complicit with smuggling networks,[4] from entering Italian territorial waters. The NGO-operated Aquarius vessel was the first to be affected by the resulting so-called 'closed ports' policy. After rescuing 629 migrants in distress at sea, on 10 June 2018 the Aquarius was denied entry into Italian territorial waters by Interior Minister Salvini, who argued that Malta should take responsibility (SOS Mediterranée 2018). The diplomatic and operational impasse resulted in the prolonged accommodation of the rescued persons on board of the vessel in international waters, which was only resolved when the Spanish government allowed disembarkation in Spain (Fernandez & Rubio 2018).

Several similar cases followed, often resulting in extra-EU treaties 'disembarkation and relocation arrangements', that is, inter-governmental agreements identifying a disembarkation port and a relocation scheme for the rescued migrants among EU member states participating on a voluntary basis (Carrera 2019b: 23-30). The European Commission and EU agencies, namely, Frontex and EASO, started to become directly involved in such arrangements since early 2019 by identifying member states willing to participate, facilitating inter-governmental dialogues and

4 Such allegations, instrumentally taken up by Italian and European political parties for electoral purposes, were initially made by the EU border agency Frontex (*Financial Times* 2016) and the Public Prosecutor of Catania, Carmelo Zuccaro (Comitato parlamentare di controllo sull'attuazione dell'Accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia di immigrazione 2017).

providing operational support at specific steps of relocation procedures (Council of the EU 2019; Carrera 2019b: 25-28).

Meanwhile, search and rescue NGOs have come under increased scrutiny by law enforcement authorities upon politically-driven ministerial orders (Ministero dell'Interno 2019),[5] often resulting in the seizure of vessels and the prosecution of shipmasters and NGOs' representatives on account of favouring illegal immigration and violating the prohibition of entering territorial waters (FRA 2019).[6]

The criminalisation of civil society actors involved in search and rescue was facilitated by the 2017 Italian government's imposition of a controversial non-legally binding 'code of conduct' upon all search and rescue NGOs operating in the Central Mediterranean (Ministero dell'Interno 2017). Such criminalisation reached a peak on 14 June 2019, when the Italian government adopted the so-called 'Security decree *bis*', introducing administrative fines from €10 000 to €50 000 for those NGOs' ship masters and ship owners who disregarded a prohibition on entering territorial waters (Art 2 DL n 53/2019). These developments, clearly at odds with the UN Declaration on Human Rights Defenders (UNGA 2016b), have raised serious concerns among humanitarian actors to the extent that in May 2019 five UN Special Procedures of the Human Rights Council sent a joint letter urging the Italian government to refrain from criminalising civil society organisations involved in search and rescue, to withdraw the criminalising decree and to respect their human rights obligations (OHCHR 2019).

The criminalisation of search and rescue NGOs, however, is not specific to Italy. Despite the lack of media attention, Spain and Greece have also adopted similar approaches. Spain, for instance, has stopped granting ship departure permits since January 2019 and threatened the Spanish NGO *Proactiva Open Arms* with a €900 000 fine (Fine 2019: 7). As for Greece, the European Court of Human Rights (European Court) is confronted with an opportunity 'to condemn the growing trend in Greece and Europe of criminalising solidarity' after the complete acquittal of the applicant, namely, the founder of the NGO Sea-Eye, by Greek courts who arbitrarily prosecuted him and exposed him to ten years' imprisonment, 'only to suspend his life-saving activities' (GLAN 2019).

In parallel to criminalising search and rescue NGOs, the EU and member states have increasingly disengaged from their search and rescue responsibilities. EUNAVFOR-MED Operation Sophia, a military operation launched in 2015 aimed at disrupting criminal smuggling and trafficking networks in the Central Mediterranean, has been increasingly scaled down, to the extent that in March 2019, despite a six-month extension of its mandate, it was deprived of its naval means and thus of its search and rescue capabilities (ECRE 2019). Similarly, the mandate of Frontex Joint Operation Themis, which replaced Operation Triton in 2018, was also redefined and limited to the Italian search and rescue regions, leaving the Maltese search and rescue regions uncovered (Frontex 2018).

5 One of the most recent ministerial orders concerned the *Mare Jonio* vessel, operated by the NGO *Mediterranea – Saving Humans* (Ministero dell'Interno 2019).

6 None of these prosecutions however have led to a conviction (EU Fundamental Rights Agency 2019).

Italian authorities, which since the 2013 Mare Nostrum operation had taken responsibility over search and rescue operations immediately off the Libyan territorial waters, have progressively transferred these responsibilities to Libyan authorities. This was possible thanks to the Italian and EU support to Libya aimed at preventing migrants from leaving the country, disingenuously presented as part of a 'migration management' strategy designed to prevent deaths at sea and countering smuggling networks.[7] The partnership with Libya has consisted of financial, material and operational support by both Italy and the EU, aimed at strengthening the capacities of the Libyan Coast Guard (Carrera 2019b: 18). Such support allowed the Libyan interim government to declare a Libyan search and rescue region, validated by the International Maritime Organisation (IMO) in June 2018 (Euronews 2018).

This policy is patently illegitimate as it triggers the violation of fundamental principles of international and human rights law, including most notably the principle of *non-refoulement*.[8] This policy in fact has translated into the practice of 'pull-backs', that is, the transfer of migrants rescued by the Libyan Coast Guard to migrants' detention centres in Libyan territory, where they have no access to asylum procedures and are held in inhumane conditions, with a well-documented risk of being subjected to serious violations of basic human rights, including torture, sexual violence, slavery and death (OHCHR and UNSMIL 2018).

Furthermore, the Libyan Coast Guard has reportedly adopted, within search and rescue operations, practices that violate international and human rights law, including intimidation and aggression (Cuttitta 2018). A major incident occurred on 6 November 2017, when both the Libyan Coast Guard and the NGO-operated Sea-Watch III vessel were involved in a search and rescue operation (SEA-watch). Witnessed by Italian navy helicopters that were flying over the area, the incident resulted in the drowning of more than 20 migrants and the 'pull-back' of 47 others, later detained in inhuman conditions and subjected to torture and sexual violence. A group of academics and NGOs filed an application against Italy to the European Court of Human Rights, based on evidence provided by a London-based forensic agency (GLAN 2018).[9] The GLAN-ASGI case is pending and may ultimately become a landmark ruling on the issue of state responsibility (see part 3.3.).

The case of Spain is also controversial. In order to limit search and rescue responsibility, Spain has cut off funds and human resources, and ceded more ground to Morocco by limiting Spanish search and rescue operations and promoting Moroccan authorities to operate in Spanish search and rescue areas, which raises serious human rights concerns among civil society (Neidhardt 2019: 10).

7 These policies in fact have resulted in an increase in deaths per arrivals, although deaths have diminished in absolute numbers (Carrera 2019b: 5-6).

8 The principle of *non-refoulement* is enshrined in multiple legal instruments, including most notably in the 1951 Convention Relating to the Status of Refugees (Art 33(1)), the European Convention (stemming from arts 2 and 3, as developed in the jurisprudence of the European Court), and the EU Charter of Fundamental Rights (art 19).

9 The case was brought to the European Court by the Global Legal Action Network (GLAN) and the Italian Association for Migration Legal Studies (ASGI).

The political and legal unsustainability of the situation led to exploring new solutions in the attempt to comply with search and rescue obligations, on the one hand, without overlooking border states' claims. With this aim, in early 2018 the EU started to explore two highly controversial concepts. The June 2018 European Council invited the Commission and the Council, in cooperation with third countries, the IOM and UNHCR, to work on a proposal about so-called 'regional disembarkation platforms' and 'controlled centres' (respectively centres based in third countries where migrants would be brought after being rescued at sea for the processing of protection claims, and institutionalised and expanded hot spots or, in other words, quasi-detention facilities in the territory of EU member states) (European Council 2018).

The idea of 'regional disembarkation platforms' has been widely criticised due to the impossibility of ensuring respect for international and EU law by the third countries concerned, including in particular the principle of *non-refoulement* and the access to asylum procedures (and reception conditions) that would meet the minimum legal standards. A joint communication issued by UN Special Procedures warned the EU that '[o]utsourcing responsibility of disembarkation to third countries … only increases the risk of *refoulement* and other human rights violations' (OHCHR 2018b: 2). The African Union (AU) itself has recently discouraged African states to cooperate with the EU on such a proposal, as this would result in the establishment of *de facto* detention centres (Carrera 2019b: 23; Boffey 2019).

'Controlled centres' in EU territory are extremely problematic also because they result in a further institutionalisation of arbitrary detention and other human rights abuses, in particular in light of the well-documented evidence of quasi-detention practices, the forced finger-printing of individuals, the degrading reception conditions and discriminatory interviewing within the already functioning hot spots (ECRE 2016; Danish Refugee Council 2019). In the absence of a new regulation on relocation based on equal solidarity among member states, however, Southern European member states have given the assurance that they will not allow the establishment of 'controlled centres' within their territory (ECRE 2018a: 3).

In this controversial context, the 23 September 2019 informal summit between Italy, Malta, France and Germany has been seen as a 'milestone' in the controversy over search and rescue and disembarkation (Carrera 2019a: 3). The outcome was a non-binding joint declaration of intent, the Malta Declaration, on a 'controlled emergency procedure' which proposes 'an alternative place or port of safety for disembarking rescued migrants, different from the MS that would otherwise be responsible' (Carrera 2019a: 4), heavily challenging the criteria established by Dublin Regulation. Welcomed by some NGOs, the proposal has been strongly rejected by countries such as Spain and Greece.

3.2 The 'externalisation toolkit'

The developments regarding search and rescue and relocation accord with the outsourcing of responsibility regarding migration and asylum management the EU and its member states have in recent years been promoting. Externalisation policies consist of measures aimed at preventing migrants from entering EU member states' jurisdiction. They

are based on arrangements with allegedly 'safe' third countries aiming at strengthening their border control capacities, 'pulling back' persons intercepted at sea and readmitting migrants (both nationals and non-nationals) into their territory. By avoiding contact with migrants or by applying the 'safe third country' or 'first country of asylum' concepts (that is, by sending migrants back to third countries in which they allegedly can seek asylum, without fully examining their protection needs (ECRE 2017a: 1), EU member states try to avoid legal responsibility particularly with respect to asylum procedures.

The EU has actively promoted externalisation policies, including by adopting financial instruments and directly seeking political arrangements with third countries. The EU Emergency Trust Fund for Africa (EUTFA) has been largely utilised to enhance key African countries' border management capacities in order to contain departures towards Europe (European Commission 2018a). The 2016 EU-Turkey agreement, aimed at reducing irregular migrants' departures towards – and to facilitate their return from – Greece is presented as a model for 'good' migration management (European Council 2016a; European Council 2018). In 2017 the memorandum of understanding between Libya and Italy enhanced the Italian externalisation policy through the reinforcement of the Libyan Coast Guard's interception and 'pull-back' capacities, through economic, logistic and material support.

In 2018 this externalisation trend intensified. New fund packages and negotiation tables paved the way for future arrangements with third countries to contain migration flows and keep them far away from European borders, under EU blessing and support (European Commission 2019). According to the declaration of the Spanish government, Spain looks at the EU-Turkey model for shaping its further collaboration with Morocco, in order to strengthen Morocco's border controls (Aynaou 2018). Cooperation with Morocco is supported by the European Commission which confirmed that the 'EU has been laying the foundations for a close partnership with Morocco. In late 2018, it approved EUR 140 million in support in border management and budget support,' through the EUTFA (European Commission 2019: 5). The EU also welcomed Italy's cooperation with Libya and in May 2018 it allocated €46 million to support Libyan interdiction capacity (Moreno-Lax & Lemberg-Pederse 2019: 27; European Commission 2018b).

The declared aim of externalisation policies is to ease the burden on coastal states, allowing for more controlled access to Europe while reducing migrants' incentives to undertake dangerous travel. In this sense important results have been achieved, with an overall reduction in irregular border crossings and arrivals in EU. Illegal border crossing has diminished by 95 per cent from its peak in October 2015. The decrease in arrivals corresponded also to a drop in the number of people who died or disappeared while attempting the Mediterranean crossing (in 2018, 28 per cent lower than in 2017) (UNHCR 2019).[10] These results have been presented as a positive impact that externalisation policies have had on migration. Nonetheless, this could be a Pyrrhic victory. While the results on illegal arrivals appear astonishing, they may hide a different reality. The

10 The death rate decreased in absolute terms, but increased in relative terms. See n 8.

containment of migrants within third countries implies a serious compression of their human rights.

In 2018, with Resolution 2228, the Parliamentary Assembly of the Council of Europe (PACE) expressed concerns about externalisation policies because 'the countries concerned may not have equivalent human rights standards or legal instances to uphold them, whereas asylum seekers face difficulties in holding the European Union or individual states responsible for possible human rights violations'. (PACE 2018: para 6).

In fact, the EU-Turkey statement has raised widespread criticism. The PACE questioned Turkey's capacity to ensure adequate protection, effective access to asylum procedures and remedies against return decisions, and defined the return to Turkey of non-Syrian refugees as contrary to EU and international law (PACE 2016). Several NGOs and international organisations denounced that, following the agreement, the new political collaboration between Greece and Turkey resulted in systematic 'push-backs' from Greece to Turkey and illegitimate detentions (ECRE 2017b; HRW 2018). In 2018 the European Committee for the Prevention of Torture affirmed that '[t]he delegation received several consistent and credible allegations of informal forcible removals (push-backs) of foreign nationals by boat from Greece to Turkey at the Evros River border by masked Greek police and border guards or (para-)military commandos' (CPT 2018: 6).

Similarly, 'push-back' practices have been widely documented at the border between Spain and Morocco. In 2017 the European Court condemned Spain for illegal 'push-backs' (*ND & NT v Spain* 2017: para 122). Moreover, several NGOs raised concerns about authorities taking repressive measures to stop people from reaching Spain (ECRE 2019a).

European cooperation with Libya has also been widely criticised since the possibility to consider Libya a 'safe third country' faltered. In April 2018 the Office of the United Nations Commissioner for Human Rights denounced the inhuman conditions of Libyan detention centres for refugees (OHCHR 2018a). Conditions were confirmed by reports of the United Nations Support Mission in Libya and several NGOs. Apparently, the containment of migrants in third countries comes at the expense of human rights.

3.3 Shifting responsibilities

The principal effects and, arguably, aim of externalisation policies are getting responsibility away from EU member states, while maintaining control over migration management. In other words, member states carry out migration control by proxy (Moreno-Lax & Giuffré 2019: 85). Yet, in *Hirsi & Others v Italy* (2012) and, more recently, in *ND & NT v Spain* (2017), the European Court opened a breach in the scheme of externalisation of responsibility, ruling that states are accountable every time they exercise *de facto* control over migrants, even extraterritorially, regardless of political agreements they may have concluded with other states.

As a consequence, states are adjusting their practice accordingly. Enhancing third countries' border control and pull-back practices is aimed at preventing any contact with migrants that could lead to their

accountability. This is an interesting reading when looking at the multiple EU and Italian efforts to support the Libyan Coast Guard operationally. The European Council's remark whereby 'all vessels operating in the Mediterranean must … not obstruct operations of the Libyan Coastguard' is remarkable (European Council 2018: 1). Arguably, this aims at preventing the intervention of EU member states-flagged vessels from being an obstacle to contactless control over migration, especially when these vessels carry rescued persons to Europe (Maiani 2018). This could add a new perspective to the proposal of regional disembarkation platforms, which encourages EU member states-flagged vessels to disembark rescued people in third countries.

Moreover, consistent with the attempts to avoid any contact with migrants, the EU Parliament recently voted against a resolution on search and rescue in the Mediterranean which called on states 'to enhance proactive search and rescue operations by providing sufficient vessels equipment ... and personnel; ... to make use of all vessels able to assist [search and rescue operations] including NGOs; ... to maintain their ports open to NGOs' (EP 2019).

However, international law has some guarantees to prevent states from outsourcing their responsibility (Goodwin-Gill 2007: 34). As posited by Moreno-Lax and Giuffre, the wide support and the weight of the reciprocal commitments in place (involving economic, technical, logistical and political aspects) could lead to ground the state responsibility at least on articles 16 and 17 of the International Law Commission Draft Articles on State Responsibility (DASR), respectively, 'aid or assistance in the commission of an internationally wrongful act' and 'direction and control exercised over the commission of an internationally wrongful act' (Moreno-Lax & Giuffré 2019: 100-108).

The EU Fundamental Rights Agency itself affirmed that 'state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in conduct that violates international obligations' (FRA 2016: 2). Moreover, Moreno-Lax and Giuffré pointed out that under the European Convention states have obligations not to engage in actions that imperil human rights, including the prohibition for a state to enter into agreements with other states that conflict with its obligations under the Convention (Moreno-Lax & Giuffré 2019: 105). Thus, the eventual violation by the third country 'will be jointly attributable to the [third country] and the EU MS for their independent contribution to a single harmful outcome', in line with article 47 of DASR (Moreno-Lax & Giuffre 2019: 105).

An important decision against the externalisation of responsibilities could be provided by the European Court. As mentioned, in the landmark *Hirsi* judgment the Court extended the edges of states' accountability. With its decision in *ND & NT v Spain* it appears to be willing to take a strong stance on migration control (Pijnenburg 2018: 407). The Court now has a new opportunity to lead the way for a more extensive interpretation of state responsibility. In the aforementioned *GLAN-ASGI* case, brought before the Court in May 2018, Italy allegedly was responsible for a Libyan Coast Guard operation that occurred in November 2017, involving several human rights violations. Loredana Leo, a chief lawyer of ASGI, stated that '[f]or the first time, the question of the direct responsibility of the Italian state in the Libyan Coast Guard

interventions and in the *refoulement* carried out in Libya by the latter is raised before the ECtHR' (ECRE 2018b). If the Court should rule against Italy, and depending on the legal reasoning it adopts, a historical chapter on state responsibility could be written, with great potential to have an impact on externalisation policies altogether and to further the effectiveness of human rights protection.

Another factor worth considering is whether the EU itself could be held responsible for its key role in the development and implementation of externalisation policies. In this case, a new chapter could be opened for the Court of Justice of the European Union (CJUE), which would be called upon to decide on EU responsibility for its migration control policy. In the three cases *NF, NG and NM v European Council* (2017) the Court affirmed its lack of jurisdiction over the EU-Turkey deal, holding that the deal was attributable to the Heads of State and Government of the member states and not to the EU itself. However, the involvement and proactivity of the EU in pursuing and supporting externalisation arrangements with third countries could lead to different outcomes in the future.

Importantly, under the Rome Statute the International Criminal Court (ICC) has jurisdiction over states' practices that engage (even indirectly) in internationally wrongful acts and grave human rights violations. Based on this consideration, a group of academics in March 2018 called on the ICC Prosecutor to open *motu proprio* an investigation on the role of Italian authorities into crimes against humanity committed in Libya.[11] While the ICC has since 2011 been investigating crimes against humanity and war crimes committed in Libya, including against migrants, it has been pointed out that the complicity of European actors should also be part of the investigation, under penalty of the Court's being accused of bias and conducting selective prosecution (Mann 2018).

A team of international lawyers recently submitted a communication to the Office of the Prosecutor of the ICC concerning 'EU migration policies in the Central Mediterranean and Libya', arguing that the EU and its member states enacted a 'premeditated and intentional practice of non-assistance of migrant boats in distress at sea' (Branco 2019: para 32). It is further argued that the EU's 'externalisation of maritime and human rights obligations' constitutes 'a (failed) attempt to avoid exposure to these legal responsibilities' (Branco 2019: para 450). Notwithstanding the difficult challenge of identifying the high-level officials responsible for the alleged crimes, this communication is a good opportunity for the ICC to not only enhance its credibility and wash away the accusation of being biased, but also to end the impunity of Western actors for international crimes and further the effective protection of human rights.

3.4 Concluding remarks

As observed throughout the article, the recent developments regarding European asylum and migration policies show the intrinsic tension between the aspirations of unity and harmonisation of the EU's foreign policy and the claims of sovereignty by the member states, reluctant to cede control over their national borders.

11 See the statement by 29 academics on Italy seizing the rescue boat Open Arms, http://statewatch.org/news/2018/mar/open-arms-statement.pdf.

The inability of EU institutions to respond to the needs of countries with greater migratory pressure has resulted in the search for intergovernmental solutions such as *ad hoc* bilateral and multilateral agreements (both within and beyond the EU) that not only fall outside the EU asylum *acquis*, but some of them even raise questions about its compliance with EU law (EDA 2018).

However, one must avoid misunderstandings: The EU and its member states seem to have the same priority, namely, to discourage migrants from entering the EU by keeping migration flows far away from European borders and, in so doing, avoiding legal responsibility. This is clearly reflected in the confirmation *en bloc* of the externalisation measures so far taken by the European Council, which used the June 2018 meeting – and those following – to introduce new elements to the 'externalisation toolkit' instead of pushing for a comprehensive CEAS reform, thus avoiding 'a divisive debate on internal solidarity' (Maiani 2018).

Nonetheless, important changes can arise after the May 2019 European Parliament elections. Under the 'unfinished business rule', the new Parliament will decide whether to revive the CEAS reform and whether to keep it as a package or as individual proposals. Unfortunately, since 'strengthening external controls' and 'enhancing return policies' are the key messages of the 2019-2024 European Council Agenda (Bamberg 2019), it is difficult to be optimistic about a change in the policy trend.

4 Conclusion

Migration and asylum certainly represented one of the major issues affecting Europe throughout 2018. The international process leading to the Global Compact, considered a milestone for the protection of refugees and migrants, introduced two issues of great relevance: the need for the international community to urgently address the link between climate change and migration; and the need to overcome the traditional distinction between refugees and migrants acknowledging that they are similarly vulnerable and that both categories are entitled to protection under international human rights law. These issues have been particularly controversial during the Global Compact negotiations, generating tensions within the EU and between member states and EU institutions.

These tensions are also clearly reflected in the selected developments within the field of EU migration and asylum policies. The inability of EU institutions to solve the main obstacles preventing the establishment of a truly common EU approach based on equal solidarity and the member states' unwillingness to cede control over their national borders led to the adoption and implementation of externalisation policies aimed at avoiding legal responsibility for migrants at both the national and supranational levels.

In short, there is a clear gap between the legal and political spheres, and between international and national aspirations. At the universal level there is a legal trend towards a human rights-based approach to migration aimed at ensuring the effective protection of the human rights of all migrants regardless of their legal status. On the other hand, at the national (and European) level there is a political trend to address migration through an

increasingly securitarian and border-control approach, leading to a dramatic limitation of international protection.

Despite the general trend of closure towards migration, it appears that judicial institutions at national, EU and especially regional level (European Court) could play an important role in limiting attempts by the EU and member states to outsource their responsibilities, thus ensuring more effective human rights protection. Yet, judicial decisions cannot be the answer to complex political issues. Only a political process leading to a structural change in the approach to migration can provide a truly sustainable solution. The Global Compact may be a positive step in this direction.

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