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Migration, the Sahel and the Mediterranean basin: which scenario for the EU27 by 2025?

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About this paper

The present article seems to have withstood the test of time. It was based on the contribution entitled 'Mission failure: an assessment of EUNAVFOR MED' for presentation at the European Law Institute's (ELI) Administrative Law Special Interest Group Conference (in Session 4 integrated in the panel entitled The Substantive View II) held at Andrassy University in Budapest (2018). The article was originally published in the ELTE Law Journal, no. 1 (2018) (Eötvös University Press) with the same title. Republication is authorized as per the conditions of ELTE Law Journal. A very superficial revision of the text was performed for consistency and readability purposes.

Migration, the Sahel and the Mediterranean basin: which scenario for the EU27 by 2025?[1]

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Abstract

In choosing to focus on the situation in the Mediterranean region over the past four years, the present article aims to assess how the Commission's White Paper on the 'Future of Europe' confronts the reality of economic migration in the broader context of the Sahel region and the Mediterranean basin. Taking the shortcomings of the EU engagement in the Mediterranean embodied by Operation Sophia/EUNAVFOR Med as an example, the present article debates the value of a "scenario 4½", based on the White Paper's scenarios 4 and 5 regarding *Schengen, migration & security* and *foreign policy & defence*. The present article mainly reaffirms that economic migration is a *global issue* providing an opportunity for the EU to play a decisive role in the development of global administration, thus enriching the discussion on Global Administrative Law in connection with the origins and impact of global governance. In this regard, unilateral actions by key EU Member-States pose a severe risk of undermining the relevance of EU Law and Public International Law toward the management of economic migration. Looking at the foreseen impact for Administrative Law, the article advocates the need to perhaps revisit the distinct types of barriers to external influences that national Administrative Law regimes have. One example refers to applying International Law instruments and considering the increasing impact of International Law on how competencies are exercised by public administrations in EU Member-States – especially as States resort to national Constitutional Law as the last line of defence against ECJ rulings.

I. Introduction

At the beginning of the 19th century, Katsushika Hokusai, a Japanese artist, created the world-famous work – 'The Great Wave off Kanawaga' – depicting an overwhelming wave menacing small, helpless boats. Such is the way the current migration trends towards Europe are often described, the degree of helplessness of EU Member States' national administrations varying from country to country.

The world today is one of paradox and volatility. At a time of great technological innovation and economic prosperity, the scale of human tragedy is equally staggering. For example, 2017 has been record-setting for the world economy: the Dow Jones grew from 19,735 points in January to over 24,750 points by year-end, registering a drop to around 23,900 points in the first three months of 2018.

Conversely, we witness some of the biggest humanitarian tragedies: the UNHCR registered the highest levels of displacement with an unprecedented 65.6 million displaced people worldwide, 22.5 million refugees (5.5 million

[1] The present article is based on the contribution entitled 'Mission failure: an assessment of EUNAVFOR MED' for presentation at the ELI Administrative Law SIG Conference.

from Syria alone), of whom only 189,300 were resettled in 2016.[2] Crucially, estimates point to 465,000 people killed during the six years of armed conflict in Syria.[3] Although the world is not black and white, these circumstances are perceived as coming together to create a clear division; a World of Order and a World of Disorder.[4]

Europe has traditionally been perceived around the World as a value-based community of law. For the thousands of migrants travelling thousands of kilometres on foot and by sea, Europe is a beacon, a symbol of hope in the World of Order. At a time when the US government moved forward with several restrictions on the entry of third-country nationals, the EU symbolises, at least for those migrants, the 'shining city upon a hill' that US President Ronald Regan described.

Nonetheless, *migration* is a contentious topic within the EU, and at least two main points characterise the debate. The first is ascertaining how EU Law is imperilled by EU Member States' actions and/or collective actions (or lack of them). The second point is that the EU Member States share a set of reasons behind adopting such actions: the assertion of national sovereignty (and the securitisation[5] thereof), economic protectionism and fragmentation of social/national cohesion. Such efforts have the potential to imperil the perception of the EU as a rule-based community committed to the respect of International Law.

Critical security studies theory underlines, among other things, a fundamental idea: security hinges upon perceptions.[6] Presently, the migration debate is still intertwined with the broader debate on EU Member State solidarity, being framed as the prime example of an impending cohesion crisis. The fact that the current migration discourse or rhetoric resorts to different hydraulic engineering concepts skews public perceptions of the other ('the migrant') as a harbinger or a messenger of misfortune – 'den Boten des Unglücks' in the words of Bertolt Brecht in the poem 'Die Landschaft des Exils'[7].

For the past four years, the world has seen how the Mediterranean Sea was transformed into a mass grave for almost 16,000 anonymous individuals – men, women and children – who lost their lives between 2014 and 2018 in an escape from scenes of either misery or violence – sometimes both. Notwithstanding the most recent efforts by the UN's High Commissioner for Refugees (UNHCR), the international community has experienced increasing difficulties in dealing with the current challenges posed by human mobility in the context of globalisation in regions of Africa and the Middle East.[8]

Regarding the role of Public International Law, the present article will consider two aspects. On the one hand, the *individual* has increased relevance in international relations, especially since 2001. However, it is equally sure that the individual still appears as a partial passive subject of International Law, in some cases dependent upon the State or mediated by the State. On the other hand, regarding the *State,* a double tendency needs to be considered: an increasing number of Southern and Northern States that objectively present (i) an inadequate correlation between internal demands and internal resources while at the same time (ii) being overwhelmed by increasing pressures of varying nature (e. g., social, economic)[9]. In addition, most States have been increasingly confronted with the consequences of externally caused events – extreme weather events or globalisation-linked economic tribulations – plac-

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2 UNHCR, *Figures at a glance,* available at <http://www.unhcr.org/figures-at-a-glance.html> accessed 1 June 2017.

3 Reuters, *Syrian war monitor says 465,000 killed in six years of fighting,* available at <https://www.reuters.com/article/us-mideast-crisis-syria-casualties/syrian-war-monitor-says-465000-killed-in-six-years-of-fighting-idUSKBN16K1Q1> accessed 4th April 2019.

4 T. L. Friedman, *Thank you for being late: an optimist's guide to thriving in the age of accelerations* (Farrar, Straus and Giroux 2016, New York).

5 By securitisation, I refer to the process whereby 'issues become securitised when leaders (whether political, societal, or intellectual) begin to talk about them – and to gain the ear of the public and the state – in terms of existential threats against some valued referent object […] the issue [raises] above normal politics and into the realm of 'panic politics' where departures from the rules of normal politics justify secrecy, additional executive powers, and activities that would otherwise be illegal.' See B. Buzan, 'Rethinking Security after the Cold War' (1997) 32 (1) Cooperation and Conflict, 5–28, 13-14. A more recent critique of the concept sees securitisation as a process of translation of so-called 'pre-existing narratives' (or threat images) to the local context of a particular State. See H. Stritzel, *Security in translation: securitisation theory and the localisation of threat* (Palgrave Macmillan 2014, Basingstoke).

6 K. Krause, M. C. Williams, *Critical security studies: concepts and cases* (University of Minnesota Press 1997, Minneapolis).

7 B. Brecht, J. Willett, R. Manheim, E. Fried, *Poems, 1913–1956* (Methuen 1987, London – New York).

8 S. Ali, D. Hartmann, *Migration, incorporation, and change in an interconnected world* (Routledge 2015, New York).

9 A. Moreira, *Memórias do Outono Ocidental: um século sem bússola* (Almedina 2013, Coimbra).

ing additional pressure on decreasing State resources. More poignantly, we may conclude that we have been for a while alternating between *'a globalisation of crises and a globalisation of powerlessness'*[10].

In brief, an increasing number of States are lacking in resources and, at the same time, are exogenous as to the impacts they suffer. Different authors employ different concepts to describe States displaying such an imbalance: 'failing State'[11]; 'collapsed State'[12]; State displaying a 'lack of effective government'[13]; 'failed State'[14]; *'gescheiterter Staat'*[15]; 'État défaillant'[16]; *'Estados fallidos'*[17]; or even 'fragile States'[18].

A few States of the Sahel and the central Mediterranean region currently display the severe imbalances as described – especially Libya.[19] The current circumstances in the wider Sahel region are a cause of great concern at the EU and NATO levels. EU Member States' actions to address the challenges posed by state fragility in the region and how these actions intersect with the human mobility (migrant) challenge in the Mediterranean lead to one striking conclusion: EU borders no longer *end* at Ceuta, Melilla and the coastlines of Lampedusa or the Greek Islands; EU borders have *de facto* extended further South and East, well beyond the historical limits of the Roman Empire's *Limes Africanus* and *Limes Arabicus* (as until 395 AD).

In the past, EU Member States could afford the luxury of not cooperating in migration management matters, mainly due to the physical distance from the migrants' countries of origin. Nowadays, the phenomenon of globalisation has increased opportunities for human mobility – specifically since organised crime harnesses the 'power of flows' that Friedman describes[20] – in essence, eliminating the physical distance that existed in the past: arrivals via the central Mediterranean route from January 2014 to November 2017 totalled almost 600,000 men, women and children.[21]

The evident absence of an effective government in Libya, the dire situation in Syria in the wake of the internal conflict and the broader insecurity context in the Sahel region (mainly in Mali and the Central African Republic) have led the EU Member States multilaterally, bilaterally and directly into the Sahel region and the Mediterranean Sea.

II. The EU and Migration: Encampment, Cooperation and Outsourcing

At the EU and State-level, the number and the simultaneous nature of current crises require an ability to look at multiple sets of problems simultaneously in a context where (i) what is a priority today may cease to be one six months later, and (ii) public perceptions are very volatile.

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[10] P. Lamy, N. Gnesotto, *Où va le monde?* (Odile Jacob 2017, Paris).

[11] G. B. Helman, S. R. Ratner, 'Saving Failed States' (1992–1993) 89 (Winter), Foreign Policy 3–20.

[12] I. W. Zartman, 'Introduction: Posing the problem of state collapse' in I. W. Zartman (ed), *Collapsed states: the disintegration and restoration of legitimate authority* (L. Rienner Publishers 1995, Boulder).

[13] D. Thürer, M. Herdegen, G. Hohloch – Deutsche Gesellschaft Für Völkerrecht Tagung, *Der Wegfall effektiver Staatsgewalt: The Failed State = The breakdown of effective government* (C.F. Müller 1996, Heidelberg).

[14] R. I. Rotberg, 'The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair' in R. I. Rotberg (ed), *When states fail: causes and consequences* (Princeton University Press 2004, Princeton, N. J.).

[15] R. Geiß, *,Failed States' Die normative Erfassung gescheiterter Staaten* (Duncker & Humblot 2005, Berlin).

[16] G. Cahin, 'L'État défaillant en droit international: quel régime pour quelle notion?' in O. Corten (ed), *Droit du Pouvoir, Pouvoir du Droit: Mélanges offerts à Jean Salmon* (Bruylant 2007, Bruxelles).

[17] M. Pérez-Gonzalez, 'Conflictos armados y posconflicto' in W. Brito, J. P. Losa (eds), *Conflitos armados, gestão pós-conflitual e reconstrução* (Scientia Iuridica – Andavira Editorial 2011, Santiago de Compostela).

[18] L. Brock, H.-H. Holm, G. Sørensen, M. Stohl, *Fragile states: violence and the failure of intervention* (Polity 2012, Cambridge).

[19] 'Libyan state weakness has been a key factor underlying the exceptional rate of irregular migration on the central Mediterranean route in recent years.' – see, UK, House of Lords, European Union Committee, 14th Report of Session 2015–16, *Operation Sophia, the EU's naval mission in the Mediterranean: an impossible challenge,* §101.

[20] Friedman (n 3).

[21] UNHCR, <https://data2.unhcr.org/en/documents/download/61295> accessed 4th April 2019.

Human mobility has increased in the 21st century due to a confluence of different factors:[22] 1) increased connectivity and access to information; 2) increased State fragility; 3) increased opportunities for mobility as transnational criminal networks harness the power of 21st-century information and capital flows; 4) pressured EU States are no longer able to rely on natural borders and distance to avoid making fundamental decisions regarding the effectiveness of existing International Law instruments to address the issue of economic migrants, while at the same time the number of forcibly displaced persons worldwide is at an all-time high of 65.6 million and the number of refugees has increased exponentially in the wake of the protracted armed conflict in Syria (5.5 million refugees). According to Betts and Collier, this context exposes all the shortcomings of what they call a 'dysfunctional refugee system'[23].

Setting aside the period that followed WWII, migration is not a new topic for Europe. Since the 1960s, several European States have authorised temporary migration for labour-related reasons, however, without granting migrants the right to seek naturalisation.[24] In addition, this practice gained a different relevance following the emergence of the Schengen area in 1985.[25] Nonetheless, such practice relates mainly to intra-EU migration.

No one would dispute the fact that, in recent years, the EU has been dealing with increasing challenges linked to the broader phenomena of human mobility and urbanisation. Mobility has one defining characteristic: it is directed from the global South to the global North: further to what is happening at Mediterranean latitudes, increasing human mobility is also happening in the Americas, originating in States located in South and Central America.[26] Here the people moving from South to North are either escaping situations of economic collapse (e.g. Venezuela) or rampant violence perpetrated by organised crime groups that the sovereign State cannot contain.

In the past decade, the EU has seen increased internal migration mainly due to the economic and financial crisis of 2007-2008, as southern EU citizens sought jobs in northern EU countries.[27] Renewed Southern European migration flows (coupled with central European migration flows) have, most recently, fuelled the questioning of some aspects of the freedom of movement within the EU – a right of every EU citizen – and the broader debate on European solidarity. At the same time, arrivals to the EU of third-country nationals have soared in a context of tribulations in the EU's neighbourhood, focusing attention on the Canary Islands, the central Mediterranean and the Aegean Sea regions.[28]

Regional systems, such as the Dublin Regulation,[29] are being placed under additional pressure due to new factors influencing human mobility: there are environmental disturbances and violence below the level of armed conflict, coupled with a double tendency of increasingly fragile States at a time of increased opportunities for human mobility fuelled by technology that increases human interactions. Overwhelming numbers of arrivals and deaths, such as those registered in 2016 (390,432 arrivals and 5,143 deaths)[30] coupled with additional conflicting pressures from civil society – towards welcoming or rejecting migrants – removed the political margin for long-term or even debate on solutions that might address the root cause(s).

When considering the current topic, there are two interrelated concepts: State (and regional) security and State fragility. The points of origin of most migrants in the Central Mediterranean are States displaying fragility at distinct levels; governmental; economic and societal'. Whereas the notion of 'failed States' is disputed in International

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[22] A. Betts, P. Collier, *Refuge: transforming a broken refugee system* (Allen Lane, an imprint of Penguin Books 2017, London).

[23] Ibid.

[24] M. H. Fisher, *Migration: a world history* (Oxford University Press 2014, Oxford – New York, USA).

[25] A. Razin, E. Sadka, *Migration states and welfare states: why is America different from Europe?* (Palgrave Macmillan 2014, New York, NY).

[26] J. E. Domínguez-Mujica, *Global change and human mobility* (Springer 2016, Berlin – Heidelberg – New York, NY).

[27] J.-M. Lafleur, *South-North migration of EU citizens in times of crisis* (Springer 2016, New York, NY – Berlin – Heidelberg).

[28] P. Bevelander, B. Petersson, *Crisis and migration: implications of the Eurozone for perceptions, politics, and policies of migration* (Nordic Academic Press 2014, Lund, Sweden).

[29] See, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, repealed by 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, JO L 180 de 29.6.2013, p. 31–59.

[30] IOM, *Migration Flows – Europe* <http://migration.iom.int/europe/> accessed 4th April 2019.

Law, there is wide acceptance that certain States display a varying degree of 'fragility'. Paraphrasing Tolstoy, *all strong States are alike; each fragile State is fragile in its own way:* massive disorganised violence, pandemics or endemic diseases with high mortality rates or that leave many disabled, crystalised intra-state conflict, famine, prolonged droughts, the 'breakdown of effective government'[31] – among other factors, the combination of which contributes to a circumstance of *State fragility*.

In the post-WWII world, armed violence had an organised character that is no longer identifiable in the 21st century. From the beginning of the 1990s onwards, armed violence started occurring more frequently in a horizontal context of *an individual against another,* going beyond the phenomenon of violence by the State against the individual – what Mary Kaldor called 'new wars'[32]. The changing character of violence – part of the broader question of the international subjectivity of the individual – required the international community to devise ways to engage in scenarios where several non-state actors had violent interactions in the framework of a new type of armed conflict, of an internal or intra-State character (e.g. the 1992 UN intervention in Somalia).

As stated above, although there are many internal and external factors contributing to State fragility, little doubt remains that, for economic migrants, this is the primary driver. In contrast, for refugees, it will be armed conflict. Broader contexts, resulting from a combination of violence and misery, trigger what Betts and Collier identify as a 'flight-for-survival' need, as the only possible response to a 'forced displacement challenge' faced by many individuals living in the fragile States of the Sahel and beyond.[33] Upon assuming a new role as a migrant, the individual thus becomes trapped in a continuous cycle of retention and escape, from which death frequently represents the only way out – fleeing one place and risking life to arrive at another, from where to flee again.

Crucially, time runs slowly between phases, and all migrants experience a long hiatus at some point when moving: encampment. The average time spent by individuals at a UNHCR camp currently stands at 17 years.[34] In fact, encampment has been the primary response by the international community to massive displacements of individuals in the Middle East going back sixty years– only recently has the UNHCR started the debate on alternatives to 'camps'[35] – at a time when an entire service industry has been building up around encampments (from telecommunications to biometric scanners[36]).

Recourse to legal mechanisms directed at outsourcing migrant management, both at the EU and State level and independently of each other, has had a visible outcome despite undermining the application of International Law. Statistics point toward a significant decrease in arrivals in Europe during 2017. With sea arrivals totalling 362,753 in 2016, following an astonishing 2015 when over one million arrivals were recorded, this year is on track to register less than 170,000 arrivals – the lowest number recorded since 2014.

In the legal and judicial fields, EU action in the framework of the internal management of migration takes place essentially on three fronts:[37] prevention (e.g., immigration controls); criminalisation (at EU level and State level); and risk management after entry into EU territory (expulsion of aliens and transfer of migrants, pursuant to

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[31] Thürer (n 12).

[32] M. Kaldor, *New & old wars* (Polity 2006, Cambridge).

[33] Betts, Collier (n 21).

[34] UNHCR, *Resolve conflicts or face surge in life-long refugees worldwide, warns UNHCR Special Envoy*, 20 June 2014, available at <http://www.unhcr.org/afr/news/press/2014/6/53a42f6d9/resolve-conflicts-face-surge-life-long-refugees-worldwide-warns-unhcr-special.html> accessed 4th April 2019.

[35] UNHCR, <http://www.unhcr.org/alternatives-to-camps.html> accessed 4th April 2019.

[36] See, UN, *WFP Introduces Iris Scan Technology To Provide Food Assistance To Syrian Refugees In Zaatari*, 06 October 2016, available at <https://www.wfp.org/news/news-release/wfp-introduces-innovative-iris-scan-technology-provide-food-assistance-syrian-refu> accessed 4th April 2019.

[37] V. Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015, Londres).

Directive 2001/40/EC and Regulation 343/2003, respectively[38]). Encampment has thus also become one of the main elements of the strategy directed at controlling the migrant influx. Predicated on public administration and administrative law, diverse types of migration detention facilities[39] have been established in some EU Member States.

Overwhelmed by the high number of individuals seeking access to administrative justice, the risk is already there of public administration promoting the use of detention beyond the limits imposed by general principles of law. Concerning the *centres de rétention administrative* (administrative retention centres) in France, the French Senate stated that administrative retention should be applied only when other coercive measures (confinement to residence or placement in an open centre) are not possible ('Preposition nº10' of the report) and that the living conditions of those in administrative retention centres should be improved.[40]

Besides encampment, EU Member States have adopted other responses. First, at EU-level, EU Member States have launched several ESDP operations, namely EUNAVFOR MED (later named Operation Sophia), coupled with an increased presence by Frontex and the **European Border and Coast Guard.**[41] Second, at the level of EU Member States, different countries have reasserted their sovereignty by: building border fences (Hungary, 2015); linking migrant admission into the country with proof of financial self-sufficiency (Denmark, 2016); introducing restrictions on fundamental rights and freedoms on the grounds of national security (Germany, 2017); and enhancing cooperation in civilian-military training and migration controls with an encampment component (Italy–Libya agreement of 2017).

The EU has a proven track record when looking at EU cooperation with Africa in peace, security, and development. First, regarding humanitarian aid policies, the EU acts, for example, through the European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO), which for 2016 had a total budget of EUR 1.889 billion[42] – moreover, 'during 2016, the EU and its Member States remained the world's largest provider of development funding, contributing more than half of the official development assistance (ODA) globally […] the European Commission alone disbursed over EUR 10.3 billion in ODA on behalf of the EU (…)'[43].

Second, looking at more direct or kinetic EU actions, several civilian and military operations have been launched during the past fifteen years: operation 'Artemis1 (2003); the operations in the Democratic Republic of

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[38] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, repealed by 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, JO L 180 de 29.6.2013, p. 31–59. Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Commission Implementing Regulation (EU) N° 118/2014 of 30 January 2014 amending Regulation (EC) N° 1560/2003 laying down detailed rules for the application of Council Regulation (EC) N° 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. 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.

[39] 'Whether a place where those held in the course of migration proceedings is a place of detention depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled "shelters", "guest houses", "transit centres", "migrant stations" or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected.' – see, UN, Doc. A/HRC/39/45, *Report of the Working Group on Arbitrary Detention*, par. 45.

[40] On the need to restrict the administrative retention practice, see French Republic, *Sénat*, *Rapport d'Information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur les centres de rétention administrative, Par Mme Éliane ASSASSI et M. François-Noël BUFFET, Sénateurs*, n.º 773.

[41] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

[42] COM (2017) 662 final.

[43] EU, *2017 Annual report on the implementation of the European Union's instruments for financing external actions in 2016*, available at: <https://ec.europa.eu/europeaid/2017-annual-report-implementation-european-unions-instruments-financing-external-actions-2016_en>, accessed 4th April 2019.

Congo, namely 'EUSEC'[44] (2005), 'EUFOR Congo' (2006), 'EUPOL Kinshasa' (2005), and 'EUPOL'[45] (2007); the civilian-military mission in support of the African Union mission 'AMIS II', in Darfur[46] (2005); 'EU SSR' in Guinea-Bissau[47] (2008); 'EUFOR', in Chad and the Central African Republic[48] (2008); operation 'Atalanta'[49] (2008); and, finally, 'EUTM Somalia' (2010) – to name a few.

From all the missions referenced, the 'EUFOR' military operation in Chad and the Central African Republic is an example of the operational complementarity between the EU and the UN. In effect, launching this 'transition operation' enabled the UN's mission (MINURCAT) to be implemented, while the European Council's authorisation was preceded by Resolution 1778 (2007) of the UN Security Council, making specific reference to previous contacts between the EU and the UN.[50]

Halfway through 2012, the EU was managing twelve active missions in the framework of the CFSP, three military missions and nine civilian missions. However, it is worth noting that, further to the missions indicated, the EU had already foreseen the launch of three additional CFSP missions in Africa.

The EUAVSEC South Sudan[51] civilian mission of 2012 focused on training and support to improve the security at Juba airport against external threats. It had a training and advisory component, consisting of work between EU experts, local airport authorities and the Sudanese Ministry of Transport toward preparing legislation in the field of airport security.

The 'EUCAP Nestor' mission (2012)[52] is also worth highlighting, given the number of countries it encompassed and the broad scope of the mission's mandate. The main objective was to reinforce the maritime security capabilities of a group of countries in the Horn of Africa region: Djibouti (where the mission's HQ was located), Kenya, Seychelles, Somalia and Tanzania. Fitting into the EU's comprehensive approach, the mission had a training component (mainly for judges, civilian police and coast guards) and a judicial system support component.

Also noteworthy from 2012 was 'EUCAP Sahel Niger'[53], a civilian mission to reinforce national capabilities for fighting terrorism and organised crime in the Sahel region through training and advising security forces.

Finally, one should mention two other CFSP engagements in Africa prepared in 2012. The first was 'EUBAM Libya' (2013)[54], an assistance mission in the fields of security and border management, launched in coordination

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[44] Council Joint Action 2006/303/CFSP of 25 April 2006 amending and extending Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC).

[45] Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo).

[46] Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan.

[47] Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU).

[48] Council Joint Action 2009/795/CFSP of 19 October 2009 repealing Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic; UN, S/RES/1778 (25SET2007).

[49] Council Decision (CFSP) 2016/2082 of 28 November 2016 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

[50] UN, S/RES/1778 (25SET2007) 1–3.

[51] Council Decision 2012/312/CFSP of 18 June 2012 on the European Union Aviation Security CSDP Mission in South Sudan (EUAVSEC-South Sudan).

[52] Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR).

[53] EU Council Conclusions (23JUL2012).

[54] Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya).

with the UN's mission ('UNSMIL'[55]); The second was 'EUTM Mali' (2013)[56], a mission aimed at training Mali's armed forces and linked with the presence of 'AFISMA', a stabilisation force in that state (2012) led by ECOWAS, the Economic Community of West African States, under a UNSC mandate.[57]

In assessing one of the busiest years for EU engagement in Africa, one of the main conclusions was that launching multiple missions with similar objectives requires strong internal coordination efforts at the EU level, especially to avoid instances of duplication. Hence, irrespective of those above all being EU' crisis management' missions, there were issues regarding overlapping tasks (for example, fighting terrorism). Following the fantastic year of 2012, the EU launched EUCAP SAHEL Mali in 2014 and then, in 2015, the EU launched EUNAVFOR MED – these engagements run in parallel with initiatives such as the 'G5 Sahel'[58].

Further to these efforts, another trend has emerged: outsourcing or externalisation. Much like the Roman Empire's treaties of friendship, the EU is now engaging bilaterally selected States – namely countries of transit – for migration management objectives, such as redirecting and/or retaining migrants in facilities or locations in third countries. The leading example of this externalisation practice is the EU-Turkey Statement of 18 March 2016, preceded by the launch in 2015 of the EU Emergency Trust Fund for Africa (with an initial allocation of EUR 1.88 billion) and followed in June 2016 by the establishment of a new Partnership Framework with third countries under the European Agenda on Migration.[59]

These developments beckon a comparison with the Roman Empire's borders. We see that the EU's borders have *de facto* extended further South and East, beyond the limits of the Roman Empire's *Limes Africanus* and *Limes Arabicus* (as until 395 AD). Furthermore, what used to be the *Limes Tripolitanus* can now be said to have primarily become a failed space where lawlessness enables trading in human beings, among other atrocities; a space where entire states can become so-called 'borderlands'[60].

Therefore, to better consider the scenarios proposed by the Commission's White Paper on the future of Europe, one should be mindful that the EU seems to be pursuing a three-pronged strategy: first, outsourcing or externalisation, often supporting third countries' public administrations with the management of migrants, with consequences at the level of the effective application of International Law;[61] second, and in close connection with the former, we have cooperation, (i) at the technical-military level or technical-police level, with training missions aimed at building up the security sectors of selected states, and (ii) maintaining a leading role in the disbursement of development aid; third, encampment, both in selected transit countries and within EU Member States, coupled with elements of deterrence, nonetheless on a smaller scale than actors such as the UN (namely the UNHCR[62]).

III. The EU's Naval Engagement in the Central Mediterranean: EUNAVFOR MED/ Operation Sophia

Pursuant to the Conclusions of the EU Council special meeting on April 23, 2015, four priorities were established to deal with the situation in the Mediterranean at the time: fighting traffickers; strengthening the EU's

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55 UN, S/RES/2040 (12MAR2012).

56 Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA).

57 UN, S/RES/2056 (5JUL2012), S/RES/2085, (20DEC2012), S/RES/2100, (25APR2013).

58 This is a group encompassing Niger, Burkina Faso, Chad, Mali and Mauritania that envisaged EU support for a multinational battalion-scale force operating in the Sahel region.

59 COM/2016/0385 final.

60 M. Ambrosini, *Irregular immigration in southern Europe: actors, dynamics and governance* (Springer 2017, New York, NY – Berlin – Heidelberg).

61 Bill Frelick, Ian M. Kysel, J. Podkul, 'Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190–220.

62 For a solid analysis of how encampment is used as a strategy worldwide, see Betts and Collier (n 21).

presence at sea; preventing illegal migration flows; and reinforcing solidarity and responsibility within the EU. In addition, there was the possibility of launching an operation in the framework of CFSP.[63]

In the framework of Council Decision (CFSP) 2015/778, of 18 May 2015, the decision was made to launch an EU military operation in the South of the Mediterranean (EUNAVFOR MED) to contribute toward 'the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean'[64] to be carried out 'in sequential phases, and in accordance with the requirements of International Law'[65], namely taking into account the positions adopted by the UN Security Council and the Libyan internationally recognised governmental authorities.

From the onset, the mandate of EUNAVFOR MED was framed in law enforcement terms, taking aim at human smuggling and trafficking. To this end, article 1 of Council Decision (CFSP) 2015/778 of 18 May states: 'The Union shall conduct a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean (EUNAVFOR MED), achieved by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with applicable International Law, including UNCLOS and any UN Security Council Resolution.'[66].

To this end, the mandate of EUNAVFOR MED (later renamed Operation Sophia) foresaw three sequential phases (see article 2 of the mandate) described as: '(1) In Phase 1, the mission will "support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with International Law'. (2) In Phase 2, Operation Sophia is tasked to "conduct boarding, search, seizure and diversion of vessels suspected of being used for human smuggling or trafficking"'. Phase 2 has two stages: Phase 2A, when the mission acts on the high seas; and Phase 2B, when the mission acts on the 'high seas or in the territorial and internal waters' of the coastal state. Phase 2B will be conducted 'in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned', which in this case is Libya. (3) In Phase 3, the mission – again in accordance with any applicable UN Security Council (UNSC) Resolution or consent by the Libyan government – will: 'take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.'

One of the main problems with this engagement is conducting maritime interception missions in waters under Libyan sovereignty. While the applicable UNCLOS regime establishes the principle of exclusion of jurisdiction in favour of the coastal state concerning the territorial sea and inner waters and in favour of a vessel's flag State – this in addition to UN Charter article 2/4 – Libya has indeed displayed an absence of effective government. In this regard, there is only one successful example of a military naval operation aimed at fighting lawlessness at sea in the absence of effective government in the coastal state, Operation Atalanta in Somalia.

At the onset of EUNAVFOR MED, the legal challenges were manifold and differed in scope. In the field of Public International Law, doubts were there regarding the UN Security Council resolutions and whether or not a formal request for intervention formulated by the (recognised) Libyan Government (the Government of National Accord as per UNSC Resolution 2259 of 23DEC2015) existed. However, Resolution 2259 did not allow for actions within the waters under Libyan sovereignty and did not alter the terms of previous Resolutions (mainly UNSC Resolution 2240). Drawing a parallel with the case of Somalia, it is worth noting that UNSC Resolutions adopted under Chapter VII of the UN Charter were all preceded by a manifestation of will (a written letter) of the Transitional Federal Government. Specifically looking at phase 3 of the mandate, the use of 'all necessary measures' could translate into the use of force in Libyan territory, thus increasing the overall risk of the engagement. As with combating Somalian pirates, the adaptability of non-state actors' tactics increases the overall uncertainty and volatility of the engagement: more pressure on one route (e.g., the Eastern route in part due to the EU-Turkey Agreement) might

[63] EU, Press Release, n. 204/15 of 23/04/2015.

[64] Art. 1, n. 1, Council Decision (CFSP) 2015/778.

[65] Art. 2, n. 2, Council Decision (CFSP) 2015/778.

[66] EU, Council Decision 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (OJ L122, 19 May 2015).

result in more crossings using another route (e.g., the central Mediterranean route, which in 2015 registered 150 000 people, the majority departing from Libya).

In the field of Criminal Law, uncertainty was there regarding the arrest, prosecution and proceedings against individuals taking part in human trafficking or smuggling activities, given that the Libyan judicial system was inoperative at the time. Further legal challenges would emerge regarding a decision by the Libyan government to waive its right to prosecute/act against national citizens suspected of crimes and ensure respect for the ECHR. Additional questions concerned evidence collection on criminal activity in a theatre of operations where non-state actors operated freely, coupled with the uncertainty surrounding the Libyan justice system[67].

How then to assess the impact of EUNAVFOR MED/Operation Sophia? The UK House of Lords 2016 report on EUNAVFOR MED/Operation Sophia provides a striking conclusion: 'The intentions and objectives set out for Operation Sophia exceed what can realistically be achieved. A mission acting only on the high seas is not able to disrupt smuggling networks, which thrive on the political and security vacuum in Libya and extend through Africa'[68]. This is to say that, as a denial-of-business-model operation, Sophia turned out to be an outstanding search and rescue mission – which was not its initial mandate – ending up 'doing more or less the same thing that previous operations by Italy and Europe did prior to its establishment'[69], mainly Italy's operation *Mare Nostrum* and Frontex's *Operation Triton*.

On the one hand, there was a decrease in fatalities at sea, as the traffickers' freedom to act was restricted. However, the tactics changed: as (safer) wooden boats were destroyed, the use of rubber dinghies increased;[70] crucially, although arrests were made connected to human trafficking networks, the suspects were primarily low-level facilitators.[71]

In addition, a few key questions remain unanswered from the onset of the engagement. First, although there was a visible short-term added value, what would have been the long-term value of this EU engagement? The fact that the mission focused on the sea, led to the (erroneous) perception by other actors (mainly NGOs) and the EU citizens of EUNAVFOR MED as a search and rescue operation[72] (much more so following the name change, aimed at echoing the birth of a child from a rescued mother aboard the German frigate 'Schleswig-Holstein'). This perception contributed to – in part – focusing the legal discussion on the Law of the Sea, specifically on territorial waters, maritime search and rescue duties, and sovereignty under International Law. In this way, the real problem of a 'broken refugee system' was deprived of much-needed attention.

In addition, the desired end state by the EU is not yet clearly defined: while some countries are clearly concerned with stemming the migrant flow, others seem equally or more concerned with the long-term objective of securing the Sahel. In these terms, the objective of making the central Mediterranean route less appealing for traffickers seemed, in hindsight, insufficient.

To conclude, the continued engagement of the EU in Africa had a boost in 2016 with the launch of EUTM RCA in the Central African Republic. As of May 2018, there are eight active EU missions in Africa, the majority of which are deployed in the Sahel region and the central Mediterranean region: EUCAP SOMALIA, EUTM SOMALIA, EUNAVFOR Atalanta, EUBAM Libya, EUTM RCA, EUCAP SAHEL Niger, EUCAP Sahel Mali, EUTM Mali, and EUNAVFOR MED. These EU engagements provide a welcome overlap and complementarity with the EU Member States' engagements. One EU Member State is worthy of recognition and praise for solid efforts in this regard: France (together with Portugal) has ensured a much needed and influential presence in the Central African Republic (launching the military operation *Sangaris*, 2013–2016) and in Mali, Niger and Chad in the framework of the on-go-

[67] UK, House of Lords, cit., §80-82.

[68] UK, House of Lords, cit., §67.

[69] UK, House of Lords, cit., §63.

[70] UK, House of Lords, cit., §63-64.

[71] UK, House of Lords, cit., p. 23.

[72] UK, House of Lords, cit., p. 23.

ing military operation *Barkhane*[73] launched 2014. This operation followed operation *Serval*, which was launched in mid-2013 at the request of the Malian government.

IV. The EU as a Rule-based Community: What Role for Public International Law?

Is International Law relevant to managing the influx of EU-bound economic migrants departing from the Western and Central Mediterranean routes? The simple short answer is yes. However, in this section, I will argue that (i) fundamental Public International Law instruments are less relevant than they could be and (ii) that fundamental Public International Law instruments risk becoming increasingly less relevant to the management of economic migrants.

One recent characterisation of the International Law regime and the system affording protection to refugees argues that individuals are offered 'a false choice between three dismal options: encampment, urban destitution, or perilous journeys', this being a vital characteristic of the 'dysfunctional refugee system'[74] in place today.

On the one hand, this is partly because the admission and expulsion of third-country nationals is still under the purview of the State. On the other hand, so-called economic migrants are not considered in the framework of the 1951 Refugee Convention. Notwithstanding the many advances in International Law regarding the international subjectivity of the individual – such as in the fields of human rights or international responsibility – when the individual is an economic migrant, then he is chiefly at the mercy of the sovereign State's policies regarding immigration and the way they translate into law.

The 1951 Convention follows the premise of Article 14 of the 1948 Universal Declaration on Human Rights that 'everyone has the right to seek and enjoy in other countries asylum from persecution'. Therefore the 1951 Convention predicates the circumstance of persecution as the justification for granting admission to a specific category of individual – the refugee – into a given State where he/she is entitled to a particular set of rights and enjoys special protection under International Law.

Other relevant Articles of the 1951 Convention are: Article 31, regarding the non-application of criminal sanctions to refugees by reason of irregular entry or stay, and non-application of restrictions to refugees' freedom of movement beyond necessary; Article 32, limiting the right of expulsion of the host State to reasons of national security and public order; and, Article 33, regarding *non-refoulement*.

The 1967 Protocol Relating to the Status of Refugees (Article I, § 2) widens the application of the 1951 Convention to situations other than post-WWII. Regarding the Eastern Mediterranean route, it is worth pointing out that while Turkey is part of both the 1951 Convention and the 1967 Protocol, this State limits the scope of applicability of the legal regime (i) to persons who have become refugees as a result of events occurring in Europe, and (ii) by the introduction of a reservation clause 'to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey'[75]. In effect, rejecting the application of an international minimum standard, and thus raising the issue of the complete application of the 'safe third country' criteria (see below).

A sizeable number of migrant deaths occur at sea along the central Mediterranean route. For the period from 2014 to 2018 (May 2018)[76], data from the International Organization for Migrations (IOM) sets the total number of deaths in the three main routes (Western, Central and Eastern Mediterranean) at about 15,984 anonymous individuals – men, women and children – out of which 13,860 deaths occurred along the central Mediterranean route.[77]

Different international legal instruments foresee and refer to a *duty to render assistance*. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) foresees on Article 98 the duty to 'render assistance to any person found at sea in danger of being lost' and the duty of every coastal State to 'promote the establishment, operation and

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[73] See <https://www.defense.gouv.fr/english/operations/barkhane/dispositif> accessed 4th April 2019.

[74] Betts, Collier (n 21) 56.

[75] 1967 Protocol to the 1951 Convention, *Declarations and Reservations*, Turkey, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&lang=en#EndDec> accessed 4th April 2019.

[76] IOM, *Deaths by Route*, available at: <https://missingmigrants.iom.int/region/mediterranean> accessed 4th April 2019.

[77] IOM, *ibid.*

maintenance of an adequate and effective search and rescue service'. Previously, Regulation 33 of the 1974 International Convention for the Safety of Life at Sea (SOLAS) referred to obligations and procedures in distress situations. In contrast, the 1979 International Convention on Maritime Search and Rescue (SAR) referred to the establishment of search and rescue regions and the development of national search and rescue services to support efficient search and rescue operations. Hence, even though the large majority of accident victims in the central Mediterranean are risking their lives by sailing in ships without nationality (unregistered and not flying any State flag, per UNCLOS article 91), and in some instances, not even seaworthy (engine or wind-powered) craft, every other State – as per UNCLOS article 98 – has an obligation to 'require the master of a ship flying its flag, in so far as he can do so without danger to the ship, crew or the passengers' to render assistance to persons in need of it.

Further legal questions that intersect the issue chiefly concern the fact that legal concepts (mainly *refugee, asylum seeker, returned refugee, internally displaced person, returned IDP, stateless person*) intersect with non-legal concepts (mainly *economic migrant*, but also *ecological migrant*)[78]. The essential distinction for the purposes of the present article is between the concept of *refugee* (and *asylum seeker*) and the concept of (economic) *migrant*. Whereas the first one is escaping a circumstance of total insecurity characterised by immediate or constant threats to life, the economic migrant is moving on from a broader insecurity circumstance, better understood with reference to the concept of human security.[79] In other terms, although both individuals see the EU as a beacon light of hope, the refugee's primary objective is safety. In contrast, the economic migrant's primary objective is certainty and stability. This distinction, in turn, is crucial for public perceptions of migration and how national governments and public administrations act.

In considering the broad topic of human mobility,[80] Article 13 of UN General Assembly Resolution 217 A (III) (Universal Declaration of Human Rights) of 10 December 1948 affirms every individual's right to 'leave any country, including his own, and to return to his country', while Article 14 states that 'everyone has the right to seek and enjoy in other countries asylum from persecution'. Conversely, the admission and expulsion of third-country nationals remain, overall, a matter under the purview of the State. So, although the 1948 UN Universal Declaration of Human Rights refers to an individual's 'right to leave any country, including his own, and to return to his country' (Article 13), and whereas the freedom of movement of workers is enshrined in Article 45 TFEU, the fact of the matter is that International Law does not foresee a right to entry for immigration purposes.

State powers in matters of admission and expulsion of third-country nationals are derived directly from State sovereignty and not from any rule of International Law. In other words, the admission of third-country nationals is an internal jurisdiction matter for the State, and national public authorities may exercise a discretionary choice essentially between three options (i) not to admit the entry of aliens, or (ii) to admit certain aliens and not others, and/or (iii) to impose conditions for entry of aliens into the territory of the State. Furthermore, legal restrictions to the economic activity of third-country nationals may flow from a State's national economic policies: for example, as to the acquisition of real or movable property or undertaking certain professional activities.

In similar terms, the State has discretionary powers regarding the expulsion of third-country nationals, as the right to expel is an inherent State right flowing directly from State sovereignty. Nevertheless, there are limitations flowing from International Law: (i) the State must exercise the power to expel a third-country national in accordance with the principle of good faith; and (ii) resorting to the concept of 'public order'[81] as a basis for expulsion must be in line with human rights standards.

The treatment of third-country nationals is a contentious International Law topic, intersecting the economic migrant issue. The controversy stems mainly from a difference in State posture: while some States support the argument that an international minimum standard exists, other States accept only the existence of a national standard regarding the treatment of third-country nationals by a State. The support given to both positions presents a difficulty in ascertaining the rules of International Law in this matter.

Irrespective of the position adhered to, there is general agreement that International Law is not the Alpha and Omega regarding the oversight of the treatment of aliens by national public administrations. On the one hand, accord-

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[78] R. Plender, *Issues in international migration law* (Brill Nijhoff 2015, Leiden).

[79] Betts, Collier (n 21).

[80] G. C. Bruno, I. Caruso, B. Venditto, *Human mobility: migration from a European and African viewpoint* (Rubbettino 2013, Soveria Mannelli).

[81] C. Eagleton, 'International Law and "Public Order"' (1939) 33 The American Journal of International Law 545–549.

ing to both standards, there is the acceptance of limitations regarding the expropriation of third-country nationals. On the other hand, national public administrations may use power at their exclusive discretion concerning other areas.

The 2014 ILC Draft Articles on Expulsion of Aliens are an additional element to consider in this section. Whereas the right of a State to expel a third-country national is recognised, Article 3 of the Draft Articles clearly points to limitations flowing from human rights norms and other International Law norms. Looking at related concepts, while 'constructive expulsion'[82] seems of doubtful relevance for the issue of economic migrants, the concept of 'disguised expulsion' is worth pointing out. Prohibited by Article 10 of the 2014 ILC Draft Articles, 'disguised expulsion' is defined as 'the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law'. Therefore, the departure must be the intended outcome of an omission or an action by the State.

Overall, there are, of course, limitations to the use a State may make of the inherent right to admit and expel third-country nationals, mainly the general principle of good faith in International Law and International Law rules relating to human rights.

Recalling the conclusion that the current refugee regime is 'dysfunctional'[83], the relevance of International Law towards managing the more comprehensive *economic migrants*' phenomenon is displayed by a recent trend, individuals resorting to regional protection mechanisms such as the ECHR. Juxtaposing the 1948 Declaration to the regional protection afforded by the 1950 ECHR, it is worth noting the 1948 Declaration's overall degree of general abstraction characterising the articles' wording, allowing at times for contradictory interpretations of it. In other terms, the 1950 ECHR regime foresees a mechanism for applying and implementing the respective legal norms, thus allowing diverse interpretations of them to be apparent in practice through ECtHR case law. The fact that an individual was able to resort to the ECtHR in search of redress was an extraordinary innovation introduced by the ECHR.

Focusing on economic migrants, the ECHR has been gaining relevance as the case law on *non-refoulement*, and the prohibition of collective expulsion is increasing. Convictions of EU Member States by the ECtHR on the grounds of violation of the prohibition of collective expulsion (ECHR, Protocol n. 4)[84] symbolise a trend by individuals towards seeking regional human rights protection mechanisms, as *economic migrants* are not protected by traditional International Law mechanisms such as the 1951 Refugee Convention and the 1967 Protocol. Finally, recalling the considerations above on administrative retention centres, the relevance of International Law is further evidenced in ECtHR case law based on violations of Article 3 of ECHR: in five different cases, the ECtHR considered that national detention practices do, in certain circumstances, violate the ECHR, convicting France in cases relating to the detention of children for purposes of deportation.[85]

How should the EU then position itself, looking forward to 2025? First, EU Member States should be mindful that International Law should be understood as being in continuous mutation, resulting from the interaction between diverse sources and small actions by great powers. A recent blow to the international system was the decision by the United States to end participation in the Global Compact on Migration on the grounds that there are 'numerous provisions that are inconsistent with US immigration policy and the Trump Administration's immigration principles'[86]. This is most unfortunate, especially given that the New York Declaration for Refugees and Migrants is a political dec-

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[82] *International Technical Products Corp. v Iran* (1985) or *Yeager v Iran* (1987) 17 Iran – USCTR 92 at 106.

[83] Betts, Collier (n 21).

[84] ECtHR, *Hirsi Jamaa and Others v Italy* (Application no. 27765/09) [ECHR Article 3 of the Convention and Article 4 of Protocol No. 4]; *ND v Spain* and *NT v Spain* (nos. 8675/15 and 8697/1), where the Court held, unanimously, that there had been a violation of Article 4 of Protocol No. 4.

[85] ECtHR cases: *AB and Others v France* (Application no. 11593/12) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *A.M. and Others v France* (Application no. 24587/12) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *RC and VC v France* (Application no. 76491/14) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *RK and Others v France* (Application no. 68264/14) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; and, *RM and Others v France* (Application no. 33201/11) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016.

[86] US Mission to the UN, *United States Ends Participation in Global Compact on Migration*, December 2, 2017. <https://usun.state.gov/remarks/8197> accessed 4th April 2019.

laration aiming at achieving international consensus in 2018 towards a global compact on refugees and, a global compact for safe, orderly and regular migration,[87] therefore aiming to reinforce the existing International Law framework.

Perhaps in a move toward reinforcing International Law, some scholars wonder how the responsibility to protect doctrine might be applied to render assistance to overwhelmed EU Member States.[88] At present, short-term solutions – chiefly enlisting the cooperation of State and non-State actors – are having a significant short-term impact: migrant arrivals to the EU have decreased from 390,432 in 2016 and 186,768 in 2017 to an impressive number of 33,205 in 2018 (updated as of 23 May 2018)[89]. Worryingly, as the EU Member States are no longer severely pressured by overwhelming numbers of arrivals, emboldened unilateral actions by key EU transit countries risk undermining the international legal framework and the Union's cohesion.

The argument can, thus, be made that externalising the management of migration seems to contribute toward a broader trend of weakening belief in International Law regarding State practice in specific domains (mainly the use of force and human rights). More specifically, policy options such as the EU-Turkey agreement or bilateral engagements by EU Member-States with countries in the Sahel region coupled with other legal and policy options, 'including stricter definitions of refugee, interdictions to entrance, interceptions, offshore processing, and application of "safe third country" rules'[90], in part resulting in a weakening of the protection provided by International Law (precisely, refugee status). With explicit reference to the safe third country criteria,[91] some authors speak of a 'nominal adherence to these criteria has often been deemed sufficient, even when there are evident gaps between formal acceptance of principles and their realisation in practice'[92].

Finally, the migration challenge summons a revision of the distinct types of barriers to external influences that national Administrative Law regimes have; for example when applying International Law instruments. Here this quote by Paul Craig is especially poignant:

'It is the increased vertical interaction between the national, EU and global levels that prompts courts to react and think hard about the terms on which they are willing to accept 'external' norms. To be sure, there is a sense in which courts have been doing this for hundreds of years, as attested to by the developed jurisprudence concerning the relationship between national and International Law. There is nonetheless little doubt that sensibilities have been heightened by the creation of the EU and the ECHR, both of which demand of contracting states a degree of acceptance over and beyond what is demanded by most international treaties. There is equally little doubt that the tensions have become more acute because of increased globalisation, which has the consequence that many rules that bind at national level de jure or de facto emanate from international and transnational bodies.'[93]

From a broader perspective, the humanisation of International Law[94] seems to be at odds with the sovereign State. Faced with globalisation and a fundamental threat to its internal affairs posed by overwhelming numbers of individuals – whose hopeful expectations no Western State is capable of confounding in a globalised world – the State is reverting to its traditional role as the most relevant International Law subject, characterised by assertions of national sovereignty.

Looking to 2025, the question then becomes how the EU27 should seek to address the migration challenge at a time when – for national governments of exogenous States – sovereignty is most effectively displayed by controlling who and what may enter the territory of the State?

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87 UN, A/RES/71/1, § 21.

88 A. Balthasar, 'Internationaler Schutz im Wandel – vom II. Weltkrieg über den Ost-West-Konflikt zum Nord-Süd-Konflikt' (2017) 24 Journal für Rechtspolitik 214–239.

89 IOM, *Migration Flows – Europe,* available at <http://migration.iom.int/europe/> accessed 4th April 2019.

90 Ambrosini (n 59) 67.

91 This concept was foreseen in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, repealed by 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, JO L 180 de 29.6.2013, p. 60–95.

92 B. Frelick, I. M. Kysel, J. Podkul, 'Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190–220, p. 146.

93 P. P. Craig, *UK, EU and global administrative law: foundations and challenges* (Cambridge University Press 2015, Cambridge, UK) 9.

94 A. Peters, *Beyond human rights: the legal status of the individual in international law* (Cambridge University Press 2016, Cambridge, UK).

V. Conclusion: Which Scenario for the EU27 by 2025?

Much like the fairy in J. M. Barrie's *Peter Pan,* International Law instruments depend upon belief translated into State practice*, lest they wither away and die*. Should International Law increasingly be perceived as less effective, divisions caused by unilateral actions are sure to undermine the European Union, beset by the exit of the United Kingdom and the isolationism of the United States.

Considering the medium-term, the chance is there of a 'Tinkerbell syndrome' befalling International Law regimes relevant to the management of (economic) migrants. As the previous section attempts to demonstrate, a new light is being cast on the larger issue of the international subjectivity of the individual. In this regard, it is worth noting a series of unilateral actions taken by certain key States, mainly the US withdrawal from the Global Compact on Migration; Italy's active cooperation with non-State actors in Libya; and several EU Member States' hostile posture toward external migrants (e. g. denouncing the refugee quota system), as well as intra-EU migrants (questioning the pillar of EU integration that is the freedom of movement of workers).

In briefly assessing the contemporary international order, three defining characteristics seem to set the period ranging from the end of 2010 (marking the beginning of the so-called *Arab Spring*) until the end of 2017 apart from other periods in modern history: (i) the number of crises in the world has never been so high; (ii) current crises take place simultaneously, and (iii) the duration of such crises extending throughout years (v. g., the situation in Syria goes back to 2011, or the Ebola outbreak in West Africa of 2014–2016). Consequently, not only the State but also the sub-State level suffer impacts to different degrees of events to which they did not contribute. Importantly, climate change will constitute a significant security and development challenge, as '[e]nvironmental degradation will continue to provoke humanitarian disasters, including desertification and floods of increasing magnitude' affecting the Sahel, as '[h]umanitarian crises due to water scarcity and related food and health emergencies, some affecting millions of people, may become recurrent, particularly in some parts of Africa'[95].

The sense that State is increasingly unable to control the flows of globalisation[96] emerges a trend broadly identified by the European Commission's White Paper. Increasing societal resilience in the EU Member States requires distinct levels of public administration (at the central level and local level) will be forced to deal with the impact of events originating in other regions of the world. Tellingly, the topic of economic migrants confirms how different cities of EU Member States are confronted with complex situations that strain local resources, clearly demonstrating the current phenomenon of *glocalisation*[97] – i. e., an intersection of the global and local levels.

The short-term effects of the EU's short-term strategy of engaging with countries of origin and countries of transit in the Sahel region and beyond will not last – especially concerning the central Mediterranean region. The European Strategy and Policy Analysis System (ESPAS) report entitled 'Global Trends to 2030' highlights turbulence and chaos in the EU's neighbourhoods as a central challenge for the Union while identifying that "Europe will continue to be a destination country for migrants from the neighbourhood"[98].

Most interestingly, in similar terms to Betts and Collier, the report stresses that the 'global humanitarian system shows signs of reaching a breaking point'[99], thus increasing the likelihood of further migration pressures. Looking at the consequences of globalisation in Africa, the report further highlights that: '[t]he tendency of globalisation to shut out some countries (such as Congo), and even some large regions (such as the Sahel), is a major threat and a source of weakness for the international system'[100]. Another critical trend analysis document estimates the world's population of migrants to approach 300 million by 2030 while also predicting that migration patterns will 'become increasingly

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[95] EUISS, *Global trends 2030 – Citizens in an interconnected and polycentric world* (European Union Institute for Security Studies 2011, Paris) 6.

[96] J. Bergé, 'La circulation totale au-delà du contrôle : hypothèse de risque invisible' (2017) 2 Risques Études et Observations 40-54.

[97] G. Ritze, Z. Atalay, *Readings in globalisation: key concepts and major debates* (Wiley-Blackwell 2010, Chichester, West Sussex, U.K. – Malden, MA).

[98] ESPAS, *Global Trends to 2030: Can the EU meet the challenges ahead?* (ESPAS 2014, Brussels) 16.

[99] Ibid., 69.

[100] Ibid., 42.

"circular" so that migrants will maintain ties with their countries of origin while strengthening transnational movements'[101].

Therefore, while scenario 5 of the Commission's White Paper would seem the most appropriate, one must conclude that it is currently unfeasible. No one would dispute that great benefits would come from implementing part of scenario 5, namely cooperation on border management, asylum policies and counterterrorism. However, looking at the other policy options, 'speaking with one voice on all foreign policy issues' seems out of reach, while 'creating a European Defence Union' – PESCO, if successfully implemented, is limited to military capability conservation and development – seems to have a lower added value towards the management of economic migrants. Even if we limit the policy issues to the 'management of economic migrants', and even if limiting the analysis to a group of Mediterranean basin EU Member States, devising a common approach seems an increasingly difficult challenge in the wake of the Italian elections and the uncertainty regarding a future government.

So, to successfully manage economic migrants, the EU cannot do *more with less*. Recalling the assessment of Operation Sophia, the House of Lords Report stated that: 'While Operation Sophia plays a role in gathering intelligence and in search and rescue, this is not sufficient to justify a Common Security and Defence Policy mission.'[102] Crucially, to guarantee an acceptable level of security in the Sahel region and the central Mediterranean region, the EU will be required to do *more with more*.

In this regard, recalling how the 2030 trends' document does not seem to be reflected in the Commission's White Paper, the case is there for a "Scenario 4 ½" – for Schengen, migration & security, and foreign policy & defence – that would have the EU cooperating more on border management and counterterrorism and engaging further on ESDP operations aimed at supporting EUMS efforts already underway, thus downgrading the two most challenging policy measures. Crucially, the EU 27 would have to agree to maintain the leading role in development aid, too.

Another critical aspect of a "Scenario 4½" is the continued pursuit of the Commission's policy of working toward forging agreements with weakly secure states in the Sahel region. The EU Member States should then move towards granting more financial support destined to improve the implementation of such agreements on the ground.

Development aid policy is essential for successfully implementing "Scenario 4 ½", and the EU should continue to play the leading role in ODA disbursement. As a comparison, the UNHCR's budget for 2017 was US 3.9 billion,[103] a number far below the financial requirement for 2019 of US 7.3 billion, 40% of which is set to be absorbed by UNHCR's five most extensive operations in 2018 (in order Iraq, Lebanon, Turkey, Syria and Uganda)[104]. In 2017, only Denmark, Luxembourg, Norway, Sweden and Britain met the United Nations' target of official development assistance (ODA) spending of 0.7% of national income on development aid.[105]

Finally, looking at Administrative Law, it seems clear that, irrespective of the Commission's White Paper scenario for the EU27 by 2025, further transfers of powers from national public administration to EU authorities are on the horizon. The management of economic migrants being a global topic, one might consider what impacts it should have on International Law in order to address the phenomenon of global governance. If one considers that the flows of globalisation often and increasingly clash with public authority controls, the problems posed by the growing ineffectiveness of State control might perhaps be debated with recourse to Global Administrative Law theory – and *international public law*[106].

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[101] EUISS (n 93) p. 45.

[102] UK, House of Lords, cit., §100.

[103] UN, *Contributions to UNHCR – 2017 as of 14 February 2018, in US dollar*, available at <http://www.unhcr.org/partners/donors/5954c4257/contributions-unhcr-budget-year-2017.html> accessed 4th April 2019.

[104] UN, *UNHCR's 2018-2019 Financial Requirements*, <http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter_Financial.pdf> accessed 4th April 2019.

[105] OECD, *Development finance data*, available at <http://www.oecd.org/dac/financing-sustainable-development/development-finance-data/> accessed 4th April 2019.

[106] A. v. Bogdandy, M. Goldman, I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 European Journal of International Law 115–145.