

# Legal Responses to the European Union's Migration Crisis

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## I. INTRODUCTION

The European Union (“EU”) imposes on itself its own constraints in which it performs as an external actor, and yet, there is little acknowledgment of this imposed constraint. It is the post-2015 migration crisis, an unexpected occurrence, which has brought the fields of EU external relation law and EU migration law together. Europe’s external border, on both land and sea, has tightened through legal acts of non-traditional nature, namely, the resort to securitisation and militarisation. Challenges, such as mass irregular migration,<sup>1</sup> require more than just individual responses from a few selected Member States that are directly affected by the issue. With thousands of people attempting to reach the shores of EU Member States, facing grave peril on their journey, such as the mass drownings in the Mediterranean Sea,<sup>2</sup> the EU and its Member States cannot, and have not, stood idly by. Instead, decisive action on a number of fronts has become an imperative undertaking.

These responses to the migration crisis have been caught up in a multileveled legal architecture that, whilst complementary, also competes with other interested stakeholders. Local responses, coupled with national efforts at Member State level, and determination of supranational coordination, make for a paradigm that is difficult to disentangle. The level of human smuggling and wider trafficking activity in the more troubled regions of the European neighbourhood pose new challenges that defy traditional convention. In addition, the profiteering from such unscrupulous activity poses a significant threat to the rule of law in the EU and its Member States more generally. Certain Member States, such as Greece and Italy, have faced a two-fold setback of the financial crisis, and have been subjected to migration flows into the EU which, being on the EU’s geographic periphery, have been unprecedented. Accordingly, the EU would likely do everything it possibly can to stem the flow of irregular migration from states not within the EU, also referred to as third states, to alleviate such problems.

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1. Throughout this article, the term “migrant” or “migrants” is used to define persons who have not met the legal categorisation as either an asylum-seeker or a refugee, and does not wish to cast distinctions as to whether persons are the aforementioned two categories, or so-called economic migrants. Similarly, “traffickers” and “smugglers” will be used as terms with a presumption of innocence.

2. Migrants in the Mediterranean: *The numbers nightmare*, THE ECONOMIST (Apr. 18, 2015), <https://www.economist.com/news/europe/21648674-ever-more-people-are-drowning-while-trying-get-europe-numbers-nightmare> [<https://perma.cc/N2WM-YCVV>].

### A. Problematising Law and Migration

Within the EU framework, there are legal complexities that need to be resolved when actionable responses are being considered. For example, at its broadest level, the external actions of the EU can be conducted from either one of two general categories of legal bases; that of the Common Foreign and Security Policy (“CFSP”) (including the Common Security and Defence Policy (“CSDP”)), or *non*-CFSP, the other areas of EU external relations. In simpler terms, CFSP can be said to be akin to an intergovernmental method of “foreign policy” through the Council of the European Union, and the European Council. Conversely, *non*-CFSP external action is the supranational method, encompassing the regular array of institutions within the Union’s actionable framework. Landmark judgments from the Court of Justice of the European Union in external relations cases centering on CFSP, such as in the *ECOWAS* (also known as “*Small Arms and Light Weapons*” or “*Legal Basis for Restrictive Measures*”),<sup>3</sup> *Mauritius*,<sup>4</sup> *Tanzania*,<sup>5</sup> *H v. Council*,<sup>6</sup> and *Rosneft*,<sup>7</sup> have all progressively framed the legal dimension of the EU’s foreign, security, and defence policy actions in recent years in response to multifaceted challenges, particularly with regard to the nature and scope of international agreements that the EU enters into with third states.<sup>8</sup>

In response to the migration crisis, the EU has deployed, in close coordination and with the approval of its Member States, a number of measures under the foreign, security, and defence legal basis (CFSP), one of which was *Operation Sophia*.<sup>9</sup> Similarly, there was also *non*-CFSP measures

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3. Case C-91/05, *Commission v. Council*, ECLI:EU:C:2008:288 [hereinafter *ECOWAS*].

4. Case C-658/11, *Parliament v. Council*, ECLI:EU:C:2014:2025 [hereinafter *Mauritius*]; see Graham Butler, *Pinpointing the Appropriate Legal Basis for External Action*, 6 EUR. J. RISK REG., 323, 323, 325 (2015).

5. Case C-263/14, *Parliament v. Council*, ECLI:EU:C:2016:435 [hereinafter *Tanzania*].

6. Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:569.

7. Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty’s Treasury and Others*, [hereinafter *Rosneft*] ECLI:EU:C:2017:236; see Graham Butler, *A Question of Jurisdiction: Art. 267 TFEU Preliminary References of a CFSP Nature*, 2 EUR. PAPERS 201, 201–08 (2017).

8. See Graham Butler, *The Coming of Age of the Court’s Jurisdiction in the Common Foreign and Security Policy*, 13 EUR. CONST. L. REV. 673 (2017).

9. Council Decision (CFSP) 2015/778, of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean, art. 1, 2015 O.J. (L 122), 31, 31, 32. Council Decision (CFSP) 2015/972, of 22 June 2015, Launching the European

utilised to stem the flow of migrants, and bring about lasting stability measures in the wider European neighbourhood. With these actions, a number of particular developments have been seen. Firstly, learning fast on its feet, the EU's soft approach in coordinating Member State activities through bodies like *Frontex* has led to increased prominence and positioning of state actors in tackling the migration crisis.<sup>10</sup> Secondly, on the other end of the spectrum, the hard face of the EU military response reflects a different approach, demonstrating the potential inability of the EU in challenging scenarios that require responding to immediate encounters in a timely and adequate manner. For the migration crisis, the need to combine foreign, security, and defence policies through CFSP; as well as migration matters through the Area of Freedom, Security, and Justice, through *non*-CFSP, are central to the discussion of the EU's full approach in the migration crisis.

### *B. Issues at Stake*

The internal and external dimension of the EU's responses through the foreign, security, and defence policy spheres (CFSP), versus the migration policies (*non*-CFSP), and the overlap between the two, potentially brings forth a legal conundrum. This nexus of policy fields stemming from different legal bases, as well as stretching the premise upon which the EU's Treaties are crafted, makes new activity permissible, albeit on questionable legal grounds. This article brings together the conundrums that the EU and its Member States are facing from a number of different legal and policy angles. Section 2 explores actions that have been taken in response to the migration crisis, and Section 3 examines the cooperative measures that have been taken in the context of existing legal bases. Section 4 observes the Union's coordinated approaches, whilst section 5 determines the future legal issues associated with EU foreign policy law and EU external relations law responses to migration issues.

By examining the EU's response to the migration crisis through this framework, legitimate questions can thus be raised about the appropriateness of particular legal instruments for achieving public policy goals. As demonstrated, when foreign, security, and defence policy matters are brought together in a coherent legal framework, it can reveal to what extent the tools at each actors disposal ensure that democracy, rule of law, and basic

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Union Military Operation in the Southern Central Mediterranean, art. 1, (EUNAVFOR Med), (2015 O.J. (157)), 51.

10. See Council Regulation 2007/2004 of Oct. 26, 2004, Establishing a European Agency for Management of Operation Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1, 1 (EC). This agency was referred to as *Frontex*. *Report on the evaluation and future development of the FRONTEX Agency*, at 2, COM (2008), 67 final (Feb. 13, 2008).

fundamental rights can be maintained, and even strengthened, in times of crisis.

## II. RESPONSES TO THE MIGRATION CRISIS IN CONTEXT

The pretext for any discussion of the legal responses to the migration crisis, and particularly the EU foreign, security, and defence policy responses, is to understand the wide variety of views held by both the national governments within the Council and among the citizens of respective Member States. Conflicting responses to large migration flows from outside the EU have the capacity to cause large-scale inaction on a pan-European level. The paradoxical nature of how Europe ended up in a situation with hundreds of thousands of people running and swimming to its borders and shores is much different to that of the previous century. Over the duration of a forty-year period in the early twentieth century, Europe saw its own continent engage in not just one, but two world wars that tore the sole and essence of Europeanism apart. It was only the external assistance, both during and after the wars, that helped European nations return to their feet,<sup>11</sup> coupled with entering into international dialogue in the form of the predecessor of the EU,<sup>12</sup> in order to get itself on a path of economic interdependency between Member States.

### A. *The Changing Times*

Coupling this early twentieth century tragedy of war, with emigration from Europe to the new world the century before, illustrates that Europe was a place in which people left for new lives elsewhere. This is in contrast to the twenty-first century, where Europe now has the opposite situation, where it has become a destination for migrants coming from other regions of the world. With the *Convention Relating to the Status of Refugees 1951*, EU Member States, like all other signatories, are in a position to allow people arriving on their territory apply for international protection. Although not within the Convention, many states take additional measures to assist, or make it easier for these persons to apply for international

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11. For example, after World War II, U.S. President Truman signed for the establishment the European Recovery Program which provided billions in financial and material assistance to western and southern European states. *See* Economic Cooperation Act of 1948 (Marshall Plan), Pub. L. No. 472, 67 Stat. 137.

12. After World War II, but before the European Union, the same found EU Member States were members of the European Coal and Steel Community ("ECSC").

protection. In fact, there is nothing preventing states (or international organisations) from taking proactive measures to ensure the path to reaching European territory is made any easier.

The ongoing responses to the migration crisis have profound implications for the EU and its Member States. Within the EU, the intersection of legal and policy fields are coming to the fore, and deserve a closer examination in light of such contemporary events. The migration crisis has bonded together many fronts of the EU: diplomacy; civilian response; and military tactics, in order to stem and further prevent the flows of migrants. The EU's progress has to be looked at in the context of whether the adopted approaches are seeking to produce short or long-term effects. While interim solutions are possible, only longer-term solutions will prevent similar crises, such as handling large-scale migration into Europe, from occurring in the future. The external dimension of the EU, and how it applies its laws beyond its boundaries, is an intriguing course of study, and one that has serious implications for how external crises come about, how responses are initiated, and ultimately executed.

With the emergence of an external dimension to European integration comes both expected and unexpected quagmires of law and policy that are constantly evolving in a polity that is consistently chartering a new course, despite criticism that it is bringing forward criminal law aspects of irregular migration.<sup>13</sup> The EU, for better or worse, has become a true global player, and is reaching new heights for the external relations of an international organisation. Recalling that the EU is not a state,<sup>14</sup> this alone places a handicap on it that takes a toll on multilateral negotiations. However, the EU being in search of an increased global role has pushed foreign policy and migration closer together.<sup>15</sup> The EU is always in a stronger position when it is engaging with third countries on a bilateral basis, and thus, has had to develop competence in its external policies. Accordingly, whilst migration has fit into this framework of external action, and has been situated in the primary field of Justice and Home Affairs, it has nonetheless become an important subject in EU foreign policy.

The migration crisis is of such a nature that it requires responses touching upon the outer capabilities of the EU and its Member States in controlling its external borders, its internal borders, and mechanisms for

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13. Thomas Spijkerboer, *Minimalist Reflections on Europe, Refugees and Law*, 1 EUR. PAPERS 533, 538 (2016), [http://www.europeanpapers.eu/it/system/files/pdf\\_version/EP\\_eJ\\_2016\\_2\\_9\\_Agenda\\_Thomas\\_Spijkerboer\\_1.pdf](http://www.europeanpapers.eu/it/system/files/pdf_version/EP_eJ_2016_2_9_Agenda_Thomas_Spijkerboer_1.pdf) [<https://perma.cc/94N6-NZZT>].

14. Opinion 2/13, Opinion of Court, *Accession of the European Union to the European Convention on Human Rights*, ECLI:EU:C:2014:2454, at ¶ 49.

15. PAUL JAMES CARDWELL, *EU EXTERNAL RELATIONS AND SYSTEMS OF GOVERNANCE: THE CFSP, EURO-MEDITERRANEAN PARTNERSHIP AND MIGRATION* 140 (2009).

coping with such unexpected events. The paradox of the present migration crisis is that the migration of persons between *internal* EU borders is not problematic *per se*, but rather, an activity that has been encouraged for EU citizens. However, very little has been done to broach the issue in regards to persons coming from outside the Union, *externally*, into the Union. This was in part due to the fact that migration of non-EU persons was not within the scope of Union law in its formative decades.

The chain of events leading up to the migration crisis were also interlinked. Migration movements across the Mediterranean to Europe have been recognised long before the recent migration crisis.<sup>16</sup> Even before the certainty that the Treaty of Lisbon would be fully ratified, perhaps as a result of the fate of the Constitutional Treaty, there were instances of migrants crossing the Mediterranean Sea, many of whom lost their lives through drowning.<sup>17</sup> However, the number of deaths were comparatively low in contrast to the numbers of deaths from 2014 onwards. Accordingly, individual Member States were in a position to cope with this small-scale maritime migration, and unilaterally dealt with such issues by providing individual support to third countries on a bilateral basis.

### B. Primary Union Law

Migration as a term within Union law should be recognised as one referring to third country nationals from non-EU Member States, and thus, should not be confused with EU citizens availing of their free movement and citizenship rights as enshrined within EU primary law. The legal backdrop of EU action is bolstered by a number of reflective policy documents to guide the relevant actors in dealing with migration from the perspective of foreign policy. June 2016 saw the publication of the Union's *Global Strategy* by the European External Action Service ("EEAS"),<sup>18</sup>

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16. *European Security Strategy: A Secure Europe in a Better World*, at 2, 3 (Dec. 12, 2003), available at [www.consilium.europa.eu/media/30823/qc7809568enc.pdf](http://www.consilium.europa.eu/media/30823/qc7809568enc.pdf) [<https://perma.cc/H5VN-AR8Y>].

17. See, e.g., Violeta Moreno-Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, 23 INT. J. REFUGEE L. 174, 174–77 (2011); Thomas Spijkerboer, *Stretching the Limits. European Maritime Border Control Policies and International Law*, in EXTERNAL DIMENSIONS OF EUROPEAN MIGRATION AND ASYLUM LAW AND POLICY 387, 388 (Marleen Maes et al. eds., 2011).

18. *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy*, EUR. EXTERNAL ACTION SERV. (June

which has acknowledged the need to join up internal and external policies in order to be in a position to manage the phenomena of migration from outside the EU.<sup>19</sup> Migration, despite having legal bases within the internal sphere of Union law, is a policy area that is not strictly internal, and nor is it based on the foreign policy provisions of the Treaties, but rather, is externally focused.<sup>20</sup> Notwithstanding the attempts within EU primary law to lay the basis for common policies to exist across the EU, coherent external policies remain an elusive, and distant reality.

Migration is not a simplistic area of law from an EU perspective. Migration and other migratory measures began to develop within the sphere of primary law in 1999 with the promulgation of the Treaty of Amsterdam. Prior to this, Member States had complete discretion as to how their asylum procedures would work. The initial attempt for such inclusion of migration was with the Treaty of Maastricht, when it was placed within the then third pillar.<sup>21</sup> In external relations by contrast, the Treaty of Maastricht proposed splitting the external affairs of the Union across three pillars. Bringing together policies across pillars was a challenge,<sup>22</sup> and had many legal constraints. Today's picture of the EU Treaties are slightly different, as migration policy is to be found within the AFSJ provisions of the Treaties, which, formally speaking, has been depillarised. For the United Kingdom, Ireland, and Denmark, each retain varying degrees of "opt-outs" that came about in the Treaty of Maastricht-era, and retained in subsequent Treaties.<sup>23</sup> The last substantial amendment to Union law regulating migration was in the Treaty of Lisbon that came into effect in 2009,<sup>24</sup> which set out the competences held by the EU either exclusively or on a shared basis between the EU and its Member States, and identifies where the EU plays a supporting role.

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2016), [https://eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf) [<https://perma.cc/AXG2-LUPR>].

19. *Id.* at 50.

20. Paul James Cardwell, *Rethinking the law and new governance in the European Union: the case of migration management*, 41(3) EUR. L. REV. 362, 368 (2016).

21. See Treaty on European Union (Treaty of Maastricht) 191/01, 1992 O.J. (C 191) 35, 1–110. The Maastricht Treaty created a Union based on three separate pillars of powers: (1) the European Communities, (2) CFSP, and (3) cooperation in the field of justice and home affairs ("JHA"). Asylum policies were covered within the JHA 'pillar.'

22. STEPHAN STETTER, EU FOREIGN AND INTERIOR POLICIES: CROSS-PILLAR POLITICS AND THE SOCIAL CONSTRUCTIONS OF SOVEREIGNTY 113 (2007).

23. See Martin Hedemann-Robinson, *The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark: The "Opt-in Opt-outs" Under the Treaty of Amsterdam*, in LEGAL ISSUES OF THE AMSTERDAM TREATY 289, 289–302 (David O'Keefe & Patrick M. Twomey eds., 1999).

24. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 1, 135 [hereinafter Treaty of Lisbon].

Prior to the Treaty of Lisbon, and for some time previously, the issue of migration of non-Union citizens to EU Member States was cast as an area where intergovernmental coordination had taken hold. Yet even major reforms with the Treaty of Lisbon could not fully dismantle the effects of the pillars. CFSP issues, such as tactful political affairs, high politics, and wider issues of defence, were still sheltered from the normal external relations competences, such as trade and development. Foreign policy has the potential to be linked with different policies, but the legal structuring of the EU is designed in such a way that it is not meant to be crossed.<sup>25</sup> However, the Treaties do not precisely delimit policy areas, nor impose a wall between policies or policy areas. This in turn entails the potential for the widening and broadening of different policies, depending on their deployment.

### C. Bases of Law

Typically speaking, given the dynamic power structures that exist between both CFSP and *non*-CFSP legal bases, and the categories of competencies, compromises need to be reached to achieve agreement on any set of policies. The distribution of competencies between the EU and its Member States impose a juxtaposition of an EU that is either able to tackle real issues, versus that of a helpless entity that is solution-less for modern and contemporary challenges. So much is new for the EU in terms of its external action in both CFSP and *non*-CFSP spheres in the post-Lisbon era with EU institutions, particularly the Parliament and the Council having engaged in disputes over the correct legal bases for international agreements.<sup>26</sup> In the *non*-CFSP sphere, it is the first time that the primary law of the EU,

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25. “The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.” Consolidated Version of the Treaty on European Union art. 40, 2012 O.J. (C 326) 13, at [hereinafter TEU post-Lisbon].

26. See generally Stanislas Adam, *The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era*, in THE EUROPEAN UNION IN THE WORLD: ESSAYS IN HONOUR OF MARC MARESCEAU 65, 65–86 (Inge Govaere et al. eds., 2014); Andrea Ott, *The Legal Bases for International Agreements Post-Lisbon: Of Pirates and The Philippines*, 21 MAASTRICHT J. EUR. & COMP. L. 739, 739, 752 (2014); Butler, *supra* note 8.

through treaties, has an explicit legal basis for the external dimension of visa, asylum, and immigration matters. This was quite a development, given that many years,<sup>27</sup> there existed a theory that CFSP was undermining EU competences—that of *non*-CFSP external relations. As a result, overlap between these policy areas, perceived or actual, became a legal issue.

One of the cruxes of the migration crisis has been that the EU's external borders are controlled by Member States, and not by the EU itself. It would be untrue to say that there is an "EU border" given that the Schengen Area only covers twenty-two of the twenty-eight Member States,<sup>28</sup> and therefore, there is no singular cohesive external border that separates EU from non-EU territory on its eastern and southern boundaries. Furthermore, neither does the EU control the internal borders between Member States, which is again left to the individual Member States to decide their political arrangement for borders within the context of the Schengen Border Code.<sup>29</sup> Although the EU does not have formal, direct control of the Schengen borders, it does play a central role in shaping the rules of these borders. For instance, the EU does have significant policy capabilities with regard to persons who are on the territory of an EU Member State, including legislative powers on settlement, residence, and returns. The sustainability of the Schengen Area, the system of agreements where irrespective of physical borders, a person may exercise the ease of travel within Europe without being subjected to border checks, has consistently been questioned throughout the course of the migration crisis. While the internal land borders are lenient, the tight external land borders operated by the Schengen Area have resulted in migrants opting for risky and circumventive routes, assisted by smugglers. In response, the EU and Member States have refocused their attention. Rather

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27. See generally C.W.A. Timmermans, *The Uneasy Relationship Between the Communities and the Second Union Pillar: Back to the 'Plan Fouchet'?*, 23 LEG. ISSUES ECON. INTEGR. 61, 61–62 (1996); Roberto Baratta, *Overlaps between European Community Competence and European Union Foreign Policy Activity*, in THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL RELATIONS 51, 51–76 (Enzo Cannizzaro ed., 2002).

28. The United Kingdom and Ireland are not a part to the Schengen, holding a formal treaty 'opt-out' for a the existence of Common Travel Area between themselves. See generally Bernard Ryan, *The Common Travel Area Between Britain and Ireland*, 64 MOD. L. REV. 855, 855–56 (2001). See generally Graham Butler, *Not a "Real" Common Travel Area: Pachero v. Minister for Justice and Equality*, (2015) 54 *Irish Jurist* 155, 155–64. The four other EU Member States who are not yet part of the Schengen Area, but will eventually be admitted are Bulgaria, Croatia, Cyprus, and Romania. The Schengen Area also includes four non-EU Member States, which are Iceland, Liechtenstein, Norway, and Switzerland.

29. Regulation 562/2006, of the European Parliament and Council of 15 March 2006 on Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), 2006 O.J. (L105) 1, 2.

than just looking at land borders, attention has also been heeded to the Union's external borders on the high seas.<sup>30</sup>

### III. COOPERATION AND LEGAL BASES

In order to bring about an effective response to the migration crisis, the EU has resorted to measures beyond those that granted in the migration articles of the Treaties. A noticeable method of indirectly influencing (and curbing) irregular migration from third states into the European neighbourhood has been external engagement primarily through direct engagement with third states on a bilateral basis, as opposed to the alternative, which would be in multilateral fora. With the EU having varied success as to its recognition in other international organisations,<sup>31</sup> the bilateral option has, to date, proven to be more effective. Many of the non-EU States also affected by the migration crisis have traditionally come within the remit of the European Neighbourhood Policy ("ENP"). The ENP was established in a time when there was relative harmony in migratory terms on the EU's external borders. Since then, there have been a number of uprisings that commenced in Tunisia,<sup>32</sup> reflecting a bubbling undercurrent that finally made its way into the mainstream of public dissatisfaction with the legal and political regime in these neighbouring States. As a result, these States experienced a variety of different outcomes: the maintenance of the existing status quo, transition phases, new settlements, and even, transitions to democracy.

The outcomes might not have been what the revolutionaries had hoped for, but the changes in governance demonstrate wider significance to keen observers of the region. Some of these North African states have borne the brunt of the migration flows from further afield, and by being on the fringe of the EU's own territory, a mass number of migrants have accumulated on the continent's periphery. Thus, it is widely viewed as an example why policy responses have been necessary. In this light, strengthening bilateral agreements with third states has been a key component in the EU's contribution to effectively counteracting the migration crisis. The legal personality of

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30. Tanja E. Aalberts & Thomas Gammeltoft-Hansen, *Sovereignty at sea: the Law and Politics of Saving Lives in Mare Liberum*, 17 J. INT'L REL. & DEV. 439 (2014).

31. See RESEARCH HANDBOOK ON THE EU'S ENGAGEMENT WITH INTERNATIONAL ORGANISATIONS (forthcoming 2019).

32. See ANTONI ABAT I NINET & MARK TUSHNET, *THE ARAB SPRING: AN ESSAY ON REVOLUTION AND CONSTITUTIONALISM* (2015). Jan Wouters & Sanderijn Duquet, *The Arab Uprisings and the European Union: In Search of a Comprehensive Strategy*, 32 Y.B. of Eur. L. 230 (2013).

the Union is now guaranteed through Article 47 of the TEU, and its capacity to enter into international agreements is provided by Article 216(1) of the TFEU, closely governed by procedures laid down in Article 218 of the TFEU. Engaging with third states for the purposes of a migration partnership can cause a two-fold effect. Firstly, their focus in the short-term can be on tackling immediate measures before them, such as the prevention of immediate drownings in the Mediterranean Sea. However, secondly, a deeper approach, such as eliminating root causes of migration, can be focused on securing long-term collaboration that benefits both parties evenly. It appears that a more visionary view only becomes clear when a crisis period arises.

#### A. *The Neighbourhood*

Egypt is just one of the States in question which has an Association Agreement (“AA”) with the EU.<sup>33</sup> As a framework agreement covering relations between the EU and Egypt, it allows for structured dialogue between the two partners. An identified area for closer cooperation has been gathering data on migration, to better determine the problem, before correctly diagnosing the identified issue. The EEAS, a body primarily charged with structuring CFSP-related matters, has, in a “*non-paper*” suggested some *non*-CFSP proposals, such as highlighting the potential for closer contact between the European policy body, Europol, and Egyptian policing and border authorities.<sup>34</sup> The EU’s legal responses of reaching “agreements” with third states, from whom migrants are originating from, are difficult to legally categorise, given they are not always international agreements or treaties in the traditional sense. Such arrangements are not opened, negotiated and ultimately concluded as per the procedure in Article 218 of the TFEU for international agreements.<sup>35</sup>

The EU is not just concluding bilateral arrangements with North African states, as such action is also extended to regions further afield. For instance, in Mali, the EU has adopted measures to combat irregular migration under the auspices of foreign policy. In December 2016, the Dutch Foreign

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33. Council Decision 2004/635, of 21 April 2004 Concerning the Conclusion of a Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, 2004 O.J. (L 304).

34. Non-Paper: Options on Developing Cooperation with Egypt in Migration Matters, EUROPEAN EXTERNAL ACTION SERVICE (2016).

35. Consolidated Version of the Treaty on European Union & Treaty on the Functioning of the European Union art. 218, 2012 O.J. (C 326) 13 [hereinafter TFEU] (“Without prejudice to the specific provisions laid down in Article 207 [of the TFEU], agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.”).

Minister concluded a “*joint communiqué*” on behalf of the EU with Mali,<sup>36</sup> flowing from the Dutch Presidency of the Council of the European Union in the first half of 2016. The Foreign Minister of the Netherlands was acting on behalf of the High Representative of the Union for Foreign Affairs and Security Policy.<sup>37</sup> This *joint communiqué* was not a formal legal agreement, and thus, no institutions of the EU were involved, and accordingly, their consent was not needed. As part of the *joint communiqué*, EU Member States would be in a position to return Malians who have failed to demonstrate their asylum status within the EU back to Mali.<sup>38</sup>

The conclusion of such an arrangement, in the form of a *joint communiqué* with a third state, using a Member State as opposed to an EU institution as a negotiator, demonstrates two things: first, the unspecific delineation for what separates *foreign* policy and *migration* policy, and second, the lengths to which actors in Europe will go to effectively combat the overall migration crisis. Third states such as Mali do not blindly sign-up for receiving the return of their nationals without something in return. Instead, tangible returns are provided *quid-pro-quo*, as they engage in an arm wrestling match with their EU negotiators. In the present example, Mali would, in return, receive from the EU a general fall-back provision: capacity-building. The EU would be committed to improve and increase Mali's capabilities in relation to its security infrastructure, building upon the existing CSDP mission.<sup>39</sup>

It remains important to recall the distinction between a political arrangement and an international agreement, with the former mandating no legal effects, whilst the latter has a strong procedural aspect, with the firm intention of creating binding legal effects. A *joint communiqué* deliberately avoids the formal conclusion of an international agreement and instead is seen as a political arrangement between one EU Member State and a third state. The legality of such an approach can certainly come into question when it is considered whether such deliberate shirking is in the spirit of European cooperation, which is based on the rule of law. Problems with the *joint communiqué* with Mali emerged quickly, whereby Mali upon receipt of two individuals deported from France in December 2015, sent the two individuals

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36. Koenders concludes migrant return agreement with Mali for EU, GOVERNMENT OF THE NETHERLANDS (Nov. 11, 2016, 4:30 PM), <https://www.government.nl/latest/news/2016/12/11/koenders-concludes-migrant-return-agreement-with-mali-for-eu>.

37. *Id.*

38. *Id.*

39. Council Decision (CFSP) 2014/219, of 15 April 2014 on the European Union CSDP Mission in Mali (EUCAP Sahel Mali), 2014 O.J. (113).

back to France, owing to questions being raised over whether such persons were even Malian citizens at all.<sup>40</sup>

### B. The CFSP-Migration Link

CFSP in the Treaties is unspecific *per se*, and its scope has consistently been delimited for its breadth by progressive judgments of the Court of Justice since its inception. This is notwithstanding the fact that the Treaties primarily envisage that it is to cover “*all areas of foreign policy*.”<sup>41</sup> Given this lack of specificity for what CFSP actually entails, it could be seen as a flexible policy instrument,<sup>42</sup> and there is no definitive time for when it is to be utilised as a legal basis for EU measures. Given an expansive interpretation afforded to it by the High Contracting Parties to the Treaties, it may be said that CFSP could be stretched as far as to include migration policies. Previously, CFSP possessed specific objectives, but the Treaty of Lisbon merged both CFSP and *non*-CFSP objectives, thus presenting, in theory, a more uniform set of objectives to cover the breadth of EU external action, regardless of legal basis. This merger in and of itself can thus be said to have the potential to either widen or narrow CFSP, depending on the context to which an act capable of having legal effect was challenged. The present Article 21 of the TEU therefore encompasses all external objectives of the Union, cutting across both CFSP and *non*-CFSP.

Every individual action of the EU requires a legal basis. The underlying legal basis for action is furthermore predicated on the need for the action to be amenable to judicial review.<sup>43</sup> The linking of CFSP and the prevention of certain individuals from entering the EU has been done before. Whether this absolutely fits the legal category of “migration” as per the Treaties is debatable, but through CFSP, the intergovernmental method has been used to introduce travel bans on persons of interest in the pursuance of EU foreign

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40. *Mali Sends Back Migrants Deported by France*, BBC NEWS (Dec. 30, 2016) <http://www.bbc.com/news/world-africa-38467244>.

41. TEU post-Lisbon, art. 24(1).

42. See Sebastian Graf Von Kielmansegg, *The Common Foreign and Security Policy—A Pool of Flexibility Models*, in FLEXIBILITY IN THE EU AND BEYOND: HOW MUCH DIFFERENTIATION CAN EUROPEAN INTEGRATION BEAR? 109–22 (Thomas Giegerich et al., eds., 2017).

43. “[M]ust be based on objective factors which are amenable to judicial review.” A phrase used by the Court of Justice time and again, but first seen in, Case C-45/86, *Commission v. Council*, 1987 E.L.C.I 163, at ¶ 11. See Anthony Arnall, *Legal principles and practical politics*, 12 EUR. L. REV. 448, 448–51 (1987).

policy,<sup>44</sup> and has been done continuously following events Libya in 2011,<sup>45</sup> and in Ukraine in 2014.<sup>46</sup> These CFSP Decisions,<sup>47</sup> albeit within the ambit of EU foreign policy, set out in Articles 21-46 of the TEU, have distinct *non*-CFSP elements.

A prohibition on certain persons travelling to and from the EU entails everything from the prevention of entry to the motion of transit of persons in the Union. It furthermore imposes a prohibition, decided unanimously by the Member States through CFSP, on issuing visas and other forms of travel documents to such persons. Thus, a formal link between CFSP and migration policies is established, with recourse to a CFSP-only legal basis. It is not just CFSP and its “*specific rules and procedures*” that have been entangled with migration.<sup>48</sup> Other elements of EU external relations may too be caught up in migration related matters. Such policies include development cooperation, and other associated EU’s competences, as found in Articles 208-213 of the TFEU for relations with third countries. And yet, the Union going as far back to the Treaty of Rome had consideration for development with third countries, but was not a policy in itself, *per se*.<sup>49</sup> Furthermore, whilst development cooperation still makes its way slowly towards better compatibility with other policies of the Union,<sup>50</sup> the coupling and complete linking of development cooperation and migration has not happened, despite both being areas that are *non*-CFSP.

For international agreements containing numerous actions, there arises questions about the appropriate legal basis of such agreements. The preference for a CFSP legal basis, or a “Community” legal basis pre-Lisbon, was desirable according to the *ECOWAS* judgment.<sup>51</sup> The Court of Justice said

44. Bernd Martenczuk, *Migration Policy and EU External Relations, in EU MIGRATION LAW: LEGAL COMPLEXITIES AND POLITICAL RATIONALES* 100 (Loïc Azoulai & Karin De Vries eds., 2014).

45. Council Decision 2011/137/CFSP, of 28 February 2011 concerning Restrictive Measures in View of the Situation in Libya, 2011 O.J. (58/33).

46. Council Decision 2014/145/CFSP, of 17 March 2014 concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, 2014 O.J. (78/16).

47. Prior to the Treaty of Lisbon, there was several types of legal acts adoptable under CFSP, such as Joint Actions, and Common Positions, amongst others.

48. Art. 24(1) of the TFEU.

49. Steve Peers, Case C-268/94, Portugal v. Council, (development policy), [1996 E.C.R. 1-6177 (Full Court), 35 COMMON MARK. LAW REV. 539, 539-55 (1998).

50. See Morten Broberg & Rass Holdgaard, *EU Development Cooperation post-Lisbon: Main Constitutional Challenges*, 40 EUR. L. REV. 349, 349-70 (2015).

51. ECOWAS, *supra* note 3.

that building on the *acquis communautaire* was more suited by adopting a measure on an EC legal basis (now TFEU), rather than a TEU legal basis.<sup>52</sup> The Treaty of Lisbon abolished the preference for a Community legal basis, thus, this point by the Court of Justice became moot after December 2009. Taking into account the *ECOWAS* judgment, could the same line of thinking by the Court of Justice be applied to a CSDP mission if the substance of *Operation Sophia* was challenged on appropriate legal basis grounds? Post-Lisbon, CFSP and *non*-CFSP legal bases cannot encroach upon one another according to Article 40 of the TEU,<sup>53</sup> and if pressed on clarifying this ability for mutual non-encroachment, it is a question the Court of Justice would be reluctant to answer. The stuttering of handling dual legal bases,<sup>54</sup> and the uncertainty surrounding the possibility to use more than one legal basis for given action(s), given procedural incompatibility between CFSP and *non*-CFSP, is traceable to a principle feature of the legal structure of EU external relations, to the extent that both legal bases have never been specifically delimited.

### C. *Operation Sophia*

Underlining the basis for the EU to act is driven forward on the grounds that combatting and eliminating human trafficking and smuggling networks is a worthy endeavour. Thus, a combative role has been taken by the EU in the form of a military mission. *Operation Sophia*, a CSDP military mission, was established through a CFSP Decision of the Council.<sup>55</sup> This CSDP mission, through CFSP, fully intended for cooperation, but not integration with *non*-CFSP aspects of EU policy. Saying that, CSDP has a multidisciplinary outlook.<sup>56</sup> According to Article 8(3) of the Decision,

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52. *Id.*

53. TEU post-Lisbon art. 40: “The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.”

54. See Geert De Baere, *From “Don’t Mention the Titanium Dioxide Judgment” to “I Mentioned it Once, But I Think I Got Away with it All Right”*: Reflections on the Choice of Legal Basis in EU External Relations after the Legal Basis for Restrictive Measures Judgment, in CAMBRIDGE Y.B. OF EUROPEAN LEGAL STUD. 537–62 (Catherine Barnard et al. eds., 2013).

55. Council Decision (CFSP) 2015/778, of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean, 2015 O.J. (L 122), *supra* note 9.

56. For a recent study from an international relations perspective, see MICHAEL E. SMITH, EUROPE’S COMMON SECURITY AND DEFENCE POLICY: CAPACITY-BUILDING, EXPERIENTIAL LEARNING, AND INSTITUTIONAL CHANGE (2017).

*Operation Sophia*, “shall cooperate. . . as appropriate, conclude arrangements with other Union agencies and bodies, in particular Frontex, Europol, Eurojust, European Asylum Support Office and relevant CSDP missions.”<sup>57</sup> The very existence of *Operation Sophia* within the Mediterranean has a number of effects. It firstly, increases the security presence of the EU in the region. Its mandate envisages three key phases of the military mission. For example, it is to, “support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law.”<sup>58</sup> The subsequent second phase envisages a two-fold response, i) to partly “conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking. . .” in international waters,<sup>59</sup> but also, ii) under the premise of a UN Security Council Resolution or with the consent of a third State, to do the same in the territorial waters of a non-EU State. The third phase permits Union-mandated forces to, “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.”<sup>60</sup> The full breadth of the potential of *Operation Sophia* was thus clarified at an early stage, but how it would work in practice remained to be seen, given that the second and third phases required some level of third-party recognition for EU action, rather than the EU acting coherently with its own determined aims in mind. One of the underlying features of international law is the concept of jurisdiction. By operating an EU military mission in the Mediterranean Sea, the EU is indirectly ensuring that non-EU nationals never enter the jurisdiction of an EU Member State in the first place.

One of the common migration routes across the Mediterranean Sea has been the *Central Mediterranean Route* (“CMR”), which is the maritime route between Libya to Italy. The popularity of this crossing point can be attributed to, amongst other things, networks of smuggling operatives in Libya.<sup>61</sup> *Operation Sophia* was not the first CSDP mission in the greater

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57. Council Decision (CFSP) 2015/778, of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean, art. 8 § 31, 2015 O.J. (L 122).

58. *Id.* at art. 2 § 2(a).

59. *Id.* at art. 2 § 2(b).

60. *Id.* at art. 2 § 2(c).

61. See *Central Mediterranean Route*, FRONTEX, <http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/> [http://perma.cc/JR8U-NK25].

European area to attempt tackling the root underlying causes of migration. Rather, it follows the failure of the EU's Integrated Border Management Assistance Mission in Libya ("EUBAM Libya"), established in 2013,<sup>62</sup> to support Libyan authorities. Notwithstanding the continued existence of the CSDP mission to date,<sup>63</sup> EUBAM Libya activities have largely stalled given *Operation Sophia's* active presence. The launching of a military operation by the EU however will not suffice. Coupled with the Union's CFSP response to the migration crisis has been the need for non-EU states to progressively undertake greater efforts to patrol their own maritime borders. As a result, the EU has assisted in upskilling local coastguard forces. For example, in Libya, *Operation Sophia* agreed with Libyan officials, two years into its mandate, to engage in the training of the local coast guard.<sup>64</sup> This engagement with the substantive migration aspects of EU policy are making the CFSP-migration link all the more apparent.

The EU's foreign, security, and defence responses to the migration crisis have unilaterally been to deter future flows of irregular migration coming to the shores of EU Member States. However, whilst appearing to be a deterrent, they are also potentially acting as an incentive for further incursions of irregular migrants. The Operation Commander of *Operation Sophia* stated in a report to the Political and Security Committee of the EU ("PSC") and the EU Military Committee ("EUMC") that the operation under his command has not contributed to additional migration in the Union via the CMR.<sup>65</sup> He went on to say that, of all the Search and Rescue ("SAR") missions taking place in the region, his operation is responsible for a mere thirteen percent of all rescued migrants.<sup>66</sup> The growing together of the EU's foreign, security, and defence cooperation (CFSP) on a separate track compared to other policies (*non*-CFSP) have thus seen a legal phenomenon occur, in that the fields of policy that were intended to operate apart, have

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62. Council Decision 2013/233/CFSP, of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya, (EUBAM Libya), (2013 O.J. (138/15).

63. Council Decision (CFSP) 2016/1339, of 4 August 2016 amending and extending Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), (2016 O.J. (L 212/111) (extending the applicability of Decision 2013/233, on the EUBAM Libya to August 2017).

64. See *Operation Sophia: signed the agreement on Libyan Coast Guard and Navy Training*, EEAS (Aug. 23, 2016), [http://eeas.europa.eu/archives/csdp/missions-and-operations/eunavfor-med/news/20160823\\_en.htm](http://eeas.europa.eu/archives/csdp/missions-and-operations/eunavfor-med/news/20160823_en.htm) [<http://perma.cc/JM7S-DK5T>]; *Operation Sophia: package 2 of the Libyan Navy Coast Guard and Libyan Navy training launched today*, EEAS (Jan. 1, 2017), [https://eeas.europa.eu/headquarters/headquarters-homepage/19518/operation-sophia-package-2-libyan-navy-coast-guard-and-libyan-navy-training-launched-today\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/19518/operation-sophia-package-2-libyan-navy-coast-guard-and-libyan-navy-training-launched-today_en) [<http://perma.cc/K3KG-XWWK>].

65. European External Action Service, *EUNAVFOR MED Op SOPHIA—Six Monthly Report*, 1 January-31 October 2016 (14978/16).

66. *Id.*

in practice naturally come closer together. Taken collectively, this puts additional pressures on the rule of law in the EU that threatens the democratic institution should policies fail to meet the levels of effectiveness for which they were intended. Whereas scepticism has been expressed by one national parliament as to the possible success of the EU's *Operation Sophia*,<sup>67</sup> the foreign, security, and defence responses to the migration crisis to date have yet to see their full potential.

The real challenge is now how future EU foreign, security, and defence policies, and the array of legal instruments at the EU's disposal will be utilised to ensure migration flows are adequately controlled within the strict confines of both EU and international law. Once *Operation Sophia* was put into place in the Mediterranean, the principle of loyalty kicked-in. The establishment of this undertaking by the EU, unanimously in the Council, ensured that under Article 4(3) of the TEU, that Member States are not in a position to undermine the EU's adopted position. Thus, individual actions by Member States outside the EU's established framework is prohibited, as they would undermine a determined aim of the EU derived from its primary and secondary law. It can thus be claimed that the non-appearance of CFSP-specific objectives makes CFSP a more difficult area to defend,<sup>68</sup> and conclusively determine. Article 22(1) of the TEU allows the European Council to adopt decisions relating to both CFSP and *non*-CFSP on "*strategic interests and objectives*" of the Union, thereby reinforcing the future of external relations by bringing the fields of CFSP and *non*-CFSP closer together.

Just how forceful has there been an effort to make a distinction between foreign, security and defence measures (CFSP), versus that of migration measures (*non*-CFSP), from a legal perspective? To date, the Court of Justice has not had to make this distinction with regards to the migration crisis, and generally, it has not been able to look into the substantive measures founded upon a CFSP legal basis, given its curtailed jurisdiction. Furthermore, Article 43(1) of the TEU sets the guidance for what CSDP

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67. For the full report, see HOUSE OF LORDS E.U. Committee, *Operation Sophia, The EU's Naval Mission in the Mediterranean: An Impossible Challenge* 41 (2016).

68. Geert De Baere, *The Basics of EU External Relations Law: An Overview of the Post-Lisbon Constitutional Framework for Developing the External Dimensions of EU Asylum and Migration Policy*, in EXTERNAL DIMENSIONS OF EUROPEAN MIGRATION AND ASYLUM LAW AND POLICY 166 (Marleen Maes et al. eds., 2011).

within the framework of CFSP is to be.<sup>69</sup> Even though this includes a broad range of matters, it does not appear to cover migratory matters. Notwithstanding its few competencies in the field, the EU continues to strive for greater action in security when Member States agree to it. With an elaborate organisational subsystem homed within the Council, including the PSC,<sup>70</sup> the Union's CSDP missions of military and civilian nature, are primarily based in regions further afield than on the Union's immediate periphery.<sup>71</sup> In Delegations of the European Union,<sup>72</sup> the permanent diplomatic missions of the EU located in third countries, staffed by officials from the EEAS, are under the direction of the High Representative of the Union for Foreign Affairs and Security Policy ("High Representative"). Officials within these missions handle external issues that are of both a CFSP and *non*-CFSP nature. Accordingly, 2017 saw the deployment of two additional roles to relevant Delegations in relevant third states, with the addition of a European Migration Liaison Officer, and a European Border and Coast Guard Agency Liaison Officer.<sup>73</sup>

The overlapping nature of national competences, EU competences and competences shared between the two provide an ever-debatable discussion on the breadth of competencies, and the "creep" of them. Ultimately, in light of a lack of migration measures in *non*-CFSP legal bases to effectively combat the migration crisis, it is foreign, security and defence measures that are coming to the rescue of the EU for being a legal basis to respond. CFSP is being conscripted to resolving matters of migration; a situation which is legally questionable and raises problems of adequate and appropriate legal bases. Furthermore, this, in turn, is bringing forward

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69. TEU post-Lisbon art. 43: "The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.")

70. For an overview of the work of the PSC, see Daniel Thym, *The Intergovernmental Branch of the EU's Foreign Affairs Executive: Reflections on the Political and Security Committee*, in *THE EUROPEAN UNION AFTER LISBON: CONSTITUTIONAL BASIS, ECONOMIC ORDER AND EXTERNAL ACTION* 517–32 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2012).

71. See PANOS KOUTRAKOS, *THE EU COMMON SECURITY AND DEFENCE POLICY*, chs. 5, 6 (2013).

72. Graham Butler, *The European Union and Diplomatic Law: An Emerging Actor in Twenty-First Century Diplomacy*, in *DIPLOMATIC LAW IN A NEW MILLENNIUM* 324 (Paul Behrens ed., 2017).

73. *Annex to the Communication from the Commission to the European Parliament, the European Council and the Council: Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration*, at 3–4, COM (2016) 960 final (2016).

the wholesome nature of Union law, where it is becoming increasingly difficult to mark different policies apart, making them increasingly indistinguishable.

#### IV. A COORDINATED APPROACH?

In light of the migration crisis being fraught with indifference on what type of EU responses should be, the national responses have been stark. The underlining EU purpose, despite differentiated internal opinion, has been to circle the square of different policies across the legal framework to deliver coherent policies.<sup>74</sup> Thus, the retreat outside of formal coordination responses through EU structures has been to return to national prerogatives of selectively derogating from the Schengen Border Code, and patrolling maritime boundaries. Thus, where coordination has occurred, it has been light. *Frontex* (“*Frontières extérieures*,” or the European Agency for the Management of Operational Cooperation at the External Borders”) has been active during the migration crisis, with varying degrees of impact and effectiveness. While it has made significant attempts towards establishing a common policy that secures a sustained external Schengen border with adequate controls,<sup>75</sup> the agency has been overwhelmed, understaffed, and underfunded. Notwithstanding *Frontex*'s legal mandate set down in EU Regulations,<sup>76</sup> the migration crisis alone has led directly to the dissolution of this body. It was reincarnated as the new European Border and Coast Guard Agency as of mid-2016,<sup>77</sup> and aimed towards more effectively coordinating and managing a coherent EU response. This reawakening led to the continuation of all existing activities, but provided the agency with

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74. Adam Łazowski & Steven Blockmans, *Constitutional foundations and EU institutional framework: seven years of working with Lisbon reform*, in RESEARCH HANDBOOK ON EU INSTITUTIONAL LAW 30 (Adam Łazowski & Steven Blockmans eds., 2016).

75. For a thorough analysis, see Roberta Mungianu, *Frontex: Towards a Common Policy on External Border Control*, 15 EUR. J. MIGR. & L. 359, 359–95 (2013).

76. See Bernard Ryan, *Council Regulation (EC) No 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, in EU IMMIGRATION AND ASYLUM LAW: A COMMENTARY 195–237 (Kay Hailbronner & Daniel Thym eds., 2nd ed. 2016).

77. 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, (2016) O.J. (251), 1.

an expanded mandate, including supporting national border forces of Member States when facing capacity challenges, and an increased ability to implement standards for the EU's external borders.

### A. Military Action

The EU has longed to be a prominent security actor. In contrast to *Frontex*, the EU military operation was launched the previous year in 2015 to combat human smuggling and trafficking operations.<sup>78</sup> Its principle purpose, reflected in its mandate, is to identify, capture, and dispose of vessels used or suspected of being used by migrant smugglers or traffickers.<sup>79</sup> *Operation Sophia*, as previously indicated, has saved over 16,000 lives in its initial months of being enacted.<sup>80</sup> Over a year later in July 2016 at the NATO Summit in Warsaw, the Summit's communiqué announced "*Operation Sea Guardian*" to complement the EU's *Operation Sophia*, and Frontex actions.<sup>81</sup> With the EU coordinating a response through naval missions long before other international partners, its previous naval mission in the Gulf of Aden in *Operation Atalanta*,<sup>82</sup> has proven that the EU had experience in conducting naval operations for alternative purposes, providing many learnt lessons.

Member States have a variety of different human rights conditions.<sup>83</sup> For the EU, it must comply with the EU Charter of Fundamental Rights, in addition to the overall principles of international law. EU external relations law and Union law more generally complies with international law, although the legal orders and their respective compatibility have been

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78. Council Decision (CFSP) 2015/972, *supra* note 9.

79. See Council Decision (CFSP) 2015/778, of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean, 2015 O.J. (L 122), *supra* note 9, at art. 1.

80. See *Communication from Member of the Commission Vera Jourova*, at 1, COM (2016) 5112 final (Jan. 8, 2016). For a full overview of the EU mission, its mandate, and legal constraints, see Graham Butler & Martin Ratcovich, *Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea*, 85 NORDIC J. INT'L L. 235, 235–59 (2016).

81. Press Release, North Atlantic Treaty Organization, Warsaw Summit Communiqué: Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw ¶ 91–93 (July 9, 2016).

82. See Daniel Thym, *Transfer Agreements for Pirates Concluded by the EU—A Case Study on the Human Rights Accountability of the Common Security and Defence Policy*, in THE LAW AND PRACTICE OF PIRACY AT SEA: EUROPEAN AND INTERNATIONAL PERSPECTIVES 167–82 (Panos Koutrakos & Achilles Skordas eds., 2014).

83. See Nicolas Sölter, *The Abyss of Complexity: Some Remarks on European and German Law in the Migration Crisis*, 23 EUR. PUB. L. 41, 45 (2017).

under intense scrutiny.<sup>84</sup> This is particularly true after the *Kadi* saga that has been debated for over a decade.<sup>85</sup> Notwithstanding this overarching issue, the United Nations Security Council (“UNSC”) Resolution 2240 (2015)<sup>86</sup> and Resolution 2292 (2016),<sup>87</sup> authorised the inspection and potential seizure of boats in international waters that are suspected of trafficking persons to European shores in haphazard unsuitable vessels. These tightly worded Resolutions have limited the scope of potential for EU action, given that the internal CFSP Decision envisaged a broader mandate, but the Resolutions to date have not authorised *Operation Sophia* to enter the waters of the Libyan State. All EU external action tackling the migration crisis is bound by the principles of *non-refoulement*.<sup>88</sup> This of course, leads to debates surrounding the questionable activity regarding the EU's negotiating response with neighbouring states for effectively battling the migration crisis. Accountability and human rights compatibility are acknowledged issues in Union law.<sup>89</sup> It is worth reiterating the Court of Justice's own words when it comes to respect for human rights. In *Kadi*, dealing with *inter alia*, restrictive measures (sanctions) through both CFSP and *non*-CFSP systems, the Court of Justice said, citing older case law, that, “respect for human rights is a condition of the lawfulness of [EU] acts. . . and that measures incompatible with respect for human rights are not acceptable in the [EU].”<sup>90</sup>

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84. Compare Rass Holdgaard, *Principles of Reception of International Law in Community Law*, 25(1) Y.B. EUR. L. 236, 263–314 (2006) with Ramses A. Wessel, *Flipping the Question: The Reception of EU Law in the International Legal Order*, 35(1) Y.B. EUR. L. 533, 533–61 (2016).

85. Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council and Commission; Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P, Commission and Others v. Kadi, ECLI:EU:C:2013:518. See also Gráinne De Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L. L.J. 51, 1–50 (2010).

86. S.C. Res. 2240 (Oct. 9, 2015).

87. S.C. Res. 2292 (June 14, 2016).

88. See generally ROBERTA MUNGLIANU, *FRONTEX AND NON-REFOULEMENT: THE INTERNATIONAL RESPONSIBILITY OF THE EU* (2016).

89. See generally Stian Øby Johansen, *Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?*, 66 INT'L. COMP. L. Q. 181, 181–207 (2017).

90. Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council and Commission, ECLI:EU:C:2008:461.

## B. The Largest Neighbour

One of the responses to the migration crisis has been to engage one of the Union's largest neighbours, Turkey, to take effective and preventative measures against third country nationals from reaching the EU in the first place. The methods of how the EU and its Member States have engaged with Turkey was put under the spotlight in a recent case before the EU's General Court. It is notable that the EU-Turkey arrangements between 2015 and 2016 had been partly concluded outside EU structures, thereby ensuring executive leverage through the Council, and thus being kept away from the oversight and involvement of both the Parliament, and the Court of Justice. Or at least, that was what was attempted. The manner in which the EU-Turkey arrangements have been conducted has been a mix of both EU Member States acting at the European Council in its capacity as an EU institution, and separately, with Heads of State and Government meeting within the European Council.<sup>91</sup>

The *NF and Others* case, filed at the General Court in 2016, queried the legality of the "EU-Turkey Statement" that the 'European Council' agreed to, and contested whether the statement was an international agreement.<sup>92</sup> It was only since the Treaty of Lisbon that the European Council has been recognised as a standalone institution,<sup>93</sup> which since *Pringle*, allows the EU Courts to review its actions.<sup>94</sup> The European Council, defending itself for the first time as an institution in its own right before the EU judiciary, claimed that the General Court did not have the necessary jurisdiction to hear the case, given its own Rules of Procedure.<sup>95</sup> Whilst Article 263 of the TFEU states that measures by Union actors in principle come within the scope of the EU Court's jurisdiction, it also must be in line with the intention to produce legal effects.<sup>96</sup> Given the subject in *NF and Others* was a press release (the "EU-Turkey Statement") perhaps the initially broad thinking behind Article 263 of the TFEU is not wide enough to capture all aspects of activity within the wider understandings of Union activity. With a press release on its own website,<sup>97</sup> the European Council did not claim authorship of the statement, and therefore, should not be

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91. See *Meeting of the EU heads of state or government with Turkey*, EUR. COUN. (Nov. 11, 2015), [www.consilium.europa.eu/en/meetings/international-summit/2015/11/29](http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/29).

92. Joined Cases T-192/16, T-193/16, & T-257/16, *NF, NG and NM v. European Council*, ECLI:EU:T:2017:128, ECLI:EU:T:2017:129, ECLI:EU:T:2017:130.

93. Art. 13(1) and 15 TEU post-Lisbon.

94. Case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756 ¶ 31.

95. See Rules of Procedure of the General Court, 2015, O.J. (105) 43.

96. See TFEU art. 263.

97. Council of the EU Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016).

considered a defendant.<sup>98</sup> The use of the European Council website to exert the positions of the Heads of State and Government meeting within the European Council demonstrates the overlapping nature of what resulting documents and exertions belonged to who. The argument of the European Council that it was not complicit is not entirely convincing. Yet, the General Court did show some hesitation in reaching such a decision given the “ambiguous wording” of the “EU-Turkey Statement.”<sup>99</sup>

If the General Court's approach to the Rules of Procedure would be similarly adopted by the Court of Justice on appeal, it would continue to chisel away at the maintenance of EU external action as a whole, including legal tools to support responses to the migration crisis. International agreements concerning migration matters should be done through the Union's Ordinary Legislative Procedure. While the EU-Turkey Statement was not an international agreement,<sup>100</sup> it would have been *non-CFSP* in nature, although at no point was Article 218 of the TFEU during the opening, negotiating, and concluding of an international agreement referenced. Rather, the Member States were keen to avoid this at all costs, and maintain the matter as an informal arrangement. An appeal of the Order of the General Court to the Court of Justice deserves some merit given that the EU-Turkey Statement in question involved the inclusion of the Commission, which will ultimately monitor the implementation of the arrangement. It could even be said that the chamber of the General Court had clearly not read the ERTA doctrine,<sup>101</sup> whereby the Council cannot merely act as a facilitator for Member States, but rather, as an institution in its own right. Given this hands-off approach used by the General Court on the arrangement itself, and the appeal that has been lodged,<sup>102</sup> the Court of Justice will play a pivotal role in the shaping of the EU's responses to tackling migration

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98. Joined Cases T-192/16, T-193/16, & T-257/16, NF, NG and NM v. European Council, ECLI:EU:T:2017:128, ECLI:EU:T:2017:129, ECLI:EU:T:2017:130 ¶ 37.

99. *Id.*

100. See Gloria Fernández Arribas, *The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem*, 1 EUR. PAPERS 771, 1097–1104 (2016).

101. Case C-22/70, Commission of the European Communities v. Council of the European Communities, ECLI:EU:C:1971:32 (European Agreement on Road Transport (ERTA)). See generally Christophe Hillion, *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations*, in THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 224–33 (Miguel Poiares Maduro & Loïc Azoulay eds., 2010).

102. Case C-208/17, NF v. European Council; Case C-209/17 P, NG v. European Council; Case C-210/17 P, NM v. European Council, pending (appeal lodged Apr. 21, 2017).

issues in the medium to long term, when looking at the implementation measures that will inevitably flow from the agreement. If the Court of Justice endorsed the General Court's view, the detriment to the EU legal order would be that the EU Treaties and their effective means of democratic and judicial control would be undermined, and depend, "entirely on choices regarding the design instead of content made by Commission or Council."<sup>103</sup>

### C. Visas and Residence

Migratory measures within the scope of the EU Treaties are not included in primary law without stipulated reservations. Protocol No. 23 annexed to the Treaties specifies that persons entering Member States, notwithstanding Article 77(2)(b) of the TFEU, shall be, "without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements."<sup>104</sup> The exact scope of this Protocol is unclear in legal terms, but it nevertheless sends a clear signal by the Member States, in succinct terms to the more supranationally-minded institutions, that progress in the field of external migration is a domain with reservation for Member States to continue exercising competence. Even so, the Treaties demonstrate, such as in Article 79(5) of the TFEU,<sup>105</sup> the intention of only admitting third country nationals who suit the economic conditions of Member States, by framing the wording of the Treaties around the employment market. Thus, it could be deduced that Union responses are not needed as such. This is further entrenched by Declaration 36 annexed to the Treaties, which affirmed the Member States intentions at the last Intergovernmental Conference ("IGC") to preserve certain competences, continuing to allow Member States to, "negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title V of Part Three in so far as such agreements comply with Union law."<sup>106</sup>

Much of the recent discussion has focused on the migration crisis from a human rights perspective. That is, attention focused almost exclusively

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103. Spijkerboer, *supra* note 13, at 552.

104. Protocol No. 23 on external relations of the Member States with regard to the crossing of external borders 2008 O.J. (C 115) 47.

105. TFEU art. 79(5). "This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."

106. Declaration 36, Declaration on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice, 2008 O.J. (C 115) 47.

on the Dublin system, as well as the Common European Asylum System,<sup>107</sup> and the international system for alleviating the plight of migrants. The Dublin Regime, which has seen incarnations of *Dublin I* and *Dublin II* has failed. *Dublin III*,<sup>108</sup> has sought to allocate the responsibility of asylum seekers between Member States, based upon criteria set down, to the first Member State in which they entered the Union. During the migration crisis, it was clear that Member States were willing to let migrants pass through their territories with the intention of reaching other Member States; a policy decision that systematically undermined the *Dublin* regime altogether. For the Common European Asylum System,<sup>109</sup> the Ordinary Legislative Procedure is the method of decision-making in use. Similarly, a common immigration policy for the Union has the potential to be developed on the same decision-making process in a variety of scenarios envisaged by Article 79 of the TFEU, including the establishment of long-term visas and residence permits, inclusive of family reunification; defining the rights of non-Union citizens and their movement and residence to other Member States; tackling illegal immigration and residence obtained unlawfully, including removal of such persons; and finally, combatting human trafficking.<sup>110</sup>

The Court of Justice is today in a position to be more responsive to “urgent” cases that are appearing on its docket than before. In 2008, a new accelerated procedure was made available through the preliminary reference system, known as the *procédure préjudicielle d’urgence* (“PPU”).<sup>111</sup> In February 2017, Advocate General Mengozzi issued his Opinion in the *X and X* case,<sup>112</sup> a PPU case, where he believed the EU Visa Code adopted by the EU in 2009 was applicable,<sup>113</sup> and thus under certain conditions,

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107. See, e.g., Mattias Wendel, *The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System*, 17 GER. L.J. 1005–1032 (2016).

108. Regulation (EU) No 603/2013, of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-country National or a Stateless Person (recast), 2013 O.J. (L 180) 31.

109. A TFEU art. 78(2)(a)-(g).

110. TFEU art. 79(2)(a)-(d).

111. See Laure Clément-Wilz, *La procédure préjudicielle d’urgence, nouveau théâtre du procès européen?*, 48 CAH. DROIT EUR. 136, 136–66 (2012).

112. Opinion of Advocate General Mengozzi, in Case C-638/16 PPU, *X and X v. Etat Belge*, ECLI:EU:C:2017:93.

113. Regulation 810/2009, of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), 2009 O.J. (L 243) 1.

that Member States in third countries should be obliged under the EU's Charter to issue visas to third country nationals on humanitarian grounds.<sup>114</sup> Whereas the Opinion of Advocate General Mengozzi can be said to have demonstrated considerable social conscience about how the EU should normatively respond to certain issues, the Court of Justice found otherwise. In its judgment in March 2017,<sup>115</sup> the Court of Justice said that given that no measures have been adopted on long-term visas and residence permits based on Article 79(2)(a) of the TFEU,<sup>116</sup> it cannot be invoked in Union law for other purposes. Such measures continued to be within the scope of individual Member States national competence. The Court of Justice furthermore saw off a potential undermining of the entire EU asylum procedure,<sup>117</sup> thereby blocking a legal pathway for persons seeking access to the EU from a third state. The Court of Justice could be accused of adopting a sympathetic approach to the movement of EU citizens across EU borders, but that "sympathy" does not extend to non-Union nationals moving across internal EU borders.<sup>118</sup> Therefore, if that judicial sympathy does not extend to persons already in the EU, then it certainly will not be extended to non-Union nationals who are outside the Union in the first place.

Expressing too much of a social conscience can result in the Court of Justice's loss of legitimacy to answer other legal questions. Whether the Court of Justice's judgment in *X and X* was reasonable or not is debatable, but the Member States' rationale for backing the Belgian argument in the case was simple; the EU Visa Code was not intended for the purposes of mandating humanitarian visas be issued by Member States through EU law. This has proven that, notwithstanding the efforts that have been made to provide for an explicit external competence in the field of migration through visa, asylum, and immigration policies; the very fact that these legal bases are not effective when implementing envisaged EU measures, have not been followed through with secondary legislation.

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114. EU's Charter of Fundamental Rights, art. 4 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment").

115. Case C-638/16 PPU, *X and X v. Etat Belge*, ECLI:EU:C:2017:173.

116. *Id.* at ¶ 44.

117. *Id.* at ¶ 48–49.

118. Piet Van Nuffel, *Having "the law" observed: The role played by the European Court of Justice in the application of EU and International Law towards third-country nationals*, in *EXTERNAL DIMENSIONS OF EUROPEAN MIGRATION AND ASYLUM LAW AND POLICY/DIMENSIONS EXTERNES DU DROIT ET DE LA POLITIQUE D'IMMIGRATION ET D'ASILE DE L'UE* 91 (Marleen Maes et al. eds., 2011).

## V. THE PATH FORWARD

The newly-created synergy of actors and policies in the migration crisis, working in tandem with one-another, leaves open the possibility for future cross-policy cooperation amongst different hierarchical actors to respond to pan-European crises. However, the political discourse on the migration crisis continues to be fraught. Matters of migration fall into a politically tense area of public policy. EU migration policy remains a framework for sets of laws, which have yet to be fully completed. It is yet to be determined how far away the harmonisation of policies for catering for the entry into the Union of non-Union citizens, but is increasingly looking less-likely as the migration crisis rumbles on. Before the financial crisis, figures show that Europe was one of the most open regions in the world in terms of inward migration flows.<sup>119</sup> Stefan Zweig, in the midst of the Second World War spoke of the madness of borders in Europe, particularly given their “*artificial*” nature, with how they were “contrary to the spirit of our times that clearly wished for closer links and international fraternity.”<sup>120</sup> For the most part, they have been eliminated internally, but to the outside world, Zweig would likely be equally horrified to see how Europe is putting up shielded deterrents for external European borders in order to protect the Schengen Area.

Interest in migration in Europe is increasing, and the research agenda is booming, with a range of publications reaching fruition, now that the migration crisis has prolonged. From whatever angle the field is approached, there is considerable discussion to be had regarding how migration is to be managed and enforced.<sup>121</sup> Europe has and will continue to be a territorial field that has a magnet-effect, with people gravitating towards its borders and shores. Whilst lacking a comprehensive approach, with answers to the problems arising as a result of the migration crisis, there are faint signs of hope. In the same way it can be argued that international law feeds off

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119. Thomas Piketty, *Pour une Europe ouverte*, LIBÉRATION, 2015; Thomas Piketty, *For an Open Europe*, in CHRONICLES: ON OUR TROUBLED TIMES 165–67 (Thomas Piketty ed., Seth Ackerman tran., 2016).

120. STEFAN ZWEIG, *THE WORLD OF YESTERDAY: MEMOIRS OF A EUROPEAN* 219 (Anthea Bell tran., 2011). Note: source originally published as: STEFAN ZWEIG, *DIE WELT VON GESTERN: ERINNERUNGEN EINES EUROPÄERS* (1942).

121. See, e.g., HUMAN RIGHTS AND THE DARK SIDE OF GLOBALISATION: TRANSNATIONAL LAW ENFORCEMENT AND MIGRATION CONTROL, (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2017).

crisis,<sup>122</sup> the EU has arguably been on the opposite end of the spectrum. The EU's legal order has thrived in times of relative normality. Practice has shown that decision-making on the political level has been slow, and where decisions are made, they are done on a compromised basis. This is unsurprising given the huge variation in national responses to the migration crisis, with Member States changing their position, such as Germany's "open door" policy which was later closed and subjected to tighter restrictions in migration policy.

#### A. *Chasing the Present*

The reason why the CFSP and *non*-CFSP conundrum has only come to the fore now is that migration measures now have an explicit basis within the Treaties. Yet, it is not a joined up framework. The Treaties provide an incomplete set of tools, which hinders a coherent and effective holistic approach towards the migration crisis. Previous CFSP actions have imposed bans on particular individuals, thus excluding judicial review of the Court of Justice, which would have been one of the key motivators for CFSP in the first place, as opposed to the use of Article 352 of the TFEU.<sup>123</sup> Concern has previously been expressed on using CFSP for migration matters.<sup>124</sup> If one contrasts the use of CFSP for migration compared to other policies, some differences arise. For example, for restrictive measures, this is done through a two-fold system of firstly, a CFSP Decision based on Article 29 of the TEU, and secondly, a *non*-CFSP Regulation, adopted on the basis of Article 215 of the TFEU.<sup>125</sup> For migration issues, such as the aforementioned travel bans, no *non*-CFSP follow-up legal acts are necessary. How this is

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122. See Benjamin Authers & Hilary Charlesworth, *The Crisis and the Quotidian in International Human Rights Law*, in NETHERLANDS Y.B. OF INT'L L. 2013: CRISIS AND INTERNATIONAL LAW: DECOY OR CATALYST? 19–39 (Mielle K. Bulterman & Willem J. M. Van Genugten eds., 2014). This builds on the previously published, Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377–92 (2002).

123. EC Treaty, art. 308 (now TFEU art. 352).

124. Martenczuk, *supra* note 44, at 100.

125. "Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. 3. The acts referred to in this Article shall include necessary provisions on legal safeguards." Art. 215 of the TFEU.

compatible with Article 40 of the TEU on the non-encroachment of CFSP and *non*-CFSP, post-Lisbon is uncertain.

The future potential of the EU as a problem-solving forum for the coordination of responses to unprecedented crises could be under threat. The entire established legal framework for EU external relations means reaction to external events will always be insufficient, which is undoubtedly a terrible prognosis. If there is no means of resolving issues, Member States can look elsewhere, albeit these are inherently limited given some competencies are already shared with the Union. To prevent this legal fragmentation and disintegration from occurring, one solution could be greater linkage of CFSP and *non*-CFSP.<sup>126</sup> As pointed to, if the European Border and Coast Guard Agency develops further there will be a need for it to have interoperable solutions, by linking it to other bodies of the Union,<sup>127</sup> such as the European Defence Agency (“EDA”). Consequently, a full interlinking of all the EU’s actors at its disposal may be further warranted. Likewise, international agreements between the EU and third states to lock-in practices preventing irregular migration will be an eventuality. Article 220(1) of the TFEU states the EU, “shall establish all appropriate forms of cooperation,” with UN bodies, the Council of Europe, the OSCE, and the OECD, and “shall also maintain such relations as are appropriate with other international organisations.” Accordingly, the EU may in future be edged into ensuring responses to crises are coordinated on a multilateral level in international fora.

Individually, Member States are competent to independently play a role in the migration crisis without resorting to collective measures, either through CFSP or *non*-CFSP. But individual actions are unable to stop the root causes of irregular migration to Europe. Solution-based thinking has been and continues to be at the heart of what the EU is about. Yet, complimenting this goal has to be coupled with legal bases being appropriate for achieving such ends. It is clear that foreign policy responses to the migration crisis, through CFSP legal tools, has been a short-term measure. The need for the EU to act in whatever manner is thus seen as the EU attempting to re-establish law and order on its external borders, whilst similarly, bringing stability in as far as it is practical to the European neighbourhood. By

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126. The Court is already applying doctrines from EU constitutional law to CFSP, such as the *Les Vert* doctrine. See Graham Butler, *Implementing a complete system of legal remedies in EU foreign affairs law*, 24 COLUMBIA J. EUR. L. (2018).

127. STEVEN BLOCKMANS, NEW THRUST FOR THE CSDP FROM THE REFUGEE AND MIGRANT CRISIS 14 (CEPS, No. 2016).

invoking foreign policy measures, rather than merely migration measures under Union law, the theory behind the actions is to prevent persons from migrating at all.

### B. Forging Legal Change

As with every Treaty-amendment that increases the potential scope of EU action, this widened vision for the EU is not always followed up with the requisite tools. Thus a vacuum is created. If the integrity of the EU's legal order is to be considered of primary importance, then the legal bases for the EU's action should be used appropriately. The coming together of CFSP and *non*-CFSP activity to achieve a comprehensive response should ideally be seen as an opportunity, rather than a legal hurdle that will cause unspeakable difficulties. Furthermore, the migration crisis has shown that *non*-CFSP tools have not been enough to provide a full EU response to a challenge, and in times of crisis, intergovernmental tools through CFSP have been resorted to. Foreign policy responses have been utilised as extended tools that encroach upon the more long-term intended uses of *non*-CFSP tools. For example, *Operation Atalanta* is fast approaching its ten-year anniversary as the first EU naval mission combating maritime piracy in the Indian Ocean. Whereas the EU's military mission, *Operation Sophia*, conducts its activities under the auspices of CFSP, the European Border and Coast Guard Agency (*Frontex*) has an equally difficult task on its hands on a *non*-CFSP basis. Much of its remit inevitably involves SAR, which itself poses questions about where to place migrants who have been rescued from unsuitable vessels for Mediterranean crossings.<sup>128</sup> The task of *Frontex* has been to compliment the AFSJ features of the Treaties. Yet, the Regulation giving legal effect and establishing the new European Border and Coast Guard Agency is conspicuous,<sup>129</sup> in that it is at pains to distance itself from any collaboration with military matters, notwithstanding that it has been called "semi-military" in its new format.<sup>130</sup> Rather, the Regulation merely makes passing reference, by envisaging that the Agency will be able to, "continue cooperation at an operational level with other Member States and/or third countries at the external borders, including military operations with a law enforcement purpose, to the extent that this cooperation is compatible with the actions of the Agency."

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128. Martin Ratcovich, *The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?*, 33 AUST. Y.B. INT'L. L. 81, 81–129 (2016).

129. Regulation 2016/1624, *supra* note 77.

130. BLOCKMANS, *supra* note 127, at 2.

Despite the disarray of refugee settlements systems that EU Member States have in place both before and in light of the migration crisis, looking elsewhere paints a much bleaker picture. The *Convention Relating to the Status of Refugees of 1951* has been ratified by neighbouring states to the EU, such as Egypt, however, in contrast with EU Member States, the full and follow-up implementation of these international principles through the national legislative framework have remained absent. The EU and its Member States multi-layered response tries to put things as if it were coherent. In the Commission's "*Agenda on Migration*," it accepted that to combat irregular migration to the EU, a multifaceted approach would have to be taken. Four policy areas were singled out: development cooperation, trade, employment, foreign and home affairs policies; which all come under different legal bases in Union law.<sup>131</sup> If anything, the overall response has been weak, and demonstrates the lack of overall coherence as regards the EU's ability to effectively combat challenges for which it is ill prepared. The political situation in Europe's wider neighbourhood continues to be perilous, which has knock-on effects in Europe; namely, that people will continue to avail of any means possible in order to make the trek to Europe.

Monitoring the passage of persons through both land and maritime means requires multifaceted responses, engaging a range of institutional actors and agencies and coordinating responses to fulfil desired EU objectives. Efforts must have sound legal bases in order to reach their maximum potential. Presently, the EU finds its not fulfilling this basic requirement. Rather than basing certain tasks exclusively on a CFSP legal basis, i.e., more intergovernmentally than supranationally, the EU should invoke, as a matter of course, *non*-CFSP legal bases. This would ensure institutional plurality, giving greater legitimacy to its decision-making in tackling the migration crisis, by giving EU citizens through the Parliament a better say, whilst also ensuring proper judicial review of the legality of such policies by the Court of Justice. To date, there has been no attempt at a framework for achieving an agreement encompassing both CFSP and *non*-CFSP matters to respond to the migration crisis. One example of a specific international agreement stretching across the breadth of the Treaties encompassing multiple legal basis that have different procedural matters has been concluded,<sup>132</sup>

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131. *A European Agenda on Migration. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 6, COM (2015) 240 final (May 13, 2015).

132. *See* Council Decision 2016/123, of 26 October 2015 on the signing, on behalf of the European Union, and provisional application of the Enhanced Partnership and

although the legality of such actions are currently being challenged before the Court of Justice.<sup>133</sup>

### *C. Building European Legal Heritage*

The legacy of the Treaties in terms of migration is becoming clear. Apportioning responsibility to the EU, without the allocation of the necessary tools for acting, is by no means an efficient way to run the affairs of an enhanced international organisation of any description. This irony is not just seen in the context of the migration crisis, but also the financial crisis, where the lack of effective tools to combat new challenges hampers the working nature of a *sui generis* international organisation. If anything, such lack of potential responses of the EU to crises points to the need for greater mechanisms for the EU to be entrusted with when difficulties arise. Coupled with this will be the need for Member States to free up their hold on competences where EU action is needed to solve the most pressing public policy issues of modern times. Some action is better no action, even when there are overarching legal problems that are equally deserving of solutions. An existential challenge to the EU in the future, of similar magnitude to the migration crisis, is conceivably possible. Whilst the migration crisis was able to be brought within the bounds of EU foreign, security, and defence policy as a complimentary measure, another crisis for the EU might not be so fortunate to have tools available to it.

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Cooperation Agreement Between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, 2016 O.J. (L 29).

133. Case C-244/17, Commission v. Council, [judgment pending].