

Chapter 6

The Challenge Posed by Migration to European Crisis Management: Some Thoughts in Light of the ‘Arab Spring’

Marie-José Domestici-Met

6.1 Introduction

It may seem difficult to reconcile the very positive image carried by the EU, as a major donor for humanitarian aid as well as for development, with the too often negative one evoked by human rights activists, when it comes to migration.

The issue is a difficult one, and may be considered as spoiled by preconceived ideas, crystallised in expressions such as “fortress Europe” (Rumford 2006, pp. 155–169) or “Europe as a sieve”.¹ Therefore, this paper will avoid too sharp judgements and enlarge its scope well beyond the events of 2011, before coming back to them.

First, ‘migration’ is a word which covers a wealth of situations: voluntary or forced, agreed with the State of destination or not. Furthermore, Europe has a long history of migration, from migrations which have brought new populations to Europe—in the early Middle Ages—to migrations of Europeans—which have built America and Australia. However, recent decades show Europe dealing with migration, firstly as a donor to forced migrants, and subsequently as a potential host area. Going back in time, but also with a wider approach, will enable us to envisage the European attitude concerning migration in a scientific way.

The hypothesis of the paper is the following: Europe could have a positive attitude towards migrants, just as it shows a structural trend of mercy towards people in need. However, new circumstances have brought Europe to care about its own security much more than before, and no longer to predominantly care about human security.

¹ Expression used in House of Commons during debate following the first use of “Fortress Europe”.

M.-J. Domestici-Met (✉)
Université d’Aix-Marseille, Aix-en-Provence, France
e-mail: marie.domesticimet@univ-amu.fr

This short paper is not the place to give a comprehensive survey on topics such as networks of traffickers, the fate of those undocumented after their arrival in Europe, percentages of regularisations, percentages of return, either forced or voluntary, the way in which the Directive on Return is practised, but it can help to go beyond the first appearance and beyond pure facts, towards what is truly at stake. The truth is that Europe is not only uncomfortable with unskilled migrants breaking its border; it is also at risk of losing the moral and political benefit it could derive from its huge international commitment to the poor and those in distress. Herein lies the problem.

The methodology consists in describing in their chronological order the successive contexts in which the different legal solutions have been introduced, giving to history, geopolitics and ideology the consideration they deserve when explaining the content of the rule of law. The paper will unfold through four stages. The first one traces back European activities in favour of forced migrants to the 1980s and 1990s: they were deployed among so many human being-centred activities. The second stage shows the young and radiant Union, at the turn of the century, developing an ideological approach to sharing the Area of Freedom, Justice and Security with migrants. During the third stage, in the early millennium, a larger Europe is faced with a globalised world characterised by mixed flows. Hence, Europe turns to being strategic, in order to sort out ‘true’ refugees and skilled migrants, through partnerships with neighbours...and perhaps at the expense of some principles. The fourth stage, the one of the Arab uprisings commonly called ‘Arab Spring’, brings the European asylum and migrations system close to collapsing, before giving a new impetus.

6.2 The 1980s and 1990s Epic

Forced migration was of concern for the EU as an element in a bunch of human being-centred European policies developed in the last years of the Cold War and its immediate aftermath. A new way seemed possible for crisis management.

6.2.1 *A Human Being-Centred European Activism*

First, development has been on the ‘EU’s agenda’—if one may speak so far before the ‘EU’ legal entity was born, and well before humanitarian action was identified as a specific activity. Since the onset of the European Economic Community, the overseas territories of European States benefited from specific treatment. As early as 1963, the Yaoundé Treaty was signed with the newly formed African States,²

² According to the official title “African and Malagasy States”.

setting up rules for the development of the latter. It was followed by the more sophisticated schemes of the Lomé I (1975), II (1979), III (1985) and IV (1990) Conventions. A full range of devices for development through legal regulation, rather than through the market, was thus established.

The ideology of ‘preferences’ and ‘non-reciprocity’ put forward by the promoters of the New International Economic Order³ mirrors the ideology of the ‘preference for the poor’ which European States have been knowing for centuries when their social services were in the hands of religious Christian people.⁴ Thus, in the Europe–ACP Countries system, being economically disadvantaged leads to being legally preferred, to positive discrimination. And the latter Lomé system enshrined some major aspects of the New International Economic Order. Indeed, it was one of the very few positive translations of the above referred to ‘soft law’ norms.

In the meantime, acting for development is not very far from the concept of crisis; since it is perceived as acting for peace and stability, as aiming at avoiding crisis for the middle and/or long term. With time, European integrated institutions have taken advantage of their economic power to put pressure on some states. Cooperation with conditionality has been meant as a tool for promoting human rights and democracy. Economic ‘sanctions’,⁵ for years, have resulted in a powerful tool for crisis management. They often target regimes which are deemed dangerous not only for peace, but namely for the respect of human rights and dignity. Therefore, in 1991 the European Community was the first to sanction former Yugoslavia, followed by the UN Security Council Resolution 713.

However, the European institutions have gone beyond. With the setting up of the Union—by the Maastricht Treaty in 1992—‘political cooperation’ between States was succeeded by ‘common policies’, later on transformed by the Amsterdam and Lisbon treaties. However, the current Common Security Defence Policy is heir to the 1992 policy, born under the aegis of the so-called ‘Petersberg tasks’. The latter are built around the idea of resorting to force in favour of the human being’s rights and dignity. They draw the picture of a ‘soft power’: humanitarian and rescue tasks; conflict prevention and peace-keeping tasks; joint disarmament operations; military advice and assistance tasks, post-conflict stabilisation tasks. However, one last task is that of combat in crisis management, including peacemaking.

Up to now it has always been about acting in favour of the human being at every stage of a crisis by prevention—through development and aid to governance, mitigation, rehabilitation and reconstruction. The EU crisis management activity

³ Cf. UN General Assembly Resolutions S3201 (1974) Declaration on the New International Economic Order, S 3202 (1974) Action Plan for the New International Economic Order and 3281(XXIX) 1974, Charter of Economic Rights and Duties of States.

⁴ The above mentioned resolutions (upon the New International Economic Order) were fuelled by the works of some key authors: Raul Prebisch and Father Joseph Lebrét who introduced the essential elements of the Christian social doctrine as the core of the developmental thought.

⁵ Even if the wording is not quite correct, and is not used by the famous article 41 of the UN Charter.

is very rich and not aimed at gaining favour for the EU. Instead, it expresses the EU's common humanist ideology. If the “*European Security Strategy*” adopted in December 2003 seemed to look for hard security, not too far from a defence of Europe's own interests, the follow-up has reinforced the human being-centred approach, with two reports (Human Security Study Group 2007; Study Group on Europe's Security Capabilities 2004), and the introduction of a ‘human security’ dimension. The 2008 revision of the European Security Strategy was thus closer to the concept of human security.

When it came to dealing with migration, the European Union was primarily interested in forced migration, be it due to persecutions, voluntary deportation, war, famine, or other disasters. This compassionate activity was, later, enshrined in law.

6.2.2 A Compassional European Activism for Forced Migrants

Since the beginning of the post-Berlin wall era, humanitarian assistance has become part of crisis management. Since it alleviates human beings' suffering, it is usually analysed as a means of mitigation that reduces the impact of a given crisis, thus making it less difficult to undergo the conflict or disaster. From another angle, and concerning certain crises, humanitarian assistance can be analysed as a means of imposing a standstill, a kind of provisional measure, which keeps people resorting to one belligerent alive. Wars being more and more often waged by civilians—people who do not belong to a state army—and against civilians, keeping civilians alive matters, even politically. It is not only a means of bringing relief to civilians, but this kind of action has also a meaning in terms of a future for the belligerents. Indeed, suffering induces anger and, later on, revenge, creating a cycle of violence and suffering bringing relief today entails less violence tomorrow.

Since ECHO's creation in 1992, Europe—the supranational institutions together with Member States—has become the first donor in the humanitarian field, sometimes reaching the level of 50 % of all that is given. At the peak of crisis, Europe has a very powerful tool in order to bring “*caritas inter armas*”.⁶ In most crises, Europe (i.e. the Union plus its Member States) is the first donor for humanitarian assistance: namely in former Yugoslavia, Palestine, Libya, and Syria. ECHO's activities are not purely quantitative. Regulation 1257/96⁷ details the principles of what is considered a partnership with operative humanitarian agencies. The stress is put upon the principles: impartiality, which entails helping according to needs—but also apolitical stance and independence *vis-à-vis* political activities. ECHO's principled activities bring quality besides quantity and the presence of more than a

⁶ Once the motto of ICRC.

⁷ Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid OJ L 163 of 2.7.1996.

hundred ECHO experts in the field brings even more quality to the funded humanitarian activities.

6.2.3 Activism in Favour of Forced Migrants and Crisis Management

However, funding these kinds of issues may amount to crisis management. Hence, the EU played such a role in former Yugoslavia through funding assistance to the uprooted. Some elements about ethnic cleansing, its origins and operative process are necessary prior to a deeper analysis. The Yugoslavian State—first a Kingdom, then a Socialist Republic—was created after the First World War and reformed after the Second. It was, in the last years of socialism in the 1980s, composed of six Federated Republics, each of them encompassing several different populations. This heterogeneity was supposed to be transcended by the common socialist ideology. However, after Tito's death in 1980, and with the decay of the socialist world, the ideological cement receded before nationalist ideologies. Milosevic highlighted the Serb heritage with a huge celebration of the Kosovo Polje battle of 1389 on its 600th anniversary. Together with Croats reaffirming the Croatian national tradition and Alija Izetbegovic taking into account the belonging of Muslim Bosniacs to the Umma,⁸ Yugoslavia fell apart. Yet, each of the different Republics was mixed and the separation was challenging. Ethnic cleansing came in to play. The rationale for ethnic cleansing is to compel minority groups to leave a territory, giving way to an ethnically pure territory. The Serb militias acted in order to implement an ethnic cleansing plan through different means: creating fear through presence, threat, rape or killing the ones who belonged to minorities. However, ethnic cleansing was not absent from other groups' strategies. This ethnic component of the crisis, crossed with some purely geographic features of the country,⁹ and with the high level of armament, gave way to one of the most structured and heavy conflicts of the last decades. In many places, urban Bosniac¹⁰ Muslims of the city were surrounded and besieged by rural Serbs firing from above, with the JNA—the former Yugoslavian army¹¹—guns and sometimes tanks.

Thus the way humanitarian aid was delivered mattered and played a dramatically important role in the survival of besieged cities. While Europe, acting first as a

⁸ He was the President of Bosnia–Herzegovina during the war. Before the fall of Yugoslavia, he promised to make Bosnia an Islamic Republic as soon as the Muslims would represent the majority.

⁹ A large number of valleys, the location of the biggest cities in valleys alongside the river, facilities for firing upon some cities (Sarajevo, the capital, and Gorazde) from the slopes of the valleys.

¹⁰ “Bosniac” is used for Muslims living in Bosnia. “Bosnian” is used for all those living in Bosnia.

¹¹ Largely made of Serbs.

Community, then as a Union, dedicated two thirds of its total assistance to the former Yugoslavia. It set up for the Sava Valley the only humanitarian field Task Force that Europe has ever established. The device of six Security Zones created for six main besieged cities by the UN Security Council¹² found its relative efficiency due to both the European funding for a large amount of assistance—led on the field by the UNHCR but implemented by European NGOs—and the military protection of the European soldiers from UNPROFOR.¹³ The strongest point of this device was the Sarajevo airlift—the longest in history—which for 46 months had thoroughly upheld a city with its hundreds of thousands of inhabitants, providing food, non-food emergency items,¹⁴ but also seeds for small urban agriculture and even paper for keeping the local newspaper *Oslobodenje* alive.

The first lesson to be drawn from this case is the strategic impact of humanitarian assistance upon forced migration. It had helped put a halt to ethnic cleansing. From September 1992 on, the war changed. A front line settled between areas dominated by the belligerents and no further major forced displacement occurred. Being helped to survive, the besieged did not give in. The fall of Srebrenica is a major exception due to very specific failures in the concept¹⁵ and system¹⁶ of a security zone. One may conclude that humanitarian action was used as a crisis management tool during the conflict, with a globally positive result. Bearing in mind the role played by the Europeans, it is obvious that the EU strongly, even if not totally successfully, acted against forced migration and in favour of its victims. The events pursuing to the Dayton peace agreements confirm and complement this first lesson learnt. The new Bosnia–Herzegovina was built upon the idea—or the myth—of ethnic reconciliation. The power sharing system gave each ethnic group a strong representation and the power of veto.¹⁷ Yet at the same time, the international community set to reverse ethnic cleansing, and humanitarian action was part of the game. ECHO funding reconstruction corresponded to minority returns rather than returns of people belonging to the main group in a given area. Two interpretations can be given. On the one hand, ethnic cleansing is equated with a crime—which has been, since then, confirmed by jurisprudence and by the Rome Statute of the

¹² Resolutions 819 (March 1993) for Srebrenica, and 824 for Sarajevo, Gorazde, Tuzla, Zepa and Bihac.

¹³ United Nations Protection Force, first created in February 1992 for supervising the cease-fire in Croatia and, then, reinforced for Bosnia–Herzegovina in August–September 1993. All battalions were seconded by European countries, namely France, the UK, Spain, the Nederland, Germany, and Italy. American troops guarded the strategic bridge of Bosanski Brod.

¹⁴ Plastic sheeting for the replacement of broken windows, sanitary items.

¹⁵ Security zones, according to humanitarian law, should be zones without any stake in the conflict, whereas the Bosniac army used Srebrenica as a rear basis for its fighting. When it suddenly retreated from the city, it seemed to the Serb militias to be a signal for an attack.

¹⁶ This specific zone had been created without a precise topographic definition, which made it impossible to identify the very edge of it and the beginning of infringement.

¹⁷ Two entities have been created: Republika Srpska and the Croato-Muslim Republic of Bosnia–Herzegovina.

ICC—and something has to be done in order to cancel its effect. It is the rationale of international public policy. On the other hand, those who have experienced suffering have a right to more help. A kind of moralism is behind the priority given to those previously victims of ethnic cleansing and potential future victims.¹⁸ The footprint of Europe cannot be discussed, since its position as a major donor made it possible for it to refuse being associated to the later policies.

A second lesson to be learnt from the Bosnian case relates to the fact that Europe has proven its generosity by granting asylum to the greater part of some 800,000 people who have fled from Croatia and Bosnia between 1991 and 1995. Prior to envisaging the role of (European) humanitarian assistance in the post-conflict period, it is necessary to look at the protection aspect. Refugee law has been drafted in order to prevent misunderstandings about a State granting asylum to someone persecuted by another State. However, the main provision of refugee law is the non-*refoulement* principle, which is recognised as customary by UNHCR¹⁹: no one should be pushed back towards the State from which he/she is escaping. All systems of refugee law recognise this principle. The African system is well known for being more generous, in that it provides for asylum being also granted without personal persecution, in case of “*events seriously disturbing public order* in either part or the whole of [a person’s] country of origin or nationality”.²⁰ Between 1991 and 1995, several Member States granted protection on their own will, giving response to the requests they were receiving. Most requests went to Germany, since many Yugoslavians had been working there since the 1980s. Then they went to Austria, Denmark, Sweden and France (Fitzpatrick 2000, p. 280). And protection was granted irrespective of the personal persecution experienced or not (Boutruche 2000). However individual the decisions for temporary protection were, they were commonly reviewed by the Council of Ministers. On 25 September 1995, the Council adopted a Resolution on burden-sharing (OJ C 1995, p. 1) with regard to the admission and residence of displaced persons on a temporary basis and, on 4 March 1996, adopted Decision 96/198/JHA (OJ L 1996, p. 10) on a future alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.

¹⁸ Indeed, the minority returns were not always easy. The UNHCR has a process for checking security conditions of return and it did activate this process in Bosnia–Herzegovina. Security incidents have been seriously taken into account in Bosnia–Herzegovina, including through a military protection of houses rebuilt for people belonging to minority (for instance, in Stolac, near Mostar a Spanish tank watching beside a Muslim-owned rebuilt house, in 1998).

¹⁹ UNHCR Declaration of states parties to the 1951 convention and or its 1967 protocol relating to the status of refugees, 16 January 2002, HCR/MMSP/2001/09.

²⁰ Article 1, § 2.

6.2.4 *From Activism to Law Making*

Europe has chosen to build upon its practice in adopting common instruments under the CFSP to overarch individual behaviours: first a Common position relating to a common approach to the word “refugee” (OJ L 1996, p. 10), and, then, a proposition for Common Action.²¹ The Action Plan of the Council and the Commission of 3 December 1998²² provides for the rapid adoption, in accordance with the Treaty of Amsterdam, of minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin, as well as the adoption of measures promoting a balance of efforts between Member States in receiving and bearing the consequences of welcoming displaced persons. All this was to lead to a Directive for Temporary Protection (Van Selm-Thorburn 1998). The latter was to introduce Europe in the small group of international actors having an extended approach to protection, as will be discussed later on.

Yet, the Kosovo crisis burst out before the Directive was adopted. The European Member States adopted a more political approach, aimed at keeping the Albanophons in Albania and in Albanophon areas of Macedonia, such as to allow them to go back to Kosovo as soon as the air strikes would be over, in view of enabling them to take the reins together with the international administration. Italy, for instance, decided to provide the logistics and the resources for a refugee camp in Albania hosting 3,000 Albanophone Kosovars, not to forget the much greater effort made by ECHO. European Member States, nevertheless, admitted specific cases onto their territories, amounting to some 10 % of the 900,000 refugees, with more than 12,000 welcome in Germany and nearly 10,000 in France (Van Selm 2000).

On 27 May 1999 the Council adopted conclusions on displaced persons from Kosovo.²³ These conclusions call on the Commission and the Member States to learn the lessons of their response to the Kosovo crisis in order to establish the measures in accordance with the Treaty. Hereby, the European Union was in line with what UNHCR High Commissioner Sadako Ogata expressed, when thinking of innovative solutions: “*Temporary protection is an instrument which balances the protection of the need of people with the interest of the States receiving them*”.²⁴

It was time to enshrine it in law.

²¹ COM (98) 372 final JO C 268 27 August 1998.

²² Action plan on how to best implement the provisions of the Treaty of Amsterdam on the area of Freedom, Justice and Security (J.O. C 19/1 23 January 1999).

²³ C 19, 20.1.1999, p. 1.

²⁴ Statement at the inter-governmental consultations on asylum, refugee and migration policies in Europe, North America and Australia, Washington DC, May 1997.

6.3 The Turn of the Century

6.3.1 *The Tampere Ideology: Granting Asylum, an Activity to Be Harmonised in the European Area of Freedom, Justice and Security*

There was, then, a slight shift. The way of thinking about migration was still the same, but, the way of dealing with it became the new frontier of integration. Thus, the focus was less on migrants' fate and more on the principle of sharing an area with them.

During the 1990s when the Community, soon substituted by the Union, acted on the global stage as a major player through ECHO, migration was mainly a disaster that other populations underwent in its eyes. It was about helping others outside Europe. It was about helping migrants, and often the host populations, in order to avoid anger in the (sometimes unwilling) populations in the receiving State. With regard to granting asylum, European States acted on their own, according both to the 1951 convention they had individually ratified at different dates, and to their own domestic regulations.

Later on, the issue of asylum first came to the fore for internal European reasons, rather than due to a common crisis management activity. The Schengen system, since it created a global European external border, demanded increased clarity in the roles that European States had to play in front of foreigners. This was the purpose of the 1990 Dublin Convention.

With the 1997 Amsterdam Treaty, visas, asylum and immigration had been "communitarised". When the European Council convened in Tampere on the 15th and 16th October 1999 and set up a programme for 2000–2004, its spirit could be summarised as such:

the European Union should not only be a single market and an economic and monetary Union but also an "area" of freedom, security and justice – an area where everyone can enjoy his or her freedoms, can live and work where he/she wishes in safety, and where disagreements and disputes can be sorted out fairly and justly²⁵

The Presidency conclusions add: *"this freedom should not (. . .) be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory"*.²⁶

²⁵ "Tampere: kick-start to the EU's policy for justice and home affairs", introduction on the Commission website (www.ec.europa.eu, accessed 6 October 2014).

²⁶ Presidency conclusions § 3, European Council, Tampere (www.europarl.europa.eu, accessed 6 October 2014).

This very generous approach called for “*common policies on asylum and immigration. . .) based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union*”.

Although encompassing some elements upon illegal immigration and those who organise it, the text is definitely oriented positively, and draws the picture of a very open Europe, proudly building upon its humanist ideology. Three specific issues have to be highlighted in the Tampere programme.

1. It states there should be “*a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children*”.²⁷

This is a fair and positive way to say that populations of states with good governance will not try to flee to Europe, either for asylum, or simply for better living conditions. The sentence also links back to the huge range of human being-centred activities Europe has developed for crisis prevention and management. As mentioned before, Europe (the Commission plus Member States) is the first donor for development, and its practice goes back to the very period of decolonisation. Moreover, for decades Europe has been promoting human rights as a dimension of development, including conditionality in its political dialogue with developing partners. Following Tampere, the 2000 Cotonou ACP–EU agreement enshrines the idea of regulating migrations through development, as stated in article 13, point 4: “*The Parties consider that strategies aiming at reducing poverty, improving living and working conditions, creating employment and developing training contribute in the long term to normalising migratory flows*”.

Europe has developed during the 1990s a strong know-how for helping rebuild institutions after a conflict. It has played a major role in Kosovo’s birth.

Thus, the Tampere programme openly links migration management to what Europe knows best: helping others outside Europe. This does not mean disregarding granting asylum.

2. As to asylum, the Presidency Conclusions go on, stating that the Council “*has agreed to work towards establishing a Common European Asylum System, including “a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of*

²⁷ Ibid § 11.

protection offering an appropriate status to any person in need of such protection".²⁸

3. And the last aspect of the programme relates to "*fair treatment of third country nationals*", evoked in the following generous way: "*the legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens.*"²⁹

These provisions are echoed by the Cotonou agreement.³⁰ However, the latter encompasses a readmission clause³¹ too. This type of device was to further develop during the next period.

6.3.2 At Last, Law Making

This very far-reaching programme, valid for the following 5 years, was not completed before the adoption of the next one, the Hague programme (2004).

The main achievement was a set of Directives which have been adopted on the asylum issue : "*the Tampere Programme (. . .) is notable for having produced the first set of legally binding EU-level agreements: temporary protection for persons displaced by conflicts; a common understanding of refugee status and "subsidiary" protection; minimum procedural guarantees; minimum conditions for the reception*

²⁸ Ibid § 16.

²⁹ Ibid § 21.

³⁰ ARTICLE 13 Migration

1. The issue of migration shall be the subject of in depth dialogue in the framework of the ACP–EU Partnership. The Parties reaffirm their existing obligations and commitments in international law to ensure respect for human rights and to eliminate all forms of discrimination based particularly on origin, sex, race, language and religion.
2. The Parties agree to consider that a partnership implies, with relation to migration, fair treatment of third country nationals who reside legally on their territories, integration policy aiming at granting them rights and obligations comparable to those of their citizens, enhancing non-discrimination in economic, social and cultural life and developing measures against racism and xenophobia.

³¹ Article 13 point 5 c) The Parties further agree that:

- i) – Each Member State of the European Union shall accept the return of and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that State's request and without further formalities;
- Each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities. The Member States and the ACP States will provide their nationals with appropriate identity documents for such purposes.

of asylum seekers; and a regulation on deciding which Member State is responsible for assessing which asylum claim” (van Selm 2005).

The first one adopted was on Temporary Protection (2001/55). It goes far beyond harmonisation, establishing a common regime run by the Council, with a burden sharing principle overarching the distribution of protected people between the European Member States. The decision is collectively taken by the Council of the EU for 1 year, with the possibility of proroguing it for 6 months (Boutruche-Zarevac 2010).³² The Regulation on Member States’ respective jurisdictions, Dublin II,³³ as well as the Directive on Asylum status³⁴ followed in 2003, and the Directive on Qualification in 2004.³⁵ The last one, on procedures for asylum request³⁶ was still to be awaited until 2005. The harmonisation is not very far-reaching, since the topic is difficult and the national traditions unevenly developed.

With regard to the regulation of migration flows, little was done. The main idea was helping development, namely institutional development, and supporting human rights in developing countries. This did not exclude one hint towards “*readmission agreements*” between the European Community and third countries in the Tampere programme. Yet, this approach was to develop more during the next stage, at a moment when European instruments became less idealistic.

6.4 The Early Millennium Era

If the Tampere programme can be considered idealistic, the Hague programme can be considered more strategic. It was tailored with regard to then current events.

³² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (O J of the European Communities 7.8.2001 L 212/12).

³³ Dublin II; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

³⁴ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

³⁵ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

³⁶ Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status.

6.4.1 *Migration as a Phenomenon Regarding Europe*

The early millennium was a time of great challenges and interrogations in geopolitics with the 9/11 attacks and the subsequent Afghanistan campaign, as well as with the war in Iraq. In the management of world affairs, the impression of entering a new era seemed to cast a new deal in development with the Millennium goals. And in crisis management, the search for a new balance between protection and respect for sovereignty pushed R2P to the forefront. The same was occurring for forced migrations. The 1980s and 1990s had been the time of emergency rescue for refugees; could the next decades become, with the end of many conflicts,³⁷ the time for sustainable solutions? In the meantime, with the number of internally displaced persons on the rise, and growing flows of persons in search of a new life in a peaceful country, the turmoil of the global South partly transferred to the North.

During the early part of the new millennium, Europe enlarged, wiping off the internal divide that spoiled the continent during bipolarisation; but at the same time, Europe faced new challenges: how to adapt and how to adapt its international role to the new conditions?

6.4.1.1 **Immigration, a New Concept for Old Europe**

As a major donor Europe had to think of “*the emerging serious imbalances*” when “*Member States were spending significant amounts on processing asylum claims in the EU where the majority of applicants did not qualify for international protection while the majority of refugees including the most vulnerable groups*”³⁸ remained unprotected in the vicinity of their State of origin. As a progressively integrating entity,³⁹ it was getting much bigger, but also suddenly quite different with its biggest ever enlargement, 10 countries at once joining 15, while the Schengen system with its unique external border was still a work in progress.⁴⁰

As a human group, Europe was considering the results of the huge change in its demography: “*Europe needs migration. Our populations are getting smaller and growing older*”.⁴¹ However, unlike the traditional countries of immigration—the United States, Australia, Canada—that have, for decades, received and integrated former refugees, together with people attracted by a possible better future and

³⁷ The Balkanic wars, Angola, Sierra Leone, Liberia, the international phase of the Congolese case (where agreements were brokered in 2002).

³⁸ The Commission Communication “On the common asylum policy and the Agenda for protection” of 26 March 2003 (COM (2003) 152 final).

³⁹ Even if still in search of its institutions, during the Intergovernmental Conference and, even more, after the rejection of the Constitutional Treaty by France and the Netherlands.

⁴⁰ Namely with some European States not belonging to the space and non-European States belonging to it.

⁴¹ European Parliament Analysis. Recommendations no DT/61933.doc, 8 June 2006.

chosen for their capacities, Europe was not used to immigration and reinstallation of refugees.

Meanwhile, on Europe's southern shores and in the eastern mountains of Greece, quite another phenomenon was appearing: that of massive mixed migration. People were approaching the external border, often without documents showing their origins, no matter what the reasons were for fleeing their country of origin. Most of the time grouped by smugglers or traffickers, sometimes on their own, forced to migrate or not, pushed by a family in quest of some remittances or making their own way towards a mythic El Dorado. According to the conditions of travel they go unnoticed⁴² or are seen in dire need of assistance. Some of them are eligible for protection, not always the ones who claim it.

6.4.1.2 Chosen Immigration

(...) we are trying to manage migration better: welcoming those migrants we need for our economic and social well-being, while clamping down on illegal immigration⁴³

Thus, was set up a *summa divisio*: legal (and fruitful) *versus* illegal (and to be fought) migration.

For Europe, an important parameter of the device relates to "readmission" agreements. The latter mean that the non-European State acknowledges its obligation to admit its own nationals. And some such agreements encompass the obligation to admit third country nationals having transited through their territory.⁴⁴ Such agreements are often balanced by facilitation of visas, but not always. Since 2002 (with Hong Kong), the EU has concluded approximately two dozen readmission agreements, half of them complemented by a visa facilitation procedure.

⁴² Such as many Iraqis and Afghans wanting to reach the UK, who had entered unnoticed into the European space and only appeared when they stopped in Sangatte in their protracted attempts to cross the Channel.

⁴³ Benita Ferrero-Waldner, Commissioner for External Relations, Speech (06/149) in Stockholm (Swedish Institute for International Affairs 7 March 2006).

⁴⁴ T Strik Parliamentary Assembly of the Council of Europe's rapporteur "Les accords de réadmission, un mécanisme de renvoi des migrants en situation irrégulière" doc no 12168 17 mars 2010.

6.4.2 *Recognition of Immigration into Europe as an Issue for External Policy*

6.4.2.1 Two Conceptual Innovations

Two key expressions appear. One relates to temporality: circular migration. The other one relates to geography and geopolitics: externalisation of asylum. Both concepts are meant to meet the challenges posed by the context.

On the 1st of May 2004, ten States entered the European Union: Poland, Slovakia, Hungary, Slovenia, Estonia, Latvia, Lithuania, Cyprus, Malta and the Czech Republic. Only the latter did not become part of the external border of the EU. Together with the Spanish Canaries Island, the Ceuta and Melilla Spanish enclaves in Morocco, Greece, and Southern Italy (namely the Bari area and the Lampedusa Island) they became the Gate of Europe. For years already there was mounting pressure around the ancient points of the Gate and this new landscape gave an opportunity for rearranging.

The system was tailored with regard to both the Central and Eastern enlargement and a unique convergence between European institutions and UNHCR, headed up at the time by a former Dutch Prime Minister. In 2002, when this enlargement was being prepared, the European Council of Sevilla echoed a UNHCR declaration calling refugees to be kept in the vicinity of their country of origin. Accordingly, the next European Council adopted the principle of having Southern countries preventing departures to Europe.⁴⁵ In 2003, the High Commissioner put forward the so-called “three-pronged working proposal”,⁴⁶ offering the perspective of two new ways for a European country to protect people in need of protection. The traditional one is granting asylum on its territory. One new “prong” would be “regional” protection, made possible by an action of capacity building in the South with European aid to strengthen protection capacity. The second new prong would be that of “European” protection aimed at protecting those having filed “manifestly unfounded” asylum request, but however in need of protection. The latter persons would be distributed among European States. To make it short: there would be fewer refugees coming to Europe, but people not eligible for refugee status would be welcomed to benefit from extended protection.

“Europe is a unique model of an emerging “common asylum space”. If burden sharing and responsibility sharing cannot be successfully applied within this space, then how can we possibly expect it to be applied globally? Indeed, I would say that Europe has no choice but to work on both fronts if it is to effectively address both the phenomenon of irregular movements of asylum seekers to Europe and the phenomenon of economic migrants abusing and clogging up its asylum systems.

⁴⁵ Concl. of the Presidency 21 and 22 June 2002.

⁴⁶ Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an Informal Meeting of the European Union Justice and Home Affairs Council, Veria, Greece, 28 March 2003.

(...) *With the accession in 2004 of ten new EU member States, there is an opportunity to be seized (...) If we want to move ahead, we will have to engage these new countries without delay in exploring the issue, since much of the joint processing may take place on their territories*".⁴⁷ In 2004, the time seemed to have come for a huge re-arrangement. After tough negotiations, the Hague programme adopted by the European Council in November for 2004–2009 was less generous than Tampere, but deliberately innovative.

Innovation lies first in a geographical shift. The most prominent aspect of the Hague programme is asylum externalisation. The EU cares about asylum seekers and pays for them, but it manages to have them protected outside Europe. This innovation was welcome by some authors (van Selm 2005),⁴⁸ and strongly criticised by others (Rodier 2004).

A second innovation relates to temporality. Following the Hague program, the EU invented the pioneer⁴⁹ concept of "circular migration", first put forward in a Communication of the Commission dated 1st September 2005,⁵⁰ and considered "development-friendly". Soon after, the European Council of 15th and 16th December 2005 ended with Conclusions of the Presidency stating, *inter alia*

GLOBAL APPROACH TO MIGRATION. The European Council notes the increasing importance of migration issues for the EU and its Member States and the fact that recent developments have led to mounting public concern in some Member States. It underlines the need for a balanced, global and coherent approach, covering policies to combat illegal immigration and, in cooperation with third countries, harnessing the benefits of legal migration. It recalls that migration issues are a central element in the EU's relations with a broad range of third countries, including, in particular, the regions neighbouring the Union, namely the eastern, south eastern and Mediterranean regions.⁵¹

6.4.2.2 The Way for Implementation

In order to implement the three-pronged system, the EU was to draw on diverse partnerships. The oldest is the ACP. The second is the Euro-Mediterranean partnership, once named the Barcelona process. And the latest refers to the concept of 'Neighbourhood', which is not exempt of some overlaps with other groups of States.

⁴⁷ Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an Informal Meeting of the European Union Justice and Home Affairs Council, Veria, Greece, 28 March 2003.

⁴⁸ Rather than focusing on somewhat nebulous "partnerships" with countries of origin, the new programme recognises the "external dimension" to asylum and migration policy. In other words, the Hague Programme envisions promoting refugee protection beyond the European Union and incorporates migration management within broader foreign policy concerns."

⁴⁹ According to MEMO 1549.

⁵⁰ COM (2005) 390 final (Communication from the Commission to the Council the European Parliament, the European Economic and Social Committee and the Committee of the Regions).

⁵¹ Council of the European Union—Presidency Conclusions 15914/1/05 REV 1 § 8.

The Council drew the first lines for implementation by annexing a document with the title “*Global approach to migration: Priority actions focusing on Africa and the Mediterranean*”, listing some very practical measures⁵² and foreseeing the use of the ACP–EU political dialogue, namely on the basis of Article 13 of the Cotonou Agreement,⁵³ “*covering a broad range of issues from institution and capacity building and effective integration of legal migrants to return and the effective implementation of readmission obligations, in order to establish a mutually beneficial cooperation in this field.*”⁵⁴

For other non-member States the period of the Hague document was very specific, since 2004, together with marking a huge enlargement, was drawing the scheme of enlargement to a halt. Europe began acknowledging the need for cooperation with the States left just outside its borders, which formed the basis of the idea of a ‘Neighbourhood’ partnership with some Eastern as well as Mediterranean countries. In order to avoid a visible line between prosperity and those left outside, it was decided to develop an area of prosperity and close cooperation involving the European Union and the neighbouring countries, the list of which has no purely geographic rationale.⁵⁵ The corresponding financial instrument⁵⁶ is a merger of MEDA⁵⁷ and TACIS⁵⁸ instruments, and the Partnership has to be

⁵² – Explore the feasibility of a migration routes initiative for operational cooperation between countries of origin, transit and destination.

- Establish and implement a pilot Regional Protection Programme (RPP) involving Tanzania as early as possible in 2006, with a steering group to oversee the programme. Based on findings from the pilot, develop plans for further programmes in Africa.
- Engage Mediterranean third countries in the feasibility study of a Mediterranean Coastal Patrols Network, Mediterranean surveillance system and related pilot projects.
- Consider supporting efforts of African states to facilitate members of diasporas to contribute to their home countries, including through co-development actions, and explore options to mitigate the impact of skill losses in vulnerable sectors.
- Establish information campaigns targeting potential migrants to highlight the risks associated with illegal migration and raise awareness about available legal channels for migration.
- Explore how best to share information on legal migration and labour market opportunities, for example through the development of migration profiles and through strengthening sub-regional fora.

⁵³ See text *supra* note 31.

⁵⁴ Text of the above-mentioned Annex.

⁵⁵ “List includes the neighbouring countries which do not currently have an accession perspective (...) Assistance to neighbouring countries with accession prospects, such as Turkey or the countries of the Western Balkans, is covered under a separate Pre-Accession Instrument” (Introduction of the Communication of the Proposition of the Commission for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood Partnership Instrument).

⁵⁶ Regulation 1638/2006—24 October 2006, based upon a proposal of the Commission dated 29 September 2004 (COM (2004) 628 final).

⁵⁷ The financial aspect of the Euro-Mediterranean policy.

⁵⁸ One of the financial instruments for support to the States of CEI.

activated on a case by case basis through an Action Plan.⁵⁹ The link between this Neighbourhood Partnership and the asylum externalisation does exist even though only a minority of the Neighbour States have entered the system conceived from 2004 (all Mobility Partnerships came later). More agreements have been concluded by European Member States on a bilateral basis.⁶⁰ A multilateral process successfully initiated could be identified with the follow-up of the Euro-African Strategy from 2007, as well as the “Processus de Rabat”.⁶¹

In short, the Neighbourhood Partnership is not, or not yet, a privileged area for cooperation about migration. Four years after the adoption of The Hague programme, as well as after the first decisions upon the Neighbourhood Partnership, the instruments in force for readmission were mainly inter-State ones or arrangements based upon another partnership contiguous with the Neighbourhood one.⁶² Thus, the implementation of the European device for having undesired migrants leaving Europe (either after an illegal entry or after the period of their legal employment has come to an end) was relatively difficult. Moreover, on the European side, as well on the migrants’ side, facts were disappointing. Illegal migrations and their related human sufferings were, nevertheless, on-going.

6.4.2.3 The Practical Tools: Institutionalisation and Programmes

The FRONTEX Agency⁶³ was created just before The Hague programme, with an obvious view to enhancing security in the general framework of the Schengen architecture. It aims at managing operational cooperation between member states, especially, but not only, when it comes to organising joint return operations of third-country nationals, illegally present on the territory of the member States. FRONTEX is also in charge of analysing risks of organising training, and disseminating knowledge. It was completed with the FRAN (Frontex Risk Analysis Network).⁶⁴

More specific are the RABITs—Rapid Border Intervention teams. Their founding regulation explicitly evokes “*the critical situations which Member States from time to time have to deal with at their external borders, in particular the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member States illegally*”. Their deployment is

⁵⁹ Action Plans, for example, have not been signed by Libya, Syria as well as Belarus.

⁶⁰ Spain and Morocco, Italy and Libya, the UK and Libya.

⁶¹ Created in 2006 (<http://www.processusderabat.net/web/>, accessed 6 October 2014).

⁶² For instance, its thanks to MEDA that Morocco negotiated with the EU its behaviour with regard to Moroccans illegally present in Europe.

⁶³ 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.

⁶⁴ Creating a cooperation upon information with some non-European States’ services.

conceived as an *ad hoc* and temporary aid.⁶⁵ Some programmes complemented the device: AENEAS⁶⁶ was meant for helping the partner States to manage migrations and asylum by capacity building, and the CCC (Common Core Curriculum) was to improve border guard training and thus transfer the FRONTEX standards to other States' services.

However, the most important type of programmes are the "situation specific and protection oriented" RPP—Regional Protection Programmes, according to "a distinction (...) drawn between the differing needs of countries in regions of transit and countries in regions of origin".⁶⁷ The latter category, since it refers to the regions of origin of refugees, often face huge difficulties, and has to be assisted in order "to comply with international obligations under the Geneva Convention and other relevant international instruments, to enhance protection capacity, better access to registration and local integration and assistance for improving the local infrastructure and migration management". Whereas in the former countries, roughly corresponding to "the southern and eastern borders of the EU", the programme was about enabling them to better manage migration and to provide adequate protection for refugees. RPPs are developed in partnership with the countries concerned and "in close consultation (...) with UNHCR and, where relevant, other international organisations"⁶⁸ (point 3).

6.4.3 *Migrations into Europe, Still a Domain for Protection?*

As early as 2004, the UNHCR, during the process of drafting the Hague programme, was explaining that its proposal was aimed at protecting the rights of those eligible for refugee status—if necessary through a determination of their status and a protection in the region of their own country—and of those at risk,

⁶⁵ "Rapid Border Intervention Teams comprise specially trained experts from other Member States on its territory to assist its national border guards on a temporary basis. The deployment of the Rapid Border Intervention Teams will contribute to increasing solidarity and mutual assistance between Member States (7) The deployment of Rapid Border Intervention Teams to provide support for a limited period of time should take place in exceptional and urgent situations." (§§ 6 and 7, Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004)".

⁶⁶ AENEAS: a programme with general objective to provide third countries with technical and financial assistance in order to help them manage migrations in a better way migrations: development of their legislation regarding protection as well as legal immigration, promotion of the respect of principle of non-refoulement and respect of the readmission. The AENEAS programme has supported 107 projects in different regions from 2004 to 2006. It has been created by Regulation (EC) n. 491/2004 of 10 March 2004.

⁶⁷ Point 2 of the "Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes" 1.9. 2005 COM (2005) 388 final.

⁶⁸ Idem, Point 3.

even though not eligible to the status. Europe was highlighted as a major actor for direct or indirect protection. Does Europe play this role?

6.4.3.1 Immigration and Human Rights: An Indivisible Package?

The concept of indivisibility comes from human rights law, since many legal instruments⁶⁹ proclaim that human rights are indivisible, meaning that no right can be safe if other ones are violated. With regard to the present topic, indivisibility means that a fair treatment of asylum seekers is not sufficient; whereas only the full respect of all migrants' rights means compliance with human rights. The complex device set up with, on the one hand, externalisation of protection and on the other hand, acceptance in Europe of some people in need even though not entitled to asylum went to be checked against indivisibility. When the EU adopted the Return Directive (2008/115 EC OJ L348/98 24 December 2008), establishing common standards for Member States it was highly "*controversial among NGOs and the academic world, because of a perception that it took an unduly harsh approach on these issues*" (Peers 2014).

However, in spite of its promises and of the efforts forward (European Commission 2006),⁷⁰ the externalisation mechanism did not easily work. Both efforts failed. While migrants were waiting for asylum, they had to stay in their region of origin. To this end, camps have been created, or reused, such as the camps in southern Libya for Chadian refugees. They were supposed to allow vetting of those in need of protection in the bigger group of economic migrants. Due to a lack of culture of asylum for people from another civilisation, or to racism in their population or simply to poor governance, the partners, namely the southern ones, have not yet reached the required level of reception. Quests for asylum in Morocco, Algeria, not to mention Libya, are all too often dangerous and disappointing. When migrants are approaching Europe in a mixed flow, the status determination of the ones eligible for refugee status offers fewer chances than on an individual basis.

Europe had hope for this mechanism; and it was also disappointed. None of the situations were compatible with the principles it proclaims. Little evolution was perceivable towards the most important principle in its eyes: circular migration programmes and "effective mechanisms for readmission" (European Commission 2006).⁷¹ The image of Europe in other countries became increasingly blurred.

⁶⁹ The International Covenant on Civil and Political Human Rights.

⁷⁰ European Commission, *The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, COM (2006) 735 final, 30.11.2006.

⁷¹ European Commission, *The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, COM (2006) 735 final, 30.11.2006.

6.4.3.2 Events Blurring the European Image

On the external borders of Europe, pressure was rising, mainly due to the Ceuta and Melilla crisis of 2005. These Spanish territories are landlocked in the North Moroccan territory. In September 2005, African migrants attempted to enter the 'European area' by climbing the barbed wire fences around the enclaves. Those climbing the walls of Ceuta were shot by the Spanish police; 11 died. The so-called 'externalisation' policy began being strongly combated by NGOs after the Ceuta and Melilla troubles. Moreover, this was the beginning of mediatisation, not of the phenomenon. The deadliest are not the Ceuta and Melilla barriers by far, but the sea. Groups of sub-Saharan migrants became more and more visible and many deaths at sea occurred and still occur. Even though there is no certainty about figures, the death toll is heavy.⁷² These incidents have provoked strong criticism.⁷³

6.4.3.3 Better Harnessing the Challenge at the Turn of the Decade?

In spite of harsh criticisms, the protagonists went on, with a view of handling both human rights and security. The year 2008 brought a reaffirmation of principles and an acceleration of implementation. In 2008, the UNHCR opened an office in Morocco, so as to offer, at the forefront of the contact with migrants, the corresponding capacity. In October, the French Presidency of the EU brought the Member States to solemnly adopt the "European Pact on Immigration and on Asylum", a comprehensive document aiming at recalling the European commitment to people in need of protection, and through which the Member States pledged to adopt a more global and flexible migration policy, including the issue of return to the State of origin. A major piece of the Pact relates to a "Common European asylum regime", once again, in order to go beyond the above mentioned Directives.

At the turn of the Decade, the efforts seemed to begin paying off. Bilateral agreements named "Mobility Partnerships" or MPs were supposed to help implement this device, encompassing issues ranging from development aid to the fight against unauthorised migration and temporary entry visa facilitation. During the period under review, Moldova (2008), Cape Verde (2008), Georgia (2009) and Armenia (2011) signed with the EU. Negotiations were opened with Ghana and Senegal. The legal device was reinforced when, in December 2008, the Directive on

⁷² According to United for Intercultural Action, a NGO, 16,000 migrants were dead between 1988 and 2012. Another one, Fortress Europe states that more than 12,000 clandestine migrants are dead and more than 5,000 have disappeared in their attempt to cross the Sicilia Canal or the Gibraltar straight, or in the Aegean or Adriatic seas, or between Africa and the Canaries islands.

⁷³ For example, *Des centaines de morts et disparus aux portes de l'Europe*, Médecins du monde, 1^{er} juillet 2008, Michel Agier, *Vent mauvais sur la Méditerranée: La fin de l'asile, c'est le déni de la vie même*, Mediapart, 7 avril 2009.

return of illegal migrants⁷⁴ was adopted, the aim of which is to ensure Member States use common standards.

The Stockholm programme (2010–2014) can be considered as setting concrete objectives for the realisation of the European Pact for Asylum and Migration, itself followed by an Action Plan. This pragmatism was needed due to the crisis striking Europe: *“The vision set out in Tampere and to a lesser extent, Hague, has disappeared. (. . .) the shift in focus toward the needs of European labor markets suggests that migration is no longer just simply a Justice, Liberty, and Security policy, but an integral part of foreign policy, employment and social affairs, and a host of other policy areas, such as trade, education, and finance”* (Collett 2010).

6.5 The ‘Arab Spring’: New Hopes or Even Tougher Challenges?

An even more specific situation arose when the so-called Arab Spring broke out. For the EU, it seemed to be the dawn of a new era, the fall of another dividing wall. Yet the new situation induced a more visible flow from Tunisia and Libya to Lampedusa in early 2011. Europe was distracted from its dreams of reinforced cooperation on various topics, even the most democratically far-reaching ones,⁷⁵ and those of new Mobility Partnerships.

Globally, in humanitarian crises, Europe (i.e. the Union plus its Member States) is the most generous donor of humanitarian assistance. With the Arab Spring, the EU stands, once again, at the forefront. In Libya, the total amount spent (for purely humanitarian activities) was 80 million euros; in Syria, it is to date (August 2014) 2.88 billions euros.⁷⁶ Moreover, Libya gave the EU the opportunity to involve both aspects of ECHO, civil protection as well as humanitarian aid. The European Civil Protection Mechanism was active with the “Pegasus” operation, one of the biggest evacuations ever. Pegasus I evacuated European workers from Libya; and Pegasus II evacuated third country nationals, mainly Egyptians and Tunisians who had their jobs in Libya. Both operations were airlifts, operated by planes of different Member States,⁷⁷ coordinated by ECHO. The EU has set up the first military operation ever totally devoted to humanitarian logistics, EUFOR Libya, created on 1st April 2011. According to principles of humanity and independence which are highlighted by Regulation 1257/96, this force was conceived as a pure tool, available for

⁷⁴ 2008/115/EC of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁷⁵ Communication of the European Commission “A partnership for Democracy and shared prosperity” COM (2011) 200 final, 8 mars 2011.

⁷⁶ Consilium.europa.eu consulted on June 2nd 2013. It is a integrated amount (ECHO plus Member States plus External Action).

⁷⁷ Germany, Denmark, Belgium.

humanitarians. The strongest element in the device was that its activation was subject to OCHA's will: "*EUFOR Libya, if requested by OCHA, shall (...) contribute to the safe movement and evacuation of displaced persons*".⁷⁸

Besides the fact that OCHA never asked for EUFOR Libya's activation, the Libyan case, together with the Tunisian one, were strongly disappointing for the EU. With regard to migrations, the EU was faced with a twofold challenge. Not only was Libya no longer in a position to play its role in readmission, but, instead, thousands of people were arriving from Libya on European shores or were left to die at sea.

6.5.1 Facing Migratory Emergency

In 2011, due to the 'Arab Spring', the EU received what was considered a 'massive influx' of some 40,000–60,000 people. Although small in comparison to intra-African displacements, it nonetheless was a dilemma for the Europeans:

The EU's celebration of its neighbours' fight for democracy put the Union in a delicate position. On the one hand, the EU had a moral duty to open up to those whose freedom has been denied (...). On the other, the constant concern regarding irregular migration intensified.⁷⁹

It could have been time for granting temporary protection, for the first time since the Directive had been adopted. Migrants would have been accepted without a status determination and they would have been sent to different Member States for 1 year. However, such was not the case, partly because the flow from Tunisia seemed linked to disorders in a specific way: not due to generalised violence, rather due to the temporary inefficiency of the security services, which had, up to then, prevented people from fleeing. This type of nexus could be discussed also in regards sub-Saharan Africans coming from Libya. Nevertheless, in the absence of temporary protection, the migratory crisis management was State-security oriented. In spite of the Hermes Operation deployed by FRONTEX,⁸⁰ there was a mess in Malta

⁷⁸ Article 1, § 2, Council Decision 2011/210/CFSP.

⁷⁹ Marie Martin "Extension of Mobility Partnerships with Euro-Mediterranean Partners" Culture and Society. Migrations (Statewatch.org).

⁸⁰ Frontex received a formal request for assistance on February 15th from the Italian Ministry of Interior regarding the extraordinary migratory situation in the Pelagic Islands. The Italian Government requested assistance in strengthening the surveillance of the EU's external borders in the form of a Joint Operation. Additionally, Italy requested a targeted risk analysis on the possible future scenarios of the increased migratory pressure in the region in the light of recent political developments in North Africa and the possibility of the opening up of a further migratory front in the Central Mediterranean area. In a statement issued by the EU Commissioner for Home Affairs, Cecilia Malmström, it was stated that Hermes will be "deployed to assist the Italian authorities in managing the inflow of migrants from North Africa, particularly arrivals from Tunisia, on the island of Lampedusa" (www.frontex.europa.eu).

and much more in Lampedusa. The local facilities were quickly overwhelmed, even though the Italian Red Cross and Civil Protection showed true efficiency and the Lampedusa inhabitants showed great generosity. The island, normally inhabited by 5,000 people received up to 25,000 people at the same time. Italian ships also saved a lot of lives that were endangered at sea.

However, the general impression resulting from European behaviour was not a positive one. The crisis put a halt to solidarity and a halt to the welcoming of mixed migration. Primarily Italy complained, demanding for “burden sharing”, and faced with the lack of response, opened the Schengen path to the migrants, which France considered a danger to itself. The welcome offered by locals was hidden from the public by the mid-term political issue. After the rescue offered by the Italian authorities,⁸¹ attention was drawn to the flux spilling over to other European countries thanks to the Schengen system. France, the next neighbour, after a few days, closed the borders, with little success due to clandestine cross-over. After a short dispute, France and Italy agreed upon commonly asking for a reform of the Schengen System. Rumours circulated of worrying examples, such as the *left-to-die* case.⁸² The UNHCR speaks of 1,500 dead during the first semester of 2011 in the central Mediterranean, due to overcrowded unseaworthy boats deprived of help. The Arab Spring was followed by the Syrian civil war and exile by sea continues. After 3 years, more than 250,000 have arrived on the sole Italian shores, coming from North Africa, Middle East, the Horn of Africa. . . . The whole system has thus been put at risk of collapse.

6.5.2 After the Arab Spring, a New Impetus

In the wake of the ‘Arab spring’ and of the turbulence it has created on the southern border of Europe, many decisions were made. After 3 years, one may consider that the events gave a strong impetus to European migratory crisis management. Two different levels may be distinguished.

⁸¹ There is often confusion between a case of 2009, relating to a lack of relief, condemned in 2011 by the European Court of Human Rights and the very efficient aid given in 2011 by the Italian authorities.

⁸² According to Amnesty international, in March 2011 one small boat fleeing from Libya was short of food and of fuel. The surrounding fishing ships gave no help. It sent a Mayday call received by the Italian rescue centre, which sent some food from a helicopter. The story ended with the boat landing again in Libya. The survivors were sent to jail. The Libyan State did not take up its responsibility. However, was it reasonable to expect such behaviour from Libya? (T Strik, (Rapporteur of the Commission for migrations, Council of Europe), Lives lost in Mediterranean sea: Who is responsible?).

In the Hirsi Jamaa and others case, the European Court of Human Rights has condemned Italy in 2012 for having, in 2009, intercepted a boat in the Maltese zone for rescue and research, and for having sent him back to Libya, pursuing to the Italy–Libya agreement for readmission.

6.5.2.1 The Overall Level: A New EU Global Approach to Migration and Mobility or Gamm

As early as June 2011, the European Council's Conclusions invited the Commission to evaluate the General approach set up previously and to "*set a path towards a more consistent, systematic and strategic policy framework for the EU's relations with all relevant non-EU countries*", adding that "*This should include specific proposals for developing the Union's key partnerships, giving priority to the Union's neighbourhood as a whole.*" The Commission was in a position to work on the basis of a public online consultation and of statistics.⁸³

The results of these investigations were the following proposals, included in a Communication of the Commission, dated 18 November 2011⁸⁴:

- To expand the scope of the General Approach from "Migrations" to "Migrations and Mobility";
- To keep to the principles of mutual benefit and dialogue with third countries;
- To consider the global approach as overarching all European activities relating to migrations, and to have it implemented by EEAS as well as the Commission and the Member States.

The GAMM puts forward four major *principles*. The first two principles are intertwined: acceptance of the existence of legal immigration into Europe and the link between migration and development. Thus, migration, since it helps migrants to help their country, is under the aegis of human security. Thus, through the acceptance of the very idea of legal migration, Europe indirectly acts in favour of human security. This is an extra contribution, added to the funds handled by DG DEVCO. In order to strengthen this action, the European Commission has issued an eloquent communication: *Maximising the Development Impact of Migration. The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus.*⁸⁵

Another set of twin principles put forward by the Global Approach cites the refusal of illegal migration, which includes struggle against it, and the establishment of a device against human trafficking. The latter is possible thanks to

⁸³ According to the UN (UNDP (2009) *Overcoming barriers: Human mobility and development*, Human Development Report; UNHCR (2011) *Global Trends 2010*), "there are 214 million international migrants worldwide and another 740 million internal migrants. There are 44 million forcibly displaced people. An estimated 50 million people are living and working abroad with irregular status. Long-term population ageing in Europe is expected to halve the ratio between persons of working age (20–64) and persons aged 65 and above in the next 50 years. Migration is already of key importance in the EU, with net migration contributing 0.9 million people or 62 % of total population growth in 2010" (Communication SEC (2011) 1353 final).

⁸⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "The Global Approach to Migrations and Mobility" (SEC (2011) 1353 final).

⁸⁵ COM (2013) 292 final.

EUROSUR, a cooperative surveillance device which has, since then, been agreed upon (see *below*). Thus, Europe insists upon the fact that it helps the victims of trafficking and it helps people who are at risk at sea on their clandestine route to Europe, which is all too frequent.

The Global Approach also encompasses a fifth principle: advancing the common European asylum policy, which at last has come to life.

Two main types of tools are designed for implementation. On the one hand, there are agreements, with different degrees of binding power: migration partnerships, proposed to the Neighbours and simple Common Agendas on Migrations and Mobility for other States. On the other hand, communication tools have been set up: Migrations and Mobility Resource Centres, and one EU immigration portal.

6.5.2.2 More Specific Elements

We shall deal with some more specific elements in an orderly way, from the country of origin to the heart of the Schengen area.

In the Region of the Country of Origin

- a) The EU has developed its Regional Protection Programmes. The system had begun with two areas only: Eastern Europe as a region of transit⁸⁶ and the African Great Lakes Region (particularly Tanzania) as a region of origin.⁸⁷ In 2010, the Horn of Africa⁸⁸ as a region of origin and eastern North Africa were added.⁸⁹ Previously a region of transit, the latter was endangered in 2011. Nevertheless, the possible creation of a RPP for Syria came to the fore in 2012. During its Presidency, Cyprus has pushed strongly in that direction, putting the topic on the European Council's Agenda. The programme has been decided on 16 December 2013, as "Regional Development and Protection Programme for refugees and host communities in Lebanon, Jordan, and Iraq" to cope with Syrian refugees.
- b) In March 2012, the EU decided⁹⁰ to accept refugees waiting for resettlement in different regions with a heavy load of refugees. Even though resettlement is a voluntary activity depending on a sovereign decision, the EU proposed a Joint

⁸⁶ Belarus, the Republic of Moldova and Ukraine.

⁸⁷ With a focus upon Tanzania, where protection seemed possible.

⁸⁸ Kenya, Yemen and Djibouti.

⁸⁹ Egypt, Libya and Tunisia.

⁹⁰ Decision of the Parliament and the Council 29 March 2012 (281/2012) (O.J. L92/1, 30.30.2012).

Resettlement Programme, following on from the one initiated in 2009, in order to improve the funding. The programme prioritises some origins⁹¹ and some types of vulnerable persons.⁹² European Member States freely decide to accept settlers, and receive financial aid for doing so, with special incentives for those who had not previously accepted reinstatement. UNHCR has welcomed this programme.

In the Region of Transit

As early as May 2011, the Commission undertook launching dialogues with Morocco, Tunisia, and Egypt with a view to adopting Mobility Partnerships. The first Mobility Partnerships has been concluded on 8 April 2013 with Morocco. In the specific case of Libya, the EU has offered its technical cooperation on the topic of borders. EUBAM Libya (EU Border Assistance Mission) has been created in order to help Libya control its thousands of kilometres of borders through the desert. But the number of police and custom officers is not sufficient.

As seen before, some RPP are conceived to benefit to regions of transit. However, with times, the South and Eastern shores of the Mediterranean—as well as, possibly, now, Ukraine- become regions of origin, which—once again!—puts the system at risk.

On the External Schengen Borders

The overall spirit is for a better protection of fundamental rights including, first and foremost, the non-refoulement principle.

- a) The EU has organised the systematisation of the RABITs deployment. Regulation 1168/2011, adopted 25 October 2011, and modifying Regulation 2007/2004, highlights in its preamble that “[t]he mandate of the Agency should therefore be revised in order to strengthen in particular its operational capabilities while ensuring that all measures taken are proportionate to the objectives pursued, are effective and fully respect fundamental rights and the rights of

⁹¹ Congolese refugees in the Great Lakes Region (Burundi, Malawi, Rwanda, Zambia);

- Refugees from Iraq in Turkey, Syria, Lebanon, Jordan;
- Afghan refugees in Turkey, Pakistan, Iran;
- Somali refugees in Ethiopia;
- Burmese refugees in Bangladesh, Malaysia and Thailand;
- Eritrean refugees in Eastern Sudan.

⁹² Main characteristics of the persons eligible to the Programme: women and children at risk, unaccompanied minors, survivors of violence and torture, persons having serious medical needs that can be addressed only through resettlement, persons in need of emergency resettlement or urgent resettlement for legal or physical protection needs.

refugees and asylum seekers, including in particular the prohibition of refoulement". Thus, the regulation is placed under the aegis of the preservation of fundamental rights.

- b) A new cooperation mechanism has been decided, *EUROSUR*.⁹³ The latter regulation seems to bring a better balance between States' security and migrants' rights and security. The regulation highlights the principle of non-refoulement and organises the respect of this principle.⁹⁴ With regard to the cooperation with neighbouring third countries, the *EUROSUR* Regulation stipulates that any "*cooperation of Member States with neighbouring third countries (...) must be based on agreements*". "*Before concluding such agreements, Member States must notify them to the Commission*", and the latter will verify "*their compliance with the provisions of the EUROSUR Regulation*", in particular concerning "*fundamental rights and the non-refoulement principle*".⁹⁵ This provisions aims at ensuring the pre-eminence of the non-refoulement principle, close to the rationale of international public policy. This rule, together with the signature of new Mobility Partnership should put an end to the inter-State North–South agreements, one of them having led to the *Hirsi* case.⁹⁶

In the Schengen Area

- a) The Common European Asylum System initiated in 2001 has finally been fully renovated. On 1 June 2011, the Commission proposed revised Directives on Asylum Procedures and on Reception conditions. After an intense period, on 12 June 2013, the proposal was endorsed by the European Parliament.⁹⁷ Within 2 years, the whole system had been revised, as follows:
- "*The revised Asylum Procedures Directive aims at fairer, quicker and better quality asylum decisions. Asylum seekers with special needs will receive the necessary support to explain their claim and in particular there will be greater protection of unaccompanied minors and victims of torture.*
 - *The revised Reception Conditions Directive ensures that there are humane material reception conditions (such as housing) for asylum seekers across the EU and that the fundamental rights of the concerned persons are fully respected. It also ensures that detention is only applied as a measure of last resort.*

⁹³ Proposal of the Commission for a Regulation establishing the European Border Surveillance System (COM (2011) 873 final) 12 December 2012 and Regulation UE no 1052/2013 (European Parliament and Council of European Union) 22 October 2013 OJ L 295, 6 November 2013.

⁹⁴ Article 22.

⁹⁵ Text of the Memo 13/578, 19 June 2013.

⁹⁶ See footnote 83.

⁹⁷ Which ECRE (European Council for Refugee and Exile) considers showing a decreased level of ambition.

- *The revised Qualification Directive clarifies the grounds for granting international protection and therefore will make asylum decisions more robust. It will also improve the access to rights and integration measures for beneficiaries of international protection.*
 - *The revised Dublin Regulation enhances the protection of asylum seekers during the process of establishing the State responsible for examining the application, and clarifies the rules governing the relations between states. It creates a system to detect early problems in national asylum, or reception systems”,⁹⁸*
 - *The revised EURODAC Regulation will allow law enforcement access to the EU database of the fingerprints of asylum seekers under strictly limited circumstances in order to prevent, detect or investigate the most serious crimes, such as murder and terrorism.⁹⁹*
- b) The burden sharing issue, which was so problematic at the peak of the crisis, is linked to the Schengen area without borders. Indeed, mutual trust between Schengen States was lacking in front of the “massive inflow” of March 2011, hence fears and closures of borders. Even worse, some States are permanently deemed unable to stop migrants—as well as to treat them with dignity. Hence this “great *Acquis*” (Fabre 2013) went under review, with two propositions from the Commission. The first one foresees an annual report of the Commission. The second one foresees the reintroduction of border controls in three types of circumstances: “*in case of foreseeable events which constitute a threat*” to public order, such as Olympic Games, “*in case of unforeseen events such as a terrorist attack and in case of (...) serious persistent deficiencies in the management of external borders*”. The last case could, alas, be that of Greece. In the beginning, there was less debate on the merits of these propositions, than on the legal basis, which entails a debate about “supranationalisation of the management of Schengen”. With the inflow becoming permanent, the Italian presidency calls for a European Task force at sea.

6.6 Conclusion

Coming back to migration and the EU, and in order to summarise, the review of European policies over the last two decades has shown that:

1. Europe being faced with global flows, a global approach was necessary and it has been set up. The GAMM is global in that it covers all types of movements, as well as in that it envisages a range of different geographic situations.

⁹⁸ Taking into account the case *M.S.S v. Belgium and Greece* (ECHR) ruling that Dublin II should not be respected if the asylum seeker is at risk of being exposed to degrading treatment.

⁹⁹ www.ec.europa.eu (2013_cetas_factsheet.pdf).

2. Fundamental principles have been reaffirmed, especially in texts dealing with operational activities. The non-refoulement principle (regulations RABIT and EUROSUR), has been reaffirmed, even against free bargaining power of a European Member State negotiating with a Third country (regulation EUROSUR). The right of the asylum seeker to be treated with dignity has been reaffirmed and is protected even against the regular devolution rules for asylum requests (confirmation of jurisprudence *MMS* by the new Dublin regulation).
3. Improvement of protection is at the core centre of the device: promotion of protection in the region of origin and the region of transit, extension of protection to people non eligible to refugee status (Directive on Temporary protection), resettlement in Europe offered to the most vulnerable ones (Joint resettlement programme) even if non-eligible.
4. Regular migrations, preferably but not exclusively circular ones, are now an open option.
5. Readmission is likely to be, from now on, dealt more and more within Mobility Partnerships, rather than in inter-States agreements.

For the time being, the EU seems consistent with its way of crisis management: merciful towards the vulnerable and in search of peaceful relations through development and capacity building. The security it is looking after is a global one, based on human security and State stability. Tragedies should not hide the efforts which are being made in order to offer a better respect of migrants' human rights, neither the fact that since 2005, Europe has spent 800 million euros by funding some 300 migrations-related projects in non-EU countries.

However, no final balance can be set up. In the practice of above-mentioned points 3, 4 and 5, there is clearly place for uncertainty. How will the southern States behave in RPPs? How many will sign MPs? Will the EU grant temporary protection to Syrians or other "European neighbours"? Which profiles will be granted the opportunity to migrate towards Europe? How long will migrations go on fuelling development? And finally, how can it be ensured that present improvements will not be ruined by new events?

References

- Boutruche S (2000) Les mouvements de réfugiés entre l'ex YUGOSLAVIE et le territoire de l'Union européenne: vers l'émergence d'une politique commune en matière d'asile? Master Thesis, Aix-Marseille University
- Boutruche-Zarevac S (2010) La protection temporaire des personnes déplacées en droit de l'Union européenne: un nouveau modèle en cas d'afflux massifs? Dissertation, Aix-Marseilles University
- Collett E (2010) The European Union's Stockholm Program: less ambition on immigration and asylum, but more detailed plans. MPI Migration Information Source
- European Commission (2006) The global approach to migration one year on: towards a comprehensive European migration policy. Brussels

- Fabre C (2013) Schengen. A great Acquis Arousing Debates over the Path of European Integration. In: *Nouvelle Europe*. www.nouvelle-europe.eu/node/1682. Accessed 6 Oct 2014
- Fitzpatrick J (2000) Elements of a formalized regime. *Am J Int Law* 94(2):279–306
- Human Security Study Group (2007) A European way of security. The Madrid Report on the Human Security Study Group
- OJ C (1995) Council resolution of 25 September 1995. OJ C 262:1
- OJ L (1996) Council decision of 4 March 1996. OJ L 63:10
- Peers S (2014) The EU's returns directive: does it improve or worsen the lives of irregular migrants? In: *EU law analysis*. <http://eulawanalysis.blogspot.de/2014/03/the-eus-returns-directive-does-it.html>. Accessed 6 Oct 2014
- Rodier C (2004) Dans des camps hors d'Europe: exilons les réfugiés. *Challenge. Liberty & Security*
- Rumford C (2006) Theorising borders. *Eur J Soc Theory* 9(2):155–169
- Study Group on Europe's Security Capabilities (2004) A human security doctrine for Europe. The Barcelona Report of the Study Group on Europe's Security Capabilities
- Van Selm J (ed) (2000) *Kosovo's refugees in the European Union*. Pinter, London
- Van Selm J (2005) The Hague Programme reflects new European realities. *MPI Migrations Information Source*
- Van Selm-Thorburn J (1998) Refugee protection in Europe. Lessons of 1998 Yugoslavian crisis. *Martinus Nijhoff*, The Hague