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Reconceiving European Migration Policy

The EU between Ambitions and Challenges

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Abstract:

Given the current context of migration crises, the question of how the EU relates to migration has been generally asked in the field of refugee rights and asylum seekers; that of its policy in terms of legal immigration is however less frequent. This paper aims at providing an analysis beyond the emergency answer to migration flows and focuses on the general migration legal order to which European Member States belong. Considering them as major integration parameters, we will illustrate States' migration competences through the lens of Access to Territory, Education and Labour for third-country nationals. This overview will allow us to further explore the evolution and perspectives of the policy making processes in Europe. It will also provide us with an understanding of how migration is currently perceived and translated into political decisions by European Member States.

After this in-depth overview, the current and foreseeable Human Rights impacts of migration regimes will be assessed. We will argue that legal immigration requirements, increasingly difficult to reach, combined with a growing restrictiveness on illegal migration hardly fit with a dignified treatment of people. Therefore, theories for a different conception of migration issues and towards more flexible policies will be discussed, both for reconciling the EU with its fundamental values and for paving the way towards a sustainable response to the growing migration movements shaping our globalized societies.

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1.
GENERAL INTRODUCTION
CONTEMPORARY PORTRAIT OF MIGRATION

1.1 PROBLEM DIAGNOSIS

Mobility is a fundamentally natural phenomenon. Shaping humanity since its early stages, it is still one of the main ongoing problematics of contemporary societies. Perceived sometimes as an asset, while at other times, depending on the era and circumstances, as a threat, mobility remains a subject of political, economic, social and even geostrategic concern. Despite the evolution of global governance tools, the "migration" parameter has yet to become subject of a consensus: a paradoxical state of affairs when free circulation of goods, services and capital is in force throughout almost the entire globe.

Guaranteeing States' sovereignty, security, stability or culture are today's main arguments for engaging into more restrictive policies. These notions, which are embedded in the political discourse, are equally prevalent within the conservative dialectic that is gaining ground among Western democracies and some emerging countries. Jair Bolsonaro's declarations[1] depicting migration as "Scum of the Earth" by, as well as Viktor Orban's "Trojan horse of Terrorism"[2] illustrate this situation. Though the debate on migration policies has been ongoing for the past thirty years in Europe and fuelling far-right discourses, it resurfaced at the heart of the refugee crisis and in the confused responding EU policies, particularly during the year 2015.

The adequacy of these policies in response to the urgency of the situation is a subject that has been addressed by numerous scholars, advocates and experts. The focus of these

[1] Guardian staff, 'Who Is Jair Bolsonaro? Brazil's Far-Right President in His Own Words', 29 October 2018, The Guardian edition, section World news <https://www.theguardian.com/world/2018/sep/06/jair-bolsonaro-brazil-tropical-trump-who-hankers-for-days-of-dictatorship> [accessed 7 April 2019].
[2] Dan Bilefsky, 'Hungary Approves Detention of Asylum Seekers in Guarded Camps', 22 December 2017, The New York Times edition, section World <https://www.nytimes.com/2017/03/07/world/europe/hungary-migrant-camps.html> [accessed 7 April 2019].

analyses has predominantly concerned the legality of such measures and practices in terms of European Human Rights Law. However, assessing the evolution of European "regular" migration policies from a more general point of view and over a longer period of time is a much more complex exercise.

The debate on migration is not new; immigration in Europe has been increasing over the past 30 years, even without the spike due to the refugee crisis. In the late 1950's, around 5 million third-country nationals lived in the Member States of the European Economic Community, before reaching the number of 15 million in 1980 and 20 million in 2000[3] in these same countries. Today, 22.3 million third country nationals officially live in the EU representing 4.4% of the population[4].

Speaking more broadly, many factors, namely globalization, have led to mobility worldwide. From 1960 to 2000, the number of individuals living outside their country of birth more than doubled, rising from 75 to 175 million worldwide[5]. These figures correspond to approximatively the same proportion of the global population at each period, 3%.

Figures thus show that it is natural for people to cross borders and that the number of migrants increases over time. This phenomenon is likely to accelerate as the consequences of climate change are already being observed. According to the International Organization for Migration (IOM), from 25 million to 1 billon people could be on the roads by 2050[6]. By impacting the industry, trade and agriculture of several countries, these environmental developments may add a significant number of economic migrants to the list. Paradoxically, countries are implementing more and more policies which restrict the conditions of entry into their territory. Guarantees to a longer term stay such

[3] Jean-Pierre Garson and Anaïs Loizillon, *L'Europe de 1950 à nos jours : mutations et enjeux*, Conference on the Economic and Social Aspect of Migration (Brussels: OCDE and European Commission, 22 January 2003).
[4] EUROSTAT, 'Migration and Migrant Population Statistics - Statistics Explained' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics#Migrant_population:_22.3_million_non-EU_citizens_living_in_the_EU_on_1_January_2018> [accessed 7 April 2019].
[5] Cécily Defoort, 'Tendances de long terme des migrations internationales : analyse à partir des six principaux pays receveurs', *Population*, Vol. 63.2 (2008), 317–51.
[6] IOM, 'A Complex Nexus', International Organization for Migration, 2015 <https://www.iom.int/complex-nexus> [accessed 7 April 2019].

as access to Labour or Education are targeted as well. Most EU Member States for instance, legally reduced the legal working time[7] or increased universities tuition fees for third country nationals.

1.2 RESEARCH GOALS

The purpose of this paper is to understand the general evolution of the legal practices of European States in the field of migration in its broader definition and assessing their concordance with current global trends in mobility. Thus, we analyse what assessment has been made of European policies from this more general perspective of regular migration, which extends beyond emergency measures. Are these practices, although legal and in accordance with international standards, fair and humane enough? Can they be more so despite the European Union's security considerations?

This research emerged from several observations on the evolution of certain legislations of Member States of the European Union. In 2006, Denmark increased university tuition fees for non-European students, followed by others such as Sweden in 2011 and France in 2019. As of today, most European States have adopted such measures, which dissuade third country immigration.

Regarding labour, in 2007, France reduced the maximum legal annual working time for foreign students, foreigners with a temporary residence permit and asylum seekers to 60%.

Across the EU, although short term and long-term visa issuances have increased for the past 10 years, the requirements for their issuance have tightened and become harder to fulfil. This situation therefore raises concerns on two main fronts. First, it illustrates that the will to migrate increases despite restrictiveness, which questions the adequacy and relevance of such policies in a global context. Secondly, the policies we've described entail an increase in financial requirements for foreigners and thus engender more

[7] International Students in France are not allowed to work more than 60% of the annual legal time: *Article R5221-26, Code Du Travail*

precarious living conditions. These policies which conspicuously favour an elitist immigration thus contribute to a growing gap between European citizens and third country nationals.

In our work, we will use the three following parameters: Territory entry, access to education and access to labour for third country nationals, as an analytical instrument for the migration practices within the EU. We will focus on the legal regimes governing these parameters from a regular migration perspective. Persons subject to a special legal regime, i.e asylum seekers, refugees and unaccompanied minors consequently enter the scope of analysis; however, they do not constitute our main area of research.

1.3 QUESTIONS AND HYPOTHESES

1.3.1 Primary Questions

The research process will be based on two main questions: (1) By analysing the European Union's response to the increase in migratory flows, we can ask ourselves *to what extent are Member States' policies in this field likely to threaten Human Rights standards in the long-term?*

(2) Consequently, one might wonder: *Is it possible at the European Level to reverse the trend towards a liberalization of migration policy?*

1.3.2 Sub Questions

The aforementioned questions raise several sub-questions: (1) What competences do member States of the European Union have in terms of territory entry, access to education and labour for third country nationals, according to International and European Law? (2) How have policies in this area evolved and how did member States justify them? (3) Although in accordance with international law, can they be criticized on a humanitarian level and in light of the current situation regarding the free movement of people? (4) Are concrete steps towards a relaxation of the above-mentioned policies feasible, especially

taking into account the economic and security challenges faced today by the European Union?

1.3.3 Hypotheses

Our main hypothesis is twofold: (1) Migration and integration policies follow a restrictive evolution, and as foreseen by Brochmann & Hammar and Schuster in the early 2000's, may threaten in the long run our liberal and democratic values[8]. In this sense, (2) striving for greater freedom of movement on a European and global scale is not only an ethical and human duty, but also, the most practical and appropriate response to the migration scenarios shaping our societies in the years to come.

In opposition to the current context, we argue that "building walls is a peculiarly lonely job and an admission of the inadequacy of the system"[9]. Figures illustrate this inadequacy: 22000 migrants lost their lives trying to reach Europe since 2000. During 2014, deaths in the Mediterranean Sea represented 75% of all the migrants who perished around the globe[10]. We believe regular migration restrictions play an important role in migrants' decisions to follow these dangerous roads.

We are also keen to consider this paper both as a practical counter-narrative to the sometimes-irrational fears fostered by a certain political-media landscape, as well as an open reflection about a new EU, whose loss of values and humanity[11] threatens its stability. We acknowledge that such an undertaking cannot be possible without being integrated into a broader perspective, which takes into account other factors (such as social justice, the fight against tax evasion, the fight against climate change, etc.), that

[8] Grete Brochmann and Tomas Hammar, *Mechanisms of Immigration Control: A Comparative Analysis of European Regulation Policies* (Bloomsbury Academic, 1999); L Schuster, 'The Exclusion of Asylum Seekers in Europe', Oxford University, Centre on Migration, Policy and Society, 2004.
[9] Roger Nett, 'The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth', Ethics, 81.3 (1971), 212–27. P 224
[10] Camille Bordenet and Madjid Zerrouky, 'Méditerranée : chiffres et carte pour comprendre la tragédie', 20 April 2015, Le Monde edition <https://www.lemonde.fr/les-decodeurs/article/2015/04/20/en-2015-un-migrant-meurt-toutes-les-deux-heures-en-moyenne-en-mediterranee_4619379_4355770.html> [accessed 8 April 2019].
[11] Marie Poinsot, '« L'Europe des valeurs est quasi absente »', *Hommes Migrations*, n° 1317-1318.2 (2017), 17–23.

have participated in creating a climate of mistrust towards EU institutions. The rehabilitation of European values among its citizens thus need to pass by the management of these factors.

In this sense and at its modest level, this thesis will propose steps towards a progressive relaxation of migration rules in the European Union, bearing in mind its security and economic concerns.

1.3.4 Timeline

To propose a different conception of migration policies, we will go back to the first debates framing the "Freedom of Movement" article 13 of the Universal Declaration of Human Rights (UDHR) through an analysis of its "Travaux Préparatoires" taking place from 1945 to 1947.

To first understand the prerogatives of EU Member States in the fields of migration, access to labour and education for third country nationals, we will proceed with a brief analysis of the binding international legal framework as enshrined in the relative UN treaties since the adoption in 1966 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). At the European level, an analysis of the Council of Europe legal order will be provided. We will then focus on the evolution of EU law since 1992: date of the Maastricht treaty when the EU was given competences in the field of migration under the third pillar: "Justice and Home Affairs".

We will also refer to the main academic works published in the field of migration since the 1980's.

1.3.5 Limits

It is important to acknowledge that this thesis aims at understanding the trends followed by the European Union and its Member States' migration policies in general terms with

regards to International Human Rights Standards. As the competences are broad for Member States in this field and national practices significantly diverse, this work does not provide a full exhaustive legal study.

The second part of this thesis which aims to advocate for a relaxation of migration policies is mostly based on academic approaches. It anticipates the results of such policies based on existing examples and studies conducted by specialists in this field. However, it cannot scientifically guarantee the validity of these previsions, bearing in mind the level of inaccuracy attributed to political and social sciences.

1.4 METHODOLOGY AND RESEARCH AXES

1.4.1 Methodology

To address our hypotheses, a qualitative analysis is undertaken. With regards to the legal study, academic research focuses on the main national, European and international legislations. The approach adopted in the second part of this thesis, which could be described as philosophical, is based mainly on the main theories developed by specialists in the field of migration and more particularly in the European context.

1.4.2 Structure

In an attempt to answer the questions introduced earlier, we will present, the international and European legal framework with regard to entry into the territory, access to education and access to the labour market for third country nationals. We will try to understand the European Union's position regarding the recommendations of the international community and which directions its policies have taken in these areas.

In the light of this data, we will then demonstrate that some of these practices may be perceived as anachronistic in the context of increased mobility (re: globalization, climate

change) and should be widely questioned with respect to humanitarian and ethical terms. This reasoning will invite us to remind ourselves of the fundamental values that have enlightened the history of the European Union and, in this sense, to argue for a more flexible migration policy.

This argumentation will be accompanied by practical approaches developed by certain theories inspired by the "migration without borders" movement. We believe the European Union could draw inspiration from them in order to fully integrate itself into the realities of the current context, and this in accordance with its fundamental values.

1.4.3 Definitions

In order to clarify the focus of our subject, it is important to provide a list of definitions of the terms used, to avoid potential misunderstandings.

Third Country national: Any person who is not a citizen of the European Union within the meaning of Art. 20(1) of Treaty on the Functioning of the EU and who is not a person enjoying the European Union right to free movement as defined in Art. 2(5) of the Regulation (EU) 2016/399 (Schengen Borders Code)[12]

Legal / Regular migration: Migration in accordance with the application of the legal framework[13]. The term entails, in this work, the entry into the territory of individuals who do not benefit from a special status, i.e asylum seekers, refugees, unaccompanied minors. Regular migration is also sometimes associated with *economic migration*.

Economic Migration: Migration mainly for economic reasons or in order to seek material improvements to livelihood[14].

Migrant: Any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's

[12] Definition of the Migration and Home Affairs of the EU: Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
[13] Definition of the European Migration Network, "*Asylum and Migration Glossary 6.0: a tool for better comparability produced by the European Migration Network"*, May 2018
[14] *Ibid*

legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is[15].

2.
LEGAL FRAMEWORK

In this chapter, we will briefly present the references to the freedom of movement of persons in the Universal Declaration of Human Rights (UDHR), and then review the legally binding tools to which the Member States of the European Union are subject. As mentioned in the introduction, we will focus on prerogatives detained by States regarding regular migration for territory entry, access to labour and access to education for third country nationals.

2.1 INTERNATIONAL

2.1.1 Territory Entry

UDHR – Article 13

The Universal Declaration of Human Rights was the first international document at the UN level to refer to freedom of movement. Its Article 13 provides two different aspects. The first one is the right to move freely within the borders of one State and the second one, the right to leave and to return freely to one's country. This right to leave was subject to different approaches regarding its interpretation. Does the right to leave imply the right to enter another country? In a situation where an individual would not be provided with entering opportunities abroad, would his/her right to leave still be guaranteed?

[15] Definition of the IOM, "*International Organization for Migration, Glossary on migration*", IML Series No. 34, 2019

Creating a link or not between the right to leave and the right to enter would thus imply a difference in States obligations: A limitation of the scope of article 13 to only the right to leave gives the States of origin a negative obligation to allow people to emigrate from the national territory. On the other hand, if we consider that the right to leave cannot be effective without having the right to enter, that is the opportunity to have access to other destinations, it would give States an obligation to receive.

The first legally binding document mentioning freedom of movement as contained in Art.13 of the UDHR is the ICCPR. The Human Rights Committee, in charge of interpreting the convention and ensuring its proper implementation by States Parties provides a clearer explanation of States' prerogatives in this matter.

ICCPR

The International Covenant on Civil and Political Rights (ICCPR) provides in article 12, paragraph 1 the right for every "*individual lawfully within a territory*" to "*liberty of movement and to choose his residence*". Furthermore, paragraph 2 mentions "*Everyone should be free to leave his country, including his own*". Considering the previously explained paradox induced by this provision, it is important to understand its framework and limits. These rights "*shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public[16]), public health or morals or the rights and freedoms of others*" (par 3).

In its related General Comment n°27, the Human Rights Committee provided several clarifications[17]. Paragraph 8 explains "*Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus,* ***travelling abroad*** *is covered, as well* ***as departure for permanent emigration***. *Likewise, the right of the individual to* ***determine the State of***

[16] The French definition of "Ordre Public" or "Public Policy Doctrine" refers to the set of guarantees for the well-functioning of legal systems in States, addressing moral, social and economic values tying the society together

[17] UN Human Rights Committee, 'Refworld | CCPR General Comment No. 27: Article 12 (Freedom of Movement)', *Refworld* <https://www.refworld.org/docid/45139c394.html> [accessed 25 April 2019].

destination *is part of the legal guarantee*". Implications for the sending States are thus clear. They specify its obligation to allow emigration or restrict it only on certain conditions as mentioned in Art. 12 par. 3. These conditions must be provided by law, and necessary in a democratic society to protect the purposes[18] of Art. 12 par. 3, however respecting the principle of proportionality[19]: "*the least intrusive instrument amongst those which might achieve the desired result*" and being provided with a justification[20]. They should also not be based on discriminatory criteria: "*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*"[21]. The commentary refers in particular to the restrictions imposed on women by some States with regard to the right to leave one's country.

However, to "determine the State of destination" doesn't expressly imply the obligation for receiving State to allow immigration. Furthermore, an alien legally expelled from a country is "*entitled to elect the State of destination, subject to the agreement of that State*". In other words, this means "*an alien who is expelled must be allowed to leave for any country that agrees to take him*"[22]. We can thus observe that the recommendations enlisted in the General comment n°27 do not interpret the right to leave one's country as completed by its opposite: the right to entry. Furthermore, as mentioned in the General Comment n°15 regarding the Position of Aliens under the Covenant, entry or residence within the territory of a State Party are clearly subjected to its right to proceed to a selection except if *considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise*". One the other hand, once legally in the territory, aliens shall benefit from the rights enshrined in ICCPR. Any difference of treatment between nationals and aliens regarding these rights must be justified by States in their reports on the basis of States security.

[18] *(par. 11)*
[19] *(par. 14)*
[20] *(par. 15)*
[21] *(par. 18)*
[22] United Nations High Commissioner for Refugees, 'Refworld | CCPR General Comment No. 15: The Position of Aliens Under the Covenant', *Refworld* <https://www.refworld.org/docid/45139acfc.html> [accessed 10 April 2019].

We can thus conclude that the ICCPR provides an interpretation of freedom of movement in its strict sense. Justifications that States must provide for restricting freedom of movement are only relative to emigration, States Parties thus being allowed to restrict partially or totally regular immigration into their territory.

2.1.2 Access to Education

UDHR – Art. 26

The right to education was first enshrined in the Universal Declaration of Human Rights. Article 26, paragraph (1) only guarantees the right to education for everyone and free access at least to elementary and fundamental education. The article, however, does not provide any provision regarding secondary and higher education.

ICESCR

The first legally binding document mentioning the right to Education is the international Covenant on Economic Social and Cultural Rights (ICESCR), ratified today by all EU Member States. The UNESCO Convention Against Discrimination in Education completed this document in 1960.

The ICESCR ensures the right to education in its article 13.

The related General Comment provides four obligations for States Parties in this sense: to protect, respect and fulfil the right to education[23]. More specifically, the obligation to fulfil itself contains two requirements: facilitate and provide. This legal regime however applies differently to primary, secondary and higher education[24].

Primary education specifically is a core obligation for the States Parties and shall be accessible and free to all. At least the most fundamental of education must be provided.

[23] UN Economic and Social Council, 'Refworld | General Comment No. 13: The Right to Education (Art. 13 of the Covenant)', *Refworld* <https://www.refworld.org/docid/4538838c22.html> [accessed 25 April 2019].
[24] *(Par. 46)*

This does not apply for Secondary and higher education, States Parties however have the obligation to "take steps" with the aim of making them equitable and free of charge. This progressive realization was defined more precisely, stressing the obligation to "*move as expeditiously and effectively as possible*" towards the full realization of article 13[25]. Thus, the goals for all levels of education should be eventually to reach the same status as primary education and be characterized by the four features defined by the Special Rapporteur on the Right to Education: availability, accessibility, acceptability and adaptability[26], the best interest of the student being the primary concern. The absence of measures in this sense[27] is thus considered a failure. Furthermore, deliberate retrogressive measures should be carefully justified by States Parties "*by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources*" with the proof that "*they have been introduced after the most careful consideration of all alternatives*"[28].

A grey area is, however, still to be addressed: The four features characterizing primary education constitute an obligation for States Parties towards all individuals within their territory including non-nationals. However, General Comment no 13 does not determine if the progressive realization of secondary and higher education includes non-nationals as well.

A closer look into the provisions relative to discrimination is then necessary. A reference is made to the principle of non-discrimination[29] as enshrined in Article 3 of the UNESCO convention against discrimination in Education. Its Article 3 (e) provides that States undertake to "*foreign national residents within their territory the same access to education as that given to their own*". Bearing in mind the steps that States Parties must take towards achieving Secondary and Higher education, this parameter ought to be fulfilled as well.

[25] *(Par. 44)*
[26] UN. Commission on Human Rights, *Preliminary Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1998/33*, 13 January 1999.
[27] *(Par. 59)*
[28] *(Par. 45)*
[29] *(Par. 34)*

As mentioned earlier, the legal regime differs from an educational level to another. Therefore, it is not clear rather increasing university subscription fees for foreign students is a discriminatory measure with regards to Article 3 of the UNESCO convention and General Comment No 13 and if it stands against the "progressive realization" of secondary and higher education.

A better understanding could be reached through the analysis of the UN Committee on Economic, Social and Cultural Rights' (UN CESCR) observations in response to States Parties' reporting process for the implementation of the Covenant.

The Case of the UK

The issue of unequal access to education between nationals and non-nationals was raised in the UN CESCR's list of issue to the United Kingdom in 2008[30].

The UK had previously increased the cost of universities but replaced up-front tuition fees by loans students will pay once they are employed, raising several concerns of the committee: first, regarding students from a less privileged background; second, regarding the access to these financing programs for non-EU citizen (UK's State Report[31]).

It thus concluded as follows: "*The Committee encourages the State party to review its policy on tuition fees for tertiary education with a view to implementing article 13 of the Covenant, which provides for the progressive introduction of free education at all levels. It also recommends that the State party eliminate the unequal treatment between European Union member State nationals and nationals of other States regarding the reduction of university fees and the allocation of financial assistance.*" (Committee's Concluding Observation[32])

[30] 'E/C.12/GBR/Q/5/', 2008.
[31] 'E/C.12/GBR/5', 2008.
[32] 'E/C.12/GBR/CO/5', 2009.

Unequal access to finance programs and reduction of fees for non-EU citizens in the access to university, which amounts to an inequality in tuition fees thus constitutes a discrimination.

2.1.3 Access to Labour

UDHR – Art. 23

The Universal Declaration of Human Rights guarantees the right to work in its article 23. Not only "everyone" enjoys the right to work and to "just and favourable conditions of work" (1) but should also not be discriminated in his right to equal pay for equal work (2). Such a remuneration should ensure "himself and his family an existence worthy of human dignity" (3). In the scope of our study, the interest is to understand to which extend this article applies to third country nationals and what prerogative States have in limiting access to work for certain categories of individuals. Terms such as "everyone", "just" and "non-discrimination" as enshrined in article 23 imply a universal value of the right to work. However, as illustrated by several national legislations – for instance, France reducing legal annual working time to 60% for Non-EU students – it is subject to interpretation.

ICESCR

The right to work is enshrined in article 6 of the Covenant on Economic, Social and Cultural Rights and completed by article 7 on the right to just favourable conditions of work. We would like to specify that rights relative to access to labour for immigrants are also enshrined in the Migrant Workers Convention[33]. However, it has not been ratified or signed by any of the EU Member States, therefore we will not provide an analysis of its content in this paper.

[33] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

In its general comment N°.18, the Committee on Economic, Social and Cultural Rights recalls the right not to be deprived of work unfairly and to "full, productive and freely chosen employment"[34] as enshrined in the ILO convention N°.122 concerning employment policies (1964)[35].

Although this framework does not imply an "absolute and unconditional right to obtain an employment"[36], States Parties must provide a certain number of guarantees[37]: Availability, Accessibility, Acceptability and Quality. The term accessibility is understood under the scope of article 2 of the ICESCR prohibiting any discrimination, as for example on the grounds of national or social origin. States Parties shall, furthermore, implement national policies to promote equality of opportunity. They have, as for all human rights, the obligation to respect, protect and fulfil the right to work. Restraining from denying or limiting equal access to decent work and taking measures to combat discrimination is thus included in the obligation to *respect*[38]. Equal access to work shall be ensured as part of the obligation to *protect*[39]. In achieving the right to work, through progressive implementation as States Parties are required[40], the Committee distinguishes, between inability and unwillingness. An unequal access to work persisting despite the effort by the State Party to abolish it, using its "maximum resources" does not constitute a violation. However, denying access to work to a certain group, legally or in practice constitutes an *act of commission* by the State Party, violating the covenant[41]. Discrimination, furthermore, is not subject to progressive implementation and constitutes a violation, regardless of the availability of resources[42]. In this sense, retrogressive

[34] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 18: The Right to Work (Art. 6 of the Covenant)', *Refworld* <https://www.refworld.org/docid/4415453b4.html> [accessed 30 April 2019].
[35] Three other legally binding instruments were adopted by the International Labour Organization (ILO) to protect Migrant Workers: *The Convention concerning migration for Employment*, the *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* as well as the *Convention concerning Decent Work for Domestic Workers*
[36] *(Par. 6)*
[37] *(Par. 12)*
[38] *(Par. 23)*
[39] *(Par. 25)*
[40] *(Par. 41)*
[41] *(Par. 32)*
[42] *(Par. 33)*

measures regarding the right to work – such as denial of access - are presumed not permissible[43].

Practices of EU Member States seem to differ from the approach provided by the ICESCR.

The Case of France

Although discrimination in employment on the grounds of national and ethnic origin constitutes a crime in the French and European legislation and is punishable by three years' imprisonment and a fine of 45000€[44], discriminatory measures are permitted on the basis of nationality. In other words, individuals cannot be discriminated against for the reason of their core identity or personal characteristics, but their non-belonging to the EU or its Member States can justify differences of treatment. However, the limitation of the legal working time to 60% for foreign students[45] (even 50% for Algerian Students), combined with the fact that students cannot obtain a permanent contract due to the limited duration of their residence permit, leads to their inability to foresee long-term professional integration and forces them, consequently, to a precarious status.

The cumbersomeness of some procedures for recruiting foreign students and non-nationals in general also causes the reluctance of some companies, particularly SMEs and VSEs, for whom more administrative procedures represent a greater burden. The rejection on the grounds of nationality is in such cases, difficult to prove but remains the real justification.

Although no large-scale quantitative studies on the difficulties in accessing the labour market has been carried, a study carried out by the Department of School Affairs of the Paris City Hall nevertheless showed that foreign students are, in general, "*clearly in a*

[43] (*Par. 34)*
[44] *Article 225-1 & 225-2 3°, Code Pénal*
[45] *Article R5221-26, Code Du Travail*

situation of cumulative difficulties, partly linked to their particular status and the additional administrative procedures that it generates"[46].

The present situation raises the question of discrimination in access to labour by France and demonstrates an ambiguous interpretation of international conventions. Article 7 ICESCR, guaranteeing just and favourable conditions of work is also subject to it. Where States Parties recognize a "*remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind*" (ICESCR Art. 7 (a) (i)), implying equal remuneration for work of equal value, questionable practices exist.

Foreign students pay contributions when they work but cannot claim unemployment benefit regardless of the reasons for the interruption of the employment contract; Article R. 5221-48 of the French Labour Code prohibits them from registering at "*Pôle Emploi*" (Employment Office) and therefore from receiving benefits. This discriminatory provision has even been validated by the French "*Conseil d'Etat"* (Administrative Supreme Court). The latter has simply ruled out the application of the principle of equality on the grounds that foreigners with a temporary work permit are "*only authorised to exercise a professional activity temporary by nature and with a specific employer*" and cannot therefore be considered as "*authorised to seek a new job on the labour market in France*".

Although benefitting or not from the contributions paid through one's work does not directly constitute an inequality of remuneration, the loss of income generated for the foreign student as well as his further difficulties to seek employment are likely to indicate a discriminatory situation. Especially since the General Comment of the UN CESCR[47] on the right to work provides for the establishment of *"a compensation mechanism in the event of loss of employment and (…) the establishment of employment services"*[48].

[46] Ville de Paris, DASCO/Bureau de la vie étudiante, *Les Discriminations En Milieu Étudiant*, July 2004.
[47] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 18: The Right to Work (Art. 6 of the Covenant)
[48] General Comment No. 18 *(Par. 26)*

The inequalities of treatment mentioned above may be justified by a need to protect the foreign student. A prior declaration and limitation of working hours are intended to avoid risks of overexploitation that an individual in a vulnerable situation is likely to suffer.

However, the prohibition of access to employment mechanisms despite his/her financial contribution seems to reflect another objective: that of simple and clear national preference in access to labour. France, although these measures still in force has not been singled out by the Committee on Economic, Social and Cultural Rights on this matter. This is explained by the fact that, although discrimination on the basis of national or ethnic origin is prohibited, discrimination on the basis of nationality is permitted when comes the need to protect national employment. The obligation to *fulfil*, developed in paragraph 26 of the General Comment advocates indeed the implementation by the States Parties of an employment policy with a view to *"meeting manpower requirements and overcoming unemployment and underemployment"*, thus likely to justify national preference and limiting access to compensation mechanisms.

2.2 COUNCIL OF EUROPE

2.2.1 Territory Entry

The European Convention of Human Rights (ECHR) does not expressly regulate Territory entry and visa policies. States Parties thus have important space for national sovereignty. Although it does not specify who should receive a visa, the European Court of Human Rights (ECtHR) established several principles that "regular migrants" can benefit from.

Torture and Right to Life

Although asylum and more generally migration issues are outside its competence, extraditions of migrants or decisions to allow further stay inside the European territory can enter the scope of particularly articles 2 and 3 of the ECHR. In this sense, a migrant likely to be deported on the grounds that he/she does not reach the prerequisites for the refugee status according to the Geneva Conventions, and therefore considered to be migrating for economic motive, could still benefit from a higher protection under the ECHR. Article 33 of the UN 1951 Geneva Refugee Convention establishes the principle that States should not expel individuals to a country where they have a serious reason to face persecution. This applies not only for countries of origin but also any country where they would face persecution.

The European Court of Human Rights provides the same understanding of non-refoulement. Persecution in the European context is therefore linked to a violation of the right to life (Article 2) or the right to be free of torture, inhuman or degrading treatment or punishment (Article 3).

In implementing migration policies, States can legally, with regard to International and European law, justify deportation on the grounds of national security. However, in the case of *Saadi v. Italy* the ECtHR established that regardless of the threat a third country national would represent to national security, any risk of persecution with regard to Art. 2 or 3 of the convention would suffice to prevent deportation[49]. In *Hirsi Jamaa and Others v Italy,* the Court established that deportation to Asylum Seekers to Libya, where they would face imprisonment and torture, was a violation of Art.3 as well[50].

The threat of direct persecution should however be emphasized. In general terms, a situation of violence that a country may experience is unlikely to reach the threshold for Art.3 unless the country is at war. This perspective evolved in *NA v. the UK*. For the Court, the generalised violence in Sri Lanka was not sufficient to prohibit deportation, however taken together with the applicant's personal situation, it would constitute a

[49] *Saadi v Italy* n°37201/06 ECtHR 2008
[50] *Hirsi Jamaa and Others v Italy* n°27765/09 ECtHR 2012

violation of Art. 3[51]. Generalised violence in a country is thus likely to prevent return. It is important to specify that a deportation can still be carried if the State can offer sufficient protection against the risk of ill-treatment as it was the case in *HLR v. France* with the State of Columbia[52]. Other reasons such as the absence of medical treatment in the destination country can also be invoked for preventing return *(D. v. The UK)*[53].

Collective expulsions

Collective expulsions are prohibited under Protocol n°4 Art. 4 of the ECHR. They describe measures forcing individuals to return as a whole group and without considering each individual's particular case. In *Conka v. Belgium*, the authorities did not sufficiently instruct the asylum procedures nor individually collected personal information[54]. Furthermore, they expressed all the deportation orders at the same time and on the same terms. In the same sense, push backs at sea are also considered a collective expulsion by the Court (*Hirsi Jamaa and others v. Italy*)[55].

Right to Family Life

As enshrined in Art. 8, the right to respect for family life can be a justification for prohibiting return. It can be understood as in a relatively broad perspective. In *Omojudi v. the UK*, the court admitted that relationships with others could constitute a part of the individual's social identity[56]. Ties between migrants and the national community were therefore considered part of his "private life", although it wasn't related to his family life. The article 12 of the ECHR, relative to the right to marry can also be wielded as a reason to further stay on the territory. Public authorities however have a right of scrutiny to avoid marriages of convenience.

[51] *NA v The United Kingdom* n°25904/07 ECtHR 2008
[52] *HLR v France* n°24573/94 ECtHR 1997
[53] *D v The United Kingdom* n°30240/96 ECtHR 1997
[54] *Conka v Belgium* n°51564/99 ECtHR 2002
[55] *Hirsi Jamaa and Others v Italy* n°27765/09 ECtHR 2012
[56] *Omojudi v The United Kingdom* n°1820/08 ECtHR 2009

The scope of Art.8 proved to be quite extensive as for instance in the case of *Nuñez v. Norway*. The applicant had committed several offenses in Norway and overpassed the re-entry ban the country had planned against him[57]. He later married a Norwegian woman with whom he had two children, prompting the court to rule against the deportation notice to which he was subject, on behalf of Article 8 of the Convention.

Limits however appeared, particularly in the *Sorabjee v. the UK* case. Despite the imminent deportation of her mother back to Kenya, the applicant's complaint was declared inadmissible because she was of a young age and considered able to adapt to the change of situation, her British nationality not considered relevant to impact the court's decision[58].

Family Reunification

While expulsion is very much regulated by the European Court of Human Rights, refusals to grant visas for spouses and children are more tolerable practices. States for instance are entitled not to respect the married couples' resettlement choices. Situations where parents establish themselves in a European country to secure financial and legal stability and who plan to bring their child are dealt with by the Court on a case by case basis.

In *Gül v. Switzerland*, the applicants, a Turkish married couple had come to Switzerland after the wife was severely injured in a fire and would not be able to enjoy sufficient physical well-being in Turkey. She was therefore granted a humanitarian permit and her husband, a residence permit to accompany her. After the refusal of the Swiss authorities to allow their daughter to join them, the Court established that, since the mother's situation stabilized, there was no reason for the couple not to go back to Turkey and found that Switzerland did not violate Art. 8[59].

On the other hand, in *Sen v. the Netherlands*, a Turkish family had to leave their daughter when immigrating permanently to the Netherlands. Although the Dutch authorities

[57] *Nuñez v Norway* n°55597/09 ECtHR 2011
[58] *Sorabjee v The United Kingdom* n°23938/94 ECtHR 1994
[59] *Gül v Switzerland* n° 23218/94 ECtHR 1994

refused her to join her parents, the Court decided that the parent's choice to leave their daughter could not be considered irrevocable with the consequence of definitively leaving her outside of the family circle. Therefore, it found the Netherlands' decision breaching Art.8[60].

Rights enshrined in article 9 to 11: Freedom of religion, expression and assembly cannot be invoked to justify settlement in a Member State of the Council of Europe[61]. Thus, their enjoyment cannot prevent expulsions of immigrants but only influence their conditions of detention.

The Istanbul Convention[62] placed risks of domestic violence in the scope of Article 3 of the ECHR, enlarging the restrictions for expulsion. However, the threshold to reach is high and the risks difficult to prove. (*AA and others v. Sweden*[63]*; N v. Sweden*[64]*).*

Although not ruling on visa policies for regular migration, the Council of Europe sets limits to States sovereignty with regard to European Human Rights law. The threshold to benefit from special rights and being granted asylum is consequently lower than to obtain refugee status under the 1951 Geneva Refugee Convention. An individual considered as a "regular migrant" or "economic migrant" would be more likely to be considered a refugee under the Council of Europe regime.

2.2.2 Access to Education

The first Protocol of the European Convention of Human Rights (ECHR) guarantees the right to education in its article 2. As enshrined, it is stated that "No person shall be denied of the right to education". This negative formulation affects differently the obligations States Parties have in compare to the ICCPR regime. The ECHR provision implies that the State should restrain from affecting the enjoyment of the right to education by

[60] *Sen v The Netherlands* n°31465/96 ECtHR 2001
[61] *Agee v. the United Kingdom* n°7729/76 ECtHR 1976 *supra note 84.*
[62] Council of Europe Convention on preventing and combating violence against women and domestic violence, opened for signatures in 2011, currently 34 countries have ratified it
[63] *AA and Others v Sweden* n°34098/11 ECtHR 2014
[64] *N v Sweden* n°23505/09 ECtHR 2010

individuals. This difference was established because at the time, every member States of the Council of Europe already had a sufficiently developed education system. On the other hand, a positive formulation would have created reluctance among them, implying they would be bound by a duty to take effective measures to ensure education for everyone.

As we have seen previously in international standards, primary, secondary and higher education follow different regimes of application. The question here is whether the Council of Europe jurisprudence implements a hierarchy between the three and if equal access to them is granted for non-nationals as well. As argued in the *Belgian Linguistic Case*, the negative wording of Article 2 Protocol 1 does correspond to the right to education for everyone[65]. The scope of this right not being clearly defined by the Court, its content and scope still vary according to the place and time. In the precise case of Belgium, the country being well developed, it encompasses entry to all three levels of education (elementary, secondary, higher). However, the case of *Y v. UK*, the European Human Rights Commission established that elementary education was primarily concerned, and not necessarily higher education[66]. This further implies that the States have no duty to establish institutions in this regard (*X v. Belgium*)[67]. If they do so on the other hand, access to them should be granted (*Leyla Sahin v. Turkey*)[68].

A direct link between the right to education as enshrined in the ECHR and the duty to provide access to all levels of education is rarely made in most decisions of the Court. No real consensus exists on the matter, although the clarification presented in the "*Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights"* affirms that elementary, secondary and higher education are equally placed under the scope of the article[69].

[65] *Belgian Linguistic Case* n°1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 ECtHR 1968
[66] *Y v UK* n°91/1991/343/416 European Commission of Human Rights 1992
[67] *X v Belgium* n°4YB260 European Commission of Human Rights 1961
[68] *Leyla Sahin v Turkey* n°44774/98 ECtHR 2005
[69] Council of Europe, *Guide on Article 2 Protocol N°1 to the European Convention on Human Rights*, 31 December 2018.

This being affirmed, could it be understood that no difference of treatment should be made on the grounds of nationality?

States Parties should "secure the right to education for all". Providing access to primary education, regardless of the nationality of the pupil is in this sense understood as an obligation for the State. The *Cyprus v. Turkey* case reminded that the child's right to education is violated in case a discrimination occurs[70]. The case of *Timishev v. Russia* demonstrated that making admission and attendance to school -although the children had attended for the past two years- conditional to the issuance of the parent's residence permit constitutes a discrimination and was a denial of the child's right to education[71]. The ECtHR is, however, less strict regarding higher education. In *Foreign Students v. UK*, the expulsion of an international university student did not constitute a violation of his right to education since its understanding with regard to the court's caselaw included mainly primary education[72]. The application was thus considered inadmissible.

In this context, what is the ECtHR's assessment when it comes to different systems of tuition fees for specific categories of individuals? Although the court considered that their increase for foreign students in this particular *Ponomaryov v. Bulgaria* case was a violation of the ECHR, it conferred a margin of appreciation on States in this respect, as long as it does not "*create a discriminatory situation*"[73]. A better understanding of the court's appreciation on this matter needs a deeper analysis of the case.

Ponomaryov V. Bulgaria

The applicants, Vitaly and Anatoliy Ponomaryov were enrolled in a secondary education establishment ran by the Bulgarian State. Russian nationals, they had moved to Bulgaria with their mother and were attending classes despite the absence of a permanent resident permit. Subsequently and according to a National Education Protocol from 1991, they were required to pay tuition fees to pursue their secondary education. The protocol held

[70] *Cyprus v Turkey* n°25781/94 ECtHR 2001
[71] *Timishev v Russia* n°55762/00 and 55974/00 ECtHR 2005
[72] *Foreign Students v The United Kingdom* n°7671/76 ECtHR 1977
[73] *Ponomaryov v Bulgaria* n°5335/05 ECtHR 2011

that only Bulgarian nationals and specific categories of foreigners were entitled to free primary and secondary education. Although they eventually regularized their legal status, they were still required to pay for the tuition fees for the time spent in high school without a residence permit.

In this situation, the Court had to evaluate whether the Bulgarian State implemented a discriminatory decision. Discrimination consists in imposing a different treatment, "without objective and reasonable justification" to individuals in a similar situation. In other words, a discrimination only exists if the goal of the distinction is illegitimate and if the ratio between the justification and the measure implemented is disproportionate[74]. In the matter, States benefit from a certain margin of appreciation provided by the Court's caselaw, in evaluating to what extend different measures for similar situations are justifiable, the scope of such margin varying according to circumstances and purposes.

Accordingly, States' margin of appreciation is rather broad on general economic or social strategy measures. To comply with the ECHR, serious reasons must however be provided to justify nationality as an only reason for a difference of treatment in access to education.

The Court emphasized the fact that its task is not to rule on how the State should perceive the right to education. It had recognized in the past that the right to education, in the expression of its core nature is to be regulated by the State according to time, space, needs and resources of the community. The Court's role is rather to intervene in assessing whether access to a certain population should be restricted or not when a free education system is indeed implemented.

It first claimed that restricting for illegal and temporary migrants the use of public services that represent an important expanse for the State ought to be legitimate since they don't participate to their financing. A distinction between different categories of foreigner residing on the territory can thus be justified. For instance, several members of the European Union, at the moment of Bulgaria's accession were exempted of tuition fees

[74] *D.H. and Others v. The Czech Republic* n°57325/00 ECtHR 2007

for secondary and primary education. Such a situation was likely to be justified as the EU forms a "special legal order" and developed "its own citizenship"[75].

Education is however one of the most fundamental public service in modern States. Arguments of resources and nationality cannot be fully transposed without restriction. Furthermore, and as argued by the ECtHR, the specific public service of education is directly protected by the ECHR.

The margin of appreciation given by the Court in the field of education is thus subject to variations. It increases according to the level of education that is concerned. This aims at reflecting the importance of such an education for the individual within society. Contrarily to primary education, mandatory in most countries and ensuring fundamental knowledge and basic integration, the university level, is optional and subjected to a certain flexibility. An increase in tuition fees for foreigner and actually tuition fees in general is a common policy which is therefore considered justifiable by the Court.

Secondary education in question in this case stands in-between. The Court's interpretation in this sense is that the Member States, and here Bulgaria, are moving towards societies where knowledge becomes an essential asset. In this context, as basic knowledge being insufficient, secondary education tends to become a fundamental aspect of personal development and social inclusion. The Court therefore required that the National tribunal reviewed its considerations on the proportionality of its judgement.

It is important to mention that in the present case, M. Anatoliy Ponomariov was 18, and thus a legal adult, at the moment of the facts. The question is therefore the one of right to education and not that of the child. The Court's decision in this sense does not differentiate between adults and children in access to "necessary" education. Arguing in favour of equal tuition fees between nationals and aliens in the Ponomariov case and extensively in cases involving other levels of education would thus not be contextualized in an "adult / children" rights dichotomy, but rather on the only ground of right to education itself. Based on this observation, it is therefore conceivable that this absence of differentiation would confer a universal dimension to any possible evolution of the right

[75] *Moustaquim v Belgium* n°12313/86, 1991 and *C. v. Belgium* n° 21794/93, 1996 - ECtHR

to education, allowing for an equal claim by individuals benefiting or not from special rights.

The university level did not however benefit from the raise of importance characterizing secondary education as mentioned earlier, although this is conceivable in the future if we refer to the current evolution of European societies. More specifically in the Ponomariov case, the applicants did not choose to settle in Bulgaria and had no realistic alternative to pursue their secondary education elsewhere. Furthermore, they were already living in the country, well integrated and mastered the national language: an non-negligible amount of conditions to be reached for the Court to rule on a discrimination, suggesting that the evolution of the equal access to education for foreigners remains a fairly distant perspective in time.

A raise in university tuition fees for third country citizens falls therefore in the broad margin of Appreciation given to the States and is unlikely, in the current context and for the reasons we enlisted, to violate the Right to Education as enshrined in the Article 2 of the European Convention of Human Rights.

2.2.3 Access to Labour

Under the Council of Europe regime, labour rights are enshrined in the European Social Charter of 1996. Although not expressly guaranteeing the right for everyone to access to work, the formulation of Art. 1 encompasses a general perspective of fulfilling employment at a national level and focuses on States' obligations: *to protect effectively the right of the worker to earn his living in an occupation freely entered upon* (Paragraph 2); *to establish or maintain free employment services for all workers* (Paragraph 3).

Guarantying just and favourable conditions of work, art. 2 focuses on States' obligations as well regarding the achievement of minimum standards such as paid holidays (paragraph 2) or weekly rest periods (paragraph 5)[76].

[76] Yannis Ktistakis, *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter: A Handbook for Legal Practitioners* (Council of Europe, February 2013). P-61

Article 18 guarantees the right to engage in a gainful occupation in the territory of other contracting parties. Although its third paragraph requires member States "*to liberalise, individually or collectively, regulations governing the employment of foreign workers*", it does not mention if such provisions apply equally for third country workers. Deeper clarifications can be found in the report sessions between States Parties and the European Committee on Social Rights.

The German Case[77]

Federal Republic of Germany's fifth report brought specific conclusions on the interpretation of article 18. The country experienced persisting preferential treatments in access to the labour market for nationals. Furthermore, migrant workers, because of a difficult economic environment in certain branches, were tied to their current job and obliged to remain in the same enterprise. Although the European Committee of Social Rights confirmed that a difficult economic and social context can justify a restricted access to certain activities for foreign workers, it reminded that States cannot bind them to their occupation, nor threaten them of expulsion in case of job loss. It also ruled on the duration and the characteristics of work permits which were limited to one year and one company, requiring them to conform to the "spirit of liberality". In the Committee's vision, migrant workers shall be given the opportunity to pursue activities others than the one they were engaged in when entering the country. It also required that their situation gradually becomes "as far as possible like that of nationals", precising that such measures only apply to nationals of States bound by the Charter.

States parties' prerogatives thus, according to European Human Rights law, remain relatively large in the field of access to labour for third country nationals. However, guidelines provided by the Committee of Ministers of the Council of Europe can illustrate which direction and principles States Parties are recommended to follow. In its

[77] Council of Europe, *Digest of the Case Law of the European Committee of Social Rights*, 2008. P-312, Germany's reporting process to the European Committee of Social Rights for the implementation of the European Social Charter

recommendation[78], it invited Member States to implement policies and practices to better integrate immigrants into the labour market, in particular by eliminating legal and practical barriers. A pragmatic implementation is required through active cooperation with local actors such as public employment services or NGOs. Such measures shall be consistent with the principle of non-discrimination, both at the legal and political level and through information and awareness raising amongst employers. In the case Member States provide services to re-integrate the labour market after a long period of unemployment, they must ensure the inclusion of migrants and persons of immigrant background.

The Council of Europe focuses on immigration from a purely human rights perspective. An individual considered as a regular migrant at the national level is likely to obtain a special status and benefit from a certain protection under the European human rights regimes, beyond the only sovereignty of States. However, the argument of preserving the well-being of national community and economy carries significant weight in the policies that States can implement to limit third-country nationals in access to territory, education and the labour market, tilting the balance in favour of broad decision-making power.

Still, the Council of Europe, and with reference to the various court decisions and recommendations, is tending towards an increasingly liberal development in the field of entry and integration policies, which would make it possible to envisage in the future the adoption by the Member States of more liberal doctrines in these areas.

2.3 EUROPEAN UNION

Territory entry, access to labour and education are in the EU framework, mostly the prerogative of Member States. Therefore, the presentation of the different regimes for these three areas cannot be made without understanding the division of competences between the EU and its Member States, as well as its evolution.

[78] Committee of Ministers of the Council of Europe, *Recommendation to Member States on Improving Access of Migrants and Persons of Immigrant Background to Employment, CM/Rec(2008)10*, 2008.

2.3.1 Common Migration Policies, between progress and shortcomings

In assessing European Migration policies and the Union's competences in this field, one must distinguish clearly asylum and legal migration policies. Whereas the Dublin system[79] first established in 1990 requires a distribution of asylum seekers among EU member states and constitutes a legally binding regime of solidarity, the division of prerogatives between the EU and Member States is more disparate with regard to legal migration. It can be added that the EU agenda differs strongly from that of Member States. This gap is mainly explained by the European Union's limited capacity to intervene due to a legal framework that still leaves States largely sovereign in the area of migration policies. We will provide an analysis of this framework before trying to understand the process that led to such a gap, emphasising that the few existing common policies in this area are mainly the result of hardly reached compromises rather than a general consensus at EU level.

The idea of common management of migration at the European level was mentioned first in 1975 by the "Tindemans Report"[80]. It drew closer attention during the discussions on the Schengen Agreement, which abolished a part of the Union's internal borders in 1985.

"Justice and Home Affairs", the third pillar of the 1992 Maastricht Treaty, constituted the first attempt to institutionalize EU's involvement in terms of migration policy at the transnational level. It aimed at reinforced Member States cooperation.

The Amsterdam Treaty signed in 1997 -followed two years later by the Tampere European Council which aimed at "*translating its justice and home affairs provision into practice"*[81], initiated the establishment by the EU level, of minimum standards regarding external border controls and aims concerning asylum, refugees and immigration, in what became the Title IV of the Treaty establishing the European Community (TEC), reflecting

[79] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, 97/C 254/01
[80] Leo Tindemans, *European Union. Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council. Bulletin of the European Communities, Supplement 1/76*, 1976.
[81] Directorate-General Justice and Home Affairs European Commission, 'Tampere Kick-Start to the EU's Policy for Justice and Home Affairs', *FactSheet #3.1,* 2002.

a new step in harmonization of immigration policies. On the other hand, criminal affairs belonging in the field of judicial and police cooperation remained intergovernmental[82]. Although marking a significant step towards the standardisation of European migration policies, the Amsterdam Treaty guaranteed Member States a certain margin of manoeuvre regarding legal immigration standards, since the competences in EU migration policy was shared between the Member States and the EU.

Besides, the prevalence of the Council of the EU in decision making regarding Title IV was established in Article 63 of the TEC, which set a five year agenda -period after 1999, year of the entry into force of the Amsterdam Treaty- in which it required the council to take measures on "*asylum, on temporary protection of displaced persons, and on areas of immigration policy, such as illegal immigration and residence, and the repatriation of illegal residents"*[83]. Until 1 May 2004, on a Member State's or the Commission's initiative, proposals for measures would be submitted to the Council, taking unanimous decision after consulting the European Parliament. It provided that the end of the five-year period, competence of proposal adoption on Title IV would be transferred to the Parliament, thus becoming a co-decisive institution together with the Council rather than a sole consultation organ. Hence, migration policy decisions would be adopted by co-decision and qualified majority within the Council. It is important to note that more controversial Title IV measures, such as "*conditions of entry and residence, and the issuing of long-term visas (valid for more than three months) and residence permits, as well as measures defining the rights and conditions under which third country (non-EU) nationals legally resident in one Member State may reside in another*" were not included in the five year agenda[84].

Later, the Nice Treaty discussions (2000) introduced qualified majority rather than unanimity in several areas, in order to reduce the weight of Member States in the decision process. However crucial areas of Title IV of the EU Charter of Fundamental rights

[82] *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 1997.
[83] House of Lords, European Union Committee, *European Union - Thirteenth Report, Session 1999-2000,* 3 April 2001
[84] *Ibid*

remained untouched. This unanimity requirement is often considered the main cause for slow progress in the area of migration[85]. Hence, adopted measures follow "common denominator agreements" obtained after ambitions have been reduced to ensure that a consensus is reached[86]. Illustrating the desire of Member States to keep complete control on these issues, some actors such as the German Foreign Minister[87] or the UK government representative[88] even attempted to reintroduce unanimity in the whole area of immigration.

The integration process was eventually achieved with the Lisbon Treaty which entered into force in 2009 and established qualified majority voting in the Council and co-decision status for the Parliament. The Community Method was thus introduced for all Amsterdam objectives and requirements enshrined in Title IV. The relevant section on policies on border checks, asylum and immigration of the Treaty on the Functioning of the European Union (TFEU) can now be found under Title V in Articles 77 – 80 TFEU.

This process was accompanied by major progresses in the area of asylum. However, while the requirements of the TEC had allowed for common policies in this area, regular immigration policies remained limited. More specifically, the right to regulate access to the labour market remains in the hands of Member States. It has been argued that slow harmonization processes are mainly explained by the Member States' reluctance and difficult governance processes at the EU level[89].

Consequently, decision-making is mostly based on "mutual recognition" and depends mostly on Member States decisions. However, despite this absence of a strong EU migration policy, inter-institutional dynamics exist and tend to counterbalance the preponderance of decision-making power.

[85] M Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', in *European Public Law*, 2003.
[86] Arne Niemann, 'The Dynamics of EU Migration Policy: From Maastricht to Lisbon', in *Constructing a Policy-Making State?: Policy Dynamics in the EU*, by Jeremy Richardson, 2012.
[87] Joschka Fischer, 'Suggestion for the Amendment of Article III-163', 2003.
[88] Peter Hain, 'Suggestion for the Amendment of Article III-163', 2003.
[89] D Thym, 'The Area of Freedom, Security and Justice in the Treaty Establishing a Constitution of Europe', *WHI-Paper 12/04*, Walter Hallstein-Institut für Europäisches Vervassungsgerecht, Humbolt-Universität Berlin, 2004.

The European Commission, for instance, became a strong reference for setting agendas through its frequent reports and recommendations. It also became an essential force of law proposals to the Council. Regarding family reunification, one of the main sources of immigration in the EU, it succeeded in triggering the issuance of a Directive on Family Reunification by the Council[90]. The criteria of admission were however left to States who still benefit from a large margin in recognising family ties[91].

Member States, in this perspective, readily agree to transfer a part of their sovereignty when restrictive areas of migration are targeted. The common policy of the EU in the fight against irregular migration and in borders control has made major progresses. In the same logic as common denominator agreements, most of the Commission Directives that were adopted by the Council were restrictive ones, as they were the only ones on reaching a general consensus. As a consequence, instruments aiming at regulating and controlling migration are developed at the EU level, while plans to develop liberal perspectives are nipped in the bud by Member States, through the voice of the Council. The Union is thus experiencing a duality between a progressive Europe advocating for more open migration policies and Member States pleading for restrictive ones.

Besides Member States actions, a second factor, taking rather a historical institutional aspect, explains the lack of progress in implementing common integration policies. When developing the immigration framework at the Union level, heads of States and government officials have kept an extended control on the policy process. Political development spaces were and still are mainly selected by ministries of justice and interior who maintained a leading role in immigration policy-making and associated migration policies with combating transnational crime[92]. The security nature of European migration policies is therefore no coincidence. Givens and Luedtke described a common use of what

[90] European Commission, *Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, COM(2000) 757 Final*, 2000.
[91] Council of the European Union, *Council Directive on the Right to Family Reunification, 2003/86/EC*, 2003.
[92] M.A Schain, 'Immigration Policy', in *Comparative Federalism: The European Union and the United States in Comparative Perspective*, by A Menon, 2006.

they called "Venue Shopping", a process through which national actors use EU level tools to achieve national purposes[93].

In the current context, rather than being compelled, Member States have strengthened their capacity to maintain control over immigration, by equipping themselves with the necessary tools to ensure that its restriction falls within their area of competence.

Likewise, coordinated economic immigration policies are still hard to foresee although the treatment of long-term resident is to be harmonized[94]. The Hague Programme in 2004 established a list of "Common Principles for Immigrant Integration Policy in the European Union", including in particular: employment and education as fundamental steps for integration, access to institutions for migrants, participation in the democratic process and "two-way" dynamics of integration[95]. In this context, it requested the Commission to draw an Action Plan presented in June 2008 on legal migration and admission procedures which constituted a positive opening to strengthen its mandate in proposing soft laws. It nevertheless reminded that competences would stay in the hands of Member States.

Despite its non-binding nature, The Hague Program had the virtue of setting standards in terms of good practices. It also initiated a convergence between Member States policies in integration and anti-discrimination, which, until then had depended on very different models[96]. A distinction should also be made between Integration and Antidiscrimination regimes which followed two distinct evolutions.

Integration's current trend is to allocate rights for foreigners based on merit. Third-country nationals must "earn" their rights, through language courses or civic integration exams (i.e. in the Netherlands, to evaluate the open-mindedness of third-country

[93] Givens and Luedtke, 'EU Immigration Policy: From Intergovernmentalism to Reluctant Harmonization', in *The State of the European Union, Vol 6: Law Politics and Society*, Oxford University Press, 2003, p. 300.
[94] Council of the European Union, *Council Directive Concerning the Status of Third-Country Nationals Who Are Long-Term Residents, 2003/109/EC*, 2003.
[95] 'Council of the EU, Justice and Home Affairs, Press Release, 2618th Council Meeting', 19 November 2004.
[96] Joppke, 'Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France and Germany', World Politics, 59, 2007.

applicants) to be taken before arrival. This emphasis on a sense of identity and adherence to values later served as a model and extended to the integration policies of major European countries such as Germany, the United Kingdom and France, yet without triggering any harmonization of these policies across the Union's borders. An attempt was made at the initiative of France in 2006, gathering the ministries of interior of the six biggest Member States. The goal was to establish a common "integration contract" at the EU level, based on the example of France. Considering the creation of an experts committee in charge of assessing the States' integration procedures, it also planned to extend this policy to the rest of the EU countries. Although requests to make this program mandatory were dropped, outcomes were achieved, and the process resulted in the "European Pact on Immigration and Asylum" (2008). According to the latter, three criteria were made necessary to enjoy integration in Europe: language mastery of the host country, adhesion and respect of its values and access to employment[97].

The review of the political dynamics for the establishment of common rules in the EU shows that member States remain the only initiators for the definition of integration policies, hitherto defined at national or intergovernmental level. Furthermore, Member-States, regarding integration, used the EU intergovernmental mechanisms to expand their State-level generated policies. Anti-Discrimination Policies, on the other hand, have followed the opposite process. States used EU models and dynamics to implement them at the national level.

Benefitting mostly to third-country nationals already residing in Europe, anti-discrimination policies have received particular attention with the adoption of two Directives[98] of the Council in the framework of the Amsterdam Treaty. They required EU countries to set up commissions mandated to analyse and take action against situations of racial discrimination. For France, which was experiencing difficulties in integrating its foreign residents, particularly because of discrimination in access to work, these

[97] Council of the European Union, *European Pact on Asylum and Immigration*, *13440/08*.
[98] Council of the European Union, *Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin*, *2000/43/EC*, 2000; Council of the European Union, *Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation*, *2000/78/EC*, 2000.

directives were a real opportunity. Following two laws prohibiting discrimination in access to housing (2001) and the labour market (2002), it created the High Authority against Discrimination and for Equality (HALDE) in 2005. This event was a springboard for the management of the integration of foreign residents in terms of discrimination. It initiated a political process in this area and integrated discrimination issues into the debates of the national assemblies, such as the debate on diversity measurement criteria in 2006 or on ethnic data in 2007[99]. The EU anti-discrimination requirements thus introduced changes at the national level. This European advocacy broadened the rights of foreign residents, contrasting with the intergovernmental process regarding civic integration which reduced the rights of immigrants. This choice of States may be explained by the fact that discrimination situations taking place on national territories were more visible and were the source of ongoing debates, shaping the emergence of a consensus to take measures against them.

2.3.2 Minimum Standards Provided by the Charter of Fundamental Rights of the European Union

The evolution of European legislation in terms of migration, as we have seen, is therefore mainly linked to the predominant decision-making power of States. Although the EU, and therefore its Member States, have followed a liberal trend, it would seem that in terms of migration and integration policies, domestic jurisdictions are more likely to have a more constraining dimension than the European ones. It also appears that EU institutions were used mainly to develop more restrictive policies.

However, the Charter of Fundamental Rights of the EU (The Charter) provides minimum standards. With regards to the right to work for non-European citizens, article 15 paragraph 3 mentions "*Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union*". Recognizing the equal status of third-country national, this article

[99] L Van Eeckhout, 'Le Conseil Constitutionnel Invalide Les Statistiques Ethniques', 16 November 2007, Le Monde edition.

is still subject to broad interpretation when translated into domestic law and is addressed to individuals "authorised to work", without defining the standards for which authorizations should be issued. Therefore, a limitation of working hours or a restriction of access to the labour market for a certain category of third-country nationals does not constitute a violation of EU law.

The right to education, on the other hand, is enshrined in the Article 14 of the European Charter of Fundamental Rights. Drawing its inspiration from national constitutions and the definition of the ECHR, it emphasizes mainly access to primary and secondary education. The right to equal treatment in relation to the university tuition fees is contextualized in a more flexible and less universal framework. The Court of Justice of the European Union (CJEU), however, established limitations of discriminatory practices in students' services. Although Member States are entitled to impose a tuition fee regime for access to higher education, the case law of the CJEU showed that this should not differ according to the nationality if the student is an EU National[100].

In the case of *Elodie Giersch and others v Luxembourg*, a discrimination occurred towards children of migrant workers, studying in the country[101]. The aid given to them by the State for public transportation was reduced on the grounds of nationality. Furthermore, this measure worried Student Unions because, if extended, it would constitute a risk for the grants system in general. The CJEU acknowledged the legitimacy of Luxembourg to protect its education system and to aim at increasing the number of Luxembourgian nationals obtaining a university degree by implementing differentiated regimes for foreign students. It also stressed that such goals could be reached "using less restrictive measures" and that the State should not go "beyond necessary". Therefore, it ruled that EU citizens, although foreign residents could not be discriminated against on the basis of nationality. This principle of non-discrimination applies even when such measures were justified by economic concerns for national education institutions[102]. The

[100] *Forcheri v Belgian State* C-152/82 CJEU, 1983; *Gravier v City of Liège* C-293/83 CJEU, 1985.
[101] Giersch and Others v Luxembourg C-20/12 CJEU, 2013.
[102] Vincent Blaizot v University of Liège and others C-24/86 CJEU, 1988.

CJEU did not, however, rule on the differentiation of treatment with regard to third country nationals.

Freedom of movement for third-country nationals, and by extension, visa regimes are the most subjected to Member States national policies. Enshrined in the article 45 of the Charter, the right to freedom of movement within the Member States borders is expressly addressed to "*every citizen of the Union*". For third country nationals, it is conditional to the requirements of the treaties and the various legal texts resulting from it. The Community Code on visa was established in 2009[103], and specified the requirements requested for short- and long-term territory entry for third-country nationals. Its article 5 grants legal competences to Member States for "Examining and Deciding on an Application". They should, according to article 21, proceed to verification of the fulfilment of the requirements provided by the Schengen Borders Code[104]. The latter, in addition to security and administrative requirements (validity of legal documents, application deadlines, penalty for illegal border-crossing), gives Member States the choice on the assessment of means of subsistence that the candidate must provide for obtaining a visa (Art. 5 & 6).

They "*shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices in the Member State(s) concerned*" and "*may be based on the cash, travellers' cheques and credit cards in the third-country national's possession*". Financial requirements are enlisted by country in the Annex 18 of the Visa Code Handbook of the EU. They vary from 14€ (Latvia) to close to 100€ per day of stay[105].

In practice, Member States, in the individual applications also link the visa deliverance to the assurance of an employment, a good familial situation, and if possible a marital status in the country of origin to be sure that the applicant will not try to extend his stay

[103] Council of the European Union and European Parliament, *Regulation of the European Parliament and of the Council Establishing a Community Code on Visas, 810/2009*, 2009.
[104] Council of the European Union and European Parliament, *Regulation of the European Parliament and the Council on a Union Code on the Rules Governing the Movement of Persons across Borders, 2016/399*, 2016.
[105] European Union, Home Affairs, 'Reference Amounts Required for the Crossing of the External Border Fixed by National Authorities' <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/schengen/docs/reference_amounts_table.pdf>.

over the legal period. Some States also require that arrival and departure take place necessarily in the State of application for the applicant not to "abuse" of his Schengen visa. If no flight connexion exists between the country of origin and the country of destination, requiring a transit through another Schengen country, the dates for the flights between this transit country and the destination country should coincide. A difference in the dates would reflect a desire on the part of the candidate to take advantage of the visa issued by the destination country to stay in another Schengen country and constitutes a current ground for refusal. These practices, although informal and legally vague are common and once again illustrate the Member States' desire to limit as much as possible the impact of EU migration regimes that tend towards greater liberalisation and affirm in this logic and whenever possible their sovereign competences for entry policies into the territory.

2.3.3 Soft Laws

The EU context thus grants Member States with large prerogatives when dealing with migration policies. Directives, instruments binding States to specific requirements give a comfortable time for implementation and remain evasive on certain subjects. The difference can be observed when EU institutions emit soft laws such as Action Plans and Recommendation which generally promote inclusive and progressive measures for third-country nationals.

To illustrate this gap, it is interesting to compare binding and non-binding instruments which were issued regarding "Integration of Third Country Nationals".

With its Communication to the different EU organs, the Commission proposed the adoption of an Action Plan for the Integration of Third-Country Nationals[106]. It recalled the common principles for Immigrant Integration Policy adopted by the European Council in 2004 and developed the "*European Agenda for the Integration of Third*

[106] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on the Integration of Third Country Nationals, COM (2016) 377 Final*, 2016.

Country Nationals" initiated by the Commission in 2011. Although depending on each Member State, integration policies were steered and promoted by the EU to encourage States to achieve them. Furthermore, the Commission recalls the fundamental values of the EU and invites Member States to consider this perspective when implementing migration policies, to pursue a "*more cohesive society overall*". It promotes significant investment into integration policies, arguing that this is the solution for a prosperous, cohesive and inclusive society, while emphasizing the need to adopt a cross-sector and cross-actors approach including civil society, regional and local authorities.

Acknowledging that integration competences remain mostly in the hands of States (Article 79 (4) of the Treaty of the Functioning of the EU), the Action Plan aims at providing minimum common grounds for the "right way forward" and even proposes very ambitious perspectives, contrasting strongly with Member States' aspirations in the current context. After reviewing current policies and listing the challenges that third-country nationals face today in European societies in terms of integration, the Action Plan sets out its recommendations on the measures to be undertaken in 5 priority areas: Pre-Departure / Pre-arrival Measures; Education; Labour Market Integration; Access to Basic Services and Active Participation and Social Inclusion.

Pre-Departure and Pre-Arrival Measures aiding the third-country national while being still in the migration process, proved to be effective for integration. Unlike border control policies, which are the main concern of States, but which only allow migration to be considered from the restrictive angle, the view proposed by the commission is based on collaboration with sending countries and its objective is one of management rather than restriction.

This changing of approach can represent a shift in migration policies if followed by Member States. In this sense, practical steps were proposed by the commission, in particular when establishing a new Partnership Framework with third countries under the European Agenda on Migration[107].

[107] European Commission, *Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration, COM(2016) 385*, 2016.

The Commission's approach on education urges as well to adopt more inclusive measures for first- and second-generation immigrant children, especially for language and cultural integration. However, States are not required to implement specific policies, especially due to the breadth of their prerogatives.

In the field of access to the labour market, the Commission is also promoting the reduction of the institutional obstacles that persist today. Recalling that people with a migrant background are more likely to experience poverty and unemployment than nationals, it stresses the role of access to labour in economic and social inclusion. Not only focusing on the need for all individuals to enjoy acceptable living conditions, it also presents immigration as a solution to sustain the welfare systems in a context of an aging European population, employment being the prior source of fiscal contribution.

While the action plan presented seems to unveil brilliant ambitions for the coming years, it contrasts sharply with the provisions held in EU law for Member States. For instance, article 24 (3) of the Directive 2016/801/EU of 11 May 2016[108]allows restriction of working hours for third-country students, setting a minimum standard of 15 hours per week. The Directive also permits States to charge students higher fees for "*handling applications for authorizations and notifications*" as long as they are not "*disproportionate*" or "*excessive*", thus leaving a wide space of interpretation.

3.
MIGRATION IN PERSPECTIVE

In view of this constant tug-of-war between States and international and supra-national organizations, the question of the concrete impact on migration policies arises. Have States' reluctances caused them to harden in recent years, or, conversely, has the increasing role of international organizations allowed them to be liberalized?

[108] *Directive of the European Parliament and of the Council of on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and Au Pairing*, (EU) *2016/801*, 2016.

3.1 MIGRATION POLICIES SINCE 1990

3.1.1 A Change of Selection

The International Migration Institute (IMI) has examined in detail the evolution of migration policies in the world over the past 50 years[109]. Its first observation was that border controls and exit measures experienced a restrictive evolution while integration policies became more progressive. Surprisingly, the number of more progressive policies surpassed the restrictive ones since the 1960s. In the 60s-70s, it was explained by the decrease of nationalism across the world and the development of international and supra-national organizations such as the UN and the EU, in parallel with the establishment of international norms regarding immigration (refugee status, family reunification). In the 80s, the main causes of this phenomenon were the opening of legal channels for family reunification, the expansion of refugee protection and the development of economic, social and political rights for third country nationals.

This came to an equal balance between the two in the 1990s, although still with a short majority of less restrictive policies. This resurgence reflected the emergence in the political sphere of growing anti-immigration discourses. In fact, irregular migrants are the category that has known only more restrictive policies over the past 50 years. It is at this period that border controls and expulsion measures increased. They also illustrated the rise of a greater severity at the global level in technological identification techniques and against hiring or transporting illegal migrants. More precisely, 4 categories of policies are distinguished. While "major" and "mid-level" policies followed a less restrictive trend, "minor" and "fine-tuning" policies followed the opposite direction. This dichotomy illustrates the main progresses made in terms of fundamental "major" standards by International Organizations (such as family reunification), while, at the domestic level, "minor" restrictive backtrackings were attempted (increased financial requirements, shortened residence periods, integration tests)[110].

[109] Hein De Haas, Katharina Natter, and Simona Vezzoli, 'Working Paper: Growing Restrictiveness or Changing Selection? The Nature of Evolution of Migration Policies', *DEMIG Determinants of International Migration*, July 2014, International Migration Institute, University of Oxford.
[110] *Ibid*, P 11

The EU, experiencing this scenario, was divided into two groups of countries. While southern ones became immigration territories, creating new regularization tools, northern States started to strengthen their migration framework, targeting mostly family migration (i.e. Netherlands "pre-entry tests" or criminalizing "grey marriages"[111]). On the other hand, foreign workers, including those with low skills (contrarily to popular beliefs), benefitted for more flexible regimes across the EU with the development of bilateral labour agreements.

The evolution of refugee policies, however, is ambiguous. Temporary protections for asylum seekers were introduced, even if they were not granted the refugee status, meaning they had the right to stay in the host country as long as their return would constitute a danger. While constituting a protective tool, these measures resulted in a focus on temporary residence, while progressively denying permanent stay. They were also accompanied by the reduction of the number of refugee status grants. Hence, in appearance, legislative changes were indeed less restrictive, but law implementation became stricter.

The findings of the IMI study also demonstrate that, although less restrictive policies remain dominant, a major shift in the selection occurred. Until the 1980s the criterion of nationality was predominant in enforcing immigration policies. Later, measures regarding "specific nationalities" eased off, while those concerning all nationalities varied between more and less restrictive. Nationality can no longer be the justification for strictly refusing the enjoyment of rights, as it would constitute a discrimination. However, it can justify more favourable treatments (leading to de facto discrimination against the rest), as we have seen with the differentiated regimes for EU and non-EU citizen.

Consequently, nationals of countries that do not benefit from these preferential treatments have seen their access to legal migration diminish and become more challenging. Visa

[111] "*The Netherlands: Discrimination in the Name of Integration - Migrants' Rights under the Integration Abroad Act*", Human Rights Watch, 2008

regimes and immigration policies became for instance particularly restrictive towards nationals of African States[112].

Criteria of admission shifted from nationality to more economic and social requirements. Competences and wealth, for instance now play a predominant role in the selection process. Furthermore, migration policies tend to be less general and to favour specific selection. The addition of economic and social criteria did not, however, banish the nationality dimension, but rather juxtaposed the two. Hence, taking a closer look of policies of OECD countries, the IMI's study observes that the abolition of racial criteria facilitated immigration to wealthy Africans and Asians with desirable skills while making more difficult that of lower-class citizens.

These latter benefitted only from more progressive regimes in specific contexts. First, seasonal workers entry was facilitated. In this context, in 2004, France implemented a "temporary residence permit", up to three years, as long as the worker would not work more than six consecutive months per year in the country. Domestic workers and caregivers constituted the second favoured category: "Domestic Workers Visas" were created in 1998 in the UK. The third category benefitting from special regimes are the nationals of States - generally bordering countries - that have signed bilateral agreements, facilitating entry and labour migration.

Economic and skills requirements also followed a more informal development. European countries now require immigration candidates to take tests in Languages and Knowledge about the destination country. Fees must also be paid for the preparation and the test itself. In addition to the social selection it is likely to create, this process also tends to be outsourced in the country of origin to avoid arrival of unwanted migrants. In this sense, The Netherlands (2006), followed by France (2007) and Denmark (2010)[113] initiated such policies.

[112] Flahaux, 'Working Paper: The Influence of Migration Policies in Europe on Return Migration to Senegal', *DEMIG Determinants of International Migration*, International Migration Institute, University of Oxford, 19, 2014.

[113] The Dutch "Civic Integration Abroad Act" came into force on 15 March 2006. It aimed at ensuring that immigrants already possess the required language knowledge before reaching the national territory. It is for the same purpose that were adopted the French law on "Immigration, Integration and Asylum", 20 November 2007 and the Danish consolidated "Aliens Act", 31 May 2010

We can thus notice that immigration policies followed a progressive evolution because of the development of international regimes and the abolition of general arbitrary criteria. Bridges for multiple aspects of immigration were created and an emphasis on economic and social criteria appeared. As a consequence, previous "*de jure"* discriminations are replaced by ones appearing "*de facto*". The concern raised by these observations is that the threshold to obtain a legal migration status becomes higher, opening the way to irregular migration, under an increasingly severe regime.

The resurgence of restrictive policies since the 1990s, balancing with the less restrictive trend followed until that period, thus challenges the idea that international and regional standards set sufficient rules to prevent migrants' rights to be curtailed[114]. On the other hand, these standards have allowed legal regimes, preventing those rights to be entirely dismantled. This is evidenced by the fact that national and European courts[115]have placed limits on States' attempts to unravel them. Family reunification, for example, has been subjected to numerous attacks by States since the 1960s, however it could never be abolished. The deconstructions undertaken by States are thus limited.

Although the 1990s saw the rise of restrictive policies, it should not be forgotten that the least restrictive ones remained more numerous. For instance, a large number of States have, among other measures, enabled migration of migrant worker's family members.

Thus, we have seen that migration policies did not follow a more restrictive trend but have rather become more complex. The goals pursued are not at controlling the quantity of immigration, but rather its quality. Beyond the usual rhetoric that has emerged in the political landscape, calling for a reduction in the number of migrants, current policies have in fact focused on establishing a hierarchy in the right to migrate legally or not. Unlike blatant "racial" justifications, today, it is the pre-requisites in terms of skills, financial, family and social situation which prevail, using the nationality criteria as an implicit selection parameter.

[114] J.F Hollifield, 'Migration and International Relations, Cooperation and Control in the European Community', International Migration Review.26 (1992).
[115] C Joppke, 'The Legal-Domestic Source of Immigrant Rights. The United States, Germany and the European Union', in *Comparative Political Studies*, 2001.

It is certain, furthermore, that the discourse towards migration has become much more "utilitarian", emphasizing the economic "gain" a migrant can represent as the sole motivation. In this sense, we can say that a commonality exists in Western migration perception and policies[116]. This purely materialistic vision of immigration has biased the demands for flexible policies. Instead of highlighting their humanist dimensions, as international standards do, it plays into the hands of the major economic powers and commercial lobbies by focusing on only economic benefits[117].

While the most privileged classes of immigrants have seen their mobility rights increase, States are trying to limit access and residence rights as much as possible, within the international legal framework, to other categories as well as to those who cannot contribute to the economic ambitions of Western countries. The tightening of eligibility criteria for legal migration, together with increased rigour in the fight against illegal immigration, have increased the vulnerability of the groups concerned, for example by making it easier for asylum seekers to enter irregular situations or by pushing an increasing number of people from countries of origin to use the dangerous and inhuman roads of the Mediterranean or other informal and criminal networks.

Some current figures can also be presented to address this statement. The list of countries from which nationals are visa free or are granted an automatic three-months visa when reaching the European territory has decreased since the 1970s. At that time, most African nationals benefitted from this regime, against only the ones from two countries in 2010[118].

3.1.2 Paper over Cracks: Outsourcing the Screening Process

As international and regional Human Rights constraints, as well as national courts and NGOs advocacies attempt to limit States in their practices, the outsourcing of the asylum applications escapes their scrutiny and takes place outside of their area of influence. Is it

[116] W.A Cornelius, 'Controlling Immigration: A Global Perspective', 2004.
[117] G Facchini, A.M Mayda, and P Mishra, 'Do Interest Groups Affect US Immigration Policy?', Journal of International Economics, 2011.
[118] Stephen Mau and others, 'The Global Mobility Divide: How Visa Policies Have Evolved Over Time', 9 February 2015, Journal of Ethnic and Migration Studies edition.

a subterfuge of European States to avoid their obligations? Officially, it is hard to consider things this way as the different agreements implemented are justified by practical aspects (efficiency, geographic proximity) which are said to allow a dignified treatment of the candidates for migration and the asylum seekers. However, it is easily noticeable that they were signed to relieve States as fast as possible from an important number of "unwanted" individuals in their territory, accelerating the process and thus taking the risk of lacking thoroughness and follow-up as to their true implementation. It can be foreseen that such measures, given the growing restrictiveness of criteria for migrating legally, will not reduce the flow of irregular migrants, but rather redirect it. In view of the current situation in Turkey, Libya and now Sub-Saharan countries, the theory contained in the texts is yet to be followed by practice on the ground.

The predominance and growing demands of States to enforce their national agendas are not unrelated to the speedy turn of outsourcing processes. National policies and the latest conclusions of the Council of the European Union[119] in this context raise serious concerns as for Europe's willingness -or at least ability- to fulfil its human rights obligations. Human Rights Watch takes position in this sense: *"In reality, the externalization approach has the effect of avoiding the legal responsibilities that arise when migrants and asylum seekers reach EU territory by outsourcing migration control"*[120]. Adopted on the 28th of June 2018 in the continuity of the previous deals with Turkey and Libya, they recall the need to strengthen borders control and to reduce their illegal crossing. Illustrating for French President Macron at the end of the summit, the victory of cooperation, they reflect above all the previously explained phenomenon of converging national interests at the European level in the only context of restrictive measures.

The conclusions provide extended support to Libyan coast guards in the fight against criminal smuggling networks and criminalizes attempts to interfere with their work. Several problems emerge from this decision. First, the country, regarding to Article 3 of the ECHR would not constitute a safe environment for deportation. However, it seems to

[119] Council of the European Union, 'European Council Conclusions, 28 June 2018, Press-Release 421/18', 2018.
[120] Judith Sanderland and Hanan Salah, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (Human Rights Watch, January 2019).

be considered safe enough for the asylum procedures to be processed from. Tripoli is facing a re-intensification of hostilities and is not in a position to guarantee respect for the rights of migrants on the ground. Furthermore, and regardless of the ongoing conflict, Human Rights organizations have reported alleged violence, extortion and degrading treatments, including within the official detention facilities[121]. Endemic corruption and close collaboration between Libyan authorities and local militias are, moreover, additional factors likely to put an unmeasurable number of migrants into the hands of criminal networks. Testimonies and reports proved systematic rapes, racketeering and enslavement. The magnitude of this risk did not, however, make EU decisions less expeditious, the border control issues remaining a priority. In its reports, "Human Rights Watch" has highlighted this fact:

> "Senior EU officials are aware of the plight facing migrants detained in Libya. In November 2017, EU migration commissioner, Dimitri Avramopoulos, said, "We are all conscious of the appalling and degrading conditions in which some migrants are held in Libya." He and other senior EU officials have repeatedly asserted that the EU wants to improve conditions in Libyan detention in recognition of grave and widespread abuses. However, Human Rights Watch interviews with detainees, detention centre staff, Libyan officials, and humanitarian actors revealed that EU efforts to improve conditions and treatment in official detention centres have had a negligible impact. Instead, European Union (EU) migration cooperation with Libya is contributing to a cycle of extreme abuse."[122]

The Council's conclusion, in paragraph three, intend to pursue the implementation of the EU-Turkey statement. This deal has been heavily criticized by several human rights organization for the abuses caused by its implementation. The first assumption leading to its signature was that Turkey is a safe place for refugees, a statement proved to be false according to Amnesty International Reports. They referred to cases where asylum seekers were sent back to their country of origin without being able to appeal the decision: a violation of their right to an effective remedy. Others are regularly sent back to

[121] *Ibid*
[122] *Ibid*

Afghanistan, Syria or Iraq where they face repeated human rights violations[123]. The EU-Turkey Statement also placed the migrants located on the Greek islands, in a legal limbo situation. They revealed worrying health and sanitary situations as well as difficult living conditions and tensions due to the overcrowding[124]. The goal of "full implementation" of the Turkey Statement is therefore highly questionable.

The conclusions enlisted in paragraph four establish a partnership in transit countries from the Western Mediterranean Route of migration. Morocco would therefore benefit from renewed European support. Although the funds received by the EU are supposedly conditional to a humane treatment of individuals, the country is far from being free of abuses[125].

Paragraph six elaborates the concept of "controlled centres" which would be implemented on a voluntary basis by Member States. Their objective would be to provide rapid processing in which irregular migrants would be distinguished from individuals entitled to protection and automatically returned to their home country. Reminding of the practices implemented in Italian "hotspots", these centres are likely to lead to expulsion decisions based solely on nationality. An arbitrariness that would violate the non-refoulement obligations of States. The efficiency requirements it establishes could also lead to collective expulsions, arbitrary detentions or police violence as it has been experienced in the past[126].

Beyond the EU common policies, Member States also claim at the national level for tougher control and faster expulsion procedures. The German minister of interior, in this sense, proposed his "Masterplan" in July 2018 which includes a reinforcement of FRONTEX, the EU border police, and the use of "disembarkation platforms" in North Africa. The first question is again "how can we externalize the burden of refugees", rather

[123] Kondylia Gogou, 'The EU-Turkey Deal: Europe's Year of Shame', Amnesty International, 2017.
[124] Marta Welander, *An Island at Breaking Point: Filling Information Gaps Relating to Refugees and Displaced People in Chios Greece* (Refugee Rights Europe, May 2017).
[125] Judith Sunderland, 'Outsourcing Border Control to Morocco a Recipe for Abuse', Human Rights Watch, 2017.
[126] *Hotspots Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights* (Amnesty International, 3 November 2016).

than "how can we effectively protect them"[127]. In Austria, country holding the presidency of the Council of the European Union in 2018, thus setting the agenda, has expressed the wish to further the externalization process by making it impossible to file asylum applications inside the European territory[128]. Alongside Matteo Salvini's Italy, it advocated for more militarization and claimed for the end of solidarity organization navigating in the Mediterranean, causing the numbers of drowning in this area to increase[129].

Borders of the EU's externalization process, which in reality started with the European Agenda on migration and the "La Valetta" summit in 2015, were pushed further then its sole neighbouring countries. The Emergency Fiduciary Fund was created and allocated with a two-billion-euro budget to help officially with the "deep causes of migration" and in favour of the "stability" in Nigeria, Senegal, Ethiopia, Mali and Niger. Niger for instance received a 266,2-million-euro support over three years, promoting development assistance and fight against human trafficking[130]. The real reasons behind the official discourse are well known and their consequences on the ground speak for themselves. Almost simultaneously with the set of the European Agenda on migration, the country passed the law 2015-36 to fight against human trafficking providing up to five years prison sentences for anyone who would provide help: food, shelter, travel assistance to travellers taking the road to Libya. An interesting fact when certain national tribunals in Europe are ruling against the criminalization of solidarity[131]. In a city like Agadez, key gateway in the western African migration routes, travel assistance was a major economic sector. It benefited from an official status, providing guarantees of low prices, safety and respectful treatment of travellers. Today, it has become informal and criminal organizations have taken over. The official figures thus reflect a misleading success. Numbers of registration at the Niger-Libya border post of Séguédine have dropped

[127] Ben Knight, 'German Interior Minister Presents His Migration Master Plan', 10 July 2018, DW News edition.
[128] 'Austria to Propose Moving Asylum Requests Outside EU', 11 July 2018, The Local, Austria edition.
[129] 'Migration: Drownings Skyrocket as European Governments Block Humanitarian Assistance on Central Mediterranean', 12 July 2018, Doctors Without Borders edition.
[130] Rémi Carayol, 'Les Migrants Dans La Nasse d'Agadez', June 2019, Le Monde Diplomatique edition.
[131] Marion Roussey, 'La Solidarité Envers Les Migrants n'est plus Un Délit', 6 July 2018, Arte Info edition.

considerably (from 290 000 in 2016 to 33 000 in 2017), but irregular migration figures are unknown and most likely have increased, with their share of criminal acts: disproportionate prices, racketeering, violent methods, abandonments in the desert[132].

Restrictive Visa regimes based on economic or knowledge requirements and externalized migration processes constitute the culminating point of Member States' will to ensure access to their territory to the only chosen ones: those representing a benefit for national economies, or those experiencing a terrible enough situation to be granted protection. This high threshold for regular migration and the minimum application of international migration standards by EU member States, combined with a hardening and a distancing of border controls have two major consequences in terms of human rights guarantees. First, externalized official detention facilities are managed in regions were a much lower scrutiny in terms of dignified treatment of people is provided, thus drastically reducing their human rights guarantees in compare to those in force on the European territory. Second, the zero tolerance on irregular migration and the high threshold to obtain legal access to EU member States lead an increasing number of individuals to use roundabout paths. Official figures may decrease as we have seen with the Nigerien example, but they do not represent a lower number of candidates for migration, rather a repeated shift towards more informal and thus more uncertain routes, reducing again the human rights guarantees.

We have thus seen that the trend followed by immigration policies was one of liberalization if we consider the strengthening of international standards and supra-national organizations. Still the States try to follow the opposite trend and attempt backtracks when possible, leading to compromises limiting the conception of migration to the only economic potential and prioritizing the security aspect. Consequently, wealth, social background and skills became not only practical, but also legal barriers to the ability to travel, leading an increasing number of people to follow informal routes. In their current implementation, European immigration policies may indirectly increase situations

[132] Fransje Molenaar, Jérôme Tubiana, and Clotilde Warin, *Caught in the Middle A Human Rights and Peace-Building Approach to Migration Governance in the Sahel* (Clingendael: Netherlands Institute of International Relations, December 2018).

of human rights violations. To reduce their impact, two levels of solutions can be analysed. On one hand, it is possible to count on a strengthening of international standards, foreseeing their uniformization on a global scale and giving them a legally binding character. On the other hand, a reverse of trend, towards a liberalization of visa regimes at the national level would prevent the indirect consequences on Human Rights explained earlier. In this sense, we will analyse the tools and work undertaken at these two levels.

3.2 MIGRATION POLICIES: REVERSING THE TREND?

3.2.1 International Influences

Despite unsuccessful attempts such as the 1994 International Conference on Population and Development in Cairo, questions of global migration management start to emerge among the international community. Until the early 2000s, migrant-receiving States had been reluctant to bring migration issues into international conferences and summits. However, the International Dialogue on Migration, launched by the IOM in 2001 seemed to initiate a shift in this trend. Followed the same year by the Berne initiative, and the creation of international instruments such as the Global Migration Group in 2003 or new processes at the Global Commission on International Migration (2005), it illustrated the new predominant space migration is progressively occupying in political agendas. At the UN level, a special representative for international migration and development was appointed in 2006, in the wake of the "High-Level Dialogue on International Migration and Development" and the "Global Forum on Migration and Development". These processes also brought forward migration management related issues into the academic environment, a context in which liberal concepts were provided as a counter-narrative to the restrictive conception of migration States have adopted. In this sense, it was argued that the absence of centralisation of migration issues and their division into several

agencies could lead to a lack of coherence[133]. It could be considered that the IOM plays a leading role in this area, however, its status would hardly allow it to convince States to build common international policies. The idea of a World Migration Organization based on the model of the World Trade Organization was thus conceptualized in the early 2000[134]. Today's Refugee and Migration Compacts can be seen as a first step towards it.

In 2018, following the initiating process of the New-York Declaration for Refugees and Migrants (2016), a new dynamic appeared to enforce international protection for refugees and migrants. It took the form of two instruments developed at the UN level: The Global Compact on Refugees (Refugee Compact) and the Global Compact for Safe, Orderly and Regular Migration (Migration Compact). They both contain engagements concerning migrant rights and requirements to guarantee their dignity and safety. They also emphasize the importance of their empowerment for the well-being of societies in which they settle[135].

Considering the global political context, the fact of reaching an agreement itself, let alone the advances it contained can be considered as a surprising success. Indeed, 2018 was a worrying year in the area of migration: scandals in the USA after migrant families were separated, thousands of Rohingya fleeing violence, the Venezuelan exodus… The same year, Europe saw Hungary criminalizing with prison sentences any act of solidarity towards refugees, asylum seekers or migrants[136], Italy preventing sea rescuing NGOs from disembarking on its territory[137]and living conditions of asylum seekers on the Greek islands deteriorating[138].

[133] Corey Robinson, 'Making Migration Knowable and Governable: Benchmarking Practices as Technologies of Global Migration Governance', in *International Political Sociology*, 4, 2018, XII.
[134] Jagdish N. Bhagwati, 'Borders Beyond Control', February 2003, Foreign Affairs edition.
[135] *Global Compact on Refugees, UN Doc A/73/12*, 2018; *Global Compact for Safe, Orderly and Regular Migration, UN Doc A/RES/73/195*, 2018.
[136] Patrick Kingsley, 'Hungary Criminalizes Aiding Illegal Migrants', 20 June 2018, New-York Times edition.
[137] 'Migrant Crisis: Italy Minister Salvini Closes Ports to NGO Boats', 30 June 2018, BBC News edition.
[138] Griff Witte, 'Conditions Are Horrific at Greece's "Island Prisons" for Refugees. Is That the Point?', 15 January 2018, Washington Post edition.

This "volley of assaults on refugees"[139]indeed seemed difficultly compatible with the evolution of international standards. The Global Compacts aim not only at consolidating them but also at highlighting the positive role migration can play in our societies. They set the basis for strengthening International Cooperation for a better management of people's movements. Certainly, to reach a consent among countries, they however recalled the "primary responsibility and sovereignty of States"[140].

Whereas the Refugee Compact is based on and reinforces existing legal frameworks, the Migration Compact constitutes an innovative instrument. And although it draws inspiration from previous human rights standards and principles, it takes the lead in the area of general migration issues management, which, never before, were the object of a global agreement. Furthermore, it does not simply ensure the creation of an enabling environment for the proper implementation of legal minimums in terms of human rights, unlike the Refugee Compact (*(i) ease pressures on host countries;(ii) enhance refugee self-reliance;(iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity* – Paragraph 7).

Stressing the necessity of international cooperation, between States and with all relevant actors related to migration, it aims at reaching consensuses on its management and the improvement of migrant rights. In this sense, sharing responsibilities and dealing with the root causes of migrations, including "*Natural disasters, the adverse effects of climate change, and environmental degradation*" are major points. These measures must be accompanied with a priority on life saving, and the fight against human trafficking. Effective screening processes shall also be implemented with guarantees for migrants to have access to sufficient documentation and be able to prove their identity. Prohibition of discrimination, access to basic services, as well as the right to work in dignified conditions are also of major importance. Emphasis is also placed on inclusion and on discourse to prevent a negative perception of migrants.

[139] Tim Gaynor, 'UNHCR's Volker Türk Calls for "More Empathic and Humane Dialogue" in Key Address', 4 October 2018, UNHCR edition.
[140] Refugee Compact para 33, Migration Compact para 7, 15

Objective 5 constitutes a particularly ambitious perspective for future regular migration policies. It aims at "*enhancing availability and flexibility of pathways for regular migration*". Mostly orientated towards facilitating labour migration, such as more bilateral agreements, free movement regimes or multiple country visas, it also proposes new insights for visa regimes. Paragraph (g), for instance, speaks of basing national and regional practices for admission and stay of appropriate duration on "*Compassionate, humanitarian or other considerations*". These notions can be broadly interpreted and offer space for more flexible criteria in the future. Furthermore, in parallel with paragraph (h), it identifies new justifications of eligibility for visa grants such as such as desertification, land degradation, drought, sea level rise, sudden-onset natural disasters and other precarious situations: criteria which until today do not guarantee specific protection and fall into the category of "economic migration".

Similarly to that on refugees, the Migration Compact includes agendas for the assessment of States' progresses. These latter will be discussed on the occasion of a "Four-yearly International Migration Review Forum", starting in 2022[141], with a "United Nation network on migration" ensuring the monitoring and review activities.

Keystone for global migration management, the Global Compact on migration remains a non-binding instrument, strongly depending on States' will and capacity for its implementation. In the EU, the realization of its ambitious objectives has already been hampered by the decision of eight Member States to exit the process[142]challenging, once again, the perspective of more virtuous and outward-looking political regimes. t is worthwhile to look at the existing dynamics that would make it possible to influence political decisions on the continent.

[141] Migration Compact para 45
[142] Mauro Gatti, 'EU States' Exit from the Global Compact on Migration: A Breach of Loyalty', 14 December 2018, Odysseus Network, Université Libre de Bruxelles edition.

3.2.2 National Advocacies

Although International Regimes follow a slow but positive evolution, States remain the key actors to trigger an effective change. In Europe, immigration, in the collective imagination has become a growing threat. Not only far-rights discourses are feeding fears and prejudgements on "the other", but main-stream parties, in their attempt to seduce and attract a part of the right-wing votes have trivialized anti-immigration ideas and imposed a necessarily negative conception of the arrival of new-comers: a dangerous game that has now normalized and deepened the roots of the far-right ideology in the European Union, threatening its unity, the stability of its institutions and that of its Member States. This conquest of the political landscape is not only the expression of conservative claims but more profoundly, seems to herald a deep institutional crisis, potentially destroying, along with the legal achievements for people of immigrant background in Europe, those of its own citizens.

In an attempt to understand the effort being made to foresee other perspectives to this growing discourse, we will evaluate the impact that NGOs and other advocacy actors are likely to have at the national and European level as well as examples of changes they succeeded to trigger. The Centre on Migration, Policy, and Society (COMPAS) carried a study at the level of the EU and of five of its Member-States to understand the role played by NGOs in policy making and the challenges they are facing[143].

It first demonstrates that the openness to external influences by the policy making actors, varies not only from a Member-States to another, but across ministries and departments as well. The working culture and habits among other factors such as the number of actors engaged, and the weight NGOs can have among these voices are likely to influence the decision process and therefore imply the need for civil society to adopt a personalized methodology according to the issue and the counterparts they interact with[144]. Furthermore, Member-States such as the UK and Germany are historically keener to

[143] Sarah Spencer, 'Migration Policy Making in Europe: Challenges and Opportunities for Civil Society: A Short Review for the Social Change Initiative', Centre on Migration, Policy and Society, University of Oxford, 2017.
[144] Elizabeth Collett, 'The Development of EU Policy on Immigration and Asylum: Rethinking Coordination and Leadership', MPI Policy Brief Series, 2015.

consult civil society through meetings and expect NGOs engagement in the policy making process. On the contrary, it is less naturally the case in France or Greece.

Civil society, particularly at European level, may in fact prove necessary to policy makers. Its expertise on particular topics can tip the balance in debates or can support a political proposal and influence opinion. For instance, the European Commission is, due to its reduced policy-making competence, very keen on the support of NGOs to obtain the approval of other European bodies and obtain additional guarantees for the implementation of its recommendations by Member States[145]. On the other hand, NGOs can face rejection, in particular when decisions to be taken are of an imperative or urgent nature, leaving little room for consultation for which there is insufficient time or capacity. In the field of migration, however, and particularly since the beginning of the Refugee Crisis, the services that NGOs have provided in the field gave them an overriding expertise and credibility regarding measures to be implemented. Their consultative and advocacy role has thus become essential.

Challenges remain. First, advocating does not allow to pursue a general ideology since political decisions are the output of negotiations and compromises. A strong opposition or hardly accessible claims are likely to disrupt the negotiation process, or even create mistrust, leading to a potential loss of funding[146]. Civil Society actors thus often revise their goals downwards to ensure advancements, albeit they would only constitute minor steps.

Secondly, at the European level, NGOs are consulted by Members of the European Parliament (MEPs), but their access to the Commission and the Council is restricted, thus reducing their potential impact. It is certain, however, that the competence of the European Parliament has extended with the Lisbon treaty, offering Civil Society a larger space of manoeuvre.

[145] Andrew Geddes and Peter Scholten, 'Policy Analysis and Europeanization: An Analysis of EU Migrant Integration Policymaking', *Journal of Comparative Policy Analysis: Research and Practice*, 2013.
[146] Giovanna Zincone, 'Comparing the Making of Migration Policies', *Migration Policy Making in Europe*, Amsterdam University Press, 2012.

Beyond institutional constraints and opportunities, the COMPAS study provides a deeper analysis of the nature of European Civil society itself to evaluate its impact and perspectives. The main finding is that NGOs are fragmented and rarely adopt a similar strategy or speak with one voice. These differences are reflected in the choice of scale of intervention (national, European, international) and the method used (pressure or negotiation, opposition or collaboration). Knowledge is also fragmented, a large number of organizations working in the field do not necessarily have the competences for advocating. Therefore, they often refuse to engage at the policy-making level.

When they do take part, several factors must be taken in consideration for greater success. It is easier to take into account and adapt to the current political agenda, rather than to integrate new data which, as a result, would possibly be rejected or not included in the priorities. Pervasive radical demands might as well compromise the access of the NGO to the consultation process. On the other hand, they can open room for others to comfort smaller claims. As mentioned earlier, credibility and experience are a fundamental parameter. This applies both for the knowledge of the field and of the intricacies in the EU decision processes. It can be ensured with a large presence and a strong network within the European Parliament and regular face-to-face briefings with MEPs[147].

In addition to some field NGOs' unwillingness or inability to engage in the policy making decision level, three categories could reveal potential supports, but do not include migration or integration advocacy as a priority: Traditional "welfare service providers", NGOs working with a wide variety of beneficiaries among which migrants support does not constitute a primary objective and international organizations providing health services for instance. A further analysis of the reasons preventing them from prioritizing advocacy could potentially unlock their potential. Advocacy is also a costly procedure. Not only trained experts are needed, but travel and accommodation to major cities or decision centres can represent high expenses. Reallocating budget lines and highlighting advocacy activities when raising funds can be considered and would reinforce NGOs capacities.

[147] Natalia Banulescu-Bogdan, *The Role of Civil Society in EU Migration Policy: Perspectives on the European Union's Engagement in Neighbourhood*, Brussels: EUI/MPI, 2011, pp. 5–6.

Trust between Civil Society and the political sphere is still to be enhanced at an individual level. Although they value their expertise, policy makers sometimes perceive NGOs as a hermetic and time-consuming entity[148]. Their agenda often being packed, they are not necessarily able to consult hundreds of pages of reports. Short memos and briefings before parliamentarian sessions are in this sense a more effective method. To attract MEPs in seminars and information events, understanding their needs is a key asset. A guaranteed presence in such events could be an opportunity to open up MEPs to alternative practices. These fora could also enable policy makers from different countries to exchange ideas and experience.

Allies at the local level should also not be underestimated. Regional authorities are sometimes limited by national requirements and can use NGOs support to challenge certain measures and cause regional changes to influence national practices. Locally elected officials and cities representatives also have a greater proximity to the field and are therefore more aware of migrants' situations. Hence, a strong relationship of trust with cities and local actors are often a win-win scenario.

The growing number of NGOs working in the field of migration and their progressive inclusion into European consultation mechanisms are thus major opportunities to allow changes in the long term. However, Civil Society organizations struggle to develop strong advocacy methods and practices and rarely speak collectively. Difficulties to adapt to the political agendas and sometimes too strong political goals rather than small-steps achievements also reduce the efficiency of negotiations.

Migration policies are thus experiencing different dynamics. The evolution of international migration standards has allowed the establishment of a minimum protection guaranteed for all. Originally focusing on refugees, their scope of application has progressively extended to other rights such as ones relative to labour or to family reunification. In the continuity of this evolution, the Global Migration and Refugee Compact aim at including new criteria for protection, in particular those related to

[148] E Florence and M Martiniello, 'The Links between Academic Research and Public Policies in the Field of Migration and Ethnic Relations: Selected National Case Studies', International Journal on Multicultural Studies, 2005.

environmental issues. They also promote integrative measures and highlight the added value of immigration both for sending and receiving countries. On the other hand, more progressive binding international standards are foreseeable only with the collaboration of States. The latter attempt to keep their protection obligation at the minimum level and accept a transfer of competences most often when border protection or the fight against irregular migration are at stake. Therefore, a dual evolution characterizes migration policies in the EU and whereas discriminatory criteria such as nationality for access to territory and integration are progressively being banned, wealth and skills have become predominant, reinforcing the exclusion of nationals from poorer countries. At the same time, practices to combat illegal immigration have intensified and have been exported beyond the Union's direct borders. These two phenomena combined have led a larger number of individuals to choose illegal immigration channels, which themselves, in order to escape increasing controls, are becoming increasingly clandestine, and therefore more expensive and dangerous. Dissonant voices of the Civil Society seek to reverse the trend from the inside by reaching for the political sphere. Although migration NGOs have obtained a strong consultative role at the European Level, several situational factors only allow them to take small steps forward.

The observation remains that the political context has fed a negative perception of migration. Associated with stagnant economic conditions and a growing mistrust towards EU institutions, these factors have paved the way for the rise of the far right, now firmly entrenched in the political landscape. It is likely to strengthen human rights threatening policies, or even trigger setbacks in terms of achievements, but it also threatens European stability and unity in the longer term.

To reconnect with the fundamental values of the EU and provide a humane and efficient response to the massive increase of immigration expected for the coming decades, we propose a counter-narrative to the restrictive ideology and attempt to enlist alternative ways to conceive migration and movement of people.

3.3 RECONCEIVING MIGRATION THEORY

Modern legal norms framing freedom of movement have emanated from article 13 of the Universal Declaration of Human Rights. Its formulation focuses on free movement within the borders of a country, the right to return and to leave one's State. As we explained earlier, this right to leave is likely to be restricted in the case no guarantee to enter another country is provided; a paradox debated from the beginning of the "Travaux Préparatoires" to the Declaration. This inconsistency was notably put forward by the representative of the United States of America at the time, Mr Daniels and by Prof. Cassin (France)[149]. Furthermore, French representative Mr Spanien proposed an amendment with a more direct approach providing the right to emigrate and to renounce one's nationality. Dr Malik from the Lebanese delegation also raised the question of whether the right to emigrate should include the right to mere travel[150]. These perspectives were not unanimously accepted due to the legal uncertainties they would imply and the high risk for the States to lose their sovereignty on migration issues. A formulation of the respective paragraph of Article 13 was therefore proposed in the following terms: "*Individuals shall be free to leave their own country and to change their nationality to that of any country willing to accept them.*"[151], opening the way for the current definition. Ambitious proposals were however made during the debates. For instance, the Chilean delegation, together with Australia, wished to deprive the right to freedom of movement from any influence of States and any limitation, at least in the Universal Declaration of Human Rights, in order to preserve its fundamental value and philosophical significance[152]. Hence, although freedom of movement has been adopted in the form in which it is worded today, the debates that have taken place on this right show that it has been subject to many interpretations. To freeze its definition would thus amount to neglect this non-consensual and evolving nature that makes its singularity, preventing it from being adapted to a new

[149] *The Universal Declaration of Human Rights: The Travaux Préparatoires*, ed. by William Schabas (Cambridge: Cambridge Univ. Press, 2013). P 440
[150] *Ibid*. P 855
[151] *Ibid*. P 1073
[152] *Ibid*. P 1715

context. Today, the face of mobility in a globalization context differs greatly from that of the past. Hence, it is senseful to initiate new reflections to consider other ways of perceiving and addressing migration to better meet the challenges faced by our contemporary societies.

3.3.1 A New Era? Migration 3.0 and the "No Border" Movement

Modernizing immigration and integration mechanisms to better meet everyone's economic and social expectations is a difficult challenge. Making mobility a win-win exchange is however possible according to Shahidul Haque, former chair of the Global Forum on Migration and Development and current Foreign Secretary of Bangladesh. For him, migration has entered its third era since the second world war. Whereas as migration 1.0 was mostly managed at the national level, migration 2.0 experienced the development of international organs such as the IOM and the UNCHR hand in hand with the emergence of binding international human rights norms and standards. He argues that this framework was built to manage migration flows mainly from and within Europe. Today, the globally scaled movements of people have modified this scenario and uncovered the inadequacies of such a system. Geopolitical tensions arising from the reshuffle of the global balance of power, civil wars and violent extremisms due to governance deficiencies and the rise of nationalist movements illustrate the backtracks taking place against globalization, leading according to Haque, to "*rising inequalities and sudden labour-market disruptions*"[153]. The model of Globalization supposedly benefiting to all is challenged by inequities at the global level and remaining humanitarian crises. While this phenomenon has contributed to the vulnerability of certain populations, these, already candidates for migration, are likely to become more so in view of the climate predictions and biodiversity destruction in the coming years.

As a result, economic migration, forced population movements, refugees escaping conflict and illegal immigration are four migration profiles that will tend to intertwine,

[153] Shahidul Haque, 'Making Migration Work for Everyone', 20 June 2019, Project Syndicate edition <https://www.project-syndicate.org/commentary/migration-order-3-0-iom-global-compact-by-md-shahidul-haque-2019-06>.

making obsolete our system which treats them as separated patterns. This migration 3.0 stresses the need for a major re-configuration of the current settings. Beyond the moral questions raised by the Human Rights consequences of today's migration policies and the imbalance of power and access to resources that candidates for immigration are increasingly facing, Haque reminds the negative consequences this situation is likely to have on western societies:

> "Today's mixed migratory patterns demand a more cohesive yet differentiated approach. The costs of maintaining the *status quo* in response to disorderly migration cannot be ignored. Growing anxieties among host populations are causing an unwarranted backlash, with far-reaching negative implications for economic and political systems."[154]

Although acknowledging the achievements of the international community, such as the Global Compacts, despite the persistence of States to protect their sovereignty, he also reminds the urgency of making such tools work sustainably.

The geographical extent of migration movements today, reflects the globalized society to which every individual now belongs. The "migration without borders" theorists attempt to reconciliate globalization with mobility. They observe a simple fact: a globalized world allowed and facilitated the free movement of goods, services, financial capitals and information. However, persons are the last data to remain excluded from this equation. As part of a response to the new face of migration 3.0, they present an equitable, ethical approach to mobility and in doing so, also challenge the dominant relationships that persist between countries in the North and the South.

As we have seen earlier, growing restriction did not prevent mobility from increasing. States' claims that the greatest threat to migrants are those who assist them justified the implementation of their external border policies with little concern to their real repercussions (e.g. more informal and dangerous migration routes). In the area of integration, stable statuses for migrants are harder to obtain and the duration of residence is limited, increasing migrants' precariousness and suggesting the existence of second-

[154] *Ibid*

class citizens. This exclusion, in fact reflects the association of migration with something necessarily problematic, either caused by or generating crisis[155].

The origin of this perception can be explained by how we relate to the notion of borders. Borders create an automatic hierarchy and a power relationship due to the status given to the insider and the outsider. In this context, borders influence access to labour, education, welfare services and those who are subordinated will rely not only on financial resources, but also on a mentor to guarantee their stay. A migrant worker is for example bound to his employer, since his resignation would result in the non-renewal of his residence permit or even his deportation. The freedom to change employer is thus more easily enjoyable for nationals. For those with illegal status, the vulnerability is higher since they can face blackmail to be reported or abuses in the working conditions. Furthermore, any break of the rules governing entry, access to services or housing, intentionally or not, is likely to result in expulsion. This vulnerability is hardly perceived by western nationals for whom globalization has resulted in an enhanced mobility and privileges outside their countries that are easily taken for granted[156].

However, nationals of receiving countries are not immune to the impact of restrictive policies originally designed for foreigners. As foreseen in the past, a greater harshness towards migrants' rights may extend towards citizens themselves[157], either in the long term, for instance the emergence of far right movements threatening EU's liberal values, or in the short term with immediate measures. In the UK, the fight against terrorism lead to the issuance of "Control Orders" authorizing the State to detain third-country nationals without a trial, in the case this trial would represent a risk for intelligence services. This

[155] Bob Sutcliffe, 'Migration and Citizenship: Why Can Birds, Whales, Butterflies and Ants Cross International Froniters More Easily than Cows, Dogs and Human Beings?', in *Migration and Mobility: The European Context*, Subrata Ghaltak and Anne Showstack Sassoon, 2001.
[156] Michael Walzer, 'The Distribution of Membership', in *Boundaries: National Autonomy and Its Limits* (Peter G. Brown and Henry Shue, 1981).
[157] Antoine Pécoud and Paul De Guchteneire, 'Introduction: The Migration Without Borders Scenario', in *Migration Without Borders: Essays on the Free Movement of People*, UNESCO Publishing / Berghahn Books, 2007.

practice later found discriminatory, rather than being abolished, was extended to all nationals[158].

Borders as conceived today also carry a temporal dimension. Stays in European countries are time-limited and are subject to a renewal of the residence permit, which sometimes depends on uncertain factors, undermining any projection of the individual in the future. Temporary visa holders or those caught in the endless process of regularizing their situation are thus suspended in time. From an external point of view, this might seem like a necessary but quite surmountable discomfort. However, time represents more than a practical tool. Plans for the future are put in brackets, missing potential opportunities, a person can lose a family member without having the chance to visit them, a child can grow too old to remain eligible for reuniting with their parents… In reinforcing the barriers to citizenship and enhancing the preference for temporary permits, States have extended their control over the temporal dimension of migration.

Strong borders also lead to an unequal enjoyment of Human Rights, questioning their universality. Indeed, enforcement of Human Rights frameworks is, in the case of migration, dependant on States compliance and relative to citizenship[159]. Border controls, even in the name of preventing harms such as human trafficking is, in reality, the original cause of the migrants' vulnerability. Not vulnerable by nature, they become so because of the subordination and dependency relationship created by immigration restriction policies. Furthermore, such a focus limits the conception of migrants to their only powerlessness, setting aside their competences and added value. It raises the question of the recognition of their full humanity and subjectivity rather than their limitation to objects of control or rescues. A parallel can be made with Brace's claim regarding slavery:

> Once you value powerlessness, then you are buying into a politics that cannot be transformative because it cannot explore capacities, contingency and multiplicity, or engage in the affairs of the world. Part of the problem of focusing on the victimhood of slaves, is that their labour disappears,

[158] *From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers* Liberty (The National Council for Civil Liberties), 2010.
[159] Linda Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants', in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004).

> making it harder to see how they are engaged with the world and part of our own moral economies and global markets.[160]

The "Migration Without Borders" movement seeks to reaffirm mobility as a human activity. It is worth noting that mobility is practiced by a majority of individuals, but only some of them are grouped under the term "migrant". One could argue it is relative to the duration of stay. However, a temporary migrant worker could be staying for a shorter period than a tourist. Using the purpose of stay as a condition is also a misleading argument. In the area of working migration, a differentiated semantic can be observed according to the country of origin. Workers from the North are considered "expats", whereas those from the South are considered "immigrants". Thus, the attribution of a certain label is not related to the intention of the individual in mobility, but rather to his or her acceptance or non-acceptance in a society as a national subject. Hence, it is a nationalist or regionalist (e.g. in the case of Europe) viewpoint providing a racialized or power-related definition of the "Foreigner"[161]. Measures to contain migration and the subordinated status of individuals moving without being authorized have contributed in "*territorializing people's relationship to space, to their Labour, and to their ability to maintain themselves*"[162]. In other terms, "*bodies become territorialized; people become subjects of a specific territory, of a sovereign power*"[163]. Despite timid progress towards a globalized approach to migration issues, a largely nationalized vision still characterizes our time and perpetuates through hard borders, the hierarchizing of human beings.

Hence, the ethical issues arising from these observations invite us to carry out a fundamental overhaul of our conception of mobility. The "Migration Without Borders" theory invites us to consider the recognition of a universal freedom of movement and an equal societal inclusiveness. In this last part, we would like to explore practical steps that can be achieved at the European level, if not to establish open borders, at least to soften

[160] Brace, 'The Opposite of Slavery: Contract, Freedom and Labour" Paper Presented at Workshop Human Rights, Victimhood and Consent' (University of Bergen, 2010).
[161] David Feldman, 'Global Movements, Internal Migration and the Importance of Institutions', International Review of Social History, 52, 2007, 105–9.
[162] Bridget Anderson, Nandita Sharma, and Cynthia Wright, 'Editorial: Why No Borders', Canada's Journal on Refugees, 26.2 (2009).
[163] Dimitri Papadopoulos, Niamh Stephenson, and Vasily Tsianos, 'Escape Routes: Control and Subversion in the Twenty-First Century', MI: Pluro Press, 2008.

its migration regime. Indeed, philosophical or ideological motivation alone cannot be at the root of such a change. It must be accompanied by a concrete illustration showing that a relaxation of migration rules can benefit the European Union. The main argument is to prove a positive impact of migration on the economy.

3.3.2 Practical Implementation

The first fear when it comes to allowing immigration is how to safeguard the welfare system. In a context of low employment rates and austerity, States are reluctant to open access to their social and compensation system to all. However, an OECD study from 2014 showed that "*Migrants contribute more in taxes and social contributions than they receive in individual benefits*"[164]. It also suggested migrants have a positive impact on innovation and economic growth.

Furthermore, it can be argued that the aging of the population that the European Union is facing, can be compensated with the arrival of newcomers. Often brandished as a key argument is also the fact that a flexible border regime would cause important waves of people to enter the continent. Opening the borders is certainly letting the migrant in, but it also allows him to leave without worry. It would make mobility more fluid and would allow thousands of migrants to return home to see a family they may not have seen for several years. On the other hand, no study has proven the veracity of the fantasized "invasions". The construction of the wall between Mexico and the United States has in no way slowed down migration flows between the two countries, nor has the opening of the border between India and Nepal caused massive inflows of migrants, such as the opening of the borders within the Schengen Europe.

Neither the rescue operations in the Mediterranean Sea, nor the regularisations of irregular migrants have ever caused a sudden and significant increase in "illegal" migration. They have only made it possible to start reconciling migrants with their societies of departure and destination.

Opening borders, legalizing the mobility of all, also means nurturing the business of those who have made a profession of human trafficking, taking advantage, in an increasingly

[164] *Is Migration Good for the Economy?*, Migration Policy Debates (OECD, May 2014).

dangerous way, of a prohibition economy. Opening borders is the most effective way to fight smugglers. The security concern often invoked would also be addressed. Allowing free movement would make it easier to know where migrants are going and under what conditions. Furthermore, the cost of border control measures could be invested in an extended police and intelligence collaboration to prevent terrorism. Besides, the money huge amounts illegal migrants spend for migration routes would be used for other purposes and develop both countries of origin and of destination.

At last, against obscurantism, it is simply a question of relaunching humanism. The avenues of reflection we have proposed deserve to be explored further. The relaxation of migratory rules could go beyond the theoretical level if space was provided for its development. The ambitious and innovative issues that this profound change would entail would require a multidisciplinary approach. It is a collective effort that would bring together a wide range of actors from academics to technocrats, politicians, local actors and NGOs. This would not only give the European Union a human face, but would also allow it, on a practical level, to develop an integration methodology that will anticipate the major population movements expected in the coming decades. This requires a duty of advocacy at all levels of society to popularize an unknown ideal, still arousing a certain mistrust.

4.
CONCLUSION AND HYPOTHESES RESPONSE

"*As a global community, we face a choice. Do we want migration to be a source of prosperity and international solidarity, or a byword for inhumanity and social friction?*"

Antonio Guterres, UN Secretary General, 11 January 2018

After having analysed the competences of States regarding access to territory, labour and education in the international and European legal frameworks, we used these three areas as a lens of analysis to understand the evolution of EU migration policies. We then gave an overview of how migration might be shaped in the future and what influence international and national actors are likely to have on this evolution, before proposing new alternatives that challenge our current conception of mobility. In this concluding chapter, we will summarize our findings and confront them with the hypotheses proposed in our introduction. Finally, we will provide recommendations and possible perspectives for further research.

The first question raised was that of *the Human Rights impact of current EU migration policies in the long term* (1). We observed that these policies do not follow a common evolution and that varying dynamics intersect depending on the area of intervention. Member States exert a major influence on the policy making process. Only under a limited number of circumstances did they accept to transfer a part of their sovereignty to the communitarian level. However, due to their international and European Human Rights obligations, the ability of Member States to restrict migration and integration policies is *not* unlimited and must correspond to minimum standards. These minimum standards are rarely raised by States, demonstrating their unwillingness to elaborate migration integrative binding norms. More liberal measures remain in the form of soft laws proposed by the European Commission. Indeed, common EU policies have only developed to meet minimum Human Rights requirement (Collective response to the refugee crisis) or to establish tools of border controls.

In their integration policies, States often settle for minimum Human Rights requirements, sometimes contradicting the opinions of the various UN treaty bodies, such as with the example of raising university tuition fees for third-country nationals. The legally binding framework of the EU permits such legislation allowing differentiated practices on the ground of nationality. Situations of vulnerability emanating from these practices, such as access to employment or social services, thus become bogged down before being recognized as the product of discrimination. Nevertheless, the case law of the European Court of Human Rights, together with the "soft laws" that are currently being developed at regional and international levels, are gradually increasing the minimum standards that States must respect.

In this context, EU Member States migration policies did not follow a merely restrictive evolution. Stimulated by the international legal framework, reception policies on the basis of asylum or family reunification have been strengthened. However, in the case of migration that does not involve special cases, which could be described as "economic migration", selection has become more complex. The nationality criteria have disappeared in favour of economic and skill prerequisites. This situation tends to lead to an elitist migration, keeping vulnerable populations, especially nationals of African countries, at bay. At the same time, the fight against illegal migration *has* increased and is being shifted away from EU borders and consequently outside of the strong legally binding Human Rights framework of the Council of Europe. Taken together, these two orientations, rather than stopping the migration flow as expected, have displaced it towards more informal, expansive, and lethal roads. Nonetheless, EU Member States continue to pursue this course of action, as illustrate the latest agreements with sub-Saharan countries.

Although threatening Human Rights, it must be acknowledged that these policies do not reflect the position of the European Union itself. The Commission’s recommendations and action plans emphasize the benefits of an open and integrative migration policy. The opposition remains in the hands of Member States, leading us to our second question.

Is it possible at the European Level to reverse the trend towards a liberalization of its migration policy? (2) As we have demonstrated, European policy making depends

primarily on national orientations. Therefore, two levels of intervention are likely to incite a change in States' practices. First, we have observed the evolution of the ECtHR's case law as well as the emergence of new international tools culminating in the two Global Compacts on Migration and Asylum. These soft laws seem to pave the way to new rights and a more cohesive approach to migration. While their full implementation still faces challenges as several European States decided to leave the process, they reflect a growing awareness at the global level, suggesting positive changes in the future.

However, European States must still be convinced to follow this trend. For this reason, we gave a succinct overview of the impact that Civil Society Organizations (CSOs) who are working on migration are likely to have in this domain. We noticed that their level of implication varies not only from one State to another but also according to departments and ministries. A strong adaptive methodology therefore needs to be developed for efficient advocacy. This scenario is only conceivable if CSOs succeed in unifying their demands and strategies. The immense diversity of their work and level of intervention thus constitutes a challenge. They are however, being granted an increasing access to European consultation, allowing them more opportunities to build stronger relationship with parliamentarian groups and representatives. Again, in this exercise, a precise method and the acknowledgement of political agendas are necessary. The contrasted results of the latest European elections do not guarantee that the development of a privileged relationship between migration NGOs and European institutions can be sustained.

Speaking beyond the only migration issue, we believe that there is a loss of humane values in Europe, which has been perfectly illustrated by the emergence of strong far-right movements. Bolstered by the fears of economic difficulties, this loss of humane values has scapegoated foreigners in particular. The effects of this rise in power by conservative parties are now being felt not only in the human rights of foreigners but also of European citizens, as in the case in Hungary and Poland (REF). We therefore attempted to reimagine a new paradigm by providing a rational and ethical counter-narrative: the "Migration Without Borders" Theory. The era we live in and the fact that our perspectives and challenges are often no more nationals than they are global suggest that the way we relate to each other should challenge the current territorialized model of citizenship. We

supported the idea that adopting a policy of openness is feasible and will not compromise States' security if well implemented, and that it may actually benefit our economies. Having not conceived migration from a materialistic point of view, we acknowledge the fact that economic and security issues are of primary concern to States. We thus insist on the development of interdisciplinary approaches to concretize and expand these theories, to eventually translate them into practical application. Furthermore, a successful and beneficial management of migration will prepare the European Union for the increasing migration flows that climate change is certain to trigger moving forward.

To conclude, we argue that a dehumanizing policy towards migrants signifies a long-term dehumanizing policy towards the citizen. Therefore, we would like to recall the fundamental humane values that have led to the ambitious European project. As a sign of international recognition, the EU was awarded the Nobel Peace prize in 2012. It aims to never again allow war and the atrocities it experienced in the first half of the twentieth century, when Jews or Spanish exiles became "undesirables". Today, facing the return of the idea that some humans are undesirable, we can make the choice to reaffirm the unity of Mankind and to translate this ideal into politics.

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