

# Migration, Crisisification, and the EU's (New) Approach to Border Management

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Laurie Buonanno  
Department of Political Science & Public Administration  
SUNY Buffalo State  
1300 Elmwood Avenue, Buffalo, New York 14222

email: [buonanl@buffalostate.edu](mailto:buonanl@buffalostate.edu)

faculty webpage: <https://politicalscience.buffalostate.edu/faculty/laurie-buonanno>

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## **Abstract**

This paper explores European Union (EU) migration and border control policies through the ‘crisisification’ paradigm. This paper seeks to answer two questions. ‘Can the crisis paradigm illuminate the evolution of European border control and migration policies?’ and ‘Has crisis become a permanent feature of EU border and migration policies?’ The first section of the paper explores the evolution of EU migration and border control policies in the context of crisis. The second section examines the roles played by technology, institutional change, policy processes, and language in EU migration and border control policies. The paper concludes with an identification and analysis of seven trends and the likely direction of border control and migration policies.

## **Introduction**

The European Union (EU) has crafted migration and border control policies in response to two distinct types of crises – the emergency and the creeping crisis. Emergencies are crises that ‘explode on the scene’. When under ‘control’ they are seen as a ‘discrete event, and exceptional situation from beginning and end’ (Boin et al., 2021). The EU has faced this type of crisis three times: during the Balkan crisis (early 1990s), the Syrian crisis (2015-2016), and the Ukrainian crisis (February 2022-present). Creeping crises, on the other hand, are ‘potential crises (that) simmer on the horizon’ pose a threat to the well-being of societies, even if they are not perceived or recognized as such by the majority of the public and policymakers’ (ibid). There have – and continue to be – an array of such creeping crises in the realm of border control and migration: the 27 national immigration policies impeding the EU’s efforts to compete with other post-industrial democracies for highly-skilled workers who are third-country nationals (HSW-TCNs); the weaponization of migration by illiberal governments; population growth rates in Sub Saharan African countries and the attendant migratory pressure on the EU; the challenge of integrating (mainly) Muslim first- and second-generation migrants in many European countries and regions; and, the ever simmering danger to the stability and democratic functioning of EU member states’ governments from populist right-wing political parties who depict a *Camp of the Saints* scenario

(see the dystopic novel by Raspail, 1975), inspiring social unrest, and the election of anti-system parties to national and regional parliaments.

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The editors of the forthcoming book *The European Union: Crises and Challenges* advance a ‘sustained condition thesis’ in which these emergencies and creeping crises are no longer temporary. Therefore, this paper seeks to answer two questions. ‘Can the crisis paradigm illuminate the evolution of European border control and migration policies?’ and ‘Has crisis become a permanent feature of EU border and migration policies?’ To answer these questions, this paper is organized in three sections. The first section explores the evolution of EU migration policy in the context of both the ‘emergency’ and the ‘creeping crisis’. The second section, drawing from Mark Rhinard’s (2019) work on crisisification in EU policymaking, examines the roles played by technology, institutional change, policy processes, and language in the making of EU border control and migration policies. The paper concludes with an analysis of trends and the likely direction of border control and migration policies.

## **Evolution of the EU’s Border and Migration Policies**

What is the evidence for EU migration and border control policies having evolved as a response to emergencies and creeping crises? Taking ‘crisis’ as the basis for delineating phases, there seem to be five distinct phases. (See Box 1.)

Box 1 The Five phases of EU migration & border control policies associated with crises

Phase 1 – The Schengen Agreement and the Dublin Convention (1985-1998)

DeLors & Santer Commissions

*Emergency*: Refugees from the former Yugoslavia

*Creeping Crisis*: Cross-border crime associated with the removal of borders among Schengen Area countries.

**Phase 2 – The Amsterdam Treaty and the Common European Asylum System (1999-2010)**

Barroso & Prodi Commissions

*Emergency:* Refugees from the former Yugoslavia; Domestic terrorism perpetrated by Muslim extremists and cross-border links among terrorists

*Creeping Crisis:* Competition among Western countries for HSW TCNs

Phase 3 – CEAS Recast, Agencification (2011-2015)

Barroso Commission

*Creeping Crisis:* Continued irregular migration, especially via the Aegean Sea and the Western & Central Mediterranean

Phase 4 – European Agenda on Migration (2015-2019)

Juncker Commission

*Emergency:* Refugees from the Syrian civil war along with opportunistic migration from African and Asian countries at the EU's overwhelmed southern borders

*Creeping Crises:* Antisystem political parties, particularly the Far Right manipulating public dissatisfaction with migration for electoral gains

**Phase 5 - New Pact on Migration and Asylum (2020-Present)**

von der Leyen Commission

*Emergency:* Ukrainian refugees from the Russian invasion

*Creeping Crises:* Population growth in Sub Saharan Africa (discussed in the paper's concluding section), Continued competition for HSW TCNs

*Phase 1: The Schengen Agreement and the Dublin Convention (1985-1998)*

The Single Market Act (1985) promised to (finally) end barriers to free movement of persons throughout the European Community. Accordingly, focus shifted from internal to external borders and EU involvement necessarily followed because Northern Europe had made immigration difficult in the 1970s with Southern Europe following suit in the 1980s. As immigrating to Europe became increasingly difficult, forged documents, traffickers, and asylum claims became the last option when all avenues for 'legal migration' had closed. In such a scenario, the EU's member states recognized they would need to cooperate and even harmonize migration and border control policies if a passport-free and common visa policy area could effectively guard against cross-border drug and human trafficking, organized crime, and terrorism. Nevertheless, policing the EU's external border had its own challenges. Taking for example Greece and Italy – the former has a jagged coastline and many islands and Italy includes

some islands closer to North Africa than Italy's mainland – making external border control an expensive proposition, one that neither country ever really had any intention of financing at the levels of Northern Europe's expectations (especially as most irregular migrants viewed the Mediterranean countries as waystations on their trek to Northern Europe!).

The Schengen Agreement (1985) – the EU's passport free arrangement – was negotiated initially as an extra-EU agreement among five of the then ten members of the European Community – Belgium, France, Luxembourg, the Netherlands, and West Germany. Therefore, Northern Europe initially insulated themselves from irregular migrants who has slipped into the EU through the Mediterranean member states. The remaining EU members – other than the UK and Ireland – eventually signed the upgraded Schengen Convention (1990), which took effect in 1995. Following the Labour Party's election into office in 1997, the UK dropped its objections to Schengen's incorporation into the EU *acquis*, resulting in Schengen's inclusion in the Amsterdam Treaty (1999).

But how was Europe's North going to stop irregular migration entering the EU from the South? The Trevi (*Terrorisme, Radicalisme, Extrémisme et Violence Internationale*) Group began considering migration issues in 1986 – so, from its inception EU migration policy was subsumed in traditional JHA issues of 'a securitarian' rather than 'humanitarian' nature (Juss, 2005, p. 753). The Ad Hoc Group on Immigration (established in 1986) grew out of the Trevi Group, and contributed to the drafting of the Dublin Convention (Hansen, 2000).

The Dublin Convention, which laid out strict rules as to where an individual seeking protection must apply for asylum, was signed by all 12 EC member states (15 June 1990), entering into force on 1 September 1997 after a slow ratification process in national parliaments. It is sometimes forgotten that the much criticized Dublin Convention was a crucial compromise for establishing passport-free movement in Europe. Northern European countries (particularly Germany) anticipated that the Schengen Area would encourage asylum shopping (whereby asylum seekers submit applications to those member states with higher acceptance rates and where more generous welfare benefits/job opportunities were available, but also submit applications to more than one member state). So, too, migration advocates worried about burden shifting ('asylum seekers in orbit') when no member state accepts responsibility for an application. Requiring petitioners to apply for asylum in the member state they entered EU territory was considered a deterrent because those member states with weak border controls

(whether by land, air, or sea) would need to pay the price by dealing with asylum claims rather than ‘waving’ asylum seekers on to other member states (Barutciski, 1994; Juss, 2005, p. 766). Accordingly, Greece, Italy, Portugal, and Spain were required, ‘as a condition precedent for being allowed to accede to the Schengen Agreements, to apply strict visa and other border controls’ (Juss, 2005, p. 768). When, for example, in early 1999 Italy relaxed its visa policy towards Albanians ‘Italy’s representative received a strong rebuke at a subsequent working group meeting, and Italy revised its policy’ (Hansen, 2000, p. 792). The Dublin System, therefore, was never designed to equalize or share asylum burdens, but rather was informed by traditional JHA concerns (Fratzke, 2015).

During this period when both the Schengen Area and the Dublin System were being negotiated in the run-up to the Maastricht Treaty (December 1991 summit), war broke out in Yugoslavia in June 1991—first in Croatia (1991-1995), followed by Bosnia and Herzegovina (1992-1995), and Kosovo (1998-1999). The EU recognized Croatia and Slovenia as independent states in January 1992 and Bosnia-Herzegovina later that year, with the UN admitting the three as independent states in May. While the Yugoslavian civil wars are mainly referenced in EU studies as a ‘baptism by fire’ (Cameron, 2012; Ginsberg, 2001) in the development of the common foreign and security policy (CFSP) and common security and defence policy (CSDP), they also were the catalyst for what would become the EU’s Common European Asylum System (CEAS). In the aftermath of the Yugoslavian break up, the refugee crisis was the most consequential in Europe since the 1940s when approximately 2.5 million people fled, mainly from the former Yugoslav republics of Bosnia and Herzegovina and Croatia (Kamm, 1992). Of the asylum applications lodged between 1991-1996, the overwhelming majority were filed in Germany (Glynn, 2017), but the under preparedness to manage an influx of refugees and do in such a way that the burden was distributed fairly throughout the member states had become apparent (Human Rights Watch, 1993). Among European countries, Germany’s response was the most generous. The number of asylum seekers residing in Western Europe totalled 320.3 thousand in 1989, more than doubling to 685.5 thousand in 1992 – with 438.2 thousand living in Germany (Hansen, 2000, p. 780). This trend continued through the 1990s, where in Germany total asylum applications for 1998 were almost 100,000, but only about 42,000 in the UK, 22,000 in France, and 5,000 in Italy (Barutciski, 1994; Hansen, 2000, Chart 1, p. 780).

The Yugoslav migration crisis also revealed that many EU member states were hewing strictly to the 1951 Geneva Convention on the Status of Refugees ‘fear of persecution’, by admitting asylum seekers under temporary ‘humanitarian’ status (with no path to asylum). Not only did temporary protection offer fewer rights (especially social and educational), the rights for refugees receiving temporary protection varied considerably among member states (Amnesty International, 1993; Barutciski, 1994).

As the Balkan war spread to Bosnia and Herzegovina, European countries (including EU member states) attempted to restrict entry requirements of asylum seekers (Barutciski, 1994, p. 32), despite the fact that people were fleeing for their lives from parts of Croatia (mainly Serbs) and Bosnia-Herzegovina (mainly Bosniaks). The EU took the position of the ‘right to remain’ and most EU member states imposed visa requirements on nationals of Bosnia-Herzegovina (Amnesty International, 1993), while failing to provide safe zones for would-be refugees to live. By 1993, only Italy, Norway, and Sweden did not have a visa requirement for inhabitants of the former Yugoslavia (ibid). The EU’s burden-shifting and uncoordinated response during the Yugoslavian refugee crisis was to fundamentally shape EU asylum and refugee policy in Phase 2.

### *Phase 2: The Amsterdam Treaty/Establishing the Common European Asylum System (1999-2010)*

Policies advanced between 1999 and 2010 attempted to deal with two emergencies—the next refugee crisis of the magnitude created by the breakup of Yugoslavia and domestic and cross-border terrorism perpetuated by (mainly) migrants who were radicalized Islamists—and a creeping crisis – competition among Western countries for HSW TCNs.

The EU agreed major institutional changes in this phase. The first was the transfer in the Amsterdam Treaty (1999) of most areas of AFSJ (third pillar) – including asylum, immigration, and border and visa policies to the EC pillar (effective in mid-2004), thus allowing laws in this policy sphere to be enacted via the Community method, but – and crucially – unanimity continued to be required in the Council. The second development was establishment of the Common European Asylum System (CEAS), the EU’s policy response to the refugee crisis arising from the Yugoslav wars.

The EU member states during this period also felt a sense of urgency because they needed to agree to the CEAS prior to accession of the Central and Eastern European countries (CEECs) – otherwise, there would be little chance of achieving the wide sweeping changes to deal effectively with the next refugee crisis. Achieving consensus on JHA policies would be more difficult post-CEEC enlargement because of the unanimity requirement in Council (qmv was not agreed until January 2005 as part of the Hague Programme and later achieved treaty status in Lisbon) coupled with uncertainty as to whether the CEECs would agree to harmonization in asylum matters, not least because of the compliance costs for member state governments the CEAS would entail. The CEAS was a pathbreaking achievement for the EU, establishing through a complex mix of directives, regulations, and third-party agreements policies on such matters as to where an asylum seeker must register (Dublin Regulation), temporary protection, reception conditions, subsidiary protection qualifications, asylum procedures, and cooperation with sending countries to reduce outward migration and accept returns. The Dublin Regulation (Dublin II, 2003) brought the Dublin Convention (1990) under EU governance and verification was provided for through the Eurodac Regulation (2003), a technological breakthrough requiring all asylum seekers and irregular migrants to be fingerprinted and to apply for asylum in the member state in which they first entered the EU. Temporary protection had been offered to many asylum seekers from the former Yugoslavia – about 60 per cent of all applicants in Germany were actually granted temporary protection rather than asylum – this made it possible in the late 1990s for EU member states to being repatriating those who had been granted temporary protection – thousands of Bosnians were both involuntary and forcibly removed (Hansen, 2000, p. 785). An EU-level policy was clearly needed. This came in the form of the Temporary Protection Directive (TPD) 2001/44/European Council, which was at the time considered a centrepiece of the CEAS. The Commission proposes TPD, but it can only be activated by the JHA Council by a qualified majority vote. Article 2 (a) of the TPD defines temporary protection as:

*a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without*



*adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.*

Articles 8-16 define Member State obligations such as residence permits, visas, accommodation and housing, social welfare and medical care, family reunification and accompanied minors. Articles 24-26 refer to solidarity, especially with respect to funding (Genç & Öner, 2018).

9/11 significantly shaped AFSJ policy *in toto*, with border and migration policies also impacted as a result. Securing Europe's external borders became paramount due mainly to the 9/11 terrorist attacks in the US and subsequent attacks in various European cities. The security emergency led to the Council Regulation establishing Frontex (*Frontières extérieures*), with a mandate to improve cooperation among border guards, the police, customs agents and coastguards, improve access to sophisticated equipment, and improve surveillance techniques (European Commission, 2009, 2011). Significantly, Frontex's establishment signalled the beginning of agencification in EU border and migration policies, a subject to which we will return below.

Policymaking in Phase 2 was affected by the post-9/11 terrorist attacks in another important way. As it became increasingly recognized that EU member states were struggling to deal with resident and citizen terrorists, and not even always foreign born – (mainly) Muslims committing acts of domestic terrorism. So, too, in no small part due to the European experience domestic terrorism, multiculturalism as an ideal was losing its sway in Europe as conservative political leaders, particularly the UK's David Cameron and Germany's Angela Merkel declared multiculturalism a failed (progressive) idea and policy (BBC News, 2011; Weaver, 2011). Following this lead, EU policymakers began to discuss promoting 'integration and inclusion' at both the national and European levels.

Nevertheless, as member states were getting down to the business of transposing CEAS directives into national law, the EU was fending off complaints about member states' uneven implementation from the UN High Commission on Refugees (UNHCR), refugee rights groups, and even other EU member states (European Commission, 2008, 2010). So, too, court opinions (European Court of Human Rights, the CJEU, and national courts) were uncovering gaps between member state transposition and implementation. Taking reception conditions as an example, 'minimum standards' allowed sufficient elasticity with respect to detention centre

conditions, education availability, healthcare, protection for minors, detention time, and ability to work while awaiting an asylum determination (Brunsden, 2008).

Cracks, too, were appearing in the Dublin system. While (primarily) Northern European countries were satisfied with the Dublin System (because it usually meant returning asylum seekers to southern Europe), the Mediterranean states became increasingly frustrated with their role as the guardians of the EU's southern borders, not least because member states – aided enormously by Eurodac – rounded up 'Dubliners' for return to the member state where the asylum seeker had first arrived (usually to Greece, Italy, or Spain) even when petitioners had jobs and a family/community networks in the member state seeking to initiate a Dublin return. In the meantime, it had become increasingly clear that home countries were not eager to accept returns – their citizens needed those remittances – and cooperation with EU member states in returning their nationals was, and remains, deeply unpopular. Member states negotiated bilateral agreements with home countries to persuade them to repatriate their citizens, contributing to a dizzying number of return arrangements. It had now become apparent to the EU that once irregular migrants arrived it was enormously difficult to return them to their home countries, prompting a resolve among national and EU policymakers to devise, agree, and implement policies that could effectively prevent irregular migrants from entering the EU in the first place.

Phase 2 also addressed for the first time the 'creeping crisis' of global competition for HSW TCNs with the Blue Card Directive (2009), which itself was influenced by the US successful H-1B visa program in attracting and retaining HSW TCNs (Caviedes, 2015). The directive provided that if a TCN resided in an EU member state for a period of at least 18 months, they could apply for employment authorization in another member state (ibid). Member states, however, competing amongst themselves for HSW TCNs, weakened the potential of the Blue Card by requiring a salary corresponding to 1.5 times the national level and allowing member states to deny entry to Blue Card holders by 'stipulating that the domestic labour market is too tight' (ibid, 177). Thus, the difficulties involved with first meeting the salary requirements for a Blue Card, the residency requirement, and the voluntary nature of free movement meant Europe could not match the unimpeded movement of HSW in the far-flung federal systems of 'settler countries', particularly Australia, Canada, and the US.

### *Phase 3: CEAS Recast, Agencification (2011-2016)*

Most of Phase 3 (2011-2016) was devoted to efforts at ‘recasting’ CEAS by balancing migrants’ rights, on one hand, with member states’ budgetary constraints and political realities, on the other as irregular migration continued, especially into the Southern Seven. Balancing took the form of revising the various directives comprising the CEAS to specify minimum standards for asylum seekers for reception conditions, asylum procedures, and clarifying qualifications (with more focus on the rights of minors and women). The EU continued with ‘agencification’ as a policy instrument to improve implementation, but with the new European Asylum Support Office (EASO) carefully named to signal that it lacked jurisdictional competence. The Dublin III Regulation recast (2013) further clarified that where an asylum application must be lodged depends upon a ‘hierarchy of criteria’ based on family unity and a valid or recently expired resident document or visa, otherwise asylum seekers who illegally transit through another member state when entering EU territory continued to be the responsibility of the member state where they arrived. Another innovation during this phase was the Asylum, Migration and Integration Fund (2014-2020 €3.1 billion) to assist member states –mainly on the EU’s southern borders – in applying the CEAS uniformly and to provide funds to promote migrant integration (European Commission, 2015a).

The ‘returns’ problem persisted, but unlike in previous years, the European public had become informed when the media reported that terrorists who were planning or had perpetrated terrorist attacks had been rejected for asylum and should have been returned to their home countries. This situation came to a head when it was reported that the Tunisian national Anis Amri – the perpetrator of the Berlin Christmas Market attack in 2016 – was one of these ‘overstayers’ whom Tunisian authorities had refused to acknowledge when the Italian government attempted to repatriate him to Tunisia. Amri had made his way to Germany from Italy, where again Tunisia initially denied Amri was a Tunisian citizen when German authorities attempted to deport him.

A critical question remained unanswered – whether the CEAS – constructed out of the experience of the Yugoslavian refugee crisis and ‘recast’ to improve harmonization – would be able to deal effectively with Europe’s next refugee crisis. The answer was to come in 2015 with the refugee crisis created by the civil war in Syria.

#### *Phase 4: European Agenda on Migration (2016-2019)*

By Phase 4, the Commission had become the arbiter between the European Parliament (with many MEPs voicing humanitarian considerations and burden sharing) and the member states, which invariably come down on the side of limiting migration and burden shifting. Public opinion polls indicated (as they typically do) that the electorate favoured more limits on immigration (especially for lower-paid jobs), while a vocal minority of ‘humanitarian globalists’ – especially NGOs and the progressive wing of centre-left parties – along with the business and industry sector that generally favours more immigration – sought to expand immigration, often framing migration laws in post-industrial democracies as racist (Miller, 2016). This was the highly contested conversation taking place when Syrians began fleeing to the EU.

There is no question that between 2015-16 the EU was engulfed in a refugee crisis. There were 1.8 million irregular crossings into the EU member states and 1.26 million first-time asylum applications filed. In addition to Syrians, national border authorities struggled with opportunistic’ migrants from African and Asian countries attempting to take advantage of the chaos at the EU’s overwhelmed southern borders (Buonanno & Nugent, 2021, p. 230). The CEAS began to crack. Greece was simply overwhelmed, prompting Germany’s Chancellor Angela Merkel to take pressure off Greece by suspending Dublin and allowing Syrians to make their way to Germany. Merkel’s decision angered transit countries who claimed their border officials and police were not prepared for such an influx of refugees – many of whom had been simply waved through by Greek authorities. The Syrian migration crisis exposed critical weaknesses in the CEAS recast because not only did vast differences continue among member states at each phase of the process from registration to an asylum determination, but even those member states with the best records were overwhelmed. With overflowing reception centres, refugees lived rough in parks, train stations, and outside of refugee reception centres. Asylum seekers waited weeks for preliminary interviews and waited months, sometimes years, for asylum determinations. The crisis emboldened antisystem political parties, particularly the Far Right, as they manipulated public dissatisfaction with the migration influx for electoral gains. Schengen was under assault as some EU member states closed their borders and erected fences. Europeans increasingly recognized that the southern and (increasingly) eastern member states needed help to control their borders – and throwing euros at the problem was no longer going to be enough.

The trial-by-error and mixed mode approach advocated in the Juncker Commission's comprehensive 'European Agenda on Migration' (EAM) (European Commission, 2015b) made sense given the shared governance system the EU and member states had established for border control and migration policies. While the EP agreed to the Commission's ideas, several member states rejected the Dublin fairness mechanism that would be the basis for alleviating the burdens on member states during refugee crises. The Commission (2015b, p. 13) argued the Dublin system had become an untenable burden on a few states; for example, in 2014, five member states were processing 72% of all asylum applications. The Juncker Commission proposed a 'fairness mechanism': if the number of asylum seekers in a member state reached over 150% of a pre-determined reference number, all further new applicants in that country would be relocated across the EU until the number of applications dipped below the reference number level. If a member state refused to take part in the reallocation, it would need to make a 'solidarity contribution' of €250,000 for each applicant for whom it would otherwise have been responsible under the fairness mechanism, to the member state that had reallocated the person. The Visegrád Group (V-4), comprising the Czech Republic, Hungary, Poland, and Slovakia, particularly opposed the proposed 'fairness mechanism' (European Commission, 2016b). With no agreement reached on the Dublin fairness mechanism and common procedures, the Commission's package languished for several years.

Nevertheless, during this period the EU agreed to a number of actions that further integrated European border control policy. First, Frontex gained more personnel and became the European Border and Coast Guard Agency, which included its reconfiguration as a uniformed service, that is, a standing corps that could be deployed to member states to assist their border officials. Second the 'hotspot' system was established under which the EU now identifies key ports of entry and supports the national border protection infrastructure with personnel from Frontex and the EASO (now EUAA) for 'operational support to facilitate systematic fingerprinting' (European Commission, 2015b, p. 13). Third, more funds were allocated for asylum and migration policies, including border control.

But as for dealing with the immediate crisis – the influx of Syrian and other refugees – the EU pursued the intensive transgovernmentalism policymaking mode with its EU-Turkey Joint Action. This agreement, forged by the European Council, signalled the EU's foray into offshoring migration control, that is, the EU entered the business of paying another country for

interdiction and the costs of hosting refugees. Similarly, the Trust Fund for Africa and EU Regional Trust Fund (Syria) agreed during this period, are meant to keep would-be asylum seekers out of Europe through a combination of relocation to safe zones or third countries and incentives (in the Africa agreement) for staying home. Intensive transgovernmentalism worked. By 2020 there were only 125,100 irregular border crossings, a decrease of 12% compared to 2019, the lowest in seven years (European Commission, 2021b) and a ‘trickle’ compared to the 1.8 million irregular border crossings into EU member states during the height of the migration crisis in the 2015-16 period (a 546% increase from 2014) (Buonanno & Nugent, 2021, p. 230).

#### *Phase 5: New Pact on Migration and Asylum (2020-Present)*

When the von der Leyen Commission was seated in December 2019, the ‘emergency’ situation of the Syrian refugee crisis of 2015-16 was in the rear view mirror. By 2021, the EU Commissioner for Home Affairs Ylva Johansson suggested that EU migration policy had moved ‘away from crisis into preparedness and response...’ (European Commission, 2021a). Indeed, the COVID-19 pandemic helped here by reducing irregular migration crossings by land, sea, and air. By 2021, however, asylum applications were once again on the rise with 617,800 applications lodged in the EU+ (includes Norway and Switzerland), an increase of one-third from 2020 and a return to pre-pandemic levels (European Union Agency for Asylum, 2022). Despite the uptick, these were manageable numbers for the EU’s CEAS. So, indeed, the 2015-16 crisis had been dealt with, it was contained. During Phase 5, the von der Leyen Commission formally withdrew the Juncker Commission’s asylum reform package, replacing it with the ‘New Pact on Migration and Asylum’ (NPMA) in September 2020. The Pact proposed to tackle several long-standing problems: expediting asylum claims, burden sharing, and returning individuals whose asylum petitions are rejected. In short, it envisaged a complete overhaul of the CEAS.

What is the state of play on the New Pact? Although political agreement has been reached on revising the Eurodac system that would allow for a longer time period for fingerprint storage, adding facial recognition, and lowering the age for fingerprinting from 16 to age 6, adopting these changes has been tied to agreeing to the Dublin IV Regulation. The New Pact exchanged the Juncker Commission’s mandatory burden sharing (see above) for ‘flexible solidarity’ – member states could select from a ‘toolbox’ with ‘something for everyone...such as

sending border guards and returning people’ when it was determined that a member state was overburdened with refugees and asylum seekers (European Commission, 2020b, p. 2). Reforms to Dublin IV would include extending the responsibility for handling an asylum claim to include applicants with a diploma from that member state and the reuniting of siblings. Refugees would also be allowed free movement after 3 years (rather than the current 5). Although there is speculation that given Poland’s major role in accepting Ukrainian refugees that the Polish government might drop its opposition to Dublin IV, it is too early to know if the experience with the Ukrainian crisis will alter the V-4’s opposition to the solidarity principle as a basis for a Dublin IV Regulation and/or whether the other member states will decide to use qualified majority voting (given that unanimity is not a requirement for CEAS matters).

Greece, despite years of complaints about its refugee detention centres (including court rulings blocking of some Dublin returns due to poor conditions), has continued to face approbation about its border control policing. *The New York Times*, for example, published an exposé accusing Greece of a ‘secret extrajudicial location before expelling them (asylum seekers) to Turkey without due process’ as one of ‘several tactics’ Greece was using to prevent a repeat of the 2015–16 migration crisis (Gridneff, 2019). Video footage shot by Turkish officials also showed a Greek coastguard ship firing shots at a dinghy of refugees and trying to tip them into the water ‘by driving past them at high speed’ near the Greek island of Kos (ibid). The EU turned to what had now become a familiar solution to disparities in CEAS implementation—agencification. Regulation 2021/2302 established the European Union Asylum Agency (EUAA) (repealing Regulation 439/2010 that had established the European Asylum Support Office (EASO)). New EUAA duties include monitoring member state compliance with the CEAS to ‘reach a situation where the asylum practices in all EU+ Member States are harmonised in line with EU obligations’. The EUAA is expected to carry out its mandate not just through technical support and training, but through ‘deployment of operational and capacity building assistance’ (European Union Agency for Asylum, 2021). In two other changes that also relied on agencification and expansion of the European Administrative Space, Frontex would begin making vulnerability assessments for border control and the European Agency for Fundamental Rights (FRA) would now monitor access to asylum and respect for fundamental rights.

Concluding the TPD Directive needed revising, the Commission in 2020 had proposed a Crisis Regulation, which if agreed, would permit different timelines for asylum matters in

‘situations of crisis’ and ‘*force majeure*’ (European Commission, 2020c). But then Russia invaded Ukraine on 22 February 2022. There had been only one instance when member states had formally requested TPD’s activation - this was in 2011 when Italy and Malta requested TPD activation to deal with the 12,100 Libyans and 27,465 Tunisians fleeing their countries during the Arab Spring and fall of Qaddafi regime. The Commission and the JHA Council denied their request on the basis that the conditions for activation (‘massive influx’) were not met (Genç & Öner, 2018, p. 7). Two subsequent influxes did not illicit a response from the Commission and the JHA Council: the 2014 separatist conflict in Eastern Ukraine when as many as 119,000 Ukrainians applied for temporary protection in Poland between January 2014-June 2016 (Poland did not request the Commission to consider TPD activation) and during the 2015-16 Syrian refugee crisis (despite calls from NGOs and other migrant advocates to do so) (Ibid, p. 8).

Before 3 March 2022 the JHA Council (2022) voted unanimously to activate the TPD for the (at the time) 650,000 Ukrainian citizens who had fled to neighbouring EU member states, observers had thought the TPD was a piece of dead legislation and needed to be revised. Twenty years had elapsed between the TPD’s passage and its activation, but a directive born of crisis became available to utilize in the worst refugee crisis on European soil since WW2. The TPD directive, unlike the Dublin Regulation, allows Ukrainian nationals to travel visa-free in Europe for a 90-day period, after which time they can select the EU Member State that they would like to stay in and apply for temporary protection for one-year, to be renewed if the crisis has not abated.

Another development in Phase 5 has been with respect to immigration. As the EU recovered more slowly from the Great Recession, national and EU policymakers sought to identify growth opportunities. As part of this effort, in 2016 the Juncker Commission proposed a revision of the 2009 Blue Card Directive because it had not produced its desired results – for example only 31% of HSW TCNs were selecting an EU member state, only a few member states had issued many blue cards (Germany accounted for almost 90% of the blue cards issues since 2012), the EU’s working population was predicted to decline from 333 million in 2016 to 292 million by 2020, and quite substantial shortfalls in IT and medical professionals were predicted in the near future (European Commission, 2016a; European Parliament, 2021). While the Commission’s original proposal – as with the original Blue Card Directive – was weakened by member states’ efforts to protect their national schemes – the 2021 directive is an improvement



over the 2016 legislation in terms of a lower salary threshold, shorter eligible employment contract, the consideration of professional experience, refugees and asylum seekers living in the EU can apply in other EU countries (in addition to the member state in which they are residing), a shorter residence requirement for intra-EU mobility, and more flexible rules for business travel – leading one expert to conclude ‘it seems likely that revised law will increase the number of Blue Card holders’, but with the proviso that the national schemes may be only indirectly impacted and other OECD countries might respond to the Blue Card by making their schemes more attractive to HSW TCNs (Peers, 2021). (Denmark and Ireland are not part of the Blue Card system.)

## **Technology, Institutional Change, Policy Processes, and Crisis Language**

But how do we know when governance has segued from ‘normal’ to ‘crisis’ in a particular policy area? Mark Rhinard (2019) identifies four signals: technological advancements, new policy processes, a realignment of institutional responsibilities/power, and a change in language by authorities to ‘justify’ European integration with such terms as ‘emergencies, urgency, existential threats to the European way of life’, and so forth. Therefore, if the evolution of EU border control and migration policies is to be understood in the context of crisis, we should be able to identify technological advancements, new policy processes, realignments of institutional responsibilities, and language ‘signalling’. This section considers each of these variables in turn.

### *Technology*

IT systems to support screening, asylum, and return processes have been crucial in post-2015-16 crisis reforms (European Commission, 2020b, p. 7). EU border control and migration policies are increasingly characterized by technological advancements of two types: integrated IT databases and sophisticated surveillance.

The EU maintains three databases that are used to control irregular migration. The Schengen Information System (SIS) — ‘The most widely used and largest information sharing system for security and border management in Europe’ – enables border guards and migration authorities to enter and consult alerts on TCNs to refuse their entry or stay in the Schengen area (European Commission, 2021c). European Dactyloscopy (Eurodac), is based on fingerprinting, but is being expanded to include other biometric data. When an individual applies for asylum,

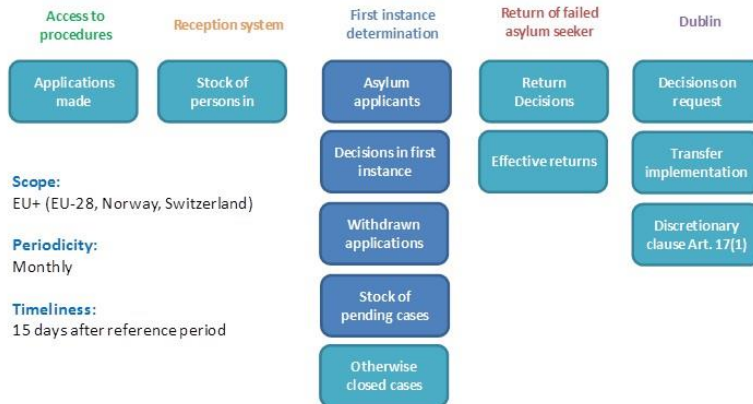
their fingerprints are transmitted to the Eurodac central system. Eurodac technology and information sharing is a crucial tool for the Dublin System to work because it enables national authorities to determine which member state is responsible for examining an asylum application when the other criteria (discussed above) do not apply. The Visa Information System (VIS) connects consulates in non-EU countries and all external border crossings points of Schengen members, border guards can verify that a person presenting a visa is the rightful holder (European Commission, 2021d).

Frontex also operates Maritime Aerial Surveillance (MAS) with surveillance airplanes and drones that stream aerial surveillance video and other data to Frontex's Warsaw headquarters and national and European authorities. Another indication of the increasing role of technology in limiting irregular migration is the 'crisis room' – 'secluded high-tech locations where huge TV monitors and computer screens collect and process data, imagery and information from the outside world in real time, and convey their findings to decision-makers 24/7' (Pawlak & Ricci, 2014, p. 6). Frontex operates the 'European Monitoring Room', a crisis room comprised of experts who monitor the incoming information about the movements of irregular migrants at the EU's external borders, including in the Mediterranean. Controversially, there is evidence that Frontex sends alerts directly to the Libyan Coast Guard (and, also, bypasses sending these alerts to merchant ships in the area) — prompting human rights groups to accuse Frontex of violating EU law (Creta et al., 2021).

The EUAA and Frontex also utilize risk analysis/statistical monitoring to predict irregular migration and chart movements. As Napierala et al. (2021, p. 38) explain, 'the main purpose of an early warning model is to detect changes in the trend of a variable or variables early enough to allow for adaptation or undertaking remedial action'. The EUAA's Early Warning and Preparedness System (EPS) and the EUAA's advancement of statistical modeling of refugee flows (European Asylum Support Office, 2017) are based on data collected and reported by the member states (plus Norway and Switzerland) on a monthly basis to EUAA as required by Regulation (EC) No 862/2007 (amended by Regulation (EU) 2020/851) – EU statistics on migration and international protection. (See Figure 1.) Furthermore, the Commission, the EUAA, and Frontex have been at the forefront of funding the advancement of statistical modeling to predict migration flows using EPS and 'big data'— such as geographic movements, conflict events, weather, familial networks, social media posts by refugees, satellite imagery,

web searches (for example, internet searches in Arabic of ‘Greece’ in 2015-2016 ‘closely mirror fluctuations in the number of refugees crossing the Aegean Sea to Greece’ – see Connor, 2017).

Figure 1 EUAA's Early warning and preparedness system (EPS)



### *Institutional change*

Agencification in policymaking is a feature of all modern democracies, a pattern accelerated with the adoption of New Public Management (NPM) by ‘Third Way’ policymakers in both EU member states and the EU in the 1990s and 2000s. The EU has established 55 agencies, with the Area of Freedom, Security, and Justice (AFSJ) ‘especially characterized by agencification’ (Buonanno & Nugent, 2021, p. 215). Agencification has been accepted by member states as a crucial feature of AFSJ policymaking, with Europol (the EU’s largest agency), EBCG (Frontex), the EUAA (formerly EASO), and the Fundamental Rights Agency (FRA) amongst those playing crucial roles in various elements of migration – from monitoring migration smuggling networks to protecting migrants’ fundamental rights. While steering clear of the debate between new intergovernmentalists (member states’ attempt to wrest policy control from the Commission through their representation on agency boards - see, for example, Bickerton et al., 2015) and supranationalists (agencification has extended the European Administrative Space - see, for example, Loschi & Slominski, 2022; Scipioni, 2018)—it is undeniable that agencification has been the ‘go to’ solution for the EU in reacting to migration crises. Agencification is a direct result of emergencies and creeping crises in the EU border control and migration arena.

The hotspot approach has further strengthened Frontex and the EUAA. During the 2015-16 migration crisis, the Commission pioneered the ‘hotspot’ system under which the EU now identifies key ports of entry and supports the national border protection infrastructure with personnel from the Frontex and EUAA for operational support. As Loschi and Slominski (2022, p. 2) explain in their study of the hotspot approach in Italy – ‘the highly underspecified hotspot approach provided EU agencies with considerable room for manoeuvre and flexibility, turning them into key actors on the ground’. Another example of the importance of AFSJ agencies is the extent to which civil society organizations (CSOs) are increasingly focusing their lobbying efforts at the agencies themselves (Giannetto, 2019).

### *Policy processes*

Crises are also followed by demands for flexible, innovative governance. We documented the use of the crisis room (see above), but the communication processes among member states has also been impacted by crisis, and largely through agencification. For example, Frontex utilizes the ‘Common Integrated Risk Analysis Model (CIRAM) to exchange information with partners and also manages six risk analysis networks: Frontex Risk Analysis Network (connected Frontex with member states’ risk analysis and intelligence experts), the European Document Fraud Risk Analysis Network, the Western Balkans Risk Analysis Network, Eastern European Borders Risk Analysis Network, Turkey-Frontex Risk Analysis Networks, and the Africa-Frontex Intelligence Community (Frontex, 2021).

As we documented in our discussion of the five phases of border control and migration policies, the EU’s policy processes have altered dramatically in response to crises, moving from a decidedly intergovernmental approach prior to the Amsterdam Treaty to a mix of the community method (CEAS), intensive transgovernmentalism (EU-Turkey Joint Action), supranational centralization (Frontex’s evolution into the EBCG and the EEA’s into the EUAA), and new modes of governance (European Migration Network, EUAA’s links with NGOs) (see, especially, Chapter 16 Buonanno & Nugent, 2021).

### *Language justifying crisis governing*

The EU’s leading policy- and decision-making institutions have employed crisis terminology to describe border control and irregular migration reforms. A less recognized nod to ‘crisis’ has

been rejection of the term ‘multiculturalism’ – itself a reaction to the crisis of domestic terrorism – to one of ‘integration’ and less subtly ‘Promoting the European way of Life’. (The von der Leyen Commission originally proposed ‘Protecting,’ but faced an outcry from the EP and NGOs European Commission, 2020a.) The new language became ‘integration’ along with ‘inclusion’, the latter emphasizing policies that promote equal opportunities for ‘EU citizens with a migrant background’. Indeed, the EU sees lack of integration as a crisis of sorts, and perhaps even a factor in the radicalization of European Muslims. Accordingly, the EU’s integration and inclusion policy has been designed to address the needs of the approximately 37 million inhabitants born outside of the EU (8.3% of the EU’s population) and the 10% of young people (15-34 years) born in the EU with at least one foreign-born parent (European Commission, 2020a, 2021b).

## **Trends and Conclusions**

This study has argued that crises have driven EU border control and migration policies and have done so in an incremental fashion. This incremental pattern is apparent, as this paper has done, when one takes the ‘long view’ – charting the inception of passport-free Europe to today’s integrated CSEA supported by extensive agencification. Our analysis (above) of the relationship between crisis and EU policy evolution has made it possible to offer a number of observations with respect to future trends.

First, given the strength of public opinion against irregular migration, the EU will continue in its resolve to ‘offshore’ or ‘externalize’ border control and refugee retention in a system that is remarkably similar to that pioneered by the US (in 1991 when it ‘diverted boats full of Haitians to Guantanamo Bay – see Fisher, 2022) – and now is using Mexico as a holding center for asylum seekers on its southwestern border), Australia (sends migrants to nearby island nations referred to as some as ‘gulag archipelago’), and most recently with the UK’s arrangement with Rwanda to receive individuals who have been denied asylum in the UK. The EU began externalizing migration control with the EU-Turkey Joint Action (discussed above). Migration watchdog groups and media outlets have responded to this development by accusing the EU of ‘offshoring’ border control to illiberal regimes and violating European and international law. They published exposés documenting how the EU funds, equips, and trains the

Libyan Coast Guard. They provided eyewitness accounts of bribery, torture, and selling into slavery in a migration detention system aimed at keeping irregular migrants from reaching the EU and returning those that had (Deutsche Welle, 2021; Elbagir et al., 2019). And as in other Western states, the EU has paid vast sums of money to illiberal regimes for this enforcement. It is a story of means and ends: excessive irregular migration threatens democratic institutions by providing a platform for anti-system Far Right Populist parties to gain a foothold in national and regional legislative bodies. That offshoring migration control ‘works’ does not bode well for migration advocates opposed to this practice and there is every reason to expect that this trend will continue, with the EU seeking new partners to assist in offshoring the control of irregular migration.

The second trend that became apparent during the Ukrainian refugee crisis connects the dots between asylum seekers and EU foreign policy. As of mid-March 11 million Ukrainians had fled their homes, with about 5.1 million fleeing to neighbouring countries, mainly EU member states (BBC News, 2022; IOM, 2022). We now have several data points – or crises – to understand under what conditions EU leaders will activate TPD. The popular narrative is one of bias – the EU welcomes white people and Christians but discriminates against brown people and Muslims because the EU did not activate TPD for Libyans, Tunisians, and Syrians. While there is evidence of bias against Muslim as compared to Christians among national authorities in granting asylum (see, for example, Adida et al., 2011; Emeriau, 2019), an analysis of the the 2022 TPD activation suggests a much more nuanced interpretation that is intimately connected to Europe’s past, present, and future relationship with the former Soviet Union and the Russian Federation. Several points need to be made here. First, TPD was enacted based on a humanitarian crisis that was occurring on European soil. Refugees from the former Yugoslavia and Ukraine were already in Europe – they fled by bus, car, and train – not by rafts and overcrowded dinghies across the Aegean and Mediterranean seas. There was nowhere else for Yugoslavians and Ukrainians to go. Second, both crises were related to Russia – the Balkan civil wars arising from independence declarations in the aftermath of the fall of the Soviet Union and the Ukrainian crisis the result of Russian aggression against an Eastern Europe country. Third, Russia’s aggression against Ukraine is taking place on the borders of EU and NATO member states – it bears mentioning that since the 2009 Lisbon Treaty the EU has had its own mutual defence clause (Article 42.7 TEU) that is similar to NATO’s Article 5. The EU had placed

sanctions on Russia after its 2014 invasion and annexation of the Crimean Peninsula and had warned Russia about further aggression in Ukraine. Critically, during the intervening years the EU had strengthened its ties with Ukraine. There is now a long history of EU-Russian tug-of-war over Ukraine's desire to move closer to Europe, culminating in the signing of the 2014 (in force since 2017) European Union-Ukraine Association Agreement, which among other provisions, commits Ukraine to adopt the EU's *acquis* and convergence in CSDP and CSFP, and established a pathway to a free trade area ('Deep and Comprehensive Free Trade Area'). Fourth, Russia has recently interfered with both national and European elections to promote anti-EU, anti-democratic populist parties and the EU has increasingly struggled with a Russia hostile to the European integration project (for example Russian disinformation during the 2016 Brexit referendum campaign). Any one of these reasons alone sets the Ukrainian refugee crisis (as it did the Yugoslavian) apart from the 2015-16 Syrian refugee crisis. The European Council (meeting both as heads of government and in the Justice and Home Affairs Council) has set a precedent that temporary protection is not a 'dead' law, but will be invoked only for refugee crises that originate in Europe. The TPD, however, had never been tested. 'Cracks' in the TPD system are emerging because many of its provisions are voluntary. One of the early concerns is the vast number of Ukrainian refugees have chosen to stay in Poland rather than move on to other member states (Nielsen, 2022), but the TPD does not include a mechanism to distribute refugees throughout Europe (nor does the Dublin Regulation – see above). Another problem with TPD is the way it was applied – only citizens, not others living in Ukraine – are entitled to TPD. This had left thousands of non-citizens in a situation where they were detained at the border and forced to make arrangements to return to their country of origin. Work on the TPD is likely just beginning.

The third trend this paper recognized was the use of technology to police the EU's external borders and reduce the number of asylum seekers entering EU territory. While some member states resorted to 'building the wall' mentality during the Syrian crisis, the EU has embraced technology from the beginning of the Schengen Area with the SIS and Eurodac. Since that time, technology has become a cornerstone in interdiction, with Frontex a major actor in preventing irregular migration and the EUAA in predicting and responding to migratory pressures. Technology will continue to play a crucial role in the Europeanization of border control and asylum/refugee policy.

A fourth factor has been the increased recognition of demographic trends in the EU and its neighbours, particularly with respect to Africa. The African diaspora to Europe will continue so long as Europe's ageing population requires more labour (pull) and there are limited economic opportunities for a relatively youthful population in African countries (push). Thus, migration issues can be considered one of the issues prompting the von der Leyen Commission to propose a new, comprehensive strategy with Africa that seeks to jointly define a new basis for EU-African Union (AU) Summits, with 'migration and mobility' one of five action areas. The EU is heavily invested in Africa, with foreign direct investment of €222 billion, compared to €42 billion from the US and €30 billion from China (2017) – and therefore presumably has the means to promote economic development and jobs so as to discourage irregular migration (European Commission - High Representative of the Union for Foreign Affairs and Security Policy, 2020, p. 6). After a hiatus due to the coronavirus pandemic, the EU-AU summits resumed in February 2022. If the EU expects to decrease external migratory pressure, it will need to accelerate development that reaches down to the individual level through Official Development Assistance (ODA) and to provide incentives for European companies to locate subsidiaries in sending countries. With the rising population on the African continent, it suggests that restarting the EU-African Union relationship needs to be a top priority for the EU. It also means that some of the demands made by the AU with respect to the EU – such as lower prices for pharmaceuticals – need to be weighed against the disruptive impact of irregular migration on the European polity. Policy linkage will become more important here.

Fifth, while public opinion has tended to favour the immigration of higher-skilled workers, while opposing lower-skilled immigration (see Heath & Richards, 2019; Naumann et al., 2018), as with so many other 'normals', the COVID-19 pandemic has softened opposition to the immigration of workers for lower-paid jobs as consumers throughout the advanced industrialized countries have been inconvenienced by supply chain disruptions (shortages in truck drivers and warehouse workers), shortages of and rising prices for consumer goods and foodstuffs (fewer agricultural and retail workers), and sometimes severe labour shortages in the healthcare sector during a pandemic when healthcare workers were most needed (Fernández-Reino et al., 2020). Suddenly, the public realized that many jobs Europeans shun are classified as 'essential' to the economy. Thus, another challenge is for the EU's asylum/refugee and



immigration policies is a rethinking of ‘essential’ to take account of low-paid employment (beyond the longstanding guestworker and seasonal agricultural labour exceptions).

Sixth, there has been concern about the ‘weaponization’ of migrants. With migration remaining unpopular among the electorate in host countries, authoritarian leaders whose countries share land or sea borders with the EU began to exploit this ‘unwelcomeness’ through the ‘weaponization’ of migration (Berzins, 2022). In the most blatant attempt at using migrants as ‘weapons’, Belarus’s strongman president, Aleksandr Lukashenko, seeking to exact revenge for EU sanctions against Belarus, facilitated transportation for asylum seekers to enter Belarus (mainly Iraqi Kurds) and cross the border into Lithuania. (The EU had agreed sanctions after a Belarus fighter jet forced a Lithuania-bound Ryanair flight to change course in May 2021 to land in Minsk in order to arrest Roman Protassevich, a Belarus journalist who was living in exile while continuing to actively oppose the Lukashenko regime (Hopkins, 2021)). In a second example of weaponization, Turkey’s President Erodğan, angered over the EU’s opposition to Turkey’s actions in Syria, violated Turkey’s 2016 facilitation agreement with the EU by ordering the bussing of migrants to the Greek border (late February 2020), while Turkish officials stood aside, refugees tore down border fences. In yet another example, in May of 2021 Morocco relaxed its border control with Spain’s autonomous city of Ceuta in retaliation for Madrid’s decision to permit the leader of the Western Sahara’s independence movement to travel to Spain for COVID-19 treatment (Kassam, 2021; Profazio, 2021). None of these attempts have had their desired effects. Sanctions have held up against Belarus and the EU immediately came to the aid of Lithuania. Turkey and the EU need each other in dealing with irregular migration. And weak states such as Morocco have more to lose than gain by annoying the EU over trivial and/or internal matters.

Finally, the border control and migration crisis has created an opportunity for the EU on the global stage. The EU’s identity is inextricably tied to multilateralism, while the US tends to favour bilateral or regional forums. Since the Lisbon Treaty came into effect, the EU has increasingly sought to speak with one voice at the UN. Clearly, the issues facing sending and receiving countries are approaching the need for multilateral solutions. The UNHCR, operating under the auspices of the General Assembly, and the International Organization for Migration’s – now also part of the UN system – mandates increasingly overlap. Furthermore, neither IO is a

specialized UN agency, with both funded from voluntary contributions. Taking the lead on revamping the current multilateral ‘system’ would be consistent with the EU’s self-image.

\* \* \*

The EU and its member states, as with all democratic ‘states’, must constantly balance their founding humanitarian principles with the nation-state’s prerogative to determine who can permanently settle in its sovereign territory (Miller, 2016). That neither cosmopolitans nor restrictionists are satisfied with the EU’s approach to border control and the CEAS implies that European policymakers have struck the necessary compromises in the highly contested arena of border control and migration policies. As we close this examination of the ways in which crises have affected the evolution of EU border and migration policies, it seems reasonable to conclude that the EU’s policy responses have followed a recognized path taken by federal systems in the past by federalizing a policy area that had been the exclusive domain of the constituent federal states.

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