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Migrant rights in an age of international insecurity: Exploring the narratives of protection and security in European migration and refugee law

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Abstract

As the migration crisis has unfolded in Europe, driven largely by conflict and instability in the Middle East and Africa, European countries have had to confront the dichotomy between what they perceive to be the protection of their national interests and an obligation to abide by humanitarian principles. These events have manifested in many prominent nativist anti-immigration and anti-refugee political movements that have tested the relevance, applicability and suitability of several international institutions and instruments. Competing and conflicting approaches can be identified among the primary actors: those in the political realm are being driven by a security and law enforcement narrative towards their migration policies, while NGOs and international organisations are following a human rights and humanitarian protection narrative. To some, even the approach of the NGOs remains disjointed, uncoordinated and fractured. In this context, a number of questions are being raised about whether the implementation of international migration law by a number of actors such as politicians, national leaders, law enforcement and the humanitarian agencies and civil society adequately balances these competing approaches. How can law enforcement and administrative agencies ensure that there is a functional and coherent balance between the national security narrative and the migrant rights narrative while, at the same time, seeking to address the needs of both their governments and vulnerable migrant groups? This is a conundrum that this paper seeks to answer.

Keywords

crisis, Europe, national security, refugees, migration

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1. Introduction

Driven largely by conflict and instability in the Middle East and Africa, the so-called migration or refugee crisis has taken the form of an exogenous shock that has challenged the international migration system. It has, first and foremost, made the distinctions between migrants and refugees harder to draw, challenging the existing international migration framework that is based on a distinction between the two. It has also resulted in a raft of new initiatives and instruments on how best to utilise the structure, norms and institutions of current migration and refugee systems that have been in place in Europe since the post-Second World War crisis.[2] Though the response has been commendable in many places, it is still hard to find someone without a strong opinion on how the migrant crisis should be, or should have been, handled better.[3]

There is also a great diversity of perspectives on what exactly would improve the migration and refugee situation in Europe.[4] One of the key issues at the heart of this great difference in perspective between the key actors, like national leaders, and non-governmental organisations (NGOs), like humanitarian and civil society actors, is what their mandated role is within the migration and refugee framework. Whereas INGOs and NGOs are predominantly concerned with the protection and proper treatment of asylum seekers, migrants and refugees,[5] government entities (and their contractors/subsidiaries such as border control agencies, coastguards and law enforcement agencies), while paying lip service to protection principles, are largely focused on the maintenance of law and order, national security and the concerns and fears of local populations.[6] As Dr Volker Türk, speaking on behalf of the UN High Commissioner for Refugees (UNHCR) pointed out,

> We have seen – and continue to see – many heartening expressions of compassion and solidarity in response to refugees, [but] we also see divisive politics and xenophobia gaining traction, amplified by uninformed discourse in the media and other public fora. This also plays out in current debates around threats related to terrorism and refugee flows.[7]

Given this 'uninformed discourse' and the prominence of anti-migration and anti-refugee sentiment, European countries have had to confront considerable friction between 'migration management' and 'protection' while also abiding by their humanitarian principles and legal obligations under international law.[8]

As noted at the Declaration of the High-level Dialogue in 2013, migration is a complex and cross-cutting issue that should be addressed in a 'coherent, comprehensive and balanced manner'.[9] Unlike national or European Union (EU) law, international migration law is not, in any meaningful sense, a distinct branch of law with its own legislature or a single instrument, but is rather understood as an umbrella term covering a complex framework of principles and rules that

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2 See Political Declaration by European Union (EU) and African Leaders, Valletta Summit on Migration, 11–12 November 2015: 'Valletta Declaration'.

3 See, for example, United Nations High Commissioner for Refugees (UNHCR), *Better Protecting Refugees in the EU and Globally* (December 2016); also see the joint statement submitted by 104 NGOs which noted that certain proposals by the European Commission would mean that 'Europe risks torpedoing its human rights foreign policy, and undermining the right to asylum internationally': Amnesty International Joint Statement, 'European Commission 'compacts' Represent Responsibility-sharing not Responsibility-shirking' (27 June 2016); Editorial, 'Europe's Response to Refugees has been Pitiful', *The Observer* (15 May 2016).

4 See, for example, Susi Dennison and Josef Janning, 'Bear any Burden: How EU Governments can Manage the Refugee Crisis', European Council on Foreign Relations Policy Brief (2017); EY, Managing the Migration Crisis: From Panic to Planning (2016).

5 See, for instance, the mandates of Council of Europe (CoE) Special Representative for Migrants and Refugees, which stipulates that he is 'responsible for gathering information on the fundamental rights of migrants and refugees in Europe, including through fact-finding missions, and making proposals for action.'; also see the Statute of the Office of the High Commissioner for Refugees, para 1: 'acting under the authority of the General Assembly, shall assume the function of providing international protection … and of seeking permanent solutions for the problem of refugees', International Labour Organization (ILO), Inter-Parliamentary Union (IPU), Migration Human Rights and Governance, the International Organisation for Migration (IOM) notes that although the 'IOM has no legal protection mandate, the fact remains that its activities contribute to protecting human rights, having the effect, or consequence, of protecting persons involved in migration', while Principle 1 of the IOM's Migration Governance Framework is 'adherence to international standards and fulfilment of migrant's rights'. With regard to some of the most prominent NGOs operating in the field and advocating at the regional and international level, similar mandates can be found at Amnesty International, Human Rights Watch (HRW), Médecins Sans Frontières and the Norwegian Refugee Council (NRC) among others.

6 See, for example, Report of the Special Rapporteur on the Human Rights of Migrants, Dr François Crépeau, UN GA DOC A/72/173 (19 July 2017), paras 19, 22–24.

7 UNHCR, Open Briefing to United Nations Security Council Counter-Terrorism Committee, 5 April 2017.

8 See, for instance, Regulation 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, in which the Preamble frames its efforts in the context of 'resolving unprecedented migratory flows towards Union territory in a comprehensive manner, including by reinforcing border management to better manage growing mixed migratory flows'. while 'Heads of State or Government stressed the need to tackle the dramatic situation at the external borders and to strengthen the controls at those borders' and 'It is necessary to monitor the crossing of the external borders efficiently, address migratory challenges and potential future threats at the external borders, ensure a high level of internal security within the Union.' Also see Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, para. 2: 'European integrated border management is central to improving migration management.' Also see Valletta Declaration, footnote 2 above, where the primary concern is identified as the pressure placed upon affected states in terms of 'humanitarian and security challenges', followed by a need to respond decisively to 'manage migration flows in all their aspects'. However, the Declaration states that such a response will be in 'full respect for human rights and the sovereignty of participating states, taking into account national legislations and specificities', according a degree of autonomy to the states. More recently, see European Commission, 'European Agenda on Migration: Good progress in Managing Migration Flows Needs to be Sustained' (6 September 2017), and associated documents.

9 Declaration of the High-level Dialogue on International Migration and Development, UN GA DOC A/68/L.5 (1 October 2013), para. 1.

regulate the international obligations of states with regard to migrants.[10] However, despite some movement towards a universal regime and promising developments, such as the New York Declaration on Migrants and Refugees,[11] the law has developed in a piecemeal fashion over time and contains a number of different applicable instruments, depending on context.[12]

This research paper aims to analyse the narratives at play in the nexus between key EU institutions that help to shape or determine the applicable international legal framework in Europe and the NGOs that advocate for the implementation of such instruments. The paper thus asks how these two competing narratives interact with each other, whether they clash with each other and whether there can be a balance between the two. It also explores the consequences such disparities ultimately present to the norms, obligations and principles of international migration and refugee law. As a case study, the EU-Turkey statement is then briefly examined as paradigmatic of these competing narrative approaches.

Research for the paper is based on the reports, publications and press releases of international organisations and NGOs, EU legal texts, statements and treaties as well as interviews conducted with the UNHCR, the Council of Europe and NGOs working with refugees and migrants in destination countries in Europe, transit countries like Turkey and source countries like Syria, Iraq, Somalia and Afghanistan. When discussing national actors that are largely driving the security narrative, the paper makes reference to organisations that have been at the forefront of responding to the refugee influx in Europe, including EU Member State governments and law enforcement agencies like Frontex (the European Border and Coast Guard Agency). The mandates and positions of the NGOs that are driving the more rights-based approaches are elaborated upon, along with the views of organisations that are seeking to find a collective solution that upholds the rights of refugees such as the UNHCR and the Council of Europe. References to the migration and refugee crises pertain to the responses to refugee arrivals in Europe, and show the complexities that exist in the discussion around contemporary migration and refugees.

2. The crises within the refugee and migration crisis

There is a real tension at play in international migration governance. The stark differences in principles, values and priorities among the various actors involved are not an abstract or merely contextual problem. Such differences can have concrete, tangible and practical consequences, affecting both vertical and horizontal relationships between international organisations (such as the EU and UN) and national actors within the different bodies of the nation-state bureaucracies, and between NGOs and national authorities and quangos on the ground. These differences heighten the rhetoric around the severity of the problem and prevent a systematic engagement. Competing mandates and agendas of countries and organisations, meanwhile, divert attention from the broader goal of protecting human safety and dignity. While defending the security interests of the state is important, to do so while observing international human rights and constitutional fundamental rights standards is a balancing act.[13] Human dignity, freedom, democracy, equality, the rule of law and respect for human rights – these values are embedded in all EU treaties that govern the EU.[14]

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10 European Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* (2014), pp. 12–14.

11 New York Declaration for Refugees and Migrants, UN GA DOC A/RES/71/1 (3 October 2016) outlines a broad set of commitments relating to the human rights of all refugees and migrants, alongside many specific commitments. It is hoped that the New York Declaration will be followed by a global compact for safe, orderly and regular migration sometime in 2018 and that a comprehensive refugee and migration framework will be adopted.

12 This framework includes, at the international level, instruments including the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection of All Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities; relevant conventions of the International Labour Organization (ILO); the 1951 Convention relating to the Status of Refugees (Geneva Convention 1951); the 1954 Convention relating to the Status of Stateless Persons; the 1961 Convention on the Reduction of Statelessness; the United Nations Convention against Transnational Organized Crime; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; the Geneva Conventions of 12 August 1949; the Vienna Convention on Consular Relations; the International Convention for the Safety of Life at Sea; the International Convention on Maritime Search and Rescue; the United Nations Convention on the Law of the Sea; and the Rome Statute of the International Criminal Court, among other regional instruments such as the European Social Charter ETS No. 035, European Convention on the Legal Status of Migrant Workers ETS No. 093, and the European Convention on Human Rights ETS No. 005.

13 Mary Arden, *Human Rights and European Law. Building New Legal Orders*. Oxford: Oxford University Press, 2015.

14 See European Union, 'Human Rights' Narrative on Protecting Fundamental Rights within the EU and Promoting Human Rights Globally'. Regulation (EU) 2016/399 of the European Parliament and the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), is overt in its reference to security concerns stating in the Preamble that '[b]order control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.' However, Article 4 of the same Regulation also obliges Member States to act in full compliance with relevant EU and international human rights law, including those relating to international protection of migrants and refugees. Also see Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (EUROSUR), para. 1 which states that 'EUROSUR will provide those authorities and the Agency with the infrastructure and tools needed to improve their situational awareness and reaction capability at the external borders of the Member States of the Union ('external borders') for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants.'

In Europe, high-profile NGOs have not minced their words. Human Rights Watch, for instance, stated that 'individual member states have rolled back asylum rights at a national level and the European Commission has proposed an overhaul of the common European asylum system that is informed by a logic of deterrence [rather] than a commitment to basic human rights'.[15] In many ways, we are witnessing less of a migration crisis per se, but rather a political crisis resulting from the failure to find true common ground and universal, effective solutions, and to implement those solutions with the required resources and oversight.

Although international migration law, and refugee law in particular, provides for the right to apply for asylum and places an obligation on states to process and potentially recognise such persons as deserving of protection,[16] states in the EU have often responded with policies and practices aimed at restricting access to the protections provided by international law. Amnesty International, for instance, has argued that 'rather than creating a bold, orderly system providing safe avenues for people to seek protection in Europe, European leaders have increasingly focused on blocking borders and negotiating with human rights violating governments to stop them coming'.[17]

Across Europe, at both the EU and national levels, the failure to enact coherent and consistent migration policies has contributed to the widespread dissatisfaction we can see in many a country's immigration policy.[18] This dissatisfaction has led to angry and resentful nativist anti-immigrant backlashes, lower public support for admitting immigrants and refugees, and an unwillingness to help them once they are in the country.[19]

As François Crépeau, the UN Special Rapporteur, pointed out recently, in Europe right now the nationalist-populist narrative is dominating the political discourse and the 'real crisis in Europe resides in the lack of political will, resulting from the absence of a common political vision as to how migration and mobility are part of Europe's present and future'.[20]

Whereas aspects of migration, and refugee law in particular, trigger rights and obligations of protection under the rubric of humanitarian action,[21] what we can observe in many circumstances is rather a security-dominated approach, predicated on the crisis narrative and broader policies aimed at deterring immigration.[22] Across Europe, migration policies are largely being driven by a security and law enforcement narrative in the political realm which is often predicated on a fuzzy conception of 'others' as an uncertain, untrustworthy or unwelcome presence in society. As Crépeau noted,

> Public discussion of these factors has been extremely shallow, often confined to little more than scaremongering about 'benefit scroungers' and migrants 'stealing jobs.' Rather than address the reasons behind migration, states often respond to increased migration movements by creating and progressively increasing barriers to mobility, narrowly focusing on securitization, repression and deterrence.[23]

Religious, racial and ethnic prejudice, fear and political and cultural resentment also seem to play a significant role, encouraging greater securitised migration policies and actions towards migrants from the Middle East and Africa.[24]

In the EUROSUR Regulation, a brief reference is made to humanitarian considerations, noting that 'it is recognised in this Regulation that migratory routes are also taken by persons in need of international protection' (para. 3), while Article 2(4) requires compliance with fundamental rights.

15 Human Rights Watch, 'EU Policies Put Refugees at Risk: An Agenda to Restore Protection' (23 November 2016).

16 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, provides for the right to asylum in Article 18 while Article 19 enshrines the principle of *non-refoulement* contained in Article 33 of the Geneva Convention relating to the status of refugees (Geneva Convention 1951).

17 Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' (2017), p. 5.

18 Report of the Special Rapporteur on the Human Rights of Migrants, Dr François Crépeau, UN GA DOC A/72/173 (19 July 2017), para. 31.

19 Ibid., para. 20; also see EUROPOL, Terrorism Situation and Analysis (TE-SAT) Report (2017), which notes that 'The migration phenomenon affecting the European continent and the perceived threat from Islamisation remain key topics on the RWE [right-wing extremist] agenda and have been used by the right-wing scene to induce public opinion to adopt its xenophobic and Islamophobic position. These topics are exploited to spread fear and concern.'

20 Office of the High Commissioner for Human Rights, 'UN Special Rapporteur on the Human Rights of Migrants Concludes His Follow up Country Visit to Greece' (16 March 2016).

21 See, for instance, Preamble to the Geneva Convention 1951: 'recognizing the social and humanitarian nature of the problem of refugees'; also see, International Organisation for Migration, *Migration Governance Framework*, Principle 1, footnote 5. States also regularly reiterate this notion in collective documents, for instance in the New York Declaration for Refugees and Migrants, paragraphs 5–6 which firmly grounded the subsequent commitments within existing international legal obligations, including to fully protect the safety, dignity and human rights and fundamental freedoms of all migrants and refugees, regardless of their status, at all times and to devise responses to large-movements with full respect for international human rights law and other relevant standards.

22 Danish Refugee Council, 'Implications of the EU's outsourcing of protection responsibilities and migration control' (March 2017), p. 3; Also see, Alison Gerard and Sharon Pickering 'Crimmigration: Criminal Justice, Refugee Protection and the Securitisation of Migration', in *The Routledge Handbook of International Crime and Justice Studies* (London: Routledge 2013), p. 595–597.

23 François Crépeau, 'U.N. Rapporteur: We Need a Long-term Strategy for Human Migration', *Refugees Deeply* (8 June 2017).

24 United Nations High Commissioner for Refugees (UNHCR), Open Briefing to United Nations Security Council Counter-Terrorism Committee (5 April 2017); also see Daniel Howden, 'The Manufacturing of Hatred: Scapegoating Refugees in Central Europe', *Refugees Deeply* (14 December 2016).

This triggers risk-reduction policies and actions with a greater focus on monitoring, classifying and managing incoming groups, and interdicting and intercepting 'illegal' and irregular migration prior to asylum claims. Key international instruments, which focus on criminalising irregular and illegal immigration by organised criminal groups, include supplementary instruments to the United Nations Convention on Transnational Organised Crime; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the Protocol against the Smuggling of Migrants by Land, Sea and Air. However, these do not adequately recognise the complexity of the human compulsions, motivations and aspirations that drive migrants to these channels.[25]

This is of concern and problematic for many reasons. But the main issue is that if contemporary migration and refugee policy increasingly reflects the broader political discourse of migration as a security concern, then there is a real risk of human rights getting crowded out – or, worse, subsumed – by an all-encompassing security-oriented discourse.[26] The Council of Europe Commissioner for Human Rights noted,

> There is a steady advance of the discourse of 'illegality' in migration law and policy. While the early EU legislation refrains from using the terminology, after about 2003, it becomes common currency appearing again and again throughout documents, legislation and decisions. This trend is of questionable consistency with the human rights obligations of the member states and their activities within the Council of Europe. As regards human rights, all the EU measures discussed above confirm, at least in their preambles, that they comply with the EU's fundamental rights obligations. Explicit references are made to member states' duties under the ECHR and, in asylum related measures to the UN Refugee Convention. However, the recognition of these commitments does not appear to influence, in practice, the approach towards criminalisation.[27]

3. Siloed approaches: competing narratives to complex issues

At the regional level, what can generally be seen at the regional level is different actors that do not see eye-to-eye on several issues relating to the status, protection and governance of migrants and refugees. International organisations and NGOs can try to hammer out a human-rights approach as much as possible, but many actors simply do not see it in the same way. As such, the approaches are fragmented and siloed, in that they are often in tension while seeking starkly different objectives.[28]

For instance, in the EU, despite a set of legally binding standards in the common European asylum system, there are evidently major differences and disparities among the Member States. Reception conditions, administrative procedures, treatment, detention – these are simultaneously reflective, and the consequences, of a fragmented and divided legal system.[29]

It is perhaps fair to say that this is a problem widely visible in public international law: domestic authorities remain the primary duty-bearers and, to a greater or lesser extent, there are very few countries that could be said to not have visible enforcement or implementation gaps.[30] A Communication from the Commission to the European Parliament and the Council in 2016 stated

> There are significant structural weaknesses and shortcomings in the design and implementation of European asylum and migration policy, which the crisis has exposed. The EU now needs to put in place the tools to better manage migration flows in the medium and long term, in line with the approach set out in the European Agenda on Migration.[31]

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25 For a study on an ecosystem approach to understanding the smuggling of migrants from the perspective of migrants, see International Organization for Migration (IOM)/Samuel Hall, 'Migrant Smuggling to Canada – An Enquiry into Vulnerability and Irregularity through Migrant Stories' (2017). For a discussion on deconstructing migrant–smuggler perspectives and understanding migrant-smuggling networks, see Nassim Majidi and Saagarika Dadu, 'Human Smugglers Roundtable', Open Democracy (2017); and Nassim Majidi, 'Communities of Smugglers and the Smuggled', Open Democracy (2017)

26 See Alessandro De Giorgi, 'Immigration Control, Post-Fordism, and Less Eligibility: A Materialist Critique of the Criminalization of Immigration across Europe', *Punishment & Society*, Vol. 12, No. 2 (2010), p. 149, who states that public discourses 'have become powerful catalysts for the consolidation of a punitive governance of migrations revolving around a process of "categorical criminalisation" of immigrants'.

27 Council of Europe Commissioner for Human Rights, Criminalisation of Migration in Europe: Human Rights Implications (2011), p. 17.

28 See, for instance, para. 2, footnote 8 of the Regulation of the European Parliament and of the Council on the European Border and Coast Guard, which states that '[t]he aim is to manage the crossing of the external borders efficiently and address migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension and ensuring a high level of internal security within the Union. At the same time, it is necessary to act in full respect for fundamental rights and in a manner that safeguards the free movement of persons within the Union.'

29 For instance, Regulation 562/2006, the Schengen Border Code, adopted by all Member States except Denmark, Ireland and the United Kingdom; also see UNHCR Guidelines, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV, and UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, March 2010.

30 See, for instance, Directorate-General for External Policies, 'Current Challenges for International Refugee Law, with a Focus on EU Policies and EU Cooperation with the UNHCR', Briefing Paper XPO/B/DROI/2012/15 (2013), pp. 10–14.

31 Communication from the Commission to the European Parliament and the Council, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe', COM (2016) 197 final, p. 2.

In the European context, the variable implementation of the universal system reflects a shift from what could be considered a 'democratic' immigration discourse versus a 'populist' immigration discourse. The UN Human Rights Council, for instance, has 'expressed concern at the increasing trend of xenophobia and hostility towards migrants in societies and the criminalisation of irregular migration, which might have a negative impact in the fulfilment of human rights globally'.[32]

All these systemic issues leave vulnerable migrant populations at risk of further harm, often unable to exercise their rights.[33] A key issue is thus: how does one work around these issues, facilitating greater dialogue and effective cooperation, as is – or should be – required by the international treaties and other instruments that make up international migration law? Providing simple answers to this question is not easy and first entails an analysis of the competing approaches currently evident in European discourse.

4. The rights-based approach: complementary or distinct?

The human rights and humanitarian protection narrative generally prevails among prominent NGOs and international organisations. At the same time, national authorities are often reported to participate minimally when these groups try to engage them on issues around human rights cooperation.[34]

The perspective of many international organisations and NGOs is, in broad terms, that human rights norms are best understood as integrated into the security policies of a state or as complementary to such security policies. At a briefing to the United Nations Counter-Terrorism Executive Directorate (UNCTED) in April 2017, UNHCR stated that: 'international refugee law does not pose an obstacle when it comes to addressing security concerns. On the contrary, security considerations have been at the forefront of the international refugee protection regime from the outset'.[35] While stating that asylum authorities should cooperate with security and intelligence services, UNHCR argued that both 'have a role to play in identifying persons who may fall within the scope of an exclusion clause or who otherwise require appropriate measures to ensure the security of the host country and its community'. In the same statement, the UNHCR acknowledged that '[i]n practice, however, security concerns often seem to overshadow equally pressing humanitarian and protection considerations'.[36] Ultimately arguing that '[i]nternational refugee law provides for safeguards and mechanisms to protect those in need of international protection from persecution, conflict, and violence – including terrorism – while bearing in mind the security interests of host countries and their communities', the UNHCR emphasised a complementary approach to migration and refugee issues that is seemingly at odds with national and EU approaches.[37]

This argument is largely premised on the notion that the international legal framework, based on the 1951 Geneva Convention, provides not just basic principles of treatment and protection, but also a limited set of principles that enable states to satisfy their security concerns while conforming with the Convention. Core aspects of international refugee law such as *non-refoulement*, and the broader notion of 'complementary protection', prohibit states from returning a refugee or asylum seeker to territories where there is a particular threat to their life or where there is a risk of torture or cruel or inhuman or degrading treatment.[38] Article 1F of the 1951 Convention provides exclusions for those who are responsible for certain offences, such as cases where, even if an individual qualifies as a refugee fleeing persecution (under Article 1A), there are serious reasons to believe that the individual in question has committed 'crimes against peace, a war crime, or a crime against humanity', a 'serious non-political crime' or 'has been guilty of acts contrary to the purposes and principles of the United Nations', which is commonly understood to broadly encompass many acts, including several forms of terrorist activity.[39]

Similarly, the Council of Europe tends to take a rights-based approach, focusing on the complex role of the European Convention of Human Rights (ECHR) in the context of migration and refugees. Backed by the European Court of Human Rights, the Council of Europe's approach is starkly different from that taken by the European Union, with the latter primarily focused on 'migration management', which includes medium- to long-term priorities such as reducing the incentives for irregular migration, saving lives, securing external borders, strengthening the common asylum policy and developing a new policy on legal migration.[40]

32 UN DOC A/HRC/35/L.28 (19 June 2017), p. 4.

33 Nils Muiznieks, Council of Europe Commissioner for Human Rights, 'Stop Your Backsliding, Europe', *The New York Times (Opinion)* (14 March 2016), noted that 'the refugee crisis unfolding along the borders of the European Union has elicited a chaotic response. There is a clear danger that the union and its member states are losing their way and are at risk of backsliding on fundamental commitments.'

34 See, for instance, Amnesty International, 'The Human Cost of Fortress Europe: Human Rights Violations Against Migrants and Refugees at Europe's Borders' (2014), pp. 9–11.

35 UNHCR, Open Briefing to United Nations Security Council Counter-Terrorism Committee (5 April 2017).

36 Ibid.

37 Ibid.

38 Geneva Convention 1951, Article 33, as well as a corresponding provisions such as Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

39 See, for instance, UN Security Council Resolution 1377, which notes that 'acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations'.

40 See for instance, European Commission, 'Migration: Towards a European Agenda on Migration'.

Like the NGO sector, the Council of Europe's various organs, including the Commission for Human Rights and relatively newly appointed Special Representative for Migrants and Refugees, advocate for a largely rights-based approach for Member State governments, with attention focused on the non-EU Balkan States and Turkey.[41]

Other actors in the region play a similar role, often invoking obligations under international law as a means of ensuring that their migrant or refugee advocacy takes place firmly within the international legal framework. Various NGOs, particularly those with a broad human rights advocacy agenda, as well as specialised interest groups that focus on particular migrants (such as unaccompanied minors or conditions of detention), are also critical to understanding the narrative inputs into the policy discourse space. Grassroots activists, human rights defenders and civil society organisations rarely appear to pay much attention to security matters and the role this plays in drafting and implementing migration and refugee policies. Rather, they keep their focus on thematic issues such as the protection of migrants or providing humanitarian assistance to refugees and other vulnerable populations.[42] Particularly for those working on the ground, many of the mandates of such organisations and actors are oriented around the provision of care or shelter or are otherwise directed towards the realisation of the rights contained within international legal instruments. Strongly rights-oriented discourse appears to prevail among many of these groups in their international and regional advocacy efforts, as is evidenced, to a large degree, by their reporting and other such outputs.

The motivations and reasons for such an approach are entirely understandable and, historically, many of the actions currently 'outsourced' to NGOs were supported by or carried out by states as part of their regular border activities. Another argument, which can create friction and lead to considerable practical problems, is the question of 'longer term sustainability'. NGOs and state institutions have dramatically different roles in the management of migration and, as such, tend to perceive their activities and roles as operating according to sometimes starkly different timescales.[43] However, an immediate, short-term humanitarian approach can be fundamentally in conflict with someone thinking of longer term consequences, especially in the context of increasingly protracted humanitarian crises that leave people in vulnerable positions for decades.[44] Mechanisms like the Sustainable Development Goals aim to bridge the short-term/long-term divide and advocate for a concerted effort for sustainable development that alleviates the immediate crises in which people find themselves. Its longer-term solutions for the well-being of such people are still finding a foothold in terms of their application and implementation.

A similar timescale for looking at solutions offered by non-governmental and administrative organisations will bring them on par with the issues that they are dealing with. Otherwise, a grassroots organisation fighting for migrants to have shelter will always be at odds with a local government who is thinking of the same migrants living in state-subsidised housing in a decade's time or the (re-)emergence of settlements like the 'Jungle' at Calais.[45]

5. The security approach: national prerogatives and international protection

However, the perspective that rights are integrated within or complementary to notions of security is not necessarily shared by the national authorities that are supposed to implement and enforce international migration and refugee law. In many instances, documented by various monitoring parties and advocacy groups, it is highly likely that many national authorities know that they are in violation of, willingly or through institutional praxis, applicable human rights norms.[46] In private, they may even openly admit as much, but public acknowledgements that a particular national authority has violated rights in the cause of 'national security' are few and far between. In many circumstances, behind closed doors, some authorities merely invoke security considerations as a means to derogate or, at the very least, deviate from, and ask rhetorically 'What are we supposed to do?'

The perceptions and narratives that underpin such an approach are worth examining in some detail. There may, of course, be entirely legitimate reasons why certain persons may pose a threat to local or national security. However, even if that were the case, it may be very difficult to reasonably assert that individualised threats warrant a legal framework that appears to assume that a 'mass' migration is, in itself, a threat to national security or the *ordre public*. Given the available data on crime rates and the role of migrants in recent terror attacks, or other major security incidents, the largely security-driven narrative that underlies much of the recent policy appears to be based on a particularly shaky premise.[47]

While there have been worrying individual cases of such a nature, EUROPOL's EU Terrorism Situation and Analysis (TE-

41 See Special Representative of the Secretary General on migration and refugees, Thematic Report on Migrant and Refugee Children SG/Inf(2017)3 (10 March 2017); also see Report of the Fact-Finding Mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on Migration and Refugees to Greece and 'the Former Yugoslav Republic of Macedonia' (7–11 March 2016).

42 See footnote 4 above.

43 EY, Managing the Migration Crisis: From Panic to Planning (2016), pp. 14–16

44 Ibid.

45 BBC News, 'France Will Not Allow Another "Jungle" Camp in Calais, says Macron' (17 January 2018).

46 See for instance, the amended Greek asylum law 2016, which removed human rights experts and UNHCR representatives from its Asylum Appeals Committee.

47 See Ben Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism UN GA DOC A/71/384 (2017), p.5, which noted that 'It is critical to bear in mind that, in the clear majority of cases, refugees and migrants do not pose a risk, but are in fact at risk, fleeing the regions where terrorist groups are the most active.' The EUROPOL, EU Terrorism Situation and Analysis (TE-SAT) Report (2017) noted that, on the contrary, 'an average of nearly 10 attacks a day were carried out on refugees in Germany in 2016' (p. 46). Furthermore, in Germany, several studies have found no discernible effects of immigration on violent crime, and 'at best, moderate effects on property crimes' and a marginal to minor increase in drug crimes and 'fare-dodging'. See Markus Gehrsitz and Martin Ungerer, 'Jobs, Crime,

SAT) Report (2016) noted that 'there is no concrete evidence to date that terrorist travellers systematically use the flow of refugees to enter Europe unnoticed'.[48] On balance, instead of reducing the risk to a potentially small number of local citizens, it seems highly likely that such an approach would rather risk violating the rights of a large number of non-citizens. If, for instance, national authorities view refugees and vulnerable migrants as *de jure* deserving of protection but as de facto security threats, then this is very likely to result in adverse consequences for the realisation of their human rights.

In certain countries such as Hungary, refugees and irregular migrants are often not only characterised as illegals but are also viewed as being on the same security continuum as transnational organised crime, drug traffickers and terrorists. In such places, national authorities place a much lower emphasis on human rights and the security narrative prevails.[49] For individuals and whole categories of persons, detention often follows, not as a last resort, as generally obliged under international law, but as a first instance measure instead.[50]

This invocation of security to displace or avoid upholding obligations under international law is very problematic. A significant increase in irregular migration and asylum claims can be highly burdensome to the administrative state, and many European countries have had to hire new personnel and allocate additional resources.[51] For the purposes of advocacy and governmental engagement, it is, naturally, a very uncomfortable topic. The reasons why this may be the case are myriad, but the basic notion may simply be that, when pushed, certain governments will opt for security over protection, conscious of their constituencies and the need to maintain authority and control over their territories.[52] For instance, the Hungarian government has stated that it is 'doing everything possible to ensure Europe's safety' and 'stressed that it is no longer only the Visegrád countries which believe that enough uncontrolled people have already reached the EU, and that therefore reinforcing internal security is an important interest'.[53]

Furthermore, many of the migrants and refugees are fleeing areas of active conflict and, especially regarding those from Syria and Iraq, there have been very prominent concerns raised, of varying plausibility, that members of terrorist groups or non-state armed groups may attempt to cross borders with the intention of committing terrorist attacks in the receiving state.[54] Democratic states have, in turn, responded to certain high-profile instances with heightened anti-immigrant rhetoric. The rise of the so-called 'populist' streak in politics may have failed to elect significant government figures, but it is quite likely that many populist movements have succeeded in pushing political discourse in a more anti-migrant, anti-refugee and generally anti-immigration direction. Further playing on 'nativist' sentiment, often couched in terms of 'economic anxiety' or 'resentment', so-called populists often seem to conflate or blur the lines between the contemporary refugee crisis and current integration issues that exist from previous historical periods of migration.[55]

Furthermore, confusion in the face of 'mass influx' has resulted in a public that is frequently ill-informed about the current nature of migration to their particular country, generally vastly overestimating the actual proportion of non-native born groups and religious minorities.[56] As a result, public discourse in many European states has pushed political leaders towards a harder migration and refugee policy in the name of 'securing the borders'.[57]

National and regional migration policy has thus followed the reactionary trend visible in European political discourse, as new laws and administrative measures have come into effect in the past few years. Many of these provisions have

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and Votes: A Short-run Evaluation of the Refugee Crisis in Germany', IZA Institute of Labor Economics DP No. 10494 (22 January 2017), pp. 1–3, 15–18; also see Government of Sweden, 'Facts about Migration and Crime in Sweden'.

48 EUROPOL, EU Terrorism Situation and Analysis (TE-SAT) Report (2016) p. 7.

49 Jim Brundsen, 'Europe Refugee Policy is "Trojan Horse of Terrorism", says Orban', *Financial Times* (30 March 2017). Also see 'Today, the protection of Hungary and of Europe is the government's task,' Janos Lazar, chief of staff to Hungarian Prime Minister Viktor Orban said to *AP, '*For Hungary, security is the most important question […] Stopping illegal immigration is a key issue.' Quoted in Tara John, 'Hungary has Created a Cruel System to Deter Migrants, Says Amnesty', *Time Magazine* (27 September 2016).

50 Human Rights Watch, 'EU Policies Put Refugees at Risk: An Agenda to Restore Protection' (23 November 2016). The report noted that 'In the wake of the EU-Turkey deal, the Greek authorities instituted a formal policy of automatic detention for those arriving by sea on the Aegean islands.'

51 European Parliament Research Service, 'Migration and Asylum'.

52 See Nils Muiznieks, Council of Europe Commissioner for Human Rights, 'Hungary's Duty to Refugees', *The New York Times (Opinion)* (28 September 2016), who noted that increased securitisation measures on the Hungarian border 'come amid a campaign to demonize refugees that has been orchestrated by the government since 2015, when it promoted a "national consultation on immigration and terrorism" that portrayed migrants as a danger to Hungarian society.'

53 Government of Hungary, 'Hungary is Doing Everything Possible to Ensure Europe's safety' (August 2016).

54 EUROPOL, EU Terrorism Situation and Trend Report (TE-SAT) Report (2016) noted that '[s]ome incidents have been identified involving terrorists who have made use of migratory flows to enter the EU. In the investigations into the 13 November Paris attacks, it was found that two of the attackers had entered the EU through Greece as part of the large influx of refugees from Syria. A number of other suspected cases, including terrorist use of fraudulent travelling documents, have since been identified. A real and imminent danger, and one that will probably continue to exist for a long time, is the potential for elements of the (Sunni Muslim) Syrian refugee diaspora to become vulnerable to radicalisation once in Europe, and to be specifically targeted by Islamist extremist recruiters.'

55 Report of the Special Rapporteur on the Human Rights of Migrants, Dr François Crépeau, UN GA DOC A/72/173 (19 July 2017), para. 22.

56 Based on polling conducted by IPSOS Mori in 40 countries, the report noted that many countries vastly overestimate the population of Muslims. Other polling indicates that many countries have very negative impressions of immigration, despite net economic or other benefits.

57 Upon the adoption of the European Border and Coast Guard Agency in 2016, Robert Kaliňák, Minister for the Interior of Slovakia and President of the Council, stated that '[t]he way we manage our external borders directly affects the entire Schengen area, including its internal borders. The European Border and Coast Guard will help us better face today's challenges together. Only with effective management of our external borders can we return to normality within Schengen. There is no other way.' European Council, 'European Border and Coast Guard: Final Approval' (September 2016).

strengthened border control efforts and increased the presence of law enforcement on the borders as certain states have built a large security apparatus that is primarily oriented towards the maintenance of border policing. In recent years, major walls and fences have been erected on borders, while new reception centres, which function like detention centres, have been built or repurposed.[58] Furthermore, in certain states, national migration or refugee officials are former military or security service personnel, untrained and seemingly uninterested in broader international migration law and the human rights framework.[59]

These increased security measures bring a whole host of potential human rights problems. However, for rights groups and, indeed, for international organisations and agencies, when advocating for such issues with relevant authorities, considerations of security can be extraordinarily difficult to override or disagree with. This may simply be the result of the often secretive or clandestine nature of the security and threat analysis: beyond what is publicly available, the true nature, scope and extent of threats is a 'known unknown' to many international organisations or NGOs. This information asymmetry is problematic: it can present a real obstacle to the perceived value and validity of the human rights narrative among actors whose greater institutional priority ore main mandate – even whose personal preference – is the maintenance of law and order or national security.

At borders, such considerations and narratives are visible in the mandate and objectives of entities such as the European Border and Coast Guard Agency, whose primary consideration is oft-cited as security with a cursory nod in the direction of upholding human rights.[60] Similarly, such an approach can be seen in the core mandate of Frontex.[61]

For many nation-states, the response does not seem to be improving – it has recently been reported that defence officials from several central European countries and the Balkans have pledged close cooperation in tackling migration.[62] At the more extreme end, some states have declared their willingness to use all possible means, up to and including the use of armed forces, notably seen in recent pushes towards militarisation on the Austria-Italy border.[63]

Furthermore, several reports from monitoring groups have noted that many procedures by authorities in so-called 'hotspots' take place without a concrete legal basis, resulting in an amorphous asylum system that makes it even harder for migrants and asylum seekers to navigate an already complicated process.[64] The word 'hotspots' is a problematic term in itself as words like this and 'crises' have greatly misrepresented the extent and scale of the issue. The connotation of hotspots is very reactionary as attention is focused on these small and narrow spaces. This completely forgoes longer term and more nuanced understandings of the source countries of migrants, their journey, motivations and their own life continuum. In effect, without a balance – or re-balance – of prevailing narratives and systemic values, such an approach is very troubling to the rules-based international order.

6. The EU-Turkey statement

Many of the issues described above came to a head around the EU-Turkey 'deal' arranged in the Spring of 2016.[65] It is fair to say that the deal largely reflects the security narrative rather than the rights-based narrative. Aimed at stemming arrivals of mostly Syrian asylum seekers and migrants from Turkey to Europe, the deal focused on those 'not in need of international protection' and sought to offer 'migrants an alternative to putting their lives at risk'.[66] A key feature of the deal was the arrangement that for 'every Syrian returned to Turkey, another Syrian will be resettled directly from Turkey to Europe', with a cap of 72,000. The resettlement of Syrians in Europe was conditional on effective returns to Turkey and an end to new arrivals in Greece.

However, there are notable phrases absent from the EU-Turkey Statement, which makes no direct reference to 'human rights' or 'values'. References to 'protection' are exclusively focused on those *not* in need of international protection. Subsequently, the deal was extended with a rather brief 'joint action plan' elaborating further actions to be taken. The deal, and the plan, both claim, rather tersely, that 'all migrants will be protected in accordance with the relevant international standards and in respect of the principle of *non-refoulement*'.[67] Yet, neither statement elaborates on

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58 See generally, Amnesty International, 'Fenced Out: Hungary's Violations of the Rights of Refugees and Migrants' (October 2015). Also see Report of the Fact-Finding Mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on Migration and Refugees, to Bulgaria, 13–17 November 2017, SG/Inf(2018)18 (19 April 2018), p. 15, which noted that the authorities have made considerable efforts to adapt old schools and military buildings into accommodation for asylum seekers.

59 For instance, the Bulgarian Border Guards have a command structure based on the military, with a former military commander in charge.

60 See European Commission, COM(2015) 671 final (15 December 2015).

61 Council Regulation (EC) No 2007/2004 (26 October 2004), which established the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, stated that it '… aims at an integrated management ensuring a uniform and high level of control and surveillance…' (para. 1); also see Frontex: Mission and Tasks.

62 Radko Hokovsky, 'How Migrants Brought Central Europe Together', *Politico* (2 July 2016)

63 Jennifer Rankin, 'Austrian Troops to Stop Migrants Crossing Border with Italy', *The Guardian* (4 July 2017); also see Saim Saeed, 'Hungary's Border Fence is Finished, says Orban', *Politico* (4 April 2017).

64 European Council on Refugees and Exiles (ECRE), *The Implementation of the Hotspots in Italy and Greece: A Study* (5 December 2016), pp. 10–13, noted that, in Italy, for example, '[t]here is no dedicated legal framework on hotspots procedures and practices and conditions are governed by asylum legislation and the Constitution. Non-legislative documents, like the Italian Roadmap and the Standard Operating Procedures (SOP) define certain practices and responsibilities.' Also see Médecins Sans Frontières (MSF), 'A Dramatic Deterioration for Asylum Seekers on Lesbos' (July 2017).

65 European Commission, 'EU-Turkey Statement' (16 March 2016).

66 Ibid.

67 Ibid. Also see Joint Action Plan on the Implementation of the EU-Turkey Statement, available at https://ec.europa.eu/commission/sites/beta-

this point in a meaningful manner and provides little concrete detail on the implementation of these rights. From these texts, it is hard to see the deal's arrangement as fully conforming with the rules of international migration law in principle or in practice.[68]

The paradox of the EU-Turkey deal and its relation to the tension between the two competing discourses described in this paper is perhaps best described by Elizabeth Collett of the Migration Policy Institute when she said,

> [t]he deal has also unveiled a paradox for a EU that has spent several decades preaching its own high asylum standards to neighboring countries. To achieve its self-imposed goal – a significant reduction in arrivals and an increase in returns to Turkey – policymakers will have to drastically cut legal corners, potentially violating EU law on issues such as detention and the right to appeal. But if governments execute the agreement in conformity with international and European legal frameworks, few arrivals are likely to be returned, and the agreement risks becoming the latest in a long series of undelivered promises to exasperated publics for whom the complex legal conundrums of implementation are both meaningless and irrelevant.[69]

It is worth briefly revisiting the rules that the EU has legislated as underpinning the EU-Turkey deal. EU law allows returns under two circumstances. First, individuals who do not apply or qualify for asylum are considered 'irregular migrants' and are eligible to be returned to Turkey.[70] Second, individuals who submit asylum claims but are determined to have arrived from a 'safe third country' where they could have claimed protection are also considered inadmissible to the European Union and are thus eligible for return.[71] Under the deal, Turkey is designated a 'safe country', a questionable assessment in itself, though few have been returned formally on this basis.[72] Regardless, several refugees and asylum seekers have been returned to Turkey, with the EU Commission and national authorities claiming one reason and UNHCR and NGOs claiming another, with the UN later referring to the post-EU-Turkey chaos as a potential explanation for the errors.[73]

However, although the deal has achieved some of its aim of lowering the flow and number of migrants to the EU,[74] it has come under harsh criticism from organisations for its negative effect on human rights.[75] Amnesty International, among many others, has recorded a number of instances where human rights have not been observed, particularly in relation to arbitrary detention practices in Greece, inhuman and degrading conditions in certain refugee camps and violations of the principle and rules relating to *non-refoulement* under the 1951 Geneva Refugee Convention, among many others.[76] Furthermore, Médecins Sans Frontières (MSF) has stated that the 'EU-Turkey deal follows the logic of treating people as if they were commodities, with disastrous consequences for the people affected' by the 'erosion of essential procedural safeguards and fundamental human rights'.[77] MSF further warns that the logical result of this is that the few 'safeguards that currently exist, such as exemptions for vulnerable people and possibilities to appeal asylum decisions, are likely to be scrapped altogether'.[78]

As to the future of the deal, Turkey has repeatedly threatened to tear it up, which could result in a more forceful response from European authorities. At time of writing, EU-Turkey relations are weakening. The collapse of the deal – and the humanitarian assistance packages that accompany it – could see the emergence of human rights violations on a much broader and more worrying scale than can currently be observed.

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political/files/december2016-action-plan-migration-crisis-management_en.pdf (accessed 1 October 2018).

68 Nils Muiznieks, Council of Europe Commissioner for Human Rights, 'Stop Your Backsliding, Europe', *The New York Times (Opinion)* (14 March 2016), noted that '[i]n exchange for concessions on visa requirements for Turks traveling to Europe, the European Union is asking Ankara to take back all migrants, including refugees from Syria, Iraq and Afghanistan, and others, who are currently crossing from Turkey into Greece by irregular means; the European Union proposes in turn to accept an equivalent number of Syrian refugees directly from Turkey. Some union officials are portraying this deal as a good solution to the crisis. In reality, the automatic forced return that the deal allows is illegal and will be ineffective. It is illegal because forced returns run contrary to the European Convention on Human Rights, which prohibits the collective expulsions of aliens. They also violate the right to seek asylum that was established in 1948 by the Universal Declaration on Human Rights, and contravene guarantees established by the 1951 United Nations Refugee Convention, which recognizes that seeking asylum can require refugees to breach immigration rules.' See, for instance, Greek Council for Refugees, Aitima, European Council on Refugees and Exiles, Solidarity Now, 'Re: Joint Action Plan on EU-Turkey Statement and Resumption of Dublin Transfers to Greece' (15 December 2016).

69 Elizabeth Collett, The Paradox of the EU-Turkey Refugee Deal, Migration Policy Institute (March 2016).

70 European Commission, 'EU-Turkey Statement' (16 March 2016).

71 Ibid.

72 European Council on Refugees and Exiles, Wrong Counts and Closing Doors: The Receptions of Refugees and Asylum Seekers in Europe, Asylum Information Database (2016), pp. 25–26. Also see Amnesty International, 'Greece: Court Decisions Pave Way for First Forcible Returns of Asylum Seekers under EU-Turkey Deal' (22 September 20170, which outlined a recent decision by Greece's highest administrative court to forcibly send two Syrian refugees to Turkey, declaring their asylum claims inadmissible and implying that Turkey was a 'safe country' for return.

73 See Amnesty International, 'The EU-Turkey Deal: Europe's Year of Shame' (20 March 2017).

74 European Commission, Seventh Report on the Progress Made in the Implementation of the EU-Turkey Statement, COM(2017) 470 final (6 September 2017), noted that 'irregular crossings from Turkey to the EU remain at a very low level and that almost 9,000 Syrian refugees have been resettled from Turkey to the EU'. Also see European Commission, 'EU-Turkey Statement: One Year On' (March 2016).

75 See Ashleigh Lovett, Claire Whelan, Renata Rendón, Joint Agency Briefing Note, 'The Reality of the EU-Turkey Statement' (17 March 2017).

76 Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' (2017), pp. 8–10, 18–19.

77 Médecins Sans Frontières (MSF), 'One Year on From the EU-Turkey Deal: Challenging the EU's Alternative Facts' (March 2017), pp. 5–7.

78 Ibid. p. 19.

7. Conclusions

At the crux of this paper lie questions about the narratives that underpin many of the recent developments that have shaped the implementation of the international migration law framework in Europe. The clash of the rights-based narrative and security-oriented narratives have been shown to have profound consequences on public and policy discourse. As such, finding feasible ways to make the competing narratives more consistent, more cohesive and more coherent is key to coordinating an improved response to issues relating to migration.

To bridge the gulf between these many competing narratives, it is important to try to focus primarily on cooperation so as to achieve a common understanding on certain points. For instance, at a fundamental level, there remains a perception gap between those who view migration as problematic in terms of security and those who view migration as a humanitarian matter. As such, a gap emerges between those who see the consequent rights as duties and obligations for the purposes of protection and assistance, and those who view such rights as ideals and aspirations that can, or indeed should, be sought only where security can be assured. Complicating matters further, there remain considerable inconsistencies in the normative framework to deal with temporal issues. This also leads to a situation where various actors have major difficulties in coordinating, planning and implementing policies in relation to action to be taken immediately as well as in the short and long term, especially in terms of protection. The failure to prepare for the long term has often resulted in undesirable downstream effects for all involved.

Though the rights-based discourse may be on the back foot, there are powerful, pragmatic and persuasive arguments for the presence of rights-oriented actors in the policy discourse process, particularly when it comes to the implementation and oversight of migration and refugee law on the ground. Among the many partnerships between state and non-state actors, there is space for the enhancement of formal and informal dialogue processes and other forms of advocacy. This will ensure that there is a common understanding of the prerogatives of security apparatuses as well as rights groups. This may entail recognition of and engagement with national or international considerations and concerns about security alongside a narrative that inspires rather than demonises migrants and refugees.[79] However, the limitations of certain institutional mandates may make such an approach not just undesirable, but also incompatible with core values and political prerogatives. Engaging on these issues should not in any way diminish or weaken human rights protections and the rule of law necessary in managing migration issues.

The international migration law framework is, between the various international, regional and national actors, a labyrinthine, byzantine system with an unclear division of duties, labour, tasks and responsibilities. High-level political discourse may be a key factor in leading the shift away from a rights-oriented discourse as humanitarian resources are 'outsourced' with the non-government sector taking over traditional nation-state migration and refugee protection; at the same time, state institutions are under pressure to shift towards providing oversight and maintaining the security and administrative framework. This is not just a problem for those working within the system, it is also a major concern for the migrants and refugees themselves, as they attempt to navigate such a complex and shifting behemoth. Addressing these failures appears to present an extraordinary political challenge. What is clear is that these competing approaches are leaving vulnerable populations underserved, as is the case with the EU-Turkey deal in relation to Syrians.

Taking steps to resolve the fundamental narrative conflicts at the policy discourse level would hopefully be a significant step towards improving the implementation of the rights of migrants on the ground. Despite the overwhelming pressures on national governments and international organisations, significant normative improvements are necessary in order to ensure sustainable progress in this regard. But without the political will necessary to shift the narrative dynamic, the risk is very real: if we do not address the chronic imbalances and inconsistencies at the heart of the system, the confusion and chaotic approaches that follow will continue to run the risk of relegating human rights even further down the list of national priorities. Without continued efforts to improve and enhance the structural harmony of the international migration and refugee system, the continued harm to vulnerable populations will be felt for generations.

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79 Report of the Special Rapporteur on the Human Rights of Migrants, Dr François Crépeau, UN GA DOC A/72/173 (19 July 2017), para. 19.

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