

## EDITORIAL

# Mobility in a European Post-Crisis Scenario: Law-Making Dynamics and Law-Enforcement Challenges

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Security and mobility have become a seemingly inseparable concept in the recent European geopolitical landscape. While the historically deeply rooted social, economic and legal aspects of migration have been extensively studied, the current emphasis on emergency in mobility management, which has been radically shaping the law-making and law-enforcement dynamics, has been rather underexplored. Taking stock of the challenges emerging in view of adjusting the law-making and enforcement set-up at the national and European levels to a context of emergency, this Special Issue pursues the ambitious goal of shedding light on the post-crisis controversial scenario of mobility in Europe, characterised by the political impasse over the reform of the overall European governance of migration. Based on a neoliberal conceptual framework, this multidisciplinary consideration of human mobility across European borders questions whether the crisis is really over or whether the sense of crisis is projected onto the future policy developments.

**Keywords:** mobility; securitisation; neoliberalism; legislation; enforcement

## 1. Setting the Scene: Human Mobility and the Latest Challenges in European Union Law and Policies

The issue of human mobility has been central to the history of European social, political, and economic integration since its inception.<sup>1</sup> Legal and political priorities like the free movement of persons, one of the four fundamental freedoms laid down in the founding Treaties,<sup>2</sup> illustrate the overriding importance of mobility issues in legislative developments at the European level.<sup>3</sup> However, as the political and media debates have been highlighting, increasing challenges regarding migratory movements inside and outside the European Union (EU) have created several transnational conflicts, social fringes and cultural incongruities on different levels.<sup>4</sup> Due to ever-evolving situations of crisis in the geographical periphery of the EU, the new inflows of third country nationals prompted a significant shift from an original paradigm of humanitarianism towards a neoliberal governance of mobility.<sup>5</sup> This shift is considered as the first step in the transition of European migration and asylum policies. Nonetheless, such a paradigm later evolved into a model of securitisation,<sup>6</sup> in which economic and political exclusion have been gradually justified by the perception of migrants as a threat to the unity and identity of European society.<sup>7</sup> Such a perception became especially visible in 2015,

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<sup>1</sup> Rinus Penninx, 'Regional Economic Integration and Migration: Lessons from the case of Europe' in Graziano Battistella (ed), *Global and Asian Perspectives on International Migration* (Springer, 2014) 183–195.

<sup>2</sup> See Treaty establishing the European Economic Community (Rome, 25 March 1957), Art 3.

<sup>3</sup> Alec Stone Sweet and Neil Fligstein, 'Institutionalizing the Treaty of Rome' in Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein (eds), *The Institutionalization of Europe* (Oxford University Press, 2001) 29–55.

<sup>4</sup> Christina Boswell and Andrew Geddes, *Migration and mobility in the European Union* (Macmillan International Higher Education, 2010).

<sup>5</sup> Violeta Moreno-Lax, 'The EU humanitarian border and the securitization of human rights: The "rescue-through-interdiction/rescue-without-protection" paradigm' (2018) 56 *Journal of Common Market Studies* 119–140.

<sup>6</sup> Jef Huysmans, 'The European Union and the securitization of migration' (2000) 38 *Journal of Common Market Studies* 751–777.

<sup>7</sup> Sarah Léonard and Christian Kaunert, *Refugees, Security and the European Union* (Routledge 2019) 14 ff.

when the majority of European generations, who are living in ‘the age of global information,<sup>8</sup> witnessed the greatest migration flow of their lives, labelled ‘the refugee crisis.’<sup>9</sup> The label ‘crisis’ was often justified by the scale of the influx of third country nationals who were strongly associated with national security issues, as well as with cultural, political, and economic threats.<sup>10</sup> According to the Eurobarometer, almost all the security challenges which the EU was facing put migration at the forefront of the concerns of Member States, regardless of how much it really affected their society.<sup>11</sup> A similar turnaround emerged in 2004 in Madrid after the terrorist attack and in 2008 following the European financial and economic crisis, when terrorism and then economic security became the number one security policy challenge.<sup>12</sup> Since the Covid-19 pandemic the same associations have been witnessed, triggering controversial lockdown measures and exclusionary border control policies against the suspected ‘dangerous outsiders.

Although in 2015 the peak in the number of asylum seekers and refugees was primarily the result of a destabilised geopolitical context in the Middle East,<sup>13</sup> the relatively long stability of migration flows was shaken up by the rapid influx of refugees, accelerating the development of common EU policies on migration and international protection. In addition, with the latest developments concerning the Eastern European Schengen borders, a sense of urgency has been raised at the law-making and enforcement levels in the EU. These developments also concern the continual migratory flows to Europe through the Balkan and Atlantic routes<sup>14</sup> as well as the recent crisis at the borders between Poland and Belarus, which contributed to fuelling the characterisation of migrants as a ‘hybrid threat with a state-sponsored instrumentalisation of people for political ends.’<sup>15</sup>

As traditional legislative frameworks were failing to adequately address the new mobility challenges, law-making at the EU and national levels gradually merged in a complex system of shared regulation and enforcement in which the EU administrative machinery often overlaps with the competence of the State authorities.<sup>16</sup> This has also caused a significant increase in the number of actors involved in the emerging governance of migration and asylum matters. These actors include EU agencies, such as the European Border and Coast Guard Agency, known as FRONTEX, or the European Asylum Support Office (EASO) recently replaced by the new EU Agency for Asylum,<sup>17</sup> with expanding operational and enforcement powers.<sup>18</sup>

The narrative of crisis has shaped the legislative and enforcement dynamics in the EU. Coupled with the new health emergency, caused by the spread of Covid-19,<sup>19</sup> and the increasing emphasis on cross-border human trafficking activities, the migratory pressure has been contributing to steering the governance of mobility and free movement in and to Europe under an emergency framework, with the reintroduction of intra-EU border checks and new mechanisms to control extra-EU border crossings.

Taking stock of these challenges to adjust the law-making and enforcement dynamics to a crisis setting, this Special Issue pursues the ambitious goal of shedding light on the post-crisis controversial scenario of mobility in Europe, also characterised by the political impasse over the effective reform of the overall

<sup>8</sup> Joseph S Nye Jr, *Power in the Global Information Age. From Realism to Globalization* (Routledge 2004).

<sup>9</sup> Huysmans (n 6).

<sup>10</sup> Foteini Asderaki and Eleftheria Markozani, ‘The Securitization of Migration and the 2015 Refugee Crisis: From Words to Actions’ in Aristotle Tziampiris and Foteini Asderaki (eds), *The New Eastern Mediterranean Transformed. Emerging Issues and New Actors* (Springer, 2021) 179–198.

<sup>11</sup> Timothy G Hammond, ‘The Mediterranean migration crisis’ (2015) 19 *Foreign Policy Journal* 1–12.

<sup>12</sup> Dionysios Stivas, ‘Securitisation of Migration at the EU level after Paris’ Attacks: The Response of the European Public’ (2019) 11 *Australian and New Zealand Journal of European Studies* 41–58.

<sup>13</sup> Bruno Nascimbene and Alessia Di Pascale, ‘The ‘Arab Spring’ and the Extraordinary Influx of People who Arrived in Italy from North Africa’ (2011) 13 *European Journal of Migration and Law* 341–360.

<sup>14</sup> See respectively Vladimir Karaj, Besar Likmeta and Bashkim Shala, ‘The Eagle’s Nest: Migrants, Refugees Tread New Balkan Route’ *Balkan Insight*, 2 December 2021, at <<https://balkaninsight.com/2021/12/02/the-eagles-nest-migrants-refugees-tread-new-balkan-route/>>; International Organization on Migration (IOM), ‘Alarming Loss of Life on Way to Canaries Worsens in 2021’ 24 September 2021 at <<https://www.iom.int/news/alarming-loss-life-way-canaries-worsens-2021>> accessed 17 January 2022.

<sup>15</sup> Statement by the President of the European Commission, Ursula von der Leyen, at the European Parliament, 23 November 2021, at <[https://ec.europa.eu/commission/presscorner/detail/en/AC\\_21\\_6254](https://ec.europa.eu/commission/presscorner/detail/en/AC_21_6254)> accessed 17 January 2022.

<sup>16</sup> See Lilian Tsourdi and Cathryn Costello, ‘The Evolution of EU Law on Refugees and Asylum’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd ed, Oxford University Press, 2021) 793.

<sup>17</sup> Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, [2021] OJ L468/1–54.

<sup>18</sup> David Fernández Rojo, *EU Migration Agencies: The Operation and Cooperation Of Frontex, EASO and Europol* (Edward Elgar, 2021).

<sup>19</sup> David Edward, Robert Lane, Leandro Mancano, ‘EU law in the time of COVID-19’ European Policy Centre’s Discussion Paper, 4 September 2020, at <<https://www.epc.eu/en/Publications/EU-law-in-the-time-of-COVID-19~367180>> accessed 17 January 2022.

European governance of migration.<sup>20</sup> This leads to the perpetuation of a situation of crisis and eventually questions whether we will ever be out of the ‘crisis.’

As the etymology of the word would suggest, a ‘crisis’ must be a turning point to regenerate the EU policies on migration. However, as stressed by the philosopher Wendy Brown, “post” indicates a very particular condition of afterness in which what is past is not left behind, but, on the contrary, relentlessly conditions, even dominates a present that nevertheless also breaks in some way with this past.<sup>21</sup> Moving from this assumption, this Special Issue offers a unique multidisciplinary examination of current mobility challenges that echo such a very near past and project their implications onto the future.

Before delving into the detailed analysis of these implications, it is crucial to reflect on the need to look for a common normative and theoretical frame that can encapsulate the law-making and law-enforcement dynamics, which will be discussed in greater detail in this Special Issue.

## 2. The Law and Politics of Post-Crisis Mobility: In Search of a Common Analytical Frame

The ‘post-crisis’ scenario in Europe has provided new types of arrangements aimed at re-organising migration governance, and a thriving academic debate has already considerably contributed to flagging up the limits of the existing and emerging legislative and enforcement regimes.<sup>22</sup> Despite the ‘fresh start’ sought by the European Commission, the New Pact on Migration and Asylum presented by the European Commission in September 2020<sup>23</sup> has been criticised by scholars<sup>24</sup> and civil society,<sup>25</sup> claiming that this political platform is anything but new and definitely unfit for an ambitious paradigm shift.

The migration crisis in 2015 was seen as a watershed from which experts expected that the influx of refugees would have forced more ambitious political agendas and justified new, progressive, transnationally harmonised inclusive mobility approaches.<sup>26</sup> However, the ongoing pandemic and the progressive rule of law backsliding<sup>27</sup> have led to the opposite outcome. National legislations were justifying more restrictive measures, often even criminalising migrants. Central and Eastern European Member States were weaponising the migration threat to feed nationalist and conservative political approaches,<sup>28</sup> while Western Member States have started to seek cooperation with third countries to externalise border controls.<sup>29</sup>

The narrative on the migration crisis has heavily contributed to the settling of a theoretical frame which, as claimed by Artur Gruszczak, is ‘reinforcing simultaneously the sense of parochial altruism and hostility towards “the other.”’<sup>30</sup> The post-crisis context has, in fact, marked a sense of insecurity and grievance among the citizens of the Member States who are demanding harsher EU initiatives in border management and

<sup>20</sup> See Salvatore F Nicolosi, ‘The Reform of the Common European Asylum System: Between Recast and New Regulation’ in RENFORCE Blog, 1 July 2020, at <<http://blog.renforce.eu/index.php/nl/author/salvo-nicolosi/>> accessed 17 January 2022.

<sup>21</sup> Wendy Brown, *Walled States, Waning Sovereignty* (Princeton University Press, 2010) 21.

<sup>22</sup> See e.g. Philippe de Bryucker, ‘The New Pact on Migration and Asylum: What it is not and what it could have been’ EU Immigration and Asylum Law and Policy Blog, 15 December 2020, at <<https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/>> accessed 17 January 2022; see also Sergio Carrera and Andrew Geddes, ‘The EU Pact on Migration and Asylum in light of the United Nations global compact on refugees: international experiences on containment and mobility and their impacts on trust and rights’ (European University Institute, Migration Policy Centre, 2021), at <<https://hdl.handle.net/1814/70600>> accessed 17 January 2021.

<sup>23</sup> European Commission, ‘On a New Pact on Migration and Asylum’ (Communication) COM(2020) 609, 23 September 2020.

<sup>24</sup> See amongst others, Daniel Thym, ‘European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the “New” Pact on Migration and Asylum’ EU Immigration and Asylum Law and Policy Blog, 28 September 2020, at <<https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/>> accessed 26 January 2022.

<sup>25</sup> European Council on Refugees and Exiles (ECRE), ‘Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded’ 6 October 2020 at <<https://ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/>> accessed 26 January 2022.

<sup>26</sup> See eg Agustín José Menéndez ‘The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration’ (2016) 22 *European Law Journal* 388, 416.

<sup>27</sup> For further references see Laurent Pech, Patryk Wachowiec and Dariusz Mazur, ‘Poland’s Rule of Law Breakdown: a Five-Year Assessment of EU’s (In)Action’ (2021) 13 *Hague Journal on the Rule of Law* 1.

<sup>28</sup> See Jean-Pierre Cassarino, ‘Beyond the criminalisation of migration: a non-western perspective’ (2018) 4 *International Journal of Migration and Border Studies* 397.

<sup>29</sup> See Anja Palm, ‘The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?’ EU Immigration and Asylum Law and Policy Blog, 2 October 2017, at <<https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>> accessed 26 January 2022.

<sup>30</sup> Artur Gruszczak, ‘“Refugees” as a Misnomer: The Parochial Politics and Official Discourse of the Visegrad Four’ (2021) 9 *Politics and Governance* 174.

mobility issues.<sup>31</sup> Accordingly, the phenomenon of migration has been mostly read in the light of the classic divide between European citizens, depicted as the beneficiaries of security, and third country nationals, who are perceived as a threat to security.

A closer but concise look at the legislative frameworks in EU migration law and policy discloses a normative continuum which over the years has progressively shifted from humanitarianism to securitisation.<sup>32</sup> Such a shift reached its peak with the migratory pressure of 2015. In this context, beyond the focus on emergency at the law-making level, migratory movements and refugees changed from constituting a complex political problem to being seen as a 'risk' for the security of the EU polity. This risk is mostly due to the difficulties for the legislative framework to effectively manage the phenomenon of mixed flows of migrants, with different motivations and different protection needs, who travel together along the same migration routes, using the same means of transport and relying on the same smuggling networks.<sup>33</sup>

As a consequence, the whole migratory phenomenon has been mostly dominated by the securitisation objective which is univocal, failing to take into account the multi-faceted nature that security, as a policy objective, might have. This level of analysis fails to take into due consideration the nature of the emerging post-crisis normative scenario on mobility in which the impact of the different crises, tragically illustrated by the situation of the island of Lesbos as discussed by Dina Siegel in this Special Issue, is reflected in the core EU fundamentals, such as free movement, as well as principles of good governance, including transparency. The resulting institutional design is characterised by a sense of provisional emergency affect European citizens as well as third country nationals. The recent pandemic has clearly emphasised this interconnection, which might be more adequately addressed by a neoliberal frame of analysis.<sup>34</sup> As will be discussed, this theoretical frame has been determining a fragmented law-making setup, of which the New Pact of Migration and Asylum is an example, as well as a trend towards the centralisation of law enforcement at the European level, to satisfy the need for security.

### **2.1. The Rise of a Neoliberal Approach to Mobility**

Neoliberal politics are increasingly used as a reference to justifications of exclusivist securitising policies, particularly in the area of migration control at the national level.<sup>35</sup> However, this neoliberal vision is also increasingly guiding the EU migration agenda.<sup>36</sup> Neoliberalism has replaced Keynesianism and its belief in a socially regulated form of capitalism as a dominant ideology in the EU. According to Nicolas Mulder, 'the real source of neoliberalism in Europe is neither technocracy nor hegemony but a problem specific to the continent: intergovernmentalism.'<sup>37</sup> This explains the interconnection between the national and the European dimension, where the latter has progressively become a hostage of the former. Europe's neoliberal transformation reached its apogee in the Lisbon Treaty, the preface of which defined the European Union as a 'social market economy.'<sup>38</sup> the original ordoliberal slogan developed in 1950s West Germany, in which the State's economic role was that of a referee, not a player.<sup>39</sup>

As has been stressed,<sup>40</sup> while criticism of neoliberal policies in the field of migration control is growing, the legislative frameworks are, conversely, increasingly integrating the neoliberal principles at EU and national levels. Consequently, new types of social, political and legal problems have emerged, such as the instrumentalisation of the notion of 'emergency' to create avenues for derogating from the ordinary legislation, as emphasised by Salvatore Nicolosi in this Special Issue, or to restoring intra-EU border controls, as the contribution by Saila Heinikoski and Tatu Hyttinen highlights in this Special Issue and, further, the

<sup>31</sup> Nicolò Conti, Danilo Di Mauro and Vincenzo Memoli, 'Immigration, security and the economy: who should bear the burden of global crises? Burden-sharing and citizens' support for EU integration in Italy' (2020) 12 Contemporary Italian Politics 77.

<sup>32</sup> Moreno-Lax (n 5).

<sup>33</sup> United Nations High Commissioner for Refugees (UNHCR), The 10-Point Action Plan in Action, 2016 – Glossary (December 2016), 282, at: <<https://www.refworld.org/docid/59e99eb94.html>> accessed 27 January 2022

<sup>34</sup> Daniel Jackson and Seth Jolly, 'A new divide? Assessing the transnational-nationalist dimension among political parties and the public across the EU' (2021) 22 European Union Politics 316–339.

<sup>35</sup> Veronika Nagy, *Crime Prevention, Migration Control and Surveillance Practices* (2018).

<sup>36</sup> Peo Hansen, 'More Barbwire or More Immigration, or Both – EU Migration Policy in the Nexus of Border Security Management and Neoliberal Economic Growth' (2010) 11 The Whitehead Journal of Diplomacy and International Relations, 89.

<sup>37</sup> Nicolas Mulder, 'The Origins of European Neoliberalism' (29 April 2019), at: <<https://www.nplusonemag.com/online-only/online-only/the-origins-of-european-neoliberalism/>> accessed 27 January 2022.

<sup>38</sup> Anna Gerbrandy, Willem Janssen and Lyndsey Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How "Social" is Public Economic Law?' (2019) 15 Utrecht Law Review 32.

<sup>39</sup> Norman Barry, 'The Social Market Economy' (1993) 10 Social Philosophy and Policy 1–25.

<sup>40</sup> Dina Siegel and Veronika Nagy, *Was there a refugee crisis in 2015? – Critical Voices on the Recent Migration Discourse* (Eleven, 2018).

fragmentation of legislative initiatives in areas including EU regular migration, or the centralisation of law enforcement at the EU level, that will be addressed in Section 2.2 below.

Eligibility for and access to services are no longer directly tied to nationality and citizenship rights but to constraints on economic or intellectual capital and employability.<sup>41</sup> Asylum claims, which are increasingly embedded within the suspicion of fraud, terrorist threats and financial opportunism, and difficulties in the exercise of rights for asylum seekers, owing to their particular situation of vulnerability and the precarious situation in which they are compelled to live at the Schengen borders, are a distinct feature of the emerging EU governance of migration. The dominant migration discourse is fuelled by toxic narratives on criminal outsiders,<sup>42</sup> justifying securitisation processes through the EU regulatory framework and externalisation of border control practices, such as the EU-Turkey deal of March 2016.<sup>43</sup>

While security narratives are used to justify extraordinary policing measures to target different groups of migrants, the concept of emergency has been overused in legislative processes and legitimises a culture of securitisation in border control. Though safety and security are created when trusted people and communities are empowered to care for and protect one another,<sup>44</sup> increased control mechanisms are introduced under the legitimacy of neoliberal approaches, referring to antiterrorism strategies and the social economic protection of EU citizens.

## **2.2. Neoliberal Objectives, Law-Making Fragmentation and Law-Enforcement Centralisation**

The progressive redefinition of social life in accordance with economic criteria and expectations, pursued by neoliberalism, had implications on mobility in a post-crisis context, in which the competition for gradually fewer resources has become predominant in Europe; this is also due to the crisis of supra-national social values and the revival of nationalism. The migratory pressure of 2015 has embodied this neoliberal shift, while highlighting the normative loopholes in the EU legislative framework as well as a poor level of implementation and compliance at the national level.<sup>45</sup> Three orders of structural problems arose as distinct features of EU migration law and policy. First, the system is not well-equipped to tackle emergency situations. On the contrary, it tends to perpetuate a situation of emergency because, as Advocate General Sharpston stated in her Opinion in *Cimade and GISTI*, 'the whole system of providing protection for asylum seekers and refugees is predicated on the burden lying where it falls'.<sup>46</sup> Second, the focus on harmonised minimum standards stopped a long way short of creating a level playing field.<sup>47</sup> Third, the system is inaccessible due to the lack of safe channels of arrival, as confirmed by Advocate General Mengozzi in his Opinion in the case of humanitarian visas in *X and X v. Belgium*.<sup>48</sup>

However, the flaws prevalent in EU migration governance are not to be seen as exclusively linked with mass influx of migrants and the diversity of their individual situations (mixed flows).<sup>49</sup> These flaws are also to

<sup>41</sup> Gareth Mulvey and Neil Davidson, 'Between the crises: Migration politics and the three periods of neoliberalism' (2019) 43 *Capital & Class* 271–292.

<sup>42</sup> Dimitris Skleparis, 'European governments' responses to the "refugee crisis": The interdependence of EU internal and external controls' (2017) 41 *Southeastern Europe* 276.

<sup>43</sup> EU-Turkey Statement, 18 March 2016, available at <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 27 January 2022.

<sup>44</sup> Jonathan Darling, 'Privatising Asylum: Neoliberalisation, Depoliticisation and the Governance of Forced Migration' (2016) 41 *Transactions of the Institute of British Geographers* 230–243.

<sup>45</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)', COM (2016) 270 final, 4.

<sup>46</sup> Case C-179/11, *CIMADE et Groupe d'information et de soutien des immigrés (GISTI)*, Opinion of Advocate General Sharpston, ECLI:EU:C:2012:298 para 83.

<sup>47</sup> Marteen den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 *Common Market Law Review* 607–642; Silas W Allard, 'Casualties of Disharmony: The Exclusion of Asylum Seekers Under the Auspices of the Common European Asylum System' (2010) 24 *Emory International Law Review* 295.

<sup>48</sup> Case C-638/16 PPU, *X and X v. Belgium*, Opinion of Advocate General Mengozzi, ECLI:EU:C:2017:93 para 175.

<sup>49</sup> Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Glossary on Migration* (2nd ed, International Organization for Migration, 2011) 63, define 'mixed flows' as: 'complex migratory population movements that include refugees, asylum-seekers, economic migrants and other migrants, as opposed to migratory population movements that consist entirely of one category of migrants'. For references see Paula García Andrade, 'Initiatives of EU Member States in Managing Mixed Flows in the Mediterranean and the EU Distribution of Competences', in Claudio Matera and Amanda Taylor (eds), *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies* (Asser Press, 2014) 51–63.

a large extent due to the institutional design and the rationale beyond the legislative frameworks adopted at the European level, which are directly connected with the management of the whole Schengen area.<sup>50</sup>

An EU migration policy constitutes a common good for the Schengen area which, as is known, was created to ensure free movement as an essential component of the internal market and hence to the benefit of European citizens. Because of the Schengen regime,<sup>51</sup> as stressed by Monika Weissensteiner in this Special Issue, border control has been replaced by the development of European police cooperation and the strengthening of EU external border monitoring. This confirms that Schengen is fully relevant for third country nationals and that a solid migration policy is necessary to ensure the effectiveness of the whole area. Nevertheless, the legislative dynamics and the attempts at reform are inherently influenced by those political trends essentially aiming at monitoring and managing the crossings at the Schengen borders.

A fragmented approach based on an overly detailed categorisation of migrants has recently become more visible. This is exemplified by the ‘hotspot approach’ and the most recent proposals accompanying the New Pact on Migration and Asylum, such as the Proposal on the Asylum Border Procedures and the Screening Regulation,<sup>52</sup> as well as in the lack of a common framework on regular migration, as will be extensively discussed by Paul Minderhoud in this Special Issue. At the law-enforcement level, this neoliberal approach has marked the need to progressively delegate to the EU the competence to secure external borders and to support the police and migration national authorities. This has been realised by boosting the mandate of EU agencies, such as the European Border and Coast Guard (FRONTEX). Because of a perennial situation of emergency, these EU migration agencies have been stretching their mandates and powers to the detriment of principles of good governance such as transparency, as a corollary of an efficient system based on the rule of law, as highlighted by Mariana Gkliati and Jane Kilpatrick in this Special Issue.

### 3. A Multidimensional and Multidisciplinary Exploration of Mobility in the Post-Crisis Context

As a complex human and social phenomenon, migration can be better explored by a mix of methodological approaches which offer enriching insights to broaden understanding of the phenomenon. This Special Issue aims to provide both a multidimensional and multidisciplinary exploration throughout the emerging landscape of mobility to and in Europe. From reflections on legislative frameworks to theoretical and historical reflections on human mobility, from law-enforcement issues on border control to new securitisation practices, the selected contributions combine analysis at the European and national levels with the perspectives of disciplines like law and criminology as well as political science and anthropology.

This disciplinary heterogeneity also has the advantage of breaking the scientific boundaries within which the academic debate is usually constrained and creating a choir of voices in which different disciplines echo each other. Besides vivid descriptions of first-hand empirical data, there are narratives, policy analysis, and legal commentaries, all included in one collection, which has the ambition to illustrate the frictions that the diversified nature of crisis has left within the emerging governance of mobility. The various contributions to the collection are not only taking stock of current research, but also emphasise the need for strong theoretical, philosophical, legal and ethical reflections to ensure a shift of paradigm in the new governance of EU migration and asylum policies.

In order to answer the multi-layered research question of how to address the post-crisis challenges to EU integration, this Special Issue puts forward the following research exploration. By setting a theoretical framework which goes beyond the predominant paradigm of securitisation to reflect on the rise of neoliberalism, the Special Issue dissects the univocal approach to the nexus of security-migration and triggers a critical examination of the various implications that neoliberalism has on the law-making and

<sup>50</sup> In this regard see in particular Bridget Carr, ‘Refugees without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone’ (2016) 38 *Michigan Journal of International Law* 137–160.

<sup>51</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen Agreement, 14 June 1985, and Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (Schengen Implementation Agreement), 19 June 1990.

<sup>52</sup> European Commission, Amended Proposal for Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final, 23 September 2020; Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final, 23 September 2020.

law-enforcement dynamics. The Greek island of Lesbos is chosen as a first exemplification of the post-crisis scenario, interpreted as a perpetuation of the implications of an emergency situation. In this connection, Dina Siegel gives a vivid critical reflection on the contemporary use of the terminology of 'crisis' and the potential harms coming with the instrumental use of borders. Based on her ethnographic fieldwork in Lesbos, the author illustrates the local dynamics of the so-called 'refugee crisis' and how the social, economic and political processes can be deconstructed into the co-presence of several types of crisis narratives. Her reflection indicates that the refugee crisis did not bring any changes due to the approach of the EU, which mainly focused on financing refugee camps as physical constructions at the EU borders. Therefore, the refugee and pandemic crises do not follow Burkhardt's conception of crisis as an historical transformation,<sup>53</sup> considering the crisis as an emergency, but it seems to be a permanent condition of emergency in the European framework.

Such a permanent condition of emergency has implications at the level of law-making and legislative reforms, as emphasised by Salvatore Nicolosi in connection with the use of emergency legislation in EU asylum law. While delving into different models of framing emergency in secondary EU legislation, the contribution argues that the concept of emergency is purposely left unclear and urges a principle-based approach to EU legislation to avoid the institutionalisation of exceptionalism, namely the adoption of measures with an emergency nature. According to the author, the current legal system is more likely to regularise the emergency than solve it.

Another implication of the neoliberal approach to migration governance in the post-crisis EU is the fragmentation of European legislation on regular migration. By stressing the impact of the crisis on the core value of free movement, Paul Minderhoud investigates the obstacles that the existing legislative framework and the security concerns may create for the enforcement of the rights of EU citizens and third country nationals. A detailed analysis of the existing EU framework on labour migration, with a refreshing criticism of the effectiveness of the 2020 New Pact, confirms the ineffectiveness of an approach to mobility based on the divide between citizens and foreigners. Also, while criticising the fragmented approach to the EU legislation on regular migration, Paul Minderhoud stresses the risk of incurring a labour crisis in the future due to the absence of a common approach to current labour migration regulation issues.

In order to take a step further from legislation towards law enforcement, Saila Heinikoski and Tatu Hyttinen offer a unique insider view on the practice at the borders between Sweden and Finland and the political debates on freedom of movement prior to and during the Covid-19 emergency. The authors reflect upon the lack of coordination between the EU and the Nordic Council on the issue of the limitations to freedom of movement and define how the so-called 'crisis' of the traditional understanding of the right to free movement of people has manifested itself over the years. The authors compare the limitations to free movement rights applied by the Nordic countries during the Covid-19 outbreak with the prevalence of utilitarian and neoliberal political models designed to justify restrictions.

If, at the national levels, the post-crisis landscape seems to be dominated by uncoordinated approaches between the Member States and the EU, at the supranational level one may be concerned about the consolidation of law-enforcement agencies, such as the European Border and Coast Guard Agency, FRONTEX, whose mandate has been significantly expanded over the years, as discussed by Mariana Gkliati and Jane Kilpatrick. Using a conceptual perspective of accountability and securitisation, the authors shed light on how the lack of transparency in FRONTEX Joint Operations has been determined by the situation of emergency and has continued to remain unaddressed due to a constant state of institutional emergency, feeding back into the perpetuation of the securitisation narrative. The authors, therefore, emphasise how rather than a migration crisis, the EU is experiencing an institutional crisis that is visible in the lack of adequate EU institutional responses to address human rights violations at the borders of the EU.

Finally, based on her extensive qualitative research, Monika Weisssteiner discusses the Schengen crisis by looking at the migration enforcement measures from a social science perspective. By drawing inspiration from anthropological scholarship, her contribution elaborates on the discussion of legal pluralism and shares an analysis of the relationship between temporality and law to understand how enforcement measures on border-patrolling have changed over time. By drawing attention to the placement of bilateral police cooperation and national prerogatives on internal security within the legal framework of the Area of Freedom, Security and Justice, Monika Weisssteiner highlights the limitations of the legislative toolbox for administrative fast-track readmissions and for border-area patrols with a focus on joint border-area policing.

<sup>53</sup> See in this regard, James R Martin, 'The Theory of Storms: Jacob Burckhardt and the Concept of 'Historical Crisis' (2010) 40 *Journal of European Studies* 307–327.

#### 4. Concluding Remarks: Prospects in Retrospect

By critically discussing the sense of crisis and its implications from a multidisciplinary perspective, the research analysis of mobility in the EU post-crisis scenario, proposed by this Special Issue, offers interesting considerations for tracing the contours of the emerging governance of mobility in and to Europe. This is worth focusing on in order to sketch possible reflections on how to correct this emerging migration machinery.

Aware that the migration crisis was not the wished-for turning point in the governance of migration in Europe, this Special Issue acknowledges the disastrous attack on core EU values and principles of equality, inclusion and the protection of human rights.<sup>54</sup> In the current post-crisis context, socio-political tensions increased the securitisation of mobility and the criminalisation of border crossing and introduced a new approach to the state of emergency to justify exclusionist legislative practices.<sup>55</sup> According to this process, restricting mobility is being seen as 'a moral and an economic imperative that is in line with 'global public interest,' defensive state responses to unwanted border crossing persist and are intensified as global crises continue to unfold.'<sup>56</sup> While supranational normative settings, such as the EU, operate with the human beings as the core concern, the nation-state system continues to prioritise a state's own citizens, as members of a closed community.

The need to go beyond such a divide is crucial for a paradigm shift and the 'fresh start' sought by the European Commission. This requires brave political decisions and considerate normative follow-ups, to avoid border control as part of migration management from becoming a tool for other geopolitical power games, including the abuse of migrants as an 'hybrid threat' against the EU. Three points have especially emerged from the exploration undertaken by this Special Issue to re-orientate the emerging governance of migration in Europe.

First, a coherent policy must be supported by a legislative framework that is able to go beyond the sense of emergency and consequent ad hoc and short-term legislative solutions, and design a future-proof system which takes into account in a balanced way both the protection needs of asylum seekers as well as the possibilities for third country nationals to immigrate to the EU for economic reasons.

Second, accountability and transparency issues have emerged along the lines of law enforcement practices at the national and European levels. It is crucial that the new machinery set up by the emerging shared administration incorporates the safeguards that the EU legal order has enshrined to preserve an effective rule of law. This requires transparent cooperation between EU agencies and national authorities as well as clear avenues for access to justice and remedies for migrants.<sup>57</sup>

Third, while criminal actions such as migrant smuggling and human trafficking must be strictly prosecuted, the spirit of solidarity, as a distinct feature of the European fabric, must be restored and converted into concrete legal obligations, avoiding the criminalisation of civil society's organizations and humanitarian agencies. National practices in this area have only created severe conditions of precarity at the borders of the EU and in transit countries.

To conclude, the need for deep insights into the harms of the emerging post-crisis governance of migration has never been more urgent.<sup>58</sup> Moving away from the citizen-migrant divide as well as from the neoliberal view that free movement is a precondition for EU citizens is key to preserve the spirit by which, in Tampere more than twenty years ago, the European Council stressed that 'freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all'.<sup>59</sup>

Rather than a post-crisis scenario, nowadays the EU experiences a condition of permanent crisis in the management of migration, which amplifies all the challenges that migratory flows bring with them, including security concerns. As the authors of these Special Issue demonstrate, resolving the contradictions inherent in the current approaches to migration in ways that leave behind toxic narratives of exclusion and crisis will require a fundamental paradigm shift.

<sup>54</sup> Daniel Stockemer, Arne Niemann, Doris Unger and Johanna Speyer, 'The "Refugee Crisis, Immigration Attitudes, and Euroscepticism' (2020) 54 *International Migration Review* 883–912.

<sup>55</sup> Elizabeth Kiely and Katharina Swirak. *The Criminalisation of Social Policy in Neoliberal Societies: Crime in Late Neoliberal Austerity* (Policy Press, 2021).

<sup>56</sup> Satvinder Juss, *International Migration and Global Justice* (Routledge, 2006). For broader discussions on this topic, see Leanne Weber and Claudia Tazreiter, *The Elgar Handbook on Migration and Global Justice* (Edward Elgar, 2021).

<sup>57</sup> Salvatore Nicolosi, 'Access to Justice and EU Enforcement Agencies in the Field of Migration: An Emerging Problem' RENFORCE Blog, 11 May 2021, at <<http://blog.renforce.eu/index.php/en/2021/05/11/access-to-justice-and-eu-enforcement-agencies-in-the-field-of-migration-an-emerging-problem-2/>> accessed 28 January 2022.

<sup>58</sup> Mimi Sheller, *Mobility justice: The Politics of Movement in an Age of Extremes* (Verso Books, 2018).

<sup>59</sup> European Council, Presidency Conclusions, Tampere European Council, 15–16 October 1999, available at <<https://www.refworld.org/docid/3ef2d2264.html>> accessed 28 January 2022.

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## Competing Interests

The authors have no competing interests to declare.

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