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**DEFINING DETENTION: THE INTERVENTION OF THE EUROPEAN COURT OF  
HUMAN RIGHTS IN THE DETENTION OF INVOLUNTARY MIGRANTS**

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# DEFINING DETENTION: THE INTERVENTION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE DETENTION OF INVOLUNTARY MIGRANTS

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## ABSTRACT

*This Article examines the European Court of Human Rights' intervention in the detention of involuntary migrants. It analyzes the use of "carceral migration control" in response to a migration "crisis," and argues that the actual crisis in the region is one of politics and policies rather than the magnitude of migration. It explores the consequences of a crisis moniker for migration, including shortsighted migration policies, entrenched caricatures of migrants as threatening, and excessive emphasis on punitive rather than humanitarian responses. Responding to migration as a crisis has led states in Europe and elsewhere to shift the movement of people across national borders from a human security issue—protecting people and providing assistance—to a national security issue.*

*This Article applies the migration crisis framework to analyze the European states' responses to the most recent rise in involuntary migration to the region. It examines the foundational principles of the*

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*European human rights system with respect to migrants. Because both the original text of the European Convention on Human Rights and the early judgments of the European Court of Human Rights strongly favored state sovereignty over migrants' rights, the Court's recent decisions on migrant detention in part have gone in a somewhat surprising direction.*

*An analysis of the European Court of Human Rights' post-crisis migrant detention judgments reveals that the Court held steadfast to the applicability of the Convention's prohibition of deprivation of liberty, namely that migrant detention is in fact detention. The case law also shows that the Court has not deviated from its relatively recent and more migrant-protective analysis of whether states' method of carceral migration control is lawful. Crisis discourse has, however, affected the Court's treatment of migrant detention claims in judgments regarding the conditions in which states have held involuntary migrants under the specter of migration crisis control. This overall picture illustrates the potential of the European system to extend human rights protections to migrants, but also the power of persistent, ubiquitous crisis discourse to forgive human rights violations.*

## TABLE OF CONTENTS

Introduction.....	179
I. Greater Migration, Greater Detention.....	184
A. An Age of Migration.....	184
B. Crisis Discourse .....	187
1. Migration Crises, Threatening Migrants .....	189
C. An Age of Detention.....	193
II. The EU Migration Response .....	195
A. The Modern EU Migration System.....	196
B. Recent Migration in Europe .....	199
1. An EU Migration System Under Duress.....	203
C. Normalizing Detention in Europe.....	206
III. The Treatment of Migrants by the European Convention on Human Rights and the European Court of Human Rights ...	209
A. Migrants and the European Human Rights System .....	209
1. “Except For:” When the European Convention on Human Rights Exempts, and When It Covers, Migrants .....	210
2. The Court: Light on Migrant Judgments, Heavy on Sovereignty .....	214
B. The European Court of Human Rights and Detention as a Means to Control Migration.....	216
1. Early Judgments on Migrant Detention .....	216
2. Recent Judgments on Detention: Capitulating to a Crisis?.....	220
Conclusion .....	226

## INTRODUCTION

This Article examines the intervention of the European Court of Human Rights in the detention of involuntary migrants.<sup>1</sup> It analyzes the construction of a migration “crisis” in Europe, and argues that the actual crisis is one of politics and policies rather than the movement of people. This characterization of crisis has normalized the use of carceral migration control, which in its broadest sense entails detention<sup>2</sup> as a punitive response to migration.<sup>3</sup> The Article reviews the jurisprudence of one of the region’s human rights protection mechanisms, the European Court of Human Rights, to unpack how the

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1. Compare E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT’L L. 333, 335 n.2 (discussing “involuntary migrants” to convey a movement of forced migration), with ALEXANDER BETTS, SURVIVAL MIGRATION: FAILED GOVERNANCE AND THE CRISIS OF DISPLACEMENT 4 (2013) (developing the concept of “survival migration” to “highlight the situation of people fleeing basic rights deprivations rather than just persecution”), and BAS SCHOTEL, ON THE RIGHTS OF EXCLUSION: LAW, ETHICS AND IMMIGRATION POLICY 1 (2012) (using the term “normal migrants” to describe “migrants who do not have a legal right to admission.”). When addressing migration and migrants, this article primarily contemplates the plight of involuntary migrants given that the forced nature of involuntary migration renders crisis discourse particularly suspect.

2. This trend has been well underway in the United States. Professor Juliet Stumpf coined the term “cimmigration law” to describe the transformation of immigration detention in the United States as a product of a blurring of immigration and criminal law. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). A former high-level American immigration official admitted that the government’s use of detention is disconnected from its administrative purpose and instead is in practice a punitive system. Anita Sinha, *Slavery by Another Name: “Voluntary” Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J.C.R. & C.L. 1, 12–13 (2015) (citing DORA SCHRIRO, IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/LSW3-RXLW>]).

3. This broad definition follows the Foucauldian concept of a “carceral archipelago,” which encompasses a state security regime of brick and mortar incarceration and also surveillance systems and their technologies. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 297 (Alan Sheridan trans., Pantheon Books 1977) (1975). A largely punitive approach not only marks a shift in migration control, but, as some have argued, in the meaning of punishment itself. See Mary Bosworth et al., *Punishment, Globalization and Migration Control: “Get Them the Hell Out of Here,”* 20 PUNISHMENT & SOC’Y 34, 39 (2018) (“Administrative practices such as detention and deportation not only are *experienced* as punishment by those subjected to them, but also are *intended* as such. In doing so, they change the role and social purpose of penalty.”) (emphasis in original) (citations omitted).

European human rights system has and is now defining migrant detention, and the extent to which detention is being tolerated.

Fleeing political upheaval in the Middle East, Africa, and South Asia, involuntary migrants are reshaping both migration trends and controls in Europe. Unauthorized border crossings in the European Union (“EU”)<sup>4</sup> began to spike in 2011 as thousands of Tunisians, fleeing the regime change following the rise of the Arab Spring, landed on the shores of the Italian island of Lampedusa.<sup>5</sup> Additionally, after the overthrow of Libyan leader Muammar Qaddafi in 2011, many sub-Saharan Africans sought refuge in Europe as they were no longer encumbered by Libya’s preventive migration policies and could finally cross the Mediterranean.<sup>6</sup> Migration to Europe peaked in 2015,<sup>7</sup> largely due to the conflict in Syria.<sup>8</sup>

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4. The EU, created after the end of World War II, was founded as an economic and political project initially comprised of six countries—Belgium, Germany, France, Italy, Luxembourg, and the Netherlands—called the European Economic Community, which changed its name to the European Union in 1993. See *The History of The European Union*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/history\\_en](https://europa.eu/european-union/about-eu/history_en) [<https://perma.cc/XGM5-X247>]. Today, the EU consists of 28 member states, constituting approximately over five hundred million people. See R. Daniel Kelemen, *The Impact of the Court of Justice on the European Law Enforcement Architecture*, in *THE TRANSFORMATION OF ENFORCEMENT: EUROPEAN ECONOMIC LAW IN A GLOBAL PERSPECTIVE* 166 (Hans-W Micklitz & Andrea Wechsler eds., 2016); see generally Oliver Patel & Alan Renwick, *Brexit: The Consequences For Other EU Member States*, UCL CONST. UNIT (June 15, 2016), <http://www.ucl.ac.uk/constitution-unit/research/europe/briefing-papers/Briefing-paper-4> [<https://perma.cc/2GCH-UYRK>] (detailing the impact of Britain leaving the EU).

5. Jeanne Park, *Europe’s Migration Crisis*, COUNCIL ON FOREIGN REL. (2015), <https://www.cfr.org/background/europes-migration-crisis> [<https://perma.cc/G4WL-U9KR>].

6. *Id.*; see also Guna El-Gamaty, *Italy and France are playing a dangerous game in Libya*, AL JAZEERA (Aug. 21, 2017), <https://www.aljazeera.com/indepth/opinion/2017/08/italy-france-playing-dangerous-game-libya-170815105230759.html> [<https://perma.cc/28WH-RTLW>]; Amanda Sakuma, *Damned for Trying*, MSNBC, <http://www.msnbc.com/specials/migrant-crisis/libya> [<https://perma.cc/ZW99-RDQ3>].

7. *Migration to Europe in charts*, BBC NEWS (Sept. 11, 2018), <https://www.bbc.com/news/world-europe-44660699> [<https://perma.cc/B2KR-49TX>].

8. See Park, *supra* note 5 (describing the origins of the migrants to Europe in 2015 and explaining that thirty-nine percent came from Syria, constituting the largest group); see also *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), <https://www.bbc.com/news/world-europe-34131911> [<https://perma.cc/4JH4-MAFX>] (reporting that, in 2015, there were 1,321,560 asylum claims within Europe).

The language describing the current trend of European migration is one of crisis, and the response in many states has been rooted in nationalism and anti-immigrant sentiments.<sup>9</sup> In turn, states are criminalizing involuntary migrants—many of whom are fleeing extreme violence and are seeking asylum—in the name of migration control. Consequently, state policies, priorities, and (in)action are animated by the “securitization” of migration.<sup>10</sup>

A key element to a securitized migration policy is carceral migration control, including detention. During the most recent heightened migration flow to the EU, some states have attempted to cover up carceral responses in a cloak of crisis by denying the practice is even detention at all. Hungary, for example, has claimed that the punitive, fenced-in facilities in which it is holding migrants are not detention facilities, but rather “transit zones” that migrants have the freedom to leave for neighboring Serbia.<sup>11</sup> In Italy, the trope of crisis has been evoked to promote mass deportations.<sup>12</sup> More recently, German Chancellor Angela Merkel, who previously was the voice of accommodating involuntary migrants, agreed under political pressure to build “border camps” for asylum seekers.<sup>13</sup> The example in Germany

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9. See *infra* text accompanying notes 113–116.

10. In this context, the term “securitization” refers to responding to migration as a national security issue. See Jef Huysmans, *The European Union and the Securitization of Migration*, 38 J. COMMON MKT. STUD. 751, 758, 762 (Dec. 2000) (arguing that the securitization of migration in the EU developed through themes including internal security and “cultural security”). There is even a sub-topic in International Relations called “critical security studies.” See Christopher S. Browning & Matt McDonald, *The Future of Critical Security Studies: Ethics and the Politics of Security*, 19 EUR. J. INT’L REL. 235, 236 (2011) (discussing one of the central themes of critical security studies as “the recognition that security is socially constructed and politically powerful.”).

11. COUNCIL OF EUROPE, REPORT TO THE HUNGARIAN GOVERNMENT ON THE VISIT TO HUNGARY CARRIED OUT BY THE EUROPE COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 23 (2018), <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/Hungary-CPT-report-Sept-18.pdf> [<https://perma.cc/74EU-8NYZ>].

12. See Alex Green, *Former Italian PM Berlusconi Calls Immigration a ‘Social Bomb Ready to Explode in Italy’ as he Pledges to Deport 600,000 Illegal Migrants if he’s Re-elected*, DAILY MAIL, (Feb. 5, 2018), <http://www.dailymail.co.uk/news/article-5353441/Berlusconi-deport-600K-illegal-migrants-elected.html> [<https://perma.cc/74EU-8NYZ>].

13. See Katrin Bennhold & Melissa Eddy, *Merkel, to Survive, Agrees to Border Camps for Migrants*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/world/europe/angela-merkel-migration-coalition.html> [<https://perma.cc/-3KWB-U2L9>] (on file with Columbia Human Rights Law Review).

is indicative of how European states continue to resort to punitive migration control measures in the face of a “crisis,” despite the fact that actual migration into the region has declined.<sup>14</sup>

Using crisis to curtail rights, in particular the rights of migrants, of course is not new. The aftermath of the terrorist attacks of September 11, 2001 is a stark example of crisis discourse in the United States, as well as states in Europe, making largely acceptable exceptional measures to monitor and vet those widely defined as “others.”<sup>15</sup> Worldwide, this compulsion to treat individuals as “others” is reinforced and enhanced in the wake of events labeled as terrorist attacks.<sup>16</sup> This Article examines the making of a potentially manufactured, or at least avoidable, crisis. It surveys the use of crisis discourse in Europe, particularly in justifying heightened detention

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14. The numbers of people risking the journey across the Mediterranean Sea peaked in 2015 and have fallen sharply in each subsequent year. See Migration to Europe in charts *supra* note 7. According to Human Rights Watch, “[j]ust over 172,300 people reached Europe by sea in 2017, less than half those in 2016.” *Europe’s Migration Crisis*, HUMAN RIGHTS WATCH, <https://www.hrw.org/tag/europes-migration-crisis> [<https://perma.cc/M8US-2WBA>]. The statistics provided by the International Organization for Migration for the first half of 2018 show that 46,449 migrants and refugees entered Europe by sea. See Tom Miles, *U.N. View on the European Migrant Crisis? There Isn’t One*, REUTERS (July 6, 2018), <https://www.reuters.com/article/us-europe-migrants-un/u-n-view-on-the-european-migrant-crisis-there-isnt-one-idUSKBN1JW1Z5> [<https://perma.cc/5ZNQ-LAN2>].

15. See, e.g., Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, HUM. RTS., Winter 2011, at 10 (“The responses by the [U.S.] federal government to 9/11 have led to an unprecedented increase in detentions and deportations and unease and confusion within immigrant communities.”); Muzaffar Chishti & Claire Bergeron, *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape*, MIGRATION POLICY INST. (Sept. 8, 2011), <https://www.migrationpolicy.org/article/post-911-policies-dramatic-ally-alter-us-immigration-landscape> [<https://perma.cc/VV9A-ZL2X>] (stating that since 9/11, immigration has been seen in the U.S. “through the lens of national security . . . giv[ing] rise to major new border security and law enforcement initiatives, heightened visa controls and screening of international travelers and would-be immigrants.”). In the European context, the region’s predominant post-9/11 response has been in the form of “soft” security measures, including the creation of the European Dactyloscopy (Eurodac) in 2003. Michael Levi & David S. Wall, *Technologies, Security, and Privacy in the Post-9/11 European Information Society*, 31 J. L. & SOC’Y 194, 199–202 (2004) (describing Eurodac as “a Europe-wide fingerprint identification system to track asylum seekers and illegal immigrants in [the then-] fourteen EU member states.”).

16. See John A. Powell & Stephen Menendian, *The Problem of Othering: Towards Inclusiveness and Belonging*, OTHERING & BELONGING, Summer 2016, at 16–17 (describing the phenomenon of “othering” following terrorist attacks).

practices, while acknowledging similarities as to the impact of crisis language on current migration policies in the United States.<sup>17</sup>

Part I examines modern-day migration trends, and how government responses globally have tended toward securitization, with migrant detention as a central feature. It will describe how this shifts the framework of migration to crisis, which in turn shifts the movement of people across national borders from a human security issue—protecting people and providing assistance—to a national security issue.<sup>18</sup> The discussion turns to the justification used by states to treat migration as a security issue, namely what Professor Jaya Ramji-Nogales calls “migration emergencies.”<sup>19</sup> It questions the authenticity of characterizing the European migration flow as unforeseen, and thus as requiring punitive and in some cases extraordinary responses.

In Part II, the Article turns to an interrogation of how the European Union was slow to, and in some cases failed to, adopt policies in line with the concept of responsibility sharing to manage the heightened migration into the region. This analysis will include a brief discussion of the Dublin Regulation, an EU system that “denies refugees the right to choose the country in which they will seek asylum,”<sup>20</sup> as an example of an EU policy choice that helped create the crisis.

Part III starts with an examination of the original treatment of migrants’ rights in the European Convention on Human Rights, and judgments issued by the European Court of Human Rights (“Court”) on migrant detention. It then analyzes key Court judgments

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17. See Christopher Ingraham, *There Is No Immigration Crisis, and These Charts Prove It*, WASH. POST (June 21, 2018) [https://www.washingtonpost.com/news/wonk/wp/2018/06/21/theres-no-immigration-crisis-and-these-charts-prove-it/?utm\\_term=.f2331da8e39b](https://www.washingtonpost.com/news/wonk/wp/2018/06/21/theres-no-immigration-crisis-and-these-charts-prove-it/?utm_term=.f2331da8e39b) (on file with the Columbia Human Rights Law Review) (highlighting data and research to dispel erroneous beliefs about immigration in the United States). The Trump Administration has reportedly said that a terrorist attack on U.S. soil could be politically beneficial. See Eric Levitz, *The President Seems to Think a Second 9/11 Would Have Its Upsides*, N.Y. MAG. (Jan. 30, 2018), <http://nymag.com/daily/intelligencer/2018/01/the-president-thinks-a-second-9-11-would-have-its-upside.html> [<https://perma.cc/RD7D-247U>].

18. See Park, *supra* note 5.

19. Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 609–11 (2017) (presenting the media’s “migration emergencies” as a “legal construction of crisis”).

20. James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT’L L.J. 719, 731 (1993).

concerning migrant detention during the latest wave of involuntary migration into the region. In doing so, the Article addresses the novel questions of whether and how the European human rights system's, namely the Court's, treatment of migrant detention exemplifies or supersedes limits on extending international human rights protections to migrants, particularly in the context of crisis.

## I. GREATER MIGRATION, GREATER DETENTION

### A. An Age of Migration

In his book *Exodus*, economist Paul Collier explores the reasons underlying the rise in migration worldwide, placing the phenomenon in the following historical context:

For a half century following the outbreak of the First World War countries closed their borders. Wars and the Depression made migration practically difficult and immigrants unwelcome. By the 1960s people overwhelmingly lived in the country in which they had been born. But during that half-century of immobility, there had been a dramatic change in the global economy; a gulf had opened up between the incomes of countries.<sup>21</sup>

Collier explains the effect of this gulf on both countries sending migrants and countries receiving migrants: the prosperous countries needed workers, and citizens of poor countries needed work.<sup>22</sup>

The resulting global migration is significant. In the last half-century, the number of people crossing borders in search of new, temporary, or permanent places to live went up almost 200 percent.<sup>23</sup> In 1960, approximately seventy-two million people resided in a country that was not their place of birth; by 2010, this population grew to 213 million.<sup>24</sup> From an economic standpoint, the push factor to migrate is

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21. PAUL COLLIER, *EXODUS: HOW MIGRATION IS CHANGING OUR WORLD* 27 (2015).

22. *Id.* at 37.

23. TOM K. WONG, *RIGHTS, DEPORTATION, AND DETENTION IN THE AGE OF IMMIGRATION CONTROL* 1 (2015) (citing data from the World Bank).

24. *Id.* at 1–2. Professor Wong goes on to point out: “While international migration to high-income, Western countries has generally accounted for much of

not dissipating, but is, instead, growing: “for several decades the income gap will be wide enough to constitute a strong incentive to migration, and one that is actually increasing.”<sup>25</sup>

This “age of migration”<sup>26</sup> is, as political science professor Tom Wong articulates, part of the “dual reality that this is also an unrelenting age of immigration control.”<sup>27</sup> Professor Wong defines immigration control as “the policies and practices used to deter unwanted immigration, meaning immigration that is occurring despite and against the intentions of states.”<sup>28</sup> Policies and practices of carceral migration control are critical to this trend.

In Europe, the United States, and elsewhere, the frame of migration control has shifted the movement of people from a human security concern to a national security concern.<sup>29</sup> The United States’ responses to the arrival of the “migrant caravan” of Central Americans represent such a shift, with the deployment of 5,600 American troops to the southwest border,<sup>30</sup> and the use of tear gas on migrants at the

the increase in the world’s migrant population, these countries are not alone in experiencing large-scale international migration.” *Id.* at 2. Wong points to several Middle Eastern countries as examples: in Jordan, 50% of the population is foreign-born; in Qatar and Kuwait, approximately 75% of the population are migrants. *Id.*

25. COLLIER, *supra* note 21, at 40. Collier also discusses the role of the diaspora in migration in what he calls the three “building blocks” of the dynamics of migration: “The first block is that migration depends upon the size of the diaspora . . . . The second is that migration adds to the diaspora, whereas absorption into mainstream society reduces it. The third is that the rate of absorption depends upon the size of the diaspora . . . .” *Id.* at 43.

26. WONG, *supra* note 23, at 3 (citing STEPHEN CASTLES, HEIN DE HAAS & MARK J. MILLER, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* (5th ed. 2013)).

27. *Id.* Professor Wong describes this age of immigration control as “the expansion of the immigration-industrial complex—which includes multilateral deportation regimes, public-private partnerships between states and publicly traded prison firms, increasingly dense networks of immigration detention sites and asylum processing centers, external border controls, and interior immigration enforcement . . . .” *Id.* at 2.

28. *Id.* at 9.

29. See Park, *supra* note 5 (quoting Brookings Institution’s Senior Fellow Khalid Koser: “We used to think of migration as a human security issue: protecting people and providing assistance. . . . Now we clearly perceive—or misperceive—migration as a national security issue. And the risk of securitizing migration is that you risk legitimizing extraordinary responses.”).

30. Thomas Gibbons-Neff & Helene Cooper, *Deployed Inside the United States: The Military Waits for the Migrant Caravan*, N.Y. TIMES (Nov. 10, 2018), <https://www.nytimes.com/2018/11/10/us/deployed-inside-the-united-states-the->

San Diego-Tijuana border crossing.<sup>31</sup> These are stark examples of how the imperative to protect people seeking refuge is supplanted by the priority to protect the nation state from a perceived threat. Principles governing the admission of foreign nationals into a state historically have implicated state sovereignty.<sup>32</sup> The balance today globally tilts heavily toward state sovereignty concerns, and the resulting emphasis on security comes at the cost of protecting vulnerable individuals fleeing their home countries involuntarily, including due to human rights abuses. This is not the only way the global community can respond, or has responded, to mass migration.

In a succinct reflection challenging the characterization of recent migration flows as a crisis,<sup>33</sup> former U.N. Deputy High Commissioner for Refugees and law professor Alexander Aleinikoff offered examples of how the United States has accommodated major refugee movements in the past. Professor Aleinikoff cites examples after World War II, Southeast Asian refugees fleeing conflicts in the 1970s and 1980s, tens of thousands of Bosnians displaced by the Balkan War in the 1990s, and one million Cubans escaping an authoritarian government over half a dozen decades.<sup>34</sup> European states, similarly, have responded to periods of mass migration on

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military-waits-for-the-migrant-caravan.html (on file with the Columbia Human Rights Law Review).

31. Colleen Long & Elliot Spagat, *Trump Strongly Defends Use of Tear Gas on Caravan Migrants*, ASSOCIATED PRESS (Nov. 26, 2018), <https://www.apnews.com/b084172b06b64badbde4d0061a1edbc> [<https://perma.cc/UPS9-YT4Q>].

32. See Ramji-Nogales, *supra* note 19, at 625 (quoting Professor Catherine Dauvergne to characterize migration law as the “last bastion of sovereignty.”); WONG, *supra* note 23, at 1 (characterizing migration as an issue that encompasses “how the movement of people across borders collides with the foundational principles of national security, sovereignty, and citizenship . . .”).

33. T. Alexander Aleinikoff, *Reflections on the Worldwide Refugee “Crisis,”* 21 *UCLA J. INT’L L. & FOREIGN AFF.* 1, 9 (2017) (“If there is a ‘crisis,’ it’s not a crisis in our broken borders, or rich countries that are at risk. I think it is a crisis of faith, a crisis of morality.”). This Article similarly argues that the European migration “crisis” is not one of numbers but of the EU migration system. See *infra* Part II.B.

34. *Id.* at 2–3. Professor Aleinikoff characterizes the United States’ response to the Vietnamese boat flow of the 1980s via the Comprehensive Plan of Action (“CPA”) as among the most significant examples of international responsibility sharing. *Id.* at 6–7.

multiple occasions since the Second World War,<sup>35</sup> and their responses were often more accommodating than defensive.<sup>36</sup>

Overwhelmingly, however, state responses to present-day migration patterns fall more in line with that of an age of immigration control. In fact, as Wong points out, “in some countries, more people have been apprehended, detained, and deported in the modern era of migration than have actually immigrated.”<sup>37</sup> Today’s persistent characterization of the movement of people across borders as unpredictable crises justifies, often to the extent of necessitating, a securitization response to migration.

## B. Crisis Discourse

The word “crisis” had a particular meaning in Ancient Greek law: “[D]erived from the Greek verb *kríno*, [its] meanings include to decide, to quarrel, to judge . . . . In law, it meant arriving at a verdict or judgment . . . [indicating] that ‘crisis’ was a central concept by which justice and the political order . . . could be harmonised through appropriate legal decisions.”<sup>38</sup> This conceived-of role for crisis as interweaving justice and political order presupposes the question: justice and order for whom? In a related question, is the harmonization geared at maintaining the status quo or adjusting political and legal

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35. See Simas Grigonis, *EU in the Face of Migrant Crisis: Reasons for Ineffective Human Rights Protection*, 2 INT’L COMP. JURIS. 93, 93 (2016) (referring to the mass migration of 60 million refugees during and after WWII, the fall of the Soviet Union causing 700,000 asylum seekers, and more recently, 2.6 million Ukrainians fleeing the war started by Russia- supported separatists).

36. See James Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 3 MICH. J. INT’L L. 3, 5–7 (1982) (describing the assistance and resettlement efforts by temporary United Nations agency, the International Refugee Organization (IRO) in operation from 1946-1952, and the support the IRO received from the United States and European nations).

37. WONG, *supra* note 23, at 11 (using the United States as an example: “[W]hereas nearly 40 million people were admitted into the United States from 1927 to 2010, some 52 million were deported or returned.”).

38. Benjamin Authers & Hilary Charlesworth, *The Crisis and the Quotidian in International Human Rights Law*, in *CRISIS AND INTERNATIONAL LAW: DECOY OR CATALYST?*, 44 NETH. Y.B. INT’L L. 21 (Mielle K. Bulterman & Willem J.M. van Genugten eds., 2013). See also Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 764–65 (2018) (discussing dictionary and other ancient language definitions of crisis).

systems to account for changes percolating due to the crisis event? The discussion that follows will weigh in on these questions.

The key to crisis discourse is how it shapes a state's response. The characterization of crisis can create an urgency to act, serving as a "catalyst."<sup>39</sup> In fact, much of international human rights law has been enacted in response to crises, primarily in response to past atrocities or in the aftermath of wars.<sup>40</sup> Calling a phenomenon a crisis can also deflect change, serving instead as a "decoy."<sup>41</sup> For example, the arrival of hundreds of Fujianese migrants to Canada in 1999 was characterized by crisis discourse, when in fact the backlash to their migration stemmed from the socio-economic success of people of Chinese descent and the way this was perceived to be altering Canada's identity.<sup>42</sup> The U.S. government's response in post-Hurricane Katrina New Orleans provides several examples of how the cover of a crisis can render acceptable the failure to act adequately.<sup>43</sup> Crisis discourse could also create the opportunity for policymakers to ignore long-term solutions, which tend also to be rights-based solutions, and instead opt for ad hoc responses.<sup>44</sup>

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39. Authers & Charlesworth, *supra* note 38, at 22.

40. Dianne Otto, *Remapping Crisis Through a Feminist Lens*, in FEMINIST PERSPECTIVES ON CONTEMPORARY INTERNATIONAL LAW: BETWEEN RESISTANCE AND COMPLIANCE? 81–82 (Sari Kouvo & Zoe Pearson, eds., 2011); Authers & Charlesworth, *supra* note 38, at 25 (providing the Charter of the United Nations and the Universal Declaration of Human Rights as examples of reactionary human rights law). Other international human rights instruments utilize the language of crisis, albeit in the context of scale of harm. *Id.* at 27–28 (providing as examples the Preamble to the Rome Statute of the International Criminal Court (Rome Statute), the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), and the Declaration on the Rights of Indigenous Peoples, in contrast to the "more bland and bureaucratic than crisis-driven flavour" of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR")).

41. Authers & Charlesworth, *supra* note 38, at 22.

42. Sean P. Hier & Joshua L. Greenberg, *Constructing a Discursive Crisis: Risk, Problematization and Illegal Chinese in Canada*, 25 ETHNIC & RACIAL STUD., 490, 498–509 (2002).

43. Authers & Charlesworth, *supra* note 38, at 22 (detailing examples of the inadequate government response in post-Hurricane Katrina New Orleans).

44. Professor Abrams, for example, writes about how the rape "crisis" affected statutory reforms of rape laws in the United States. Abrams, *supra* note 38, at 769.

Historians and political philosophers have been contending with the concept of crisis since the mid-twentieth century.<sup>45</sup> Hannah Arendt, one of the first political thinkers to raise the serious questions associated with the plight of refugees,<sup>46</sup> wrote in 1958 that “[t]he general crisis that has overtaken the modern world everywhere and in almost every sphere of life manifests itself differently in each country, involving different areas and taking on different forms.”<sup>47</sup>

Arendt’s depiction of ubiquitous global crises half a century ago resonates strongly with how a spectrum of socio-political issues are driven by crisis discourse today. For example, as Professor Dianne Otto details, the condition “more or less permanently suspended in states of crises” describes a spectrum of everyday issues, including food security and climate change.<sup>48</sup> The unremarkable and ubiquitous nature of the term “crisis” today raises questions about the functionality of the designation. In the context of migration, the moniker of crisis has a significant effect on the identity imposed on involuntary migrants, which then fosters public and institutional tolerance for emergency-driven responses.

### 1. Migration Crises, Threatening Migrants

As demonstrated by the pervasiveness of crises today, there is significant flexibility in how a crisis is construed or constructed.<sup>49</sup> Determining which events culminate into a crisis is tied to the fact that crisis is a signifier largely derived from a social construct.<sup>50</sup> Cultural

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45. Lin Chalozin-Dovrat, “Crisis” in *Modernity: A Sign of the Times Between Decisive Change and Potential Irreversibility*, in DISCOURSE AND CRISIS 67 (Antoon De Rycker & Zuraidah Mohd Don eds., 2013). For a history of the evolution of the concept of crisis in Western European political thought, see *id.* at 70–86.

46. See Richard J. Bernstein, *The Illuminations of Hannah Arendt*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/opinion/why-read-hannah-arendt-now.html> (on file with the Columbia Human Rights Law Review).

47. Chalozin-Dovrat, *supra* note 45, at 67.

48. Otto, *supra* note 40, at 75–77 (arguing that ubiquitous crises characterizations is reshaping how the international community approaches peace and security, and that “crises everywhere are . . . particularly dangerous . . . for feminism, and indeed for all progressive ways of thinking.”).

49. Ramji-Nogales, *supra* note 19, at 618. See also Authers & Charlesworth, *supra* note 38, at 23 (stating that “[c]risis’ is malleable and ambiguous, a generic term for a type of transition.”).

50. See Antoon De Rycker & Zuraidah Mohd Don, *Discourse in Crisis, Crisis in Discourse*, in DISCOURSE AND CRISIS 3 (2013) (“Crisis events influenced by, what

resonance, often manifested in socio-political views of an influential or actual majority, is an important indicator of what events or phenomena are labeled a crisis, and how this designation plays out.<sup>51</sup> For example, cultural disagreement has been elevated to a crisis in the same-sex marriage context as countries around the globe claim that same-sex marriage threatens calamity on different-sex marriages, children, and society at large.<sup>52</sup> In the context of migration, socio-political views of groups based on their race, ethnicity, nationality, and/or religion have been explicitly used to construct a migration crisis in the United States and Europe.<sup>53</sup>

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is said or written: these texts in their turn will lead to new texts, even new genres, which will then co-create new discourses or reinforce/subvert existing ones . . .”).

51. See Authers & Charlesworth, *supra* note 38, at 22 (“The success or failure of a reaction is dependent on the way the story of the event is told: ‘the identification of a crisis always projects a possible response, and requires narratives of these responses to resonate culturally.’”).

52. See, e.g., Ben Westcott & Angus Watson, ‘A Great Divide’: Inside the Battle to Stop Same-Sex Marriage in Taiwan, CNN (Nov. 24, 2018), <https://www.cnn.com/2018/11/23/asia/taiwan-gay-marriage-china-intl/index.html> [<https://perma.cc/3XRL-TEYY?type=image>] (quoting opposition to same-sex marriage legalization as stating: “If Taiwan passes marriage equality, HIV-positive people will come to Taiwan and flood our health system.”); Dana Alexandra Scherle, *Romania Votes on Same-Sex Marriage with Government in Crisis*, MSN NEWS (Oct. 6, 2018), <https://www.msn.com/en-us/news/world/romania-votes-on-same-sex-marriage-with-government-in-crisis/ar-BBNVJXB> [<https://perma.cc/EKV3-XVNE?type=image>] (citing arguments against same-sex marriage to include “threaten[ing] society as a whole” and “claim[ing] gay people want to ‘take away’ other people’s children.”); Will Woodward, Chloe Watson & Nick Evershed, *Homophobia Hits Home: Readers Expose Ugly Side of Same-Sex Marriage Campaign*, THE GUARDIAN (Sept. 12, 2017), <https://www.theguardian.com/australia-news/2017/sep/13/homophobia-hits-home-readers-expose-ugly-side-of-same-sex-marriage-campaign> [<https://perma.cc/2DT8-362F>] (referencing anti-same-sex marriage advocates in Australia’s leaflets claiming “our children and their children will be brainwashed by homosexual organizations.”).

53. See Anthony Faiola, *New Far-Right Anti-Immigrant Sentiment Hits German Streets*, WASH. POST (Jan. 24, 2015), [https://www.washingtonpost.com/world/europe/new-far-right-anti-immigrant-sentiment-hits-german-streets/2015/01/23/dd23ec5c-a282-11e4-9f89-561284a573f8\\_story.html?utm\\_term=.def97c3baba6](https://www.washingtonpost.com/world/europe/new-far-right-anti-immigrant-sentiment-hits-german-streets/2015/01/23/dd23ec5c-a282-11e4-9f89-561284a573f8_story.html?utm_term=.def97c3baba6) [<https://perma.cc/85XJ-KP8Q>] (on file with Columbia Human Rights Law Review) (quoting a German anti-immigrant protester in Dresden who claimed that “[t]his is not about racism but about control . . . They come here, wanting to force their mentalities on Germans. All these women in veils. We need a new immigration law.”). Protests in Bratislava, Slovakia, “organized by an extremist outfit . . . ended with more than 100 arrests on Saturday.” Andrew Higgins, *Fissures in E.U. Deepen From Strain of Migrant Influx and Greek Debt*, N.Y. TIMES (June 21, 2015), <https://www.nytimes.com/2015/06/22/world/europe/fissures-in-eu>

Culture in the form of political will can override what arguably should be inherent in the meaning of crisis, namely that it is an event that is temporally bound. Specifically, while the term in its most genuine sense should describe an event that was unforeseeable and unique, a crisis has come to describe occurrences that “can be exceptional, predictable, repetitive, and possibly even perpetual.”<sup>54</sup> The crisis discourse accompanying the movement of people across nation state borders, given that the phenomenon is ongoing and shows no signs of slowing,<sup>55</sup> is an example of an omnipresent and potentially perpetual crisis.<sup>56</sup>

Returning to the Ancient Greek definitional function of crisis, the designation as it has played out in the context of migration largely

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deepen-from-strain-of-migrant-influx-and-greek-debt.html [https://perma.cc/29LY-97MR] (on file with Columbia Human Rights Law Review). The arrests occurred “just two days after the anti-immigration Danish People’s Party, once dismissed as an assembly of marginal cranks, won more than 20 percent of the vote in parliamentary elections in Denmark.” *Id.* During the recent heightened wave of involuntary migrants to Europe, elected officials in the Czech Republic, Hungary, Poland, and Slovakia declared admission preferences for Christian (*i.e.* not Muslim) refugees. Jürgen Bast & Liav Orgad, *Constitutional Identities in the Age of Globe Migration*, 18 GERMAN L.J. 1587, 1590 (2017). *See also* Dana Milbank, *To Uphold Trump’s Travel Ban, Justices Have to Ignore his “Animus,”* WASH. POST. (Apr. 25, 2018), [https://www.washingtonpost.com/opinions/what-makes-the-muslim-ban-a-muslim-ban-trump/2018/04/25/0ae1c3c0-48d0-11e8-8b5a-3b1697adcc2a\\_story.html?utm\\_term=.ac210bc5fcd9](https://www.washingtonpost.com/opinions/what-makes-the-muslim-ban-a-muslim-ban-trump/2018/04/25/0ae1c3c0-48d0-11e8-8b5a-3b1697adcc2a_story.html?utm_term=.ac210bc5fcd9) [https://perma.cc/WQ9P-YLV5] (on file with Columbia Human Rights Law Review) (describing President Trump’s false claims about Muslim immigrants in the United States); Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/> [https://perma.cc/A2Z5-YHFP] (discussing Mexican immigrants as “bringing drugs. They’re bringing crime. They’re rapists.”); *see generally* Abdeslam Marfouk, *I’m Neither Racist Nor Xenophobic, but: Dissecting European Attitudes Towards a Ban on Muslims’ Immigration*, 12 ETHNIC & RACIAL STUD. 1 (2018) (providing “evidence that racism and immigration phobia play a key role in shaping Europeans’ support of a ban on Muslims’ immigration.”).

54. *Id.*; *see also* Chalozin-Dovrat, *supra* note 45, at 86 (“Five semantic clusters . . . are still active in contemporary uses of the term [crisis]: decisive change, evenementality (*i.e.*, the sense of event), abnormality, inevitability and potential irreversibility.”).

55. *See* Vincent Chetail, *The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights*, 28 GEO. IMMIGR. L.J. 225, 225 (2013) (stating that “[m]igration is a permanent feature of history” and “[t]here is nothing surprising in this”).

56. Ramji-Nogales, *supra* note 19, at 609 (questioning whether migrant flows characterized as emergencies are actually “unexpected and unpredictable.”).

has served to maintain order for the citizens of receiving states, at the expense of ensuring protection for involuntary migrants. As such, the label of a migration crisis has been used to maintain the status quo, further normalizing migration predominantly as a security concern instead of responding to migration by adjusting to a new normal.

In Europe and elsewhere, migration perceived as a security threat normalizes extraordinary, punitive state responses to the movement of people across borders.<sup>57</sup> This process of securitization shifts the identity of involuntary migrants from individuals in need of protection to a generalized group of threatening newcomers.<sup>58</sup> As a starting point, receiving states typically view migrants as monolithic, essentialized culturally and thereby occupying a space of “the other.”<sup>59</sup> Perceiving migrants through the security lens as individuals from whom inhabitants of the receiving state need protection makes migrants what Professor Viet Thanh Nguyen calls “hypervisible.”<sup>60</sup>

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57. Utilizing the concept of crisis for other objectives is a subject of analysis in areas outside of migration control. *See, e.g.*, David Landau, *Populist Constitutions*, 88 UNIV. CHI. L. REV. 521, 527 (2018) (“The constitution-making moment allows populist leaders to give a dramatic response to [an] environment of crisis.”); NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007) (defining “shock doctrine” as governments and corporations capitalizing on actual or perceived crises). Additionally, some have suggested a tension in conceptualizing securitization between disciplines. *See, e.g.*, Vicki Squire, *The Securitisation of Migration: An Absent Presence?*, in *THE SECURITISATION OF MIGRATION IN THE EU* 19, 20 (2015) (“[D]ivergent responses to the question of whether or not migration is securitised not only reflects divergent conceptualizations of securitisation, but also the entrenchment of a disciplinary divide between scholars of migration studies and scholars of critical security studies.”).

58. Roger Zetter, *Creating Identities, Diminishing Protection and the Securitisation of Asylum in Europe*, in *REFUGEE PROTECTION AND THE ROLE OF LAW: CONFLICTING IDENTITIES* 22, 26 (Susan Kneebone, Dallah Stevens & Loretta Baldassar, eds., 2014) (“[T]he ‘Europeanisation of Europe’s Asylum Policy’ . . . ha[s] substantially reinforced the negative identity of refugees seeking asylum in the EU and diminished the scope and quality of protection . . .”).

59. Leti Volpp has written foundational articles on these concepts. *See* Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1182 (2001); Leti Volpp, *Talking “Culture.” Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1574 (1996).

60. VIET THANH NGUYEN, *INTRODUCTION TO THE DISPLACED: REFUGEE WRITERS ON REFUGEE LIVES* 15 (Viet Thanh Nguyen, ed., 2018) (“Invisible and hypervisible, refugees are ignored and forgotten by those who are not refugees until they turn into a menace. Refugees, like all others, are unseen until they are seen everywhere, threatening to overwhelm our borders, invade our cultures, rape our women, threaten our children, destroy our economies.”).

When migration is framed as a threatening crisis, it also sparks a restrictive articulation of what is a state's collective identity, thereby imposing

an “us” versus “them” discourse.<sup>61</sup> As discussed in the next section, securitizing migration in Europe in the name of protecting a perceived collective identity has cast involuntary migrants increasingly as incorrigibly irregular.<sup>62</sup>

### C. An Age of Detention

The detention of involuntary migrants, and non-citizens generally, is a practice increasingly used by states around the world. A migrant can be detained during one or more periods: upon her arrival seeking entry into the state, during the adjudication of her immigration case (including for asylum),<sup>63</sup> and in furtherance of her removal from a country.

The rise of migrant detention in the United States is a striking example of the escalated use of carceral migration control. The government in the not so distant past rarely detained migrants, but today detention in the United States is virtually “commonplace.”<sup>64</sup> This includes a shift in detaining migrants without specific cause—there was a 146 percent increase in apprehension of immigrants without criminal convictions at the border in 2017.<sup>65</sup>

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61. Bast & Orgad, *supra* note 53, at 1590 (“Immigration policy echoes national identity by mirroring not only the qualities that ‘we’ value in others, but also the essentials that define ‘us’ as a nation.”).

62. See Leti Volpp, *Refugees Welcome?*, 28 BERKELEY LA RAZA L.J. 71, 91–94 (2017) (“[A]n asylum application is one of the few ways to enter a European country. There is thus an analogy between the U.S. ‘illegal immigrant’ and the European refugee . . .”).

63. The practice of detaining asylum seekers is one increasingly used worldwide. In the United States, for example, legislative changes passed in 1996 made the detention of asylum seekers mandatory. The automatic detention of asylum seekers is arguably against international law. See WONG, *supra* note 23, at 45–48 (arguing that mandatory detention amounts to arbitrary detention in violation of several international human rights and customary law).

64. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 182 (2012).

65. Amanda Holpuch, *Families Divided at the Border: ‘The Most Horrific Immigration Policy I’ve Ever Seen’*, THE GUARDIAN (June 19, 2018), <https://www.theguardian.com/us-news/2018/jun/19/families-border-separations-trump-immigration-policy> [<https://perma.cc/9C5C-AAER>].

As a result, the United States immigration system held an average of over 42,000 people in custody each day through 2018.<sup>66</sup> Additionally, in the summer of 2018, President Trump's "no tolerance" policy for unauthorized border crossings led to family separation, including separately detaining over 1,600 children from their parents.<sup>67</sup> This policy change fueled what has been an ongoing trend of privatizing migrant detention—over 60 percent of the migrant detention facilities in the United States, including these recent "family detention" centers, are owned and operated by for-profit corporations.<sup>68</sup>

In Europe, the United Kingdom has one of the largest immigrant detention systems,<sup>69</sup> and, as Part II.C. details, migrant detention across Europe is on the rise. The United Kingdom, along with the United States and Australia—the other industrial countries with relatively long histories of carceral migration control practices—do not have statutory limits on the length of migrant detention.<sup>70</sup>

While immigration detention has garnered increased scrutiny from the international human rights community,<sup>71</sup> there is general acceptance that detention is an appropriate adjunct to migration control.<sup>72</sup> This acquiescence exists despite the fact that significant

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66. Geneva Sands, *This Year Saw the Most People in Immigration Detention Since 2001*, CNN (Nov. 12, 2018), <https://www.cnn.com/2018/11/12/politics/ice-detention/index.html> [<https://perma.cc/TM3V-2XMS>].

67. Holpuch, *supra* note 65.

68. *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics/> [<https://perma.cc/XVX4-RECY>].

69. See Jamie Grierson, *Immigration Detention: How the UK Compares with Other Countries*, THE GUARDIAN (Oct. 10, 2018), <https://www.theguardian.com/uk-news/2018/oct/10/immigration-detention-how-the-uk-compares-with-other-countries> [<https://perma.cc/LQU8-VHKG>]; Niamh McIntyre & Diane Taylor, *Britain's Immigration Detention: How Many People are Locked Up?*, THE GUARDIAN (Oct. 11, 2018), <https://www.theguardian.com/uk-news/2018/oct/11/britains-immigration-detention-how-many-people-are-locked-up> [<https://perma.cc/4S72-69VL>].

70. Grierson, *supra* note 69.

71. See Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and the EU Law*, 19 IND. J. GLOBAL LEGAL STUD. 257, 272 (2012) [hereinafter *Human Rights and the Elusive Universal Subject*].

72. DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 169 (2011) ("[L]engthy purely administrative detention of non-dangerous migrants and asylum seekers has become very common in Europe"); Sklansky, *supra* note 64, at 182 (describing the practice of detaining immigrants as "commonplace" in the United States).

human rights interests are at stake, including the deprivation of liberty, restrictions on freedom of movement, and possible violations of the prohibition of torture or degrading or inhumane conditions.<sup>73</sup> By characterizing migration as a crisis, states have legitimized and normalized detaining involuntary migrants for administrative reasons alone,<sup>74</sup> illustrating how “detention is symbolic of the crisis narrative.”<sup>75</sup>

## II. THE EU MIGRATION RESPONSE

The fact that crisis discourse has shaped the perception of recent migration into Europe is not only indicative of a global trend and growing nationalism in the region, but also of the repercussions of EU policy-making. The region’s migration policies, particularly in relation to asylum seekers, have failed to provide uniformity<sup>76</sup> or establish systems for shared responsibility<sup>77</sup> amongst member states. Instead, European migration has generated increasingly punitive responses, including detention, a result more representative of a crisis of the region’s policies than the magnitude of migration.

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73. See Grigonis, *supra* note 35, at 95 (adding the right to family life, and access to justice, education, and employment as significant human rights interests).

74. Human rights guidelines and instruments have explicitly criticized the use of detention for administrative purposes only. See, e.g., U.N. HIGH COMM’R FOR REFUGEES (UNHCR), DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION, at GUIDELINE 4.1.4 ¶ 32 (2012), <https://www.refworld.org/docid/503489533b8.html> (on file with the Columbia Human Rights Law Review) (“[D]etention is not permitted as a punitive . . . measure or a disciplinary sanction for irregular entry or presence in the country.”); Convention Relating to the Status of Refugees, art. 31, Jul. 28, 1951, 189 U.N.T.S. 150 (prohibiting States from imposing penalties on refugees “on account of their illegal entry or presence.”).

75. Cetta Mainwaring, *Constructing a Crisis: The Role of Immigration Detention in Malta*, 18 POPULATION, SPACE & PLACE 687, 687 (2012) (examining the role of Malta’s mandatory detention policy for irregular migrants in the early 2000s).

76. See *infra* text accompanying note 126–129 (noting the lack of uniformity in EU asylum procedures despite the Common European Asylum System (CEAS)).

77. For an examination of the concept of shared responsibility to protect refugees generally, see E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 690 (2015) (“Despite the gravity of the refugee crisis, states can manage it *if* they cooperate to share the cost and responsibility of protecting [Syrian] refugees.”) (emphasis in original).

### A. The Modern EU Migration System

The European Union's history of migration policy tracks Collier's trajectory of starting with a need for workers.<sup>78</sup> The founding treaty, the 1957 Treaty of Rome, of what was then called the European Economic Community (EEC), established a migration policy that provided for the freedom of movement for foreign workers.<sup>79</sup> Early migration policies consisted of bilateral agreements between states based on labor needs, and were not concerned with harmonizing migration policies more broadly.<sup>80</sup>

The region's desire for work-based immigration changed after the 1970s oil crisis, when, despite a recession and growing unemployment, foreign workers not only remained in the EEC but were also beginning to bring over family members.<sup>81</sup> In response, the Council of Europe ("Council") encouraged the drafting of common legislation pertaining to immigration.<sup>82</sup> Some member states opposed the Council's effort as an infringement on national sovereignty, and so

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78. See *supra* notes 21–22 and accompanying text.

79. Marco Martiniello, *The New Migratory Europe: Towards a Proactive Immigration Policy?*, in IMMIGRATION AND THE TRANSFORMATION OF EUROPE 298, 313–14 (Craig A. Parsons & Timothy M. Smeeding eds., 2006); Hathaway, *supra* note 20, at 722 (noting that freedom of movement provisions for workers were extended to all EEC citizens in the 1986 Single European Act).

80. Martiniello, *supra* note 79, at 311; see also Huysmans, *supra* note 10, at 753 (“[I]n the 1950s and 1960s immigrants were primarily an extra workforce in most western European countries. . . . Countries like France, Germany and the Netherlands used a permissive or even promotional migration policy motivated by the need for extra labour.”).

81. Martiniello, *supra* note 79, at 303–04. See also Saara Koikkalainen, *Free Movement in Europe: Past and Present*, MIGRATION POLICY INST. (Apr. 21, 2011), <https://www.migrationpolicy.org/article/free-movement-europe-past-and-present> [<https://perma.cc/EQT8-STX3>] (“To the surprise of the host nations, however, most of the guest workers had come to stay. Moreover, many of these migrants had invited their families to join them in the destination countries . . . .”); Bob Hepple, *The Crisis in EEC Labour Law*, 16 INDUS. L.J. 77, 79, 80–81 (1987) (“The unemployment rate in the EEC grew from 3 percent in 1973 to 4.5 percent in 1975 and 6 percent in 1980. . . . [T]o 11.8 per cent in January 1987 . . .”).

82. Hathaway, *supra* note 20, at 729 (noting that the Council issued “resolutions in 1976 and 1981 calling for procedural and substantive harmonization of refugee law”).

in 1985 the Council adopted a resolution leaving non-European migration policy as an issue for individual states to legislate.<sup>83</sup>

During this time, there was a regional appetite to forge cooperation with respect to asylum procedures.<sup>84</sup> The first attempt at this was the 1985 Schengen Agreement, which sought to eliminate internal border controls and harmonize the external border control laws of participating states.<sup>85</sup> Another effort toward regional asylum procedures was the 1990 Dublin Convention,<sup>86</sup> which initiated a system to determine which member state is responsible for processing asylum claims.<sup>87</sup> Significantly, the resulting Dublin Regulation designates the EU member state where asylum seekers first enter as the state responsible for processing their applications.<sup>88</sup> Its motivation, as the name indicates, is regulatory, including preventing asylum

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83. Martiniello, *supra* note 79, at 314–15; *see also* Hathaway, *supra* note 20, at 729–30 (noting that Europe’s two supranational authorities were effectively excluded from further development of a common asylum law).

84. Cathryn Costello, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?*, 7 *EUR. J. MIGRATION & L.* 35, 37 (2005) [hereinafter Costello, *The Asylum Procedures Directive*].

85. For a summary of the historical context leading up to the Schengen Agreement, *see* Sean M. Topping, Note, *Defying Schengen Through Internal Border Controls: Acts of National Risk-Taking or Violations of International Law at the Heart of Europe?*, 48 *GEO. J. INT’L L.* 331, 334–36 (2016); *see also* Hathaway, *supra* note 20, at 724 (pointing out that Italy, Spain, Portugal, and Greece were required to enact stringent visa and other external border controls before being permitted into the Schengen Border Agreement.).

86. For a summary of the development of the Dublin Regulation, including of the 1990 Convention, *see* SUSAN FRATZKE, *MIGRATION POLICY INST., NOT ADDING UP: THE FADING PROMISE OF EUROPE’S DUBLIN SYSTEM* 3–4 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/MPIe-Asylum-DublinReg.pdf> [<https://perma.cc/BS9B-9LNJ>]. For the latest version of the Dublin Regulation, *see* Council Regulation 604/2013, 2013 O.J. (L 180) (EU).

87. Costello, *The Asylum Procedures Directive*, *supra* note 84 at 41; Martiniello, *supra* note 79, at 318 (“To avoid the ‘orbiting refugee’ phenomenon, [the Dublin Convention] lays down that one Member State alone shall be in charge of screening each asylum application.”).

88. *See* Mainwaring, *supra* note 75, at 695 (“Under the [Dublin] Regulation, all irregular migrants are fingerprinted when they arrive in an EU member state. These fingerprints are held as part of the Eurodac, a European database containing the fingerprints of all asylum seekers and migrants who cross borders irregularly.”). Recent exceptions have been made for family reunification requests. *See* Catherine Tinker, *Saving Lives and Building Society: The European Migration Agenda*, 22 *ILSA J. INT’L & COMP. L.* 393, 400 (2016).

“shopping,”<sup>89</sup> wherein migrants may seek to benefit from the substantial differences amongst EU states in rates of asylum grants.<sup>90</sup> Thus, the Regulation’s objective has not been to facilitate capacity sharing among Dublin states, but instead to serve as an apparatus to make asylum determinations,<sup>91</sup> a distinction that, as discussed previously in Part I.B.1, has contributed significantly to the region’s migration crisis.

At the turn of the century, member states attempted a uniform asylum process “after concluding that a common asylum and migration policy was fundamental to the goal of transforming the EU into an area of freedom, security, and justice.”<sup>92</sup> The result was the Common European Asylum System (CEAS),<sup>93</sup> whose infrastructure was created between 2000 and 2005, and prompted a second iteration of the Dublin Regulation (“Dublin II”).<sup>94</sup> The recently intensified wave of involuntary migration to the region put to the test core components of EU migration policy, including the Schengen Agreement, the CEAS, and Dublin.

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89. FRATZKE, *supra* note 86, at 1.

90. For example, in 2016, the chance of an asylum applicant from Afghanistan being recognized as a refugee was 1.7% in Bulgaria, but 97.0% in Italy. HANNE BEIRENS, MIGRATION POLICY INST., CRACKED FOUNDATION, UNCERTAIN FUTURE: STRUCTURAL WEAKNESSES IN THE COMMON EUROPEAN ASYLUM SYSTEM 4, 17 (2018), <https://www.migrationpolicy.org/research/structural-weaknesses-common-european-asylum-system> [<https://perma.cc/B68J-CMBG>].

91. FRATZKE, *supra* note 86, at 4 (describing Dublin II as the first part of CEAS “aimed simply to establish a mechanism *swiftly* to determine the Member State responsible for examining an asylum application.”).

92. Maryellen Fullerton, *Refugees and the Primacy of European Human Rights Law*, 21 UCLA J. INT’L L. FOREIGN AFF. 45, 52 (2017).

93. For a general background on the CEAS, see Elspeth Guild, *Conflicting Identities and Securitisation in Refugee Law: Lessons from the EU* 151–53, in REFUGEE PROTECTION AND THE ROLE OF LAW (Susan Kneebone et al. eds., 2014); see generally OLGA FERGUSON SIDORENKO, THE COMMON EUROPEAN ASYLUM SYSTEM: BACKGROUND, CURRENT STATE OF AFFAIRS, FUTURE DIRECTION (2007) (analyzing and evaluating the CEAS).

94. The first piece of CEAS legislation enacted was the 2000 EURODAC Regulation, which created a centralized biometrics system for asylum seekers. Fullerton, *supra* note 92, at 52. In addition to the Dublin Regulation, the EU enacted in 2003 the Reception Conditions Directive, which set standards for shelter and services for asylum seekers. *Id.* at 52–53. Following the Qualification Directive, which created two groups of asylum grants, the last piece of CEAS legislation was the 2005 Asylum Procedures Directive, which set out mandated adjudication procedures such as individual interviews and government-provided interpreters. *Id.* at 53–54.

## B. Recent Migration in Europe

The wave of intensified migration into the European region began in 2011, in the wake of the Arab Spring uprisings.<sup>95</sup> In 2013, involuntary migrants lodged approximately 435,385 asylum claims in the EU;<sup>96</sup> in 2014, that number rose to around 600,000.<sup>97</sup> By 2014, Europeans were engaged in an extensive dialogue about migration,<sup>98</sup> and by 2015 the region's response to involuntary migrants was described as "abysmal."<sup>99</sup>

Globally, 2015 marked an unprecedented year for migration. According to the Office of the UN High Commissioner for Refugees (UNHCR), there were 65.3 million involuntary migrants.<sup>100</sup> That year, approximately 1.3 million migrants sought entry into Europe,<sup>101</sup> predominately from Syria, Iraq, and Afghanistan.<sup>102</sup>

The severity of the danger associated with the journey across the Mediterranean Sea was captured in images and numbers,<sup>103</sup> and

95. *Id.*

96. European Comm'n Press Release MEMO/15/4544, Towards a Comprehensive European Migration Policy: 20 years of EU Action (Mar. 4, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-4544\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4544_en.htm) [<https://perma.cc/R7UH-X7CX>].

97. *Id.*

98. Stefano M. Torelli, *Migration Through the Mediterranean: Mapping the EU Response*, EUROPEAN COUNCIL ON FOREIGN REL. (2017), [https://www.ecfr.eu/specials/mapping\\_migration](https://www.ecfr.eu/specials/mapping_migration) [<https://perma.cc/7XK9-8HHE>].

99. Matteo Garavoglia, *Why Europe Can't Handle the Migration Crisis*, BROOKINGS INST. (Oct. 5, 2015), <https://www.brookings.edu/blog/order-from-chaos/2015/10/05/why-europe-cant-handle-the-migration-crisis/> [<https://perma.cc/8HGA-RKM3>].

100. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, at 2 (2016), <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> [<https://perma.cc/3CRW-B7BY>].

101. Fullerton, *supra* note 92, at 47–48.

102. Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RES. CTR. (Aug. 2, 2016), [http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/pgm\\_2016-08-02\\_europe-asylum-04/](http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/pgm_2016-08-02_europe-asylum-04/) [<https://perma.cc/E3CT-W9C6>].

103. *See, e.g.*, Jane Onyanga-Omaya, *Migrant Deaths in Mediterranean Hit a Record in 2015*, USA TODAY (Dec. 31, 2015, 5:35 PM), <https://www.usatoday.com/story/news/world/2015/12/31/record-migrant-refugee-deaths-mediterranean/78124496/> [<https://perma.cc/MQT5-N7HQ>] ("The death toll of refugees and other migrants making the perilous journey across the Mediterranean Sea in 2015 rose to a record 3,771. . . . April was the deadliest month for migrant deaths on the Mediterranean in 2015. Nearly 1,250 died, including an estimated 800 in a single incident when a vessel capsized off the Libyan coast.");

was exacerbated by both the conditions of migrants' vessels<sup>104</sup> and, in some cases, receiving countries' hostile reception of the migrants.<sup>105</sup> External EU border states such as Greece and Italy in particular carried a disproportionate share of responsibility for receiving involuntary migrants. From 2013 to 2014, Italy experienced a 143% increase in the number of migrants seeking asylum, and Greece, during the same period, undertook a 153% increase in asylum applications.<sup>106</sup>

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see also Jim Yardley & Elisabetta Povoledo, *Mediterranean Shipwreck Kills 40 Before a Rescue*, N.Y. TIMES (May 5, 2015) [hereinafter *Mediterranean Shipwreck Kills 40 Before a Rescue*], <https://www.nytimes.com/2015/05/06/world/europe/italy-migrants-mediterranean-sinking.html> [<https://perma.cc/WTQ5-P43C>] (on file with Columbia Human Rights Law Review) (“[T]he number of people attempting the crossing on smuggler boats is rising sharply. The Italian authorities reported that nearly 6,000 people were rescued in the Mediterranean in a 48-hour period.”); Jim Yardley, *Rising Toll on Migrants Leaves Europe in Crisis; 900 May Be Dead at Sea*, N.Y. TIMES (Apr. 20, 2015) [hereinafter *Rising Toll on Migrants Leaves Europe in Crisis*], <https://www.nytimes.com/2015/04/21/world/europe/european-union-immigration-migrant-ship-capsizes.html> [<https://perma.cc/3UHR-QB2H>] (on file with Columbia Human Rights Law Review) (describing how, in one migrant vessel disaster off a Greek island, “Greek news media showed video of people flailing in the water, or floating on a piece of the boat’s hull, as rescuers with the Greek Coast Guard pulled them onto the nearby rocks.”).

104. *Rising Toll on Migrants Leaves Europe in Crisis*, supra note 103 (quoting a survivor of the wreck that killed an estimated 800 people described a “three-tiered vessel” filled with migrants: “A few hundred people were forced to enter the hold, the lowest level, and locked up so that they would not climb up.”); Rick Noack, *Meet the Man who Rescued 600 Migrants on his Boat, and Thinks Others Could Do the Same*, WASH. POST (July 28, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/07/28/meet-the-man-who-rescued-600-migrants-on-his-boat-and-thinks-others-could-do-the-same/?utm\\_term=.c71c94498d94](https://www.washingtonpost.com/news/worldviews/wp/2015/07/28/meet-the-man-who-rescued-600-migrants-on-his-boat-and-thinks-others-could-do-the-same/?utm_term=.c71c94498d94) [<https://perma.cc/KE4W-Q58K>] (on file with Columbia Human Rights Law Review) (quoting one man who devotes time to saving migrants at sea: “[m]any [migrants] use inflatable dinghies to cross the sea. Out of the six boats we saw, about four were about to sink.”).

105. See HUMAN RIGHTS WATCH, *THE MEDITERRANEAN MIGRATION CRISIS: WHY PEOPLE FLEE, WHAT THE EU SHOULD DO* (2015), [https://www.hrw.org/sites/default/files/report\\_pdf/eu0615\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/eu0615_web.pdf) [<https://perma.cc/B2NA-BEAZ>] (describing how the European Union and its member states “have at times turned a blind eye to egregious human rights abuses by recipient governments, and development projects in themselves have caused rights violations.”).

106. Sabrina L. Camboulives, *Luck of the Draw for Asylum Seekers in Europe: Why the Common European Asylum System Is a Breach of Justice and Why a Third Phase of Amendments Is Required*, 42 VT. L. REV. 393, 412–13 (2017); see also Mario Savino, *The Refugee Crisis as a Challenge for Public Law: The Italian Case*, 17 GERMAN L.J. 981, 983 (2016) (explaining how, between January 2014 and

Not all involuntary migrants remained in external border states. Many continued to move through Europe, seeking to settle into countries like Sweden and Germany, “which in 2015 received almost half of all EU asylum applications.”<sup>107</sup> This secondary migration movement spurred strong restrictionist responses in transit states such as Hungary, where the government erected barbed-wire fences at its borders and enacted policies prioritizing the push back of involuntary migrants.<sup>108</sup>

The actual number of migrants approaching Europe has declined. At the peak of migration to the region in 2015, the UNHCR estimated over one million arrivals by land and sea.<sup>109</sup> For 2018, the agency reported 141,472 arriving migrants to Europe.<sup>110</sup> The UNHCR numbers for 2017 put the region’s migrant arrival number at 185,139,<sup>111</sup> down from 373,652 in 2016.<sup>112</sup>

Throughout this recent wave of migration, and despite the declining numbers, protectionist sentiments have taken hold. In 2016, the Hungarian Prime Minister, Viktor Orbán, in opposition to a proposed effort to coordinate a response to the arrival of migrants across the EU, stated: “For us migration is not a solution but a

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September 2016, over 1.5 million migrants reached Europe via the Mediterranean Sea, eight times the same number between 2008 and 2013. Two-thirds of this group landed on Greek shores, while the remaining one-third reached Italy.).

107. Natalia Banulescu-Bogdan & Susan Fratzke, *Europe’s Migration Crisis in Context: Why Now and What Next?*, MIGRATION POLICY INST. (Sept. 24, 2015), <https://www.migrationpolicy.org/article/europe%E2%80%99s-migration-crisis-context-why-now-and-what-next> [<https://perma.cc/6LU3-843A>]; see also Martha F. Davis, *Cities Rising: European Municipalities and the Refugee Surge*, 39 SUFFOLK TRANSNAT’L L. REV. 683, 698–700 (2016) (discussing the impact of arriving refugees on local cities across Europe).

108. See Phillip Heijmans, *Migrant Arrivals Drop as Hungary Enforces Tough Law*, AL JAZEERA (Sept. 6, 2018), <https://www.aljazeera.com/news/2018/09/migrant-arrivals-drop-hungary-enforces-tough-law-180906194436319.html> [<https://perma.cc/4VPT-RTT2>] (describing Hungary’s practice of “push-backs” as “a process that allows border police to physically remove asylum seekers within 8km of the border without due process”).

109. UNITED NATIONS HIGH COMM’R FOR REFUGEES, OPERATION PORTAL: REFUGEE SITUATIONS—MEDITERRANEAN SITUATION (last visited April 23, 2019), <https://data2.unhcr.org/en/situations/mediterranean> [<https://perma.cc/QA9Y-NBEA>].

110. *Id.*

111. *Id.*

112. *Id.* UNHCR estimates the total arrivals of migrants to Europe, as of April 23, 2019, to be 18,876. *Id.*

problem . . . not medicine but a poison, we don't need it and won't swallow it."<sup>113</sup> In 2017, the "Alternative for Germany (AfD)" party, running on an anti-immigrant, anti-Muslim platform, became the first far right party to win parliamentary seats since World War II.<sup>114</sup>

Woven into these restrictionist responses to the heightened involuntary migrant flow into Europe is crisis discourse. An AfD representative, for example, described the task of responding to the migration crisis as fighting an "invasion of foreigners."<sup>115</sup> France's former presidential candidate, Marine Le Pen, depicted the region's migration flow as "a flood of immigrants that are sweeping all before them."<sup>116</sup>

Professor Aleinikoff describes the region's response to this heightened involuntary migration as sending "a political shock wave through the European Union and raising existential questions about the 'idea of Europe.'"<sup>117</sup> The responses in many instances articulate a notion of Europe that rejects the reconfiguration of a political order to accommodate migrants, and instead uses the cloak of crisis to maintain the status quo for its citizens.

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113. *Hungarian Prime Minister Says Migrants Are "Poison" and "Not Needed,"* THE GUARDIAN (July 26, 2016), <https://www.theguardian.com/world/2016/jul/26/hungarian-prime-minister-viktor-orban-praises-donald-trump> [<https://perma.cc/T8L6-KC3B>]. The Orbán government also characterized an effort to mandate that they take in refugees as "a rape of EU law." R. Daniel Kelemen & Laurent Pech, *Of Red Lines and Red Herrings: The EPP's Delusions about Restraining Orbán*, INDEX (Mar. 20, 2019, 11:55 am), [https://index.hu/english/2019/03/20/epp\\_fidesz\\_red\\_line\\_expulsion\\_viktor\\_orban\\_manfred\\_weber\\_joseph\\_daul\\_manfred\\_weber/](https://index.hu/english/2019/03/20/epp_fidesz_red_line_expulsion_viktor_orban_manfred_weber_joseph_daul_manfred_weber/) [<https://perma.cc/Hz9Q-5ERX>]; see also Bast & Orgad, *supra* note 53, at 1590–91.

114. Judith Vonberg & Nadine Schmidt, *Far-Right Party Wins Seats in German Parliament for First Time in Decades*, CNN (Sept. 25, 2017), <https://www.cnn.com/2017/09/24/europe/germany-far-right-party-election/index.html> [<http://perma.cc/9QMK-67ZK>].

115. *German Election: How Right-Wing is Nationalist AfD?*, BBC NEWS (Oct. 13, 2017), <https://www.bbc.com/news/world-europe-37274201> [<https://perma.cc/LZY4-3M6D>].

116. Yonette Joseph, *In Their Own Words: Marine Le Pen and Emmanuel Macron*, N.Y. TIMES (May 5, 2017) (quoting Le Pen at an April 2017 rally in Marseille), <https://www.nytimes.com/2017/05/05/world/europe/emmanuel-macron-marine-le-pen-quotes.html> [<https://perma.cc/N2PL-ZVK5>] (on file with the Columbia Human Rights Law Review). Le Pen went on to say: "[T]his is not the French way. . . . If we carry on like this, the whole of France will become a gigantic no-go zone. . . . A multicultural society is a society that has multiple conflicts." *Id.*

117. Aleinikoff, *supra* note 33, at 1.

Hungarian Prime Minister Orbán characterized the EU migration response as “madness,” stating: “We must acknowledge that the European Union’s misguided immigration policy is responsible for this situation.”<sup>118</sup> In this case, Orbán is accurate—it was the EU migration system, not the magnitude of migration, that created what has been called “a crisis of protection” in the region.<sup>119</sup> The legal regimes in place when the heightened migration began, as well as changes made to the system as a response to a migration “crisis,” represent policies of “deterrence, deflection, and return.”<sup>120</sup> The consequence of these policy choices is that migration to the region has been unmanageable, a condition a spokesperson for the United Nations’ International Organization for Migration characterized as “a political crisis, not a migrant crisis.”<sup>121</sup>

### 1. An EU Migration System Under Duress

Among the first signs of strain within the EU migration system were the fissures in the EU Schengen Agreement. Pre-dating the most recent heightened migration flow to the region, France and Denmark in 2011 enacted border controls in reaction to Tunisian and Libyan refugees from Italy.<sup>122</sup> Hungary erected a barbed-wire fence on its border with Serbia in July of 2015.<sup>123</sup> Germany introduced border controls to curtail migration from Austria in September 2015, and Austria, the Netherlands, and Slovakia followed with their own border measures.<sup>124</sup> These deviations represent the most significant aberrations the Schengen system has endured.<sup>125</sup>

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118. Ian Traynor, *Migrant Crisis: Hungary PM Says Europe in Grip of Madness*, THE GUARDIAN (Sept. 3, 2015), <https://www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-orban-europe-response-madness> [https://perma.cc/QM78-4W9J].

119. Bast & Orgad, *supra* note 53, at 1587.

120. Siobhán Mullally, *A Crisis of Protection in Europe: Migrants at Sea*, 110 PROC. ASIL ANN. MEETING 173, 173 (2017).

121. Miles, *supra* note 14. International Organization for Migration spokesperson Leonard Doyle added: “We are concerned that the toxic narrative against migrants, to put it bluntly, be diminished, and people see migration for what it is. It’s a necessary part of the modern world, provided it’s managed. The issue is that people’s perception is that it’s out of control.” *Id.*

122. Park, *supra* note 5.

123. *Id.*

124. *Id.*

125. *Id.*

The recent migration to the region also called into question the objective of the CEAS to create a uniform EU system to handle asylum claims. During this period of heightened migration, the CEAS revealed itself to be not a common system but “a collection of discrete national systems.”<sup>126</sup> Specific deficiencies within the CEAS included inconsistencies in how EU states register third-party nationals<sup>127</sup> and funding shortcomings.<sup>128</sup> These deficiencies were part of why the Migration Policy Institute reported that:

[T]he number of arrivals [of involuntary migrants to Europe] alone, while historic, was not solely to blame. Structural deficiencies—both legal and operational—are baked into the very DNA of the Common European Asylum System (CEAS) and have long undermined Europe’s ability to manage asylum flows in a humane and efficient manner.<sup>129</sup>

While there have been ad hoc attempts to facilitate cooperation in response to recent migration amongst states in the region,<sup>130</sup> the most significant attempts at systemic change have been to the Dublin system. The modifications to Dublin, tellingly, reflect crisis discourse

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126. FRANCESCO MAIANI, EUR. PARLIAMENT POLICY DEPT FOR CITIZENS’ RIGHTS & CONSTITUTIONAL AFFAIRS, THE REFORM OF THE DUBLIN III REGULATION, at 11 (Apr. 2016) [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL\\_STU\(2016\)571360\\_EN](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN). [<https://perma.cc/U6XT-7RBH>]; see also SCHOTTEL, *supra* note 1, at 8–9 (2012) (“Under the Lisbon Treaty the EU has undertaken to frame a common policy on immigration but it remains very likely that, even under an EU framework, many decisions about the admission of normal migrants will remain a competence of individual Member States.”); see also WILSHER, *supra* note 72, at 180 (“Immigration powers over [migrants is] a significant bastion of sovereignty . . . reserved to Member States.”).

127. BEIRENS, *supra* note 90, at 4.

128. *Id.* at 8.

129. *Id.* at 1. The MPI report details how these deficiencies in the CEAS play out across four stages: (1) at the registration stage; (2) at the reception stage; (3) within the procedures and processing of claims; and (4) in the adjudication of asylum claims. *Id.*

130. Namely, the EU-Turkey migrant transfer agreement and quotas as an attempt to share responsibility for refugees entering the external border states. See Ramji-Nogales, *supra* note 19, at 642–43. For more on the EU-Turkey agreement, see Eur. Comm’n, *EU-Turkey Statement: Two Years On* (Apr. 2018), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314\\_eu-turkey-two-years-on\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf) [<http://perma.cc/R77S-9TE7>].

and prioritize carceral migration control over providing greater protection for involuntary migrants.<sup>131</sup> A section of the Dublin III Regulation, which went into force in 2014 as a response to post-Arab Spring migration flow, is devoted to “preventing” and “managing” the crisis, in circumstances when a Member State needs to “deal with the situation of particular pressure on its asylum system.”<sup>132</sup> The use of detention facilities is a key focus of Dublin III, compared to migrant detention appearing once in Dublin II.<sup>133</sup>

The Dublin system generally has been the subject of considerable criticism,<sup>134</sup> including that it fails to take into account structural inequities and vastly different adjudication processes

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131. The Dublin Regulation applies to all members of the European Union, with slight differences in Denmark due to “technical reasons.” Iceland, Liechtenstein, Norway and Switzerland—countries outside the Union—have adopted the Dublin Regulation. See Patrick J. Lyons, *Explaining the Rules for Migrants: Borders and Asylum*, N.Y. TIMES (Sept. 16, 2015), <https://www.nytimes.com/2015/09/17/world/europe/europe-refugees-migrants-rules.html> [https://perma.cc/QXJ8-35WW] (on file with the Columbia Human Rights Law Review).

132. Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 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, 2013 O.J. (L 180) 31, at art. 33(2) [hereinafter Dublin III Regulation], <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN> [https://perma.cc/3Z4Y-Z6LZ]. Further, Article 33 of Dublin III directs EU Member States to establish a “preventive action plan” to help alleviate pressures and crises, and to “draw up a ‘crisis management action plan’ to ensure that the fundamental rights of the applicants are not abridged.” Camboulivès, *supra* note 106, at 402 (citing *supra* Dublin III Regulation, art. 33).

133. An entire section of Dublin III (Section V) is devoted to “Detention for the purpose of transfer,” with Article 28 describing in detail when detention is appropriate, and for how long. The Article emphasizes that detention must last for “as short a period as possible,” and there is an explicit requirement that detention not last longer than six weeks before being transferred to the responsible Member State. Dublin III Regulation, *supra* note 132, at ¶ 20.

134. Costello, *The Asylum Directive*, *supra* note 84, at 42 (“Most academic commentary on the Dublin Convention has been overwhelmingly negative. It simply does not work.”).

amongst states,<sup>135</sup> and that the transfer system is inefficient.<sup>136</sup> During the recent migration flow, one significant issue with the Dublin Regulation was that member states were not required to assist other overburdened member states.<sup>137</sup> Consequently, the EU external border states were not able to adequately process the disproportionate number of asylum seekers they received, which in many instances caused the moratorium of Dublin.<sup>138</sup>

### C. Normalizing Detention in Europe

Starting in the early 1990s, the detention of involuntary migrants, particularly of asylum seekers, became a contentious topic

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135. Hathaway, *supra* note 20, at 726 (“Because there is no procedural or substantive harmonization of affirmative norms of refugee law in Europe, recognition rates for persons with comparable claims differ quite significantly from country to country.”).

136. Rachael E. De Orio, *Seeking Sanctuary across the Sea: Why the Influx of Refugees and Asylum Seekers to Greece Requires Major Policy Changes*, 41 SUFFOLK TRANSNAT’L L. REV. 51, 76 (2018).

137. *UNHCR Calls for the EU Relocation Scheme to Continue*, U.N. HIGH COMM’R FOR REFUGEES (Sept. 26, 2017), <https://www.unhcr.org/news/press/2017/9/59ca64354/unhcr-calls-eu-relocation-scheme-continue.html> [https://perma.cc/8GST-CYR8].

138. Starting in 2013 and peaking in 2015 during the height of migration into Europe, the Dublin Regulation has been suspended numerous times by individual states, the UNHCR, and by courts. *See, e.g., Netherlands: Court of Appeal Suspends Dublin Transfer to Poland*, EUROPEAN DATABASE OF ASYLUM LAW (Oct. 4, 2013), <http://www.asylumlawdatabase.eu/en/content/netherlands-court-appeal-suspends-dublin-transfer-poland-awb-1311314-art-47-charter> [https://perma.cc/9Y3N-TNE8]; Forum Réfugiés, *Dublin – France*, ASYLUM INFO. DATABASE (explaining that France suspended transfers to Hungary on several occasions in 2016 and 2017, to Italy in 2016 and again in 2018, to Bulgaria in 2016, and to Norway, Sweden, and Finland in 2017), <http://www.asylumineurope.org/reports/country/france/asylum-procedure/procedures/dublin> [https://perma.cc/R4B6-46MD]; Cécile Pouilly, *UNHCR Urges Suspension of Transfers of Asylum-Seekers to Hungary Under Dublin*, U.N. HIGH COMM’R FOR REFUGEES (Apr. 10, 2017) (calling for a suspension of Dublin transfers to Hungary), <http://www.unhcr.org/en-us/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seeker-s-hungary-under-dublin.html> [https://perma.cc/42XL-887R]; Lyons, *supra* note 131 (“The European Union has had a moratorium on Dublin transfers back to Greece since 2011, and Hungary unilaterally stopped accepting them in June [2015].”). Some argue that reform that will get actual results requires “re-centering EU responsibility allocation schemes on one key objective—quick access to asylum procedures.” MAIANI, *supra* note 126.

in Europe.<sup>139</sup> In 1995, non-governmental organizations and branch offices of the UNHCR in Western Europe reported an increased practice of detaining asylum seekers,<sup>140</sup> a trend fostered in “the context of more restrictive entry and immigration policies” in the region,<sup>141</sup> as well as a rise of the European prison population generally.<sup>142</sup> By the turn of the century, the EU developed migration policies that focused less on protection and more on management,<sup>143</sup> which in turn resulted in an increased use of detention as migration control in the region.<sup>144</sup> According to Migreurop,<sup>145</sup> between 2000 and 2012 the number of immigration detention facilities in Europe and Mediterranean countries increased from 324 to 473.<sup>146</sup> France, for example, detained

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139. Jane Hughes & Ophelia Field, *Recent Trends in the Detention of Asylum Seekers in Western Europe*, in DETENTION OF ASYLUM SEEKERS IN EUROPE: ANALYSIS AND PERSPECTIVE 5 (Jane Hughes & Fabrice Liebaut, eds., 1998).

140. *Id.* at 7.

141. *Id.* at 6. The authors provide examples of legislation passed in Germany, the United Kingdom, Switzerland, France, Denmark, and Austria. The restrictive laws include creating ways to detain asylum seekers, increasing the permissible length of detention, and removing or cutting public benefits for asylum seekers. *Id.* at 8–10. For example, France in 1994 amended its asylum law to create international “waiting zones” in railway stations, permitting the detention of asylum seekers for up to twenty days. *Id.* at 9.

142. *Id.* at 8. The trend of non-citizen, non-criminal detention increasing alongside a ballooning domestic criminal population mirrors the trend in the United States when the 1980s “War on Drugs” created a pathway for increased detention of non-citizens. See Sinha, *supra* note 2, at 14.

143. See generally SCHOTTEL, *supra* note 1, at 21–23 (discussing Europe’s migration policies as falling into the “management paradigm”).

144. Council Directive 2008/115, 2008 O.J. (L 348) 98; see also Lydie Arbogast, *Migrant Detention in the European Union: A Thriving Business* 11 (Emmanuel Blanchard et al. eds., Eurideas trans., 2016), <http://www.migreurop.org/IMG/pdf/migrant-detention-eu-en.pdf> [<https://perma.cc/XAz4-48CQ>] (explaining how, under European law, foreign nationals present on EU territory without leave to remain, and, in certain cases, asylum seekers, while their application is being processed, may be detained for the purpose of removal in accordance with the Return Directive and the Asylum Procedures Directive respectively).

145. *Introduction to the Migreurop Network*, MIGREUROPE, <http://www.migreurop.org/article643.html?lang=fr> [<https://perma.cc/Q3HT-4UM5>] (Migreurop is “a network of activists and scholars aimed at spreading knowledge about the generalization of retention for undocumented foreigners as well as the increasing number of [detention] camps”).

146. AYTEN GÜNDOĞDU, *RIGHTLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS* 117 (2015).

approximately 28,000 immigrants in 2003, and by 2015 that number nearly doubled to 47,565.<sup>147</sup>

Migrant detention in Europe continues to proliferate as a response to the region's recent migration "crisis." As of November 2016, Spain had eight dedicated migrant detention facilities, along with transit facilities within airports and other travel hubs, and "ad hoc" facilities off of the coast.<sup>148</sup> Hungary now operates six migrant detention centers, some of which they refer to as "transit zones."<sup>149</sup> States across the region have characterized their migrant detention practices as other euphemisms such as registration camps, reception or holding centers, guesthouses, and border zone camps.<sup>150</sup>

In a trend similar to the ownership and operation of immigrant detention facilities in the United States, migrant detention in Europe has become increasingly privatized.<sup>151</sup> The use of for-profit companies to run migrant detention centers in the region began at the turn of the century, with the United Kingdom leading the movement.<sup>152</sup> In response to the recent heightened migration flow, states such as Germany, Austria, Belgium, Spain, and Greece have turned to for-

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147. Admir Skodo, *How Immigration Detention Compares Around the World*, CONVERSATION (Apr. 22, 2017), <https://theconversation.com/how-immigration-detention-compares-around-the-world-76067> [https://perma.cc/LB76-GFW3]; GLOBAL DETENTION PROJECT: FRANCE (last updated Oct. 2018), <https://www.globaldetentionproject.org/countries/europe/france> [https://perma.cc/ZJ29-2DZL].

148. GLOBAL DETENTION PROJECT, SPAIN IMMIGRATION DETENTION PROFILE (Nov. 2016) <https://www.globaldetentionproject.org/wp-content/uploads/2016/11/Spain-Immigration-Detention-Report.pdf> [https://perma.cc/A2GT-A6RJ].

149. GLOBAL DETENTION PROJECT, HUNGARY IMMIGRATION DETENTION PROFILE (Sept. 2016) [https://www.globaldetentionproject.org/wp-content/uploads/2016/09/Hungary\\_immigration\\_detention\\_report\\_updated.pdf](https://www.globaldetentionproject.org/wp-content/uploads/2016/09/Hungary_immigration_detention_report_updated.pdf) [https://perma.cc/PUSX-A42X] (describing a "transit zone" as a closed, fenced, heavily guarded complex that uses shipping containers near its border with Serbia.) The Röske detention facility consists of shipping containers converted into lodging and dining facilities. *Id.* Migrants in Röske live "in containers in small locked compounds," that are guarded at all times and surrounded by razor-wire fences. *Id.*

150. OPEN ACCESS NOW, THE HIDDEN FACE OF IMMIGRATION DETENTION CAMPS IN EUROPE, 2F (Dec. 2014), <http://www.epim.info/wp-content/uploads/2018/10/1A-The-hidden-face-of-immigration-detention-camps-in-Europe-1.pdf> [https://perma.cc/WY9T-GEBL].

151. See Sinha, *supra* note 2, at 21–24.

152. OPEN ACCESS NOW, *supra* note 150, at 4D. The European Commissioner for Justice and Home Affairs in 2007 stated: "security is no longer a monopoly of the public sector, it is part of the common good, and responsibility for its implementation must be shared between the public and private sectors." Arbogast, *supra* note 146.

profit companies to manage their growing migrant detention portfolio.<sup>153</sup> This trend is significant with respect to whether policies are trending toward or away from migrant-protective measures, given that for-profit facilities generate more reported incidents of human rights violations, both in the United States<sup>154</sup> and in Europe.<sup>155</sup>

### III. THE TREATMENT OF MIGRANTS BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

#### A. Migrants and the European Human Rights System

In her comprehensive study of the treatment of migrants by the European human rights system, *When Humans Become Migrants*,<sup>156</sup> Professor Marie-Bénédicte Dembour analyzes the official records—the travaux préparatoires—of the Convention and concludes that “[m]igrants were hardly a consideration in the newly created human rights scheme.”<sup>157</sup> Similarly, noting the non-universality of the Convention’s coverage,<sup>158</sup> Professor Marco Duranti describes the scope of the system’s protection this way: “The European human rights system was directed at safeguarding those freedoms that the European

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153. Arbogast, *supra* note 146, at 38–40.

154. Manny Fernandez & Katie Benner, *The Billion-Dollar Business of Operating Shelters for Migrant Children*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/migrant-shelters-border-crossing.html> [<https://perma.cc/VCG7-LF4M>] (on file with Columbia Human Rights Law Review); Alice Sperry, *Detained, Then Violated*, THE INTERCEPT (Apr. 11, 2018), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/> [<https://perma.cc/U6H6-BHCY>].

155. Arbogast, *supra* note 144, at 47.

156. Professor Dembour argues that this feature of the European human rights system is not shared by the Inter-American human rights system. *See generally* MARIE-BÉNÉDICTE DEMBOUR, *WHEN HUMANS BECOME MIGRANTS* (2015) [hereinafter *WHEN HUMANS BECOME MIGRANTS*].

157. *Id.* at 2.

158. MARCO DURANTI, *THE CONSERVATIVE HUMAN RIGHTS REVOLUTION: EUROPEAN IDENTITY, TRANSNATIONAL POLITICS, AND THE ORIGINS OF THE EUROPEAN CONVENTION* 210, 323 (2017) (stating that the European human rights system is designed for “a bounded cultural space restricted to those nations who embraced a common set of ethical values derived from the shared history of their peoples. The Universal Declaration, by contrast, explicitly grounded its human rights principles in metaphysical assumptions regarding inherent human attributes.”).

unity movements described as derived from Western Europe's premodern Christian and humanist heritage within the confines of what [Winston] Churchill termed 'democratic European civilisation.'"<sup>159</sup>

The following discussion examines the treatment of migrants' rights in the text of the Convention, by the now-defunct European Commission on Human Rights ("Commission"), and by the Court. The Commission and the Court for decades largely ignored the subject, and the Convention's original text only mentions migrants in the context of exempting the group from the rights it provides. Beginning in 1985, the Court started issuing judgments on migrant claims, leading some commentators to assert that migrants were "lucky" to rely on the Convention, and that it is a privilege that they achieved "indirectly."<sup>160</sup>

### 1. "Except For:" When the European Convention on Human Rights Exempts, and When It Covers, Migrants

An overview detailing the treatment of migrants by the instrument governing the Commission and the Court provides context relevant to examining how this particular human rights system has handled migrant detention. Generally, the original text of the Convention makes explicit mention of migrants once, by exempting them from particular protections provided in its articles.<sup>161</sup> Its provision specifically providing for protection against unlawful deprivation of liberty expressly pertains to migrants as a group that might not have otherwise been protected. The following outlines the provisions of the Convention to date that contend with migrants' rights.

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159. *Id.* at 210. Duranti describes criticisms of the Conventions scope as "posit[ing] that its progenitors only had on their minds the defense of democracies on the continent." *Id.* at 3.

160. WHEN HUMANS BECOME MIGRANTS, *supra* note 156, at 5, n.13 (expressing "indirectly" in French as *par ricochet* and, more harshly, "*par effraction*" (forced illegal entry).

161. Contrasting the Convention with one of the Inter-American human rights system's founding documents, the American Declaration of the Rights and Duties of Man, which contains "specific safeguards for aliens," Dembour states: "By contrast, such protective intent is absent from the European Convention, which contains only two references to the alien . . . curtailing rather than expanding the rights of migrants." *Id.* at 36.

Article 16 is the provision in the Convention's original text that explicitly and exclusively refers to migrants by using the term "aliens."<sup>162</sup> It does so by qualifying that the protections of Articles 10 and 11, which provide for the freedoms of expression, and assembly and association, respectively, are not applicable to migrants' exercise of political activity.<sup>163</sup> Along the same vein, Article 16 also exempts states that restrict the political activity of migrants from Article 14's prohibition on discrimination.<sup>164</sup> Referred to as the "alien clause," this provision was included in the Convention without much discussion amongst its drafters.<sup>165</sup>

Article 5.1(f) is the other provision in the original text of the Convention that addresses, and in certain situations exempts, migrants. Article 5 protects against unlawful deprivation of liberty and security, starting with an affirmation that "[e]veryone has the right to liberty and security of person."<sup>166</sup> The six exceptions to the canopy of "everyone," however, dominate the provision's text. The last categorical exception includes migrants,<sup>167</sup> specifically permitting the deprivation

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162. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 16, Europ. T.S. No. 5, 213 U.N.T.S. 221, (entered into force Sept. 3, 1953) [hereinafter European Convention]. For a discussion of the use of "alien" in European law as signifying undesirable migrants, see Alison Bashford & Jane McAdam, *The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law*, 32 LAW & HIST. REV. 309, 318 (2014). For an in-depth account of the history of the term "alien" in reference to immigrants in the United States, see Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 71 (2003).

163. European Convention, *supra* note 162, at art. 16.

164. *Id.* There have been calls for the abolition of Article 16 since the late 1970s. See WHEN HUMANS BECOME MIGRANTS, *supra* note 156, at 35.

165. WHEN HUMANS BECOME MIGRANTS, *supra* note 156, at 36 ("[T]he alien clause was hardly debated during the *travaux préparatoires* of the Convention, every participant to these implicitly taking its necessity for granted."). Dembour surmises: "[T]he imposition of restrictions on aliens' activities seems to have been the price to pay for having the protection of the European Convention extended to 'everyone' falling under the jurisdiction of a member state, as proclaimed in Article 1"). *Id.* at 35.

166. European Convention, *supra* note 162, at art. 5.1.

167. The other subsections in Article 5 provide for lawful deprivation of liberty for: (a) a person after conviction by a competent court; (b) a person for non-compliance with a lawful court order or to fulfill any obligation prescribed by law; (c) a person who poses a flight risk and is being brought before the competent legal authority on reasonable suspicion of having committed an offense; (d) a minor for the purpose of educational supervision or to bring before competent legal authority;

of liberty in the context of state action seeking to deport or extradite an individual.<sup>168</sup>

By singling out migrants subject to deportation proceedings as among the categories of individuals that may not be covered by Article 5, the Convention signaled that detention is part of states' sovereign right to control migration.<sup>169</sup> Part III.C of this Article explores in detail the Court's interpretation of Article 5.1(f), which generally has leaned heavily toward recognizing state sovereignty over migrants' liberty interest.<sup>170</sup>

The Convention also exempts migrants in a protocol ratified after the original text that defines the scope of the right to freedom of movement. Article 2 of Protocol 4 reads: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose their residence."<sup>171</sup> As such, the right to freedom of movement is expressly limited to individuals who

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(e) persons for the prevention of spreading infectious diseases and others deemed dangerous or unwanted "persons of unsound minds, alcoholics or drug addicts or vagrants." European Convention, *supra* note 162, at art. 5.1(a)–(e).

168. *Id.* art. 5.1(f), (providing for "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."). The subsequent three subsections of Article 5 address procedural concerns (5.2, 5.3, and 5.4), and the last, 5.5, provides for an enforceable right to compensation. *Id.*

169. See Cathryn Costello, *Immigration Detention: The Grounds Beneath Our Feet*, 68 CURRENT LEGAL PROBS. 143, 147–48 (2015) [hereinafter Costello, *Immigration Detention*] ("By leaving immigration detention in its own silo, subject to looser standards of justification, human rights law risks obscuring the question of why enforcing a particular form of law or preventing certain risks from materializing should be assumed to warrant detention, in contrast to other fields.").

170. A frequent accompaniment to challenges under the Convention concerning the treatment of migrant detention is Article 3, which prohibits "torture or inhumane or degrading treatment or punishment." European Convention, *supra* note 162, at art. 3. The application of Article 3 to migrants can attach during one or both of the following scenarios. The first is an alleged violation of Article 3 in the case where a state seeks to remove a migrant to their country of origin. The second scenario relates to migrant detention, namely that the conditions of confinement violate Article 3.

171. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, ¶ 1, Sept. 16, 1963, 1496 U.N.T.S. 263, E.T.S. No. 046 [hereinafter Protocol No. 4 to the Convention for the Protection of Human Rights].

are lawfully inside the borders of a state, which by definition excludes migrants seeking (but who have not yet obtained) lawful status.<sup>172</sup>

The Convention does affirmatively confer rights to migrants in a few instances. By covering national origin and birth status, Article 14 grants migrants rights against discrimination.<sup>173</sup> As discussed in *infra* Part III.B.2, an analysis of Article 14 was the principle part of the Court's first judgment related to migrants.

The remaining provisions explicitly addressing migrants' rights are protocols ratified subsequent to the original articles of the Convention. Both contemplate the rights of migrants in the context of deportations, and both are concerned with procedural due process. The first prohibits the "collective expulsion of aliens," thereby requiring an individualized finding that removal is warranted.<sup>174</sup> The second directly provides for procedural safeguards when states seek to expel migrants.<sup>175</sup>

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172. This is not unique to the Convention. *See, e.g.*, Jaya Ramji-Nogales, *Freedom of Movement and Undocumented Migrants*, 51 *TEX. INT'L L.J.* 173, 174 (2016) (noting that "Article 12(1) of the International Covenant on Civil and Political Rights (ICCPR), applies only to individuals lawfully within a State territory - not to the undocumented."); *see also* Costello, *Human Rights and the Elusive Universal Subject*, *supra* note 71, at 275 (pointing out that the Convention Relating to the Status of Refugees, specifically Article 26, restricts the right to freedom of movement to those "lawfully in the territory.").

173. European Convention, *supra* note 162, at art. 14. Specifically, the provision sets forth that the enumerated rights laid out in the Convention "shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.* For an in-depth examination of Article 14, *see* Marek Antoni Nowicki, *The European Convention of Human Rights: Prohibition of Discrimination*, 1999 *ST. LOUIS-WARSAW TRANSATLANTIC L.J.* 17, 18 (1999); *see also* Ivana Radacic, *Gender Equality Jurisprudence of the European Court of Human Rights*, 19 *EUR. J. INT'L L.* 841, 842-51 (2008) (exploring the Court's gender discrimination jurisprudence).

174. Protocol No. 4 to the Convention for the Protection of Human Rights, *supra* note 171, at art. 4.

175. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 22, 1984, 1525 *U.N.T.S.* 195, *E.T.S.* No. 117.

## 2. The Court: Light on Migrant Judgments, Heavy on Sovereignty

The Court, operational since 1959, is the enforcement mechanism of the Convention. The Court has a unique breadth of authority vis-à-vis other international tribunals, in that its judgments are binding on both state and non-state entities. As such, the Court's mandate includes issuing judgments on applications from individuals alleging human rights violations committed by states.<sup>176</sup>

As noted by several scholars, the case law of the Court addressing the rights of migrants, including jurisprudence on their detention, is relatively new.<sup>177</sup> This is not because migrants and their lawyers failed to utilize the Convention's protections. To the contrary, they were "amongst the first to understand and to try to use the potential of the Convention."<sup>178</sup> The reason why the Court initially did not issue judgments addressing migrants' rights had to do with the now-defunct Commission. From five years before the Court was operational to 1998, the Commission was the forum for the beginning and end of migrants' applications. It did so by finding that migrant cases lacked the merit necessary for the Court's consideration. As a result, the Commission served as a gatekeeper that ensured that migrants' applications rarely reached the Court.<sup>179</sup>

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176. DURANTI, *supra* note 158, at 1–2 ("Some have described the Strasbourg court as a Supreme Court of Europe with prerogatives of constitutional review akin to that of the mighty US Supreme Court.").

177. See WILSHER, *supra* note 72, at 140 ("[T]he case-law is relatively new and still evolving."); WHEN HUMANS BECOME MIGRANTS, *supra* note 156, at 2 ("[T]he Court first pronounced on a 'migrant case' only in 1985, at a time when it had already developed an important case law in other areas.").

178. WHEN HUMANS BECOME MIGRANTS, *supra* note 156, at 2.

179. For a number of migrants, their efforts translated into "friendly settlements," but a majority "came up against a brick wall at Strasbourg." *Id.* See also Marat Kengerlinsky, *Immigration and Asylum Policies in the European Union and the European Convention on Human Rights*, 12 GEO. PUB. POL'Y REV. 101, 106 (2007) ("[M]any of the cases [before the commission] never went beyond the admissibility stage and were declared manifestly ill-founded before being considered fully on their merits."). For more on the Commission's function generally, see DURANTI, *supra* note 158, at 386 ("The now-defunct Strasbourg commission was tasked with screening applications from private parties and determining whether to refer them to the Strasbourg court. Before 1998, . . . state parties were not required to recognize the court's jurisdiction and the right of individual petition.").

The Court issued its first judgment concerning migrants' rights in 1985, in *Abulaziz, Cabales and Balkandali v. United Kingdom* (hereinafter *ACB v. UK*).<sup>180</sup> The applicants were non-native, permanent residents of the UK alleging that their spouses' denial of entry<sup>181</sup> violated rights and protections provided by the Convention, including the right to respect private and family life provided by Article 8,<sup>182</sup> and Article 14's prohibition against discrimination.<sup>183</sup>

The final judgment, issued by the Grand Chamber,<sup>184</sup> shaped the Court's future decisions concerning migrant rights in several significant ways. First, the *ACB* Court's reticence to recognize race discrimination claims made by migrants is one that it has repeated in subsequent Article 14 migrant cases.<sup>185</sup> Second, and more relevant to

180. *Abulaziz, Cabales and Balkandali v. United Kingdom* (No. 94), Eur. Ct. H.R. (ser. A) (1985) [hereinafter *ACB v. UK*]. It also was the first time the Court "expounded its approach to sex discrimination claims." Radacic, *supra* note 173, at 844; see also Ramji-Nogales, *supra* note 172, at 185 (discussing the Court's extensive jurisprudence on whether the right to family unity includes migrants' right to remain, especially those who face removal because of criminal convictions).

181. *ACB v. UK*, *supra* 180, ¶¶ 57–58. At issue was the distinction in legislation passed in 1980 that effectively denied male spouses the right to entry and reunification with their spouses under circumstances in which the government would have granted entry to female spouses.

182. European Convention, *supra* note 162, at art. 8.1.

183. *ACB v. UK*, *supra* 180, ¶ 70 (alleging specifically that the law discriminated against them on the grounds of sex, race, and, for one applicant, birth). The applicants also alleged that the state's discrimination based on their national origin constituted degrading treatment in violation of Article 3, which the Court rejected. *Id.* ¶ 57(2). The Court upheld the applicants' remaining claim that there was no effective domestic remedy for their complaint of discrimination on the ground of sex. *Id.* ¶ 93.

184. The Grand Chamber of the European Court of Human Rights hears cases referred to it after a relinquishment of jurisdiction by a Chamber, or when it accepts a party's request for referral after a Chamber judgment is issued. For the general practice information on Grand Chamber panels, see *European Court of Human Rights: Composition of the Court*, COUNCIL OF EUROPE, [https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#newComponent\\_1346152138668\\_pointer](https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#newComponent_1346152138668_pointer) [https://perma.cc/39DY-VTKP].

185. See generally Marie-Benedicte Dembour, *Still Silencing the Racism Suffered by Migrants – the Limits of Current Developments under Article 14 ECHR*, 11 EUR. J. MIGRATION & L. 221, 222, 226 (2009) (positing that despite case law developments regarding racial discrimination against Roma applicants in Eastern European countries, the European Court of Human Rights has avoided addressing racism against migrants by hewing to an exceptionally high standard of proof and rejecting the concept of indirect discrimination). In *ACB*, the Court held that, taken together with Article 8, the UK's immigration law violated Article 14's prohibition

the analysis in this Article, is the judgment's emphasis on state sovereignty as curtailing migrants' rights, which the Grand Chamber summarized in this way: "[T]he Court cannot ignore that the present case is concerned . . . with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control entry of non-nationals into its territory."<sup>186</sup>

## B. The European Court of Human Rights and Detention as a Means to Control Migration

Almost a decade after the Court issued the *ACB v. UK* judgment, it delivered its first decisions addressing migrant detention. The Court's initial decisions weighed significantly in favor of state sovereignty over protecting migrants' liberty interest. The Court, in subsequent cases, somewhat softened its strong presumption that a state's action of detaining migrants is lawful. Member states' increased use of detention, leading up to carceral migration control practices in response to the recent heightened migration flow into the region, has caused the Court to issue additional judgments on migrant detention. The subject of crisis appears in these judgments in response to states evoking it to argue their right to curtail migrants' liberty interest in extraordinary circumstances. The Court's recent opinions generally, however, have placed greater weight on migrants' rights than the history of the Convention and the Court would have suggested.

### 1. Early Judgments on Migrant Detention

The Court issued what for some time were its leading decisions on migrant detention in the late 1990s. The threshold question of the applicability of Article 5.1—whether a state's migrant detention

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against sex discrimination. *ACB v. UK*, *supra* note 180, ¶ 74–83. However, it did not find that the law discriminates on the grounds of race or birth. *Id.* ¶ 84–89.

186. *ACB v. UK*, *supra* note 180, ¶ 67. The *ACB* Court's decision with respect to the applicants' Article 8 claim similarly made a long-lasting impact on subsequent migrant judgments. The Court held that there was no "lack of respect" for the applicants' family life because they could live together in their home countries, and thus no violation of Article 8 on its own. *Id.* ¶ 68–69. This interpretation of Article 8 laid the groundwork for the Court to find non-admission a violation only in exceptional circumstances. See *WHEN HUMANS BECOME MIGRANTS*, *supra* note 156, at 3 (stating that the Court has reached "verdicts of violation in only a handful of family reunification cases.").

practice rises to deprivation of liberty—was addressed by its judgment in *Amuur v. France*.<sup>187</sup> In that case, the Court found that holding migrants in “transit zones,” including airports, constitutes detention despite the argument that migrants at transit zones are only prohibited from entering the country, but are free to leave. The *Amuur* judgment laid out the criteria for when a state’s actions amount to depriving migrants of liberty,<sup>188</sup> and in doing so set limitations on states’ sovereignty rights over migration control measures.

The Court returned to interpreting the Convention as primarily protecting state sovereignty over migrants’ rights in its initial judgments interpreting Article 5.1(f), namely whether the detention is lawful. As discussed previously in section III.B.1, the provision’s exemption of migrants contemplates two scenarios—the detention of a migrant awaiting deportation, and the detention of a migrant seeking entry without authorization, including potential asylum seekers.<sup>189</sup>

In a judgment pertaining to the first scenario of migrant detention pending deportation, *Chahal v. UK*,<sup>190</sup> the Grand Chamber

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187. *Amuur v. France*, App. No. 19776/92, Eur. Ct. H.R. (June 25, 1996). The European Commission on Human Rights referred to the Court the applicants’ Article 5.1 allegation, even though the original petition included allegations that the state also violated Article 3’s prohibition of torture or inhumane or degrading treatment; Article 6’s right to a fair trial; and Article 13’s right to an effective remedy. *Id.* ¶ 30 (“The applicants Mahad, Lahima, Abdelkader and Mohammed Amuur and eighteen other Somali nationals applied to the Commission on 27 March 1992. They alleged breaches of Articles 3, 5, 6 and 13 of the Convention (art. 3, art. 5, art. 6, art. 13).”).

188. *See id.* ¶ 42 (“[A]ccount must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.”).

189. *See supra* note 168 (quoting the text of art. 5.1(f)).

190. *Chahal v. United Kingdom*, App. No. 22414/93, ¶ 117, Eur. Ct. H.R. (Nov. 15, 1996).

ruled<sup>191</sup> that the state did not violate Article 5.1(f).<sup>192</sup> In doing so, it laid the important foundation that the Convention does not mandate a state to demonstrate that the detention of a non-citizen is justified by particular circumstances: “[A]ll that is required . . . is that ‘action is being taken with a view to deportation.’”<sup>193</sup>

Over ten years later, the Court similarly rejected the application of a necessity test in *Saadi v. U.K.*,<sup>194</sup> when it addressed Article 5.1(f)’s exemption for the detention of unauthorized entering migrants.<sup>195</sup> The judgment of the Fourth Section of the Court applied

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191. The Grand Chamber of the Court issued the only decision in *Chahal* because under then Rule 51 (now Rule 72) of the Rules of the Court, the Chamber relinquished jurisdiction to a Grand Chamber. European Court of Human Rights, *Rules of Court*, Registry of the Court (Aug. 1, 2018), [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf) (on file with the Columbia Human Rights Law Review). Under Rule 73, when the Chamber does not relinquish jurisdiction, the Grand Chamber may issue a judgment on a case under Article 43 of the European Convention on Human Rights (providing that any party to the case may, in exceptional cases, request within three months from the date of judgment that the Grand Chamber rehear the case). *Id.*

192. The Court also addressed allegations related to both the applicant’s detention and deportation. The Grand Chamber found that applicant’s removal from the United Kingdom to India would violate Article 3’s protection against “torture or inhumane or degrading treatment or punishment,” substantiating that there is a real risk that he would be subject to treatment in violation of the provision as a suspected Sikh militant. *Chahal*, App. No. 22414/93, ¶ 107. The Court also examined whether the applicants were provided effective remedies before the national courts to challenge Mr. Chahal’s detention pursuant to Article 5 paragraphs 4 and 13 and concluded that they did not. *Chahal*, App. No. 22414/93, ¶¶ 140–55.

193. *Chahal*, App. No. 22414/93, ¶ 112. The Court did, however, articulate that the detention is lawful only during ongoing removal proceedings: “[A]ny deprivation of liberty under Article 5 para. 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible . . . .” *Id.* ¶ 113. Nonetheless, Professor Costello describes the Court ruling as “treating those facing deportation as accordingly liable to detention.” Costello, *Immigration Detention supra* note 169, at 152.

194. *Saadi v. United Kingdom*, App. No. 13229/03, ¶ 65, Eur. Ct. H.R. (Jan. 29, 2008).

195. See Costello, *Immigration Detention, supra* note 169, at 148 (explaining that in *Saadi*, “[t]here was no legal obligation to show that detention was necessary to achieve any particular aim in the individual case, ie [sic] that there was a ground for the detention, but rather once the migrant is classed as an ‘unauthorised entrant’, [sic] she is detainable.”); GÜNDOĞDU, *supra* note 146 at 119–20 (“In a move justifying detention undertaken simply for administrative expediency, the Court concluded that Saadi’s detention was not in violation of the right to liberty given

the *Chahal* rule by holding that the state did not have to show that the detention was necessary, only that it was not arbitrary or excessive.<sup>196</sup>

The Grand Chamber took up the *Saadi* case and, in agreeing that there was no Article 5.1(f) violation, endorsed the short-term detention of asylum seekers when expedited case processing is deemed necessary. The *Saadi* Court placed at the forefront states' sovereignty over migration control: "To interpret . . . Article 5 §1(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right [to] control [migration]."<sup>197</sup> Additionally, in determining whether the detention of an asylum seeker was necessary, the Court validated the state invoking crisis to justify such detention.<sup>198</sup>

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the 'administrative problems' faced by the UK in the face of 'increasingly high numbers of asylum-seekers.'").

196. *Saadi*, App. No. 13229/03, ¶ 45. The Grand Chamber found that the applicant's detention was not arbitrary, because officials released him after adjudicating his asylum claim and not excessive because the detention lasted seven days. *Id.* ¶ 46.

197. *Saadi*, App. No. 13229/03, ¶ 65. The partly dissenting opinion, authored by all six of the judges who dissented from the majority's Article 5.1(f) judgment, focused on the fact that Dr. Saadi was an asylum seeker, and that the majority's application of the *Chahal* decision to the first limb of the provision as to unauthorized entries does not distinguish between asylum seekers and migrants detained awaiting deportation for committing a crime. Ayten Gündoğdu notes that this criticism of the majority ruling, also articulated by UNHCR and other human rights non-governmental organizations who criticized the *Saadi* judgment, "fails to confront how these distinctions themselves are at the root of the problem, as they allow the states to legitimize detention as a necessary and effective measure . . ." GÜNDOĞDU, *supra* note 146, at 123.

198. "[T]he Court finds that, given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with increasingly high numbers of asylum-seekers . . . it was not incompatible with Article 5.1(f) of the Convention to detain the applicant . . ." *Saadi*, App. No. 13229/03, ¶ 80; *see also* Costello, *Immigration Detention*, *supra* note 169, at 150 (noting that the domestic courts, specifically the Court of Appeal and the House of Lords, held that Dr. Saadi's "detention was acceptable, given that the UK was experiencing an increase in asylum-seekers"); GÜNDOĞDU, *supra* note 195, at 120 (characterizing this ruling as "justifying detention undertaken simply for administrative expediency"). The number of migrants seeking asylum in the late 1990s rose steadily in the U.K. and other states in the region, peaking in 2000, the year Dr. Saadi sought asylum. *Asylum Seekers Figures*, BBC (Feb. 7, 2001), [http://news.bbc.co.uk/2/hi/uk\\_news/1157031.stm](http://news.bbc.co.uk/2/hi/uk_news/1157031.stm) [<https://perma.cc/2TQ3-W4EX>].

In the years leading up to the recent heightened migration into Europe, the Court has built on its *Chahal* and *Saadi* decisions in its analysis of Article 5.1(f) to provide for a more migrant-protective analysis on the issue of detention. This has included analyzing migrant detention with additional safeguards such as mandating a link between deportation and detention, requiring states to make good faith and sustained efforts to effect the deportation of detained migrants, and characterizing detention as a measure of last resort.<sup>199</sup> The next section includes an examination of whether the Court's judgments have continued this trend in the context of recent migration flows characterized as creating a crisis for the region.

## 2. Recent Judgments on Detention: Capitulating to a Crisis?

The Court has issued judgments on migrant detention that have contended with the relationship between crisis discourse and carceral migration control in the context of the heightened migration into Europe that started in 2011. Perhaps predictably, states have used the cloak of crisis in their arguments for shielding migration detention from the human rights standards provided by the Convention. The discussion that follows surveys the Court's post-crisis migrant detention decisions to assess the extent to which it has validated these arguments. It highlights judgments representative of how the Court consistently has ruled that Article 5 protections are applicable to detention measures created in response to the recent migration into the region. It also examines how crisis discourse has not caused the Court to deviate from the standards it developed after the *Chahal* and *Saadi* judgments regarding the lawfulness of migrant detention under Article 5.1(f).

The migration crisis has had the most influence over the Court's migrant detention rulings on detention conditions. Specifically, viewing carceral conditions as reflecting a state of emergency has led the Court, in some instances, to rule that the detention is not in

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199. Costello, *Immigration Detention supra* note 169, at 152–55; Laurens Lavrysen, *European Asylum Law and the ECHR: An Uneasy Coexistence*, 4 GOETTINGEN J. INT'L L. 197, 233–34 (2012); Costello, *Human Rights and the Elusive Universal Subject, supra* note 71, at 281–82; Francesca Ippolito, *Detention of Irregular Migrants: Dialogue and Divergence Between the Inter-American and European Human Rights Courts*, 65 REVUE HELLENIQUE DE DROIT INTERNATIONAL 583, 588 (2012).

violation of the Convention's Article 3 prohibition on degrading or inhumane conditions.

On the application of Article 5, beyond challenging the admissibility of a claim based on procedural grounds, states have tried to use the characterization of migration as a crisis to challenge the applicability of Article 5.1 to their detention practices. An example of this is Italy's arguments in *Khlaifia and Others v. Italy*.<sup>200</sup> In response to a spike in migration following the Arab Spring, the state re-opened the Centro di Soccorso e Prima Accoglienza ("CSPA") on the island of Lampedusa. Italian officials also later held the applicants on moored ships.<sup>201</sup> The state characterized both the CSPA and the moored ships as "not detention facilities but open reception facilities,"<sup>202</sup> facilities which were in use because of the supposed migration crisis and dangerous migrants:

Faced with a humanitarian and logistical emergency, the Italian authorities had been obliged to seek new premises which, in the Government's view, could not be regarded as places of detention and arrest. The surveillance of the CSPA by the Italian authorities was

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200. *Khlaifia and Others v. Italy*, App. No 16483/12, Eur. Ct. H.R. (Dec. 15, 2016) [hereinafter *Khlaifia* GC judgment].

201. In September of 2011, the Italian coastguard intercepted the applicants' vessels, who were eventually transferred to Lampedusa. After violent protests and a fire erupted in the CSPA, Italian authorities transferred the applicants to a sports park, from which they escaped. Government officials subsequently apprehended them during protests in Lampedusa, and ultimately held the applicants for several days on moored ships in the port of Palermo. Approximately fourteen days after their arrival, Italian authorities removed the applicants to Tunisia under the authority of an ad hoc agreement.

202. *Khlaifia* GC judgment, *supra* note 200, ¶ 61. In the case of the CSPA, it characterized the facility as an "initial reception and accommodation centre" to provide migrants first aid and basic shelter. *Id.* ¶ 32. The government relied on Italian law when making this argument. However, it is questionable as to whether the government's argument would withstand its own law. See Maria Pichou, *Reception or Detention Centres? The Detention of Migrants and the EU 'Hotspot' Approach in the Light of the European Convention on Human Rights*, 99 CRITICAL Q. FOR LEGIS. & L. 114, 122 (2016) ("[N]ational law provided only for the establishment of 'centres of identification and expulsion,' where the detainees were provided with the right to have the legality of their detention reviewed by a Court. Consequently, only the detention of aliens in [these centres] had a legal basis under Italian law.") Nonetheless, the Grand Chamber stated that "[e]ven measures intended for the protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty." *Khlaifia* GC judgment, *supra* note 200, ¶ 71.

merely protective, in order to avoid criminal or harmful acts being committed by the migrants or against the local inhabitants.<sup>203</sup>

Judgments such as *Khlaifia* contend with the inadmissibility claim made early in the Court's jurisprudence, including in *Amuur v. France*,<sup>204</sup> namely that migrant detention is not actually detention. Hungary made this argument in *Ilias and Ahmed v. Hungary* regarding the "Röszke transit zone" it built on the border between Hungary and Serbia at the height of the migration to the region in 2015.<sup>205</sup> Like in *Amuur*, Hungary claimed that involuntary migrants in Röszke were not deprived of their liberty since they were "free to leave the territory of the transit zone in the direction of Serbia."<sup>206</sup> The Court

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203. *Khlaifia* GC judgment, *supra* note 200, ¶ 59. The Italian government also argued in both proceedings that the applicants do not fall within the scope of Article 5.1(f) because they were not held pending deportation or extradition but instead were temporarily allowed to enter Italy. *Id.* ¶ 81. The Grand Chamber dismissed this argument by noting that the precise language of the Convention includes "lawful arrest or detention . . . to prevent his effecting an unauthorized entry into the country" or when "deportation or extradition" proceedings are pending. *Id.* ¶ 94.

204. See text accompanying footnotes 187–188.

205. See HUNGARIAN HELSINK COMM., BEST INTEREST OUT OF SIGHT: THE TREATMENT OF ASYLUM SEEKING CHILDREN IN HUNGARY 3 (2017), <http://www.refworld.org/pdfid/5937afe44.pdf> [<https://perma.cc/8RES-9QVU>]. Röszke is one of Hungary's two "transit zones"—the other is the Tompa transit zone, bordering Croatia. See *Migration Issues in Hungary*, INT'L ORG. FOR MIGRATION (June 29, 2018), <http://www.iom.hu/migration-issues-hungary> [<https://perma.cc/SX5Z-EA3D>]. See generally Benjamin Novak, *UNHCR Chief Says Hungary's Transit Zones Are Really Just Detention Centers*, BUDAPEST BEACON (Sept. 13, 2017), <https://budapestbeacon.com/unhcr-chief-says-hungarys-transit-zones-are-really-just-detention-centers/> [<https://perma.cc/NR3Y-PRAM>] (noting that "[r]efugees in Röszke live in containers in small locked compounds").

206. *Ilias and Ahmed v. Hungary*, 47287/15, ¶ 49, Eur. Ct. H.R. (Sept. 18, 2017) (citing a report by the UNHCR). The Grand Chamber held hearings on *Ilias and Ahmed v. Hungary* on April 18, 2018, see Press Release, European Court of Human Rights, *Grand Chamber Hearing in Case of Asylum-Seekers Held in Hungarian Border Zone Before Being Sent to Serbia* (Apr. 18, 2018) (on file with the Columbia Human Rights Law Review). A judgment from the Grand Chamber is still pending. See *Cases Pending Before the Grand Chamber*, EUR. COURT OF HUMAN RIGHTS, <https://www.echr.coe.int/Pages/home.aspx?p=hearings/gcpendin&c> [<https://perma.cc/BD6H-6VTY>].

denied the state's claim, recognizing the applicability of the applicant's Article 5 claims.<sup>207</sup>

The Court's consistent finding that Article 5 applies to migrant detention practices even when states invoke the specter of crisis has meant that judgments have gone on to address whether states' carceral migration practices are lawful under Article 5.1(f). In its analyses, the Court has applied the additional safeguards it articulated after its *Chahal* and *Saadia* rulings to determine whether the liberty deprivation was lawful.<sup>208</sup> As such, the Court's more recent decisions, despite crisis discourse, have been more migrant-protective than its initial judgments on detention, emphasizing the application of safeguards for particularly vulnerable involuntary migrants.<sup>209</sup>

Crisis discourse, however, has seemingly had more influence though over the Court's decisions when assessing the conditions of migrant detention facilities and Article 3's protections against degrading or inhumane conditions. This crisis effect appears even in

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207. *Ilias and Ahmed*, App. No. 47287/15, ¶ 56. Russia made a similar argument that involuntary migrants remained voluntarily in Moscow's airport, a claim that the Court also rejected. *Z.A. and Others v. Russia*, 3028/16, Eur. Ct. H.R., Sept. 18, 2017. The one partial inadmissibility finding issued by the Court has been in *J.R. and Others v. Greece*, App. No. 22696/16, ¶ 86–87, Eur. Ct. H.R. (May 5, 2018) (ruling on Article 5 claims regarding the "Vial hotspot," a migrant reception, identification, and registration center set up in an unused factory after the EU-Turkey Statement went into effect and holding that the claims were inadmissible so long as applicants were kept in a semi-open facility where detainees were able to go out during the day).

208. *See, e.g.*, *M.K. v. Russia*, App. No. 35346/16, Eur. Ct. H.R. (2018) (finding no Article 5.1(f) violation due to lack of evidence of arbitrariness, bad faith, deception, or unjustified delays with respect to the state's conduct); *J.R. and Others v. Greece*, App. No. 22696/16 (finding no violation because period of detention was not excessive); *H.A. v. Greece*, App. No. 58424/11, Eur. Ct. H.R. (2016) (applying *Chahal* and *Saadi* but finding an Article 5.1(f) violation for lack of due diligence); *J.N. v. UK*, App. No. 37289/12, Eur. Ct. H.R. (2016) (same); *H.S. and Others v. Cyprus*, App. No. 41753/10, Eur. Ct. H.R. (2015) (finding an unlawful deprivation of liberty in the absence of clear legal basis).

209. *See, e.g.*, *Abdullahi Elmi and Aweys Abubakar v. Malta*, App. No. 25794/13, 28151/13, Eur. Ct. H.R. (2017) (minors); *O.M. v. Hungary*, App. No. 9912/15, Eur. Ct. H.R. (2016) (LGBT asylum seekers); *Abdi Mahamud v. Malta*, App. No. 56796/13, Eur. Ct. H.R. (2016) (involuntary migrants with physical and psychological illnesses); *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Eur. Ct. H.R. (2011) (destitute asylum seekers).

judgments where the Court's Article 5 rulings were not swayed by states' crisis exception arguments.<sup>210</sup>

For example, the characterization of a migration crisis expressly played a role in the *Khlaifia* Court's consideration of whether the detention conditions at issue violated Article 3's prohibition of degrading or inhumane conditions. The applicants alleged, and the Government did not deny, that the CSPA was overcrowded, holding three times its normal capacity at the time of their detention.<sup>211</sup> The government relied heavily on the context of a migration crisis, namely "a situation of humanitarian emergency in Italy" due to "the massive influx of North African migrants."<sup>212</sup> It explained that authorities responded to complaints of poor conditions in the CSPA "with the requisite promptness in a situation of emergency."<sup>213</sup>

Notably, in *Khlaifia*'s analysis of the migrant detention facility conditions, the Grand Chamber takes into account the allegation of crisis: "While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose."<sup>214</sup>

The *Khlaifia* opinion rejected the argument that the conditions at the CSPA violated the Convention's prohibition of degrading or inhumane conditions expressly on evidentiary grounds, but the Court acknowledged that the context of a crisis affected its ruling.<sup>215</sup>

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210. There are notable judgments where the Court ruled that migrant detention conditions did violate Article 3, particularly in cases involving notorious facilities such as those in Greece and Turkey. *See, e.g.,* *Khaldarov v. Turkey*, App. No. 23619/11, ¶ 31, Eur. Ct. H.R. (Sept. 5, 2017) (noting that the Court found Article 3 violations of the Kumkapi Removal Centre in this and several previous judgments); *Amadou v. Greece*, App. No. 37991/11, ¶ 50, Eur. Ct. H. R. (May 4, 2016) (relying on the Court's previous judgments of Article 3 violations concerning the specific conditions at Fylakio and Aspropyrgos).

211. *Khlaifia* GC judgment, *supra* note 200, ¶ 142 (describing the conditions in the Lampedusa CSPA, including the facilities' lack of hygienic and sanitary conditions).

212. *Id.* ¶ 150.

213. *Id.* ¶ 155.

214. *Id.* ¶ 185. The Court, however, was careful to recognize the "absolute character of Article 3" and the fact that "an increasing influx of migrants cannot absolve a State of its obligations under that provision." *Id.* ¶ 184.

215. *Id.* ¶ 197. The Grand Chamber Article 3 ruling reversed the Chamber below. *Id.* ¶ 200. The Second Section's opinion similarly acknowledged the "exceptional situation" to which Italy was responding in the detention of the

Subsequent judgments, including *Ilias and Ahmed* and *J.R. and Others*, have followed the *Khlaifia* ruling in yielding to the discourse of crisis to deny claims of an Article 3 violation. The *Ilias* judgment recognized that “the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the authorities at the relevant time.”<sup>216</sup> The *Ilias* court ultimately ruled that the conditions of the Röske transit zone did not violate Article 3.<sup>217</sup> Similarly, in *J.R. and Others*, the Court discussed the conditions of the Greek “hotspot” in the context of “an exceptional and sharp increase” in migration flows to Greece, and acknowledged that this has “created organisational, logistical and structural difficulties.”<sup>218</sup>

An optimistic reading specifically of the *J.R. and Others* judgment is that the Court issued its decision relying on the fact that the dispute addressed a nascent phase of the carceral conditions. The Court may not have given the same weight to the argument of a migration crisis if the detention conditions had been longer lasting: “In

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applicants. *Khlaifia and Others v. Italy*, App. No. 16483/12, Judgment of the Second Section, ¶ 124, Eur. Ct. H.R. (Dec. 15, 2016) [hereinafter *Khlaifia* Second Section judgment]. The majority opinion, nonetheless, found the CSPA conditions in violation of Article 3. *Id.* ¶ 136. The Grand Chamber also reversed the Second Section’s holding that Italy violated Article 4, Protocol 4’s prohibition against collective expulsion, which was a particularly significant development for the protection of migrants under the European Convention. See Jaya Ramji-Nogales, *Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights*, 20 ASIL INSIGHTS 1 (2016), <https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights> [https://perma.cc/U2KR-HRRD]; Duygu Cicek, *Introductory Note to Khlaifia and Others v. Italy (Eur. Ct. H.R.)*, 56 ASIL INSIGHTS 2 (2016), <https://www.cambridge.org/core/journals/international-legal-materials/article/khlaifia-and-others-v-italy-eur-ct-hr/BB3955A266528DC1592BA69695432E73> [https://perma.cc/6JFW-ANU2]; Denise Venturi, *The Grand Chamber’s Ruling in Khlaifia and Others v. Italy: One Step Forward, One Step Back?*, STRASBOURG OBSERVERS (Jan. 10, 2017), <https://strasbourgoobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/> [https://perma.cc/8K2B-FKHB]. Both the Second Section and the Grand Chamber unanimously found that the Italian government’s detention of the applicants on the ships was not an infringement of Article 3. *Khlaifia* Second Section judgment, *supra*, ¶ 144; *Khlaifia* GC judgment, *supra* note 200, ¶ 211.

216. *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Fourth Section, ¶ 83, Eur. Ct. H.R. (Sept. 18, 2017).

217. *Id.* ¶ 90.

218. *J.R. and Others*, App. No. 22696/16, 25, ¶ 138, Eur. Ct. H.R. (May 28, 2018) (direct quotations translated from the French original).

other words, in another case, dealing with living conditions in the hotspots at a more recent date, the Court might be less lenient.”<sup>219</sup> It is an open question whether the European Court of Human Rights, and the EU migration legal system generally, will respond to detention in a manner that challenges what may become a perpetual emphasis on a migration crisis.<sup>220</sup>

## CONCLUSION

This Article set out to place the recent European migration crisis in context. Specifically, it brought in global migration and migration control trends, as well as the power and purpose of crisis discourse, to present a critical perspective on the region’s response to migration. It then examined the evolution of the European Convention on Human Rights and the European Court of Human Rights with respect to migrants.

This Article undertook a historical and present-day examination of migrant detention judgments by the European Court of Human Rights. It evaluated the Court’s judgments in light of the European human rights system’s foundational inclination toward state sovereignty at the expense of migrants’ rights generally, and particularly in cases involving carceral migrant control. The inquiry was how the increasingly prevalent discourse of crisis shaped the Court’s migrant detention case law.

The findings are perhaps surprising. A comprehensive analysis of the Court’s post-crisis migrant detention judgments reveals that the Court has held steadfast to the applicability of the Convention’s prohibition of deprivation of liberty, namely that migration detention is in fact detention. The case law examination also shows that the Court has not deviated from its relatively recent and more migrant-protective analysis of whether states’ method of carceral migration control is lawful. However, the influence of crisis discourse has affected the Court’s treatment of migrant detention claims in judgments regarding the conditions in which states have held involuntary migrants under the specter of migration crisis control. This overall picture illustrates both the potential of the European system to extend

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219. Annick Pijnenburg, *JR and Others v Greece: What Does the Court (Not) Say About the EU-Turkey Statement?*, STRASBOURG OBSERVERS (Feb. 21, 2018), <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/> [https://perma.cc/4S9N-S5R9].

220. See *supra* text accompanying notes 37–44.

human rights protections to migrants and the power of persistent, ubiquitous crisis discourse to influence what systems define as human rights violations.