

# 1. JUDICIAL RESPONSES TO THE MIGRATION CRISIS: THE ROLE OF COURTS IN THE CREATION OF A EUROPEAN IDENTITY

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## *1. – Introduction*

Europe has been struck by what is commonly described as a ‘migration crisis’.<sup>1</sup> The crisis has resulted in the upsurge of far-right and nationalist parties, supported by their voters’ fear and resentment of migrants.<sup>2</sup> However, in the assessment of migration and the perception thereof, the jurisprudential pillar is commonly overlooked.

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<sup>1</sup> CARDWELL, “Tackling Europe’s Migration ‘Crisis’ Through Law and ‘New Governance’”, *Global Policy*, 2018, p. 73 on the fact that migration is presented as a crisis, and less a humanitarian one than a security threat. Similarly: BOELES et al., *European Migration Law*, 2<sup>nd</sup> ed., Cambridge, 2014, p. 28.

<sup>2</sup> Several studies suggest the existence of a link between integration policies and public opinion on immigrants. For an overview, see CALLENS, “Integration Policies and Public Opinion: In Conflict or in

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 1-24.

This chapter aims to (partially) fill that gap by examining if and how the European regional courts contribute to the construction of a European identity, based on shared European values. It is in times of crisis that identity changes are most probable,<sup>3</sup> but is this true for jurisprudence too? In taking a foremost human rights-based approach to analysing the treatment of migrants, this chapter seeks to advance knowledge and insight into the role of the European Court of Human Rights ('ECtHR') and, to a lesser degree, the Court of Justice of the European Union ('CJEU') for the construction of a (perceived) European identity. Based upon ostensible differences between 'us' and 'them', this European identity is contrasted to the one of the 'others' from beyond Europe.

The chapter will draw attention to the manner in which the European courts contribute to the creation or reinforcement of a (perceived) Europeanness, which has a reciprocal impact on (foreign) policy considerations.<sup>4</sup> The law and the jurisprudence of the regional European courts are highly effective tools to influence and change popular and political understandings of migration.<sup>5</sup> While especially the ECtHR traditionally maintained a strong institutional standing, the Court does increasingly seek the approval of its constituencies, the State Parties, and can therefore not be viewed as isolated from the political forces, among other populism and increasing nationalism, surrounding it.<sup>6</sup>

The chapter will, among other, scrutinize the language used in judgments of the European courts in their discussion of migration.<sup>7</sup> There are some indications that the ECtHR attaches a positive connotation to migration from within Europe, consistent

Harmony?", *LISER Working paper* No. 2015-02; ALSTON, "The Populist Challenge to Human Rights", *NYU School of Law Research Paper* No. 18-05, 2018, pp. 7 and 11.

<sup>3</sup> LEEK, MOROZOV, "Identity Beyond Othering: Crisis and Politics of Decision in the EU's Involvement in Libya", *International Theory*, 2018/10, p. 123.

<sup>4</sup> On the central role of foreign policy for the production of identity, see LEEK, MOROZOV, *cit. supra* note 3; CAMPBELL, *Writing Security: United States Foreign Policy and the Politics of Identity*, Minneapolis, 1992.

<sup>5</sup> See related LANGFORD, "International Courts and Public Opinion", 28 February 2018, available at: <<https://ssrn.com/abstract=3131863>>.

<sup>6</sup> STOYANOVA, "Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights", *European Journal of Legal Studies*, 2018, pp. 90 and 122-123; BAUMGÄRTEL, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*, Cambridge, 2019, pp. 102 and 156.

<sup>7</sup> On the importance of linguistic practices for the creation of identities in politics, see LEEK, MOROZOV, *cit. supra* note 3, p. 126.

with the principle of free movement, a right granted to citizens of the European Union ('EU'). The ECtHR's favourable approach to migration from within is illustrated by the use of positively loaded terms such as 'opportunities', 'positive', 'globalisation', while reverting to negative connotations in discussing migration from beyond ('challenges').<sup>8</sup> Paradoxically, the positive effects of globalism seem to be limited to the European context only, and, hence, 'globalisation' acquires a distinctively regional rather than universal flair in the case-law of the court.<sup>9</sup>

This chapter discusses two strands of arguments: the first strand explores the rule of law and whether the courts are influenced more by political guidelines rather than the law. The second strand looks at what the European regional courts consider traditional European values, and whether these values are a judicial creation in response to the migration crisis.<sup>10</sup> In the context of this discussion, is the ECtHR still worthy of its designation as the "lighthouse" for those who seek protection?<sup>11</sup> Is the Court really the "crown jewel"<sup>12</sup> and "flagship"<sup>13</sup> of the Council of Europe, as certain of its Member States see it? Indeed, the question arises whether the lighthouse does not guide individuals into safe haven any longer. Does, rather, the ship increasingly sail under the flag of Euronationalism and thus contribute to the polarization of Europeans and migrants, who as 'others' do not share the same set of European values?

<sup>8</sup> See for instance, European Court of Human Rights, *Shindler v. The United Kingdom*, Application No. 19840/09, Judgment of 7 May 2013, paras. 37-59.

<sup>9</sup> Research on European legal culture to a certain extent confirms this hypothesis. See GRØDELAND, MILLER, *European Legal Cultures in Transition*, Cambridge, 2015, p. 6.

<sup>10</sup> On the alleged judicial activism of the ECtHR in the field of migration: LAVRYSEN, "Is the Strasbourg Court Tough on Migration?", 5 December 1992, available at: <<https://strasbourgobservers.com/2012/12/05/is-the-strasbourg-court-tough-on-migration/>>.

<sup>11</sup> MIJATOVIĆ, "Continued Reform of the European Human Rights Convention System: Better Balance, Improved Protection", Address by Council of Europe Commissioner for Human Rights, 12 April 2018, Document No. CommDH/Speech (2018), p. 3.

<sup>12</sup> MÄLKSOO, "Introduction Russia, Strasbourg, and the Paradox of a Human Rights Backlash", in MÄLKSOO, BENEDEK (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge, 2017, p. 3.

<sup>13</sup> As referred to by the Norwegian government, in: <<https://www.regjeringen.no/no/tema/utenrikssaker/menneskerettigheter/innsikt/norge/id578539/>> (all translations by the author). The Committee of Ministers of the Council of Europe reconfirmed its commitment to the ECHR and the ECtHR in the recent Copenhagen Declaration, available at: <[https://www.echr.coe.int/Documents/Copenhagen\\_Declaration\\_ENG.pdf](https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf)>.

## 2. – *Approaches, Hypotheses and Choice of Method*

This chapter works with the hypothesis that the European regional courts, although formally independent from the legislative and executive of the European Council and the EU, respectively, are nonetheless influenced by the current political sentiments. The point of departure is the assumption that the European courts play a significant, yet not well-recognised and severely under-researched role in the construction of a European identity. This chapter is apprehensive that the courts, in their case-law, clearly position themselves as to the question of migration and the human rights of marginalized people not fitting into the understanding of an European ‘us’.<sup>14</sup> As such, it resonates Marie-Bénédicte Dembour’s concerns that the ECtHR implicitly shares a discourse, and arguably also values, that conceive migrants a threatening others.<sup>15</sup>

With an ever-increasing caseload, including numerous cases dealing with migration, the courts assume an important responsibility for a common European response to migration. Judgments and decisions do affect and reflect back on the Member States, their administration, their citizenry, and the migrants themselves. As such, focus should be shifted from analysing the effects of the executive (and to a lesser degree the legislative) powers in Europe, to increasing the scrutiny of the judiciary. Thus, this chapter has the underlying objective to create a consciousness of the role that courts play in the creation of a European identity. Interconnected, this chapter also urges an increased attention of legal scholarship to the use of non-binding soft law, as contained in policy documents, and its reference in the case-law of the ECtHR and the CJEU.<sup>16</sup>

This chapter applies traditional legal methodology in analysing treaty law, case-law and legal doctrine. However, being situated in the borderland between law and politics, it will also draw on scholarship from the political sciences and related disciplines. Same is valid for academic publications on migration, group identities and so-called ‘othering’, if considered useful to strengthen the arguments. Beyond scholarly writings, this chapter critically examines official reports, documents, and web-sites of the EU and the European Council.

<sup>14</sup> See for a similar concern, STOYANOVA, *cit. supra* note 6, pp. 83, 125.

<sup>15</sup> DEMBOUR, *When Humans Become Migrants*, Oxford, 2015, p. 504.

<sup>16</sup> On the growing significance of soft law for the legal treatment of migrants, see CARDWELL, *cit. supra* note 1, pp. 68, 71-72.

### 3. – *Checks and Balances*

“The fundamental principles of the separation of powers and judicial independence are considered central tenets of all liberal democracies, everywhere and in every time. And rightly so”, said Marta Cartabia, Vice President of the Italian Constitutional Court, in her speech in occasion of the opening of the ECtHR’s judicial year 2018.<sup>17</sup> In reverting to Montesquieu’s *The Spirit of Laws*, Cartabia emphasised that the separation of powers and judicial independence are basic conditions for the effective protection of individual rights and liberties, in order to guarantee to each individual an effective remedy against any breach of rights.<sup>18</sup> A traditional nation State is structured upon the separation of powers, according to which the executive, legislative and judiciary branches are separated and independent from each other.<sup>19</sup> In a functioning State, it would accordingly be worrisome if the executive or legislative could directly influence the outcome of the judiciary’s decisions. Note that the legislative indirectly influences the judiciary, since it adopts laws that the courts apply. As a matter of fact, the laws of a democratic State will always reflect the current electorate and political tendencies. For obvious reasons, same is valid for regional or international institutions. On the supranational level, in our case the EU, a similar system of checks and balances is put into place. Article 2 of the consolidated version of the Treaty on European Union (2008) explicitly links the rule of law with the notion of human rights: “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”.<sup>20</sup> It is broadly acknowledged that these principles include the idea of a separation of powers.<sup>21</sup> Yet, the separation of powers is less clear-cut at the EU level than in many of its member States, particularly with regard to the legislative and executive branches. CJEU Judge and Professor of Law Allan Rosas points out that legislation is passed by the EU Council, which consists of a ministerial representative of each Member State. In many cases, however, the Council acts jointly with the European Parliament, consisting of elected

<sup>17</sup> CARTABIA, *The Authority of the Judiciary Separation of Powers and Judicial Independence: Current Challenges*, 26 January 2018, p. 1, available at: <[https://www.echr.coe.int/Documents/Speech\\_20180126\\_Cartabia\\_JY\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20180126_Cartabia_JY_ENG.pdf)>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Available at: <<https://www.britannica.com/topic/checks-and-balances>>.

<sup>20</sup> Consolidated Version of the Treaty on European Union, OJ C 115, 9 May 2008, p. 13 ff.

<sup>21</sup> ROSAS, “Separation of Powers in the European Union”, *The International Lawyer*, 2007, p. 1034.

representatives.<sup>22</sup> This process of so-called ‘codecision’, where the Council acts together with the Parliament, is used for areas of exclusive competence of the EU, or shared competence with the Member States.<sup>23</sup> Thus, the responsibilities of the executive and the legislative are blurred, with a risk of jeopardising the rule of law. It is this structural configuration of the EU that demands increased attention, as it reflects in the jurisprudence of the European courts. In her above mentioned speech, Cartabia requests the preservation of the main dividing line between political institutions and institutions of protection. In her view, the judicial independence is put at risk when the clear duality between government and the judicial branch is distorted. Although, in her speech, Cartabia probably did not have the ECtHR and the European political institutions in mind, her call for preservation is equally valid for them. Thus, not only the executive and the legislative, but also the executive and the judicial branch are not as clearly separated as one would expect. Importantly, Cartabia points out that judge-made law is an important factor that can unhinge checks and balances, since judges act as law-makers rather than law-appliers.<sup>24</sup> If the parliamentary legislation is of poor quality, the interpretative power of judges expands “hugely, in the form of value-oriented interpretation”,<sup>25</sup> a matter of particular significance to the present discussion on the interpretation of ostensible European values. Given that the ECHR is a living instrument, which is subject to dynamic interpretation, such law-making is acceptable within certain limits. Considering that human rights law aims at protecting individuals from excessive State power, an expansion of the individuals’ rights by means of a dynamic interpretation generally seems justified. While the Court has to decide on how to interpret imprecise provisions or adopt the laws’ application to new, unforeseen circumstances, it may nonetheless not trespass the boundaries of what the law is meant to regulate. Erik Voeten points out that the inherent subjectivity of judicial discretion of a rights review is understood as a political defeat: the Russian president Vladimir Putin, for example, claimed that the *Ilaşcu* decision by the ECtHR was a “purely political decision, an undermining of trust in the judicial international system”.<sup>26</sup> It could be argued that the ECtHR’s dynamic interpretation

<sup>22</sup> *Ibid.*

<sup>23</sup> Available at: <<https://www.consilium.europa.eu/en/council-eu/decision-making/>>.

<sup>24</sup> CARTABIA, *cit. supra* note 17, p. 2.

<sup>25</sup> *Ibid.*

<sup>26</sup> VOETEN, “Politics, Judicial Behaviour, and Institutional Design”, in CHRISTOFFERSEN, MADSEN (eds.), *The European Court of Human Rights between Law and Politics*, Oxford, 2011, pp. 61-62. See

is a Pandora's box that creates more problems than it solves. Disregarding, for the sake of the argument, the already controversial relationship between the ECtHR and Russia,<sup>27</sup> judicial interpretations that are considered subjective judge-made law could be seen as counterproductive to the whole human rights system. Since the concerned States, for whatever (legal, political or moral) reason, do not recognise the judgment as impartial, they are unwilling to acknowledge the decision, thereby leading to a backlash for human rights of the affected individuals.<sup>28</sup> Oddly, both side make the argument of politicization: the Court holds that the respondent State disregards its decisions for political reasons (e.g. in order to continue with human rights violations), while the State claims the Court is interfering with its politics (e.g. by not respecting the margin of appreciation) by politicizing the law.<sup>29</sup> The non-compliance<sup>30</sup> of States with judgments rendered by the ECtHR in cases of migration is arguably also tainted with politics. The stronger the pushback against the migrant 'others' in the domestic political sphere, the more unlikely the respondent State is willing to respect and comply with supranational decisions that determine a violation of the migrants' freedoms and rights, especially if these decisions entail a liberal, inclusive, and non-nationalist interpretation of the law.

Matej Avbelj convincingly argues that the CJEU, prior to the adoption of the Treaty of Maastricht, in a similar manner developed and introduced an unwritten, hence judge-made, standard of human rights protection for the EU and its institutions. In what he terms a human rights "inflation", Avbelj shows that the EU in the case of *Wachauf v. Germany* expanded this standard beyond the institution itself to

European Court of Human Rights. *Ilaşcu and others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004.

<sup>27</sup> For an analysis of the relationship, see: MÄLKSOO, "The European Court of Human Rights and Russia: Quo Vadis?", 22 November 2018, available at: <<http://www.cambridgeblog.org/2018/11/the-european-court-of-human-rights-and-russia-quo-vadis/>>.

<sup>28</sup> MÄLKSOO, *cit. supra* note 12, pp. 3-25, concluding that realism has to prevail in dealing with States with anti-liberal history and ideology. Mälksoo considers the weakness of theories of human rights socialization that they tend to suggest universal models without duly taking into account the specific country contexts.

<sup>29</sup> For the case of Russia, see, GRIFFIN, Russia could withdraw from European Convention on Human Rights, state news agency RIA reports, 2018, available at: <<https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html>>.

<sup>30</sup> On the non-compliance, see the report of the Parliamentary Assembly of the Council of Europe, DE VRIES, *Implementation of Judgments of the European Court of Human Rights*, Doc. 13864 09, September 2015, available at: <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=22005>>.

become a binding norm for all its member States in their implementation of EU law.<sup>31</sup> Although the intent assumingly was good, it nonetheless led to an adverse reaction: the EU Member States and particularly their constitutional courts considered this judge-made law an illegitimate interference, a threat to their sovereignty, and a breach of the principle of legality that prescribes the foreseeability of the law.<sup>32</sup>

The following sections will further discuss whether the separation of powers is in jeopardy and whether the judges of the European Courts have created a concept of shared ‘European values’ and a common ‘European identity’, innate to ‘us, the Europeans’, but lacking to the ‘others, the migrants’.

#### *4. – Fundamental Rights and Freedoms in the Case-law of the European Courts*

Not only the boundaries of the branches of the EU and the Council of Europe tend to be blurred, also the interface between community and human rights law, which is highly relevant for the discussions of the different European organs’ competence, has become more unclear. Initially, the two areas of law were not confounded. However, already in 1969, the European Court of Justice (ECJ) declared that fundamental rights, although at the time not explicitly codified, formed part of the general principles of community law, the observance of which the Court ensured.<sup>33</sup> Two decades later, the ECJ decided that the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) had “particular significance”,<sup>34</sup> and finally in the 1990s, the ECJ started to cite individual judgments of the ECtHR to back up its interpretations.<sup>35</sup> The Charter of Fundamental Rights of the EU was proclaimed in 2000 and became legally binding in 2009 with the entry into force of the Treaty of Lisbon. In its chapeau, the Charter

<sup>31</sup> AVBELJ, ‘Human rights inflation in the European Union’, in VIOLINI, BARAGGIA (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors*, Cheltenham, 2018, pp. 10-11.

<sup>32</sup> *Ibid.*

<sup>33</sup> Case 29/69, *Erich Stauder v. City of Ulm - Sozialamt*, 12 November 1969, ECLI:EU:C:1969:57, para. 7.

<sup>34</sup> Joined Cases 46/87 and 227/88, *Hoechst v. Commission of the European Communities*, 21 September 1989, ECLI:EU:C:1989:337, para. 13.

<sup>35</sup> Case C-13/94, *P v. S & Cornwall County Council*, 30 April 1996, ECLI:EU:C:1996:170, para. 16. See extensive discussion in: ROSAS, *cit. supra* note 21, p. 1041; AVBELJ, *cit. supra* note 31, pp. 12-13.



“reaffirms, with due regard for the powers and tasks of the Union (...), the rights as they result (...) from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, (...) and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.”

Interestingly, the Charter connects the notions of powers, constitutional traditions with international obligations arising from the ECHR, and the case-law of the CJEU and ECtHR. With the adoption of the Charter, the EU has clearly, on a political and on a legal level, confirmed its commitment to human rights and the corresponding jurisprudence of the European regional courts. In Article 52(3), the Charter guarantees the rights corresponding to the ones contained in the ECHR.<sup>36</sup> In doing so, it prevents different standards of human rights in the national implementation of EU law.<sup>37</sup> Moreover, the increasing referral of the ECtHR to the CJEU’s case-law further streamlines the human rights standard in Europe.<sup>38</sup> Indeed, the human rights approach of both European courts appears to be largely, if not fully, coherent. At first glance, it seems as though this consistency of the human rights approaches is beneficially for the individuals concerned, in being accorded the same rights by the different judicial institutions of the European community. Nonetheless, a different scenario might be conceivable: what if this coherence is detrimental to migrants? There are indications that the case-law coming out of both courts would take a coordinated approach. If the ECtHR increasingly discusses migrants as the unwanted ‘others’, this jurisprudence would reflect in the case-law of the CJEU, thus amplifying their negative perception. In turn, if the hypothesis is correct that courts’ decisions can influence the public opinion and thereby also policy makers, then the migrants’ situation is further deteriorated.

<sup>36</sup> Charter of Fundamental Rights, OJ C 364, 18 December 2000 p. 1. The official commentary to Art. 52(3) holds that the scope of the guaranteed rights is determined by the law itself as well as the case-law of the ECtHR and the CJEU (OJ C 303, 14 December 2007, p. 33).

<sup>37</sup> LOCK, “The ECJ and the ECtHR: The Future Relationship between the Two European Courts”, *The Law and Practice of International Courts and Tribunals*, 2009, p. 283; BOELES et al., *cit. supra* note 1, p. 45, pointing out that the ECHR is not legally binding within the ambit of EU law and that the EU is not party to the ECHR.

<sup>38</sup> E.g. see European Court of Human Rights, *Maslov v. Austria*, Application No. 1638/03, Judgment of 23 June 2008, para. 42; *Id.*, *Pellegrin v. France*, Application No. 28541/95, Judgment (Grand Chamber) of 8 December 1999, para. 66; *Id.*, *Goodwin v. United Kingdom* Application No. 28957/95, Judgment (Grand Chamber) of 11 June 2002, para. 43. Furthermore: LOCK, *cit. supra* note 37, p. 380.

In addition to its intra-European efforts, including the consistency of the human rights jurisprudence of the regional courts, the EU is committed to cross-regional work on positive human rights narratives.<sup>39</sup> This commitment is in line with the human rights priorities of the United Nations ('UN') and the Sustainable Development Goals ('SDG') that the world leaders agreed upon in 2015. The SDG No. 10 has the aim of reducing inequalities and calls upon all States to "[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies".<sup>40</sup> The UN 2030 Agenda for Sustainable Development, by which the SDG officially came into force, furthermore recognises the positive contribution of migrants and calls for full respect for their human rights and humane treatment, irrespective of their migration status.<sup>41</sup> Thus, the EU is not only bound by positive law to protecting human rights as contained in the TFEU and the ECHR, it is also devoted to observing the human rights regime of the UN. This commitment of a supranational organisation is praiseworthy and probably uncontroversial, given that its Member States without exception are members to the core UN human rights treaties and, as such, legally bound to fulfilling their provisions. This commitment across treaty regimes is undoubtedly part of a trend, in which international and/or supranational organisations pledge to adhere to international (human rights) treaties to which they formally cannot accede because they lack statehood.<sup>42</sup> Although the conflation of treaty regimes entails a harmonisation of the law, it at the same time also causes interpretational headaches for the law-applying bodies. The ECtHR, for instance, will be forced to interpret legal sources that it does not formally have jurisdiction over. The Court will also have to refer to case-law that originates in cases that do not deal with human rights violations.

In returning to the UN approach to migration, the UN Secretary General in a report of 2017 on 'Making Migration Work for All' emphasizes its links to the 2030

<sup>39</sup> General Secretariat of the Council of the EU, Conclusions on EU Priorities in UN Human Rights Fora, Doc. 6346/18 of 26 February 2018.

<sup>40</sup> See goal target No. 10.7. Available at: <<https://www.un.org/sustainabledevelopment/inequality/>>.

<sup>41</sup> General Assembly of the United Nations, "Transforming Our World: the 2030 Agenda for Sustainable Development", UN Doc. A/RES/70/1 of 21 October 2015, para. 29.

<sup>42</sup> A similar development occurred in the field of international criminal law: the International Criminal Court (ICC) and Art. 21(3) Rome Statute commit to respecting human rights law, a treaty regime with a very distinct aim and nature than international criminal law. The ICC, as an international organisation, cannot become member to any human rights treaties that are tailored to prevent the misuse of State power over individuals.

Agenda for Sustainable Development. He acknowledges a shared responsibility of States to address the needs and concerns over migration and to protect the human rights of migrants.<sup>43</sup> Although highlighting the positive aspects of migration as “an engine of economic growth, innovation and sustainable development” that assists to create bonds between countries and societies, the Secretary General also stresses that migration is a “source of division within and between States and societies” and, as such, “one of the most urgent and profound tests of international cooperation”.<sup>44</sup> He hoped that the *Global Compact on Safe, Orderly and Regular Migration*, adopted in the following year, would bring the challenges of migration between Member States under control and bridge the divide between their policy implementations and ambitions. Moreover, he sadly acknowledged that “xenophobic political narratives about migration are all too widespread”, a fact that remains valid today too.<sup>45</sup> In December 2018 then, the UN General Assembly by resolution adopted the Global Compact.<sup>46</sup> The resolution acknowledges the existence of “misleading narratives that generate negative perceptions of migrants”, a development that must be countered by providing research and access to objective, evidence-based, and clear information on migration.<sup>47</sup> The intrinsic connection between the perception of the migrant ‘others’, who are different than ‘we’, and xenophobic, misleading narratives – to borrow the wording of the UN documents – cannot be underestimated. In this connection, researchers have pointed out that the understanding of a European identity based on common values could be lopsided if it is mobilized against European integration, claiming that the ‘others’ lack our shared memories, traditions, and myths.<sup>48</sup> This dangerous development of othering that has been explored in the social sciences, foremost social psychology and sociology, has to be taken on board by legal and political sciences too. Note that the importance of research is highlighted throughout the Global Compact, a call that we in academia cannot be left unanswered.<sup>49</sup>

<sup>43</sup> Report of the UN Secretary-General, “Making Migration Work for All”, UN Doc. A/72/643 of 12 December 2017, para. 5.

<sup>44</sup> *Ibid.*, para. 1.

<sup>45</sup> *Ibid.*, para. 9.

<sup>46</sup> General Assembly of the United Nations, UN Doc. A/RES/73/195 of 19 December 2018 (based upon General Assembly Resolution A/RES/72/244 of 24 December 2017).

<sup>47</sup> General Assembly of the United Nations, UN Doc. A/RES/73/195, *cit. supra* note 46, para. 10.

<sup>48</sup> CICEO, “The Difficult Path Towards Europeanness: Assessing the Politics of Culture and Identity in the European Union”, *On-line Journal Modelling the New Europe*, 2016, p. 10.

<sup>49</sup> *Cit. supra* note 46, paras. 17, 17(f) and (k), 21(j), 35(c), and 66.

## 5. – *Immigration, Borders, and Human Rights*

Borders represent the belonging and the exclusion, the interiority and the exteriority.<sup>50</sup> The functions and usefulness of borders in the civic space is, according to Étienne Balibar, becoming more problematic because they allow for the crystallisation of collective identities: the ‘us’, the ‘Europeans’, the ‘majority’. Simultaneously, these borders fill functions of imaginary protection, in separating ‘us’ from ‘them’.<sup>51</sup> Yet, in the state-centred sphere of international and European law, States are free to exercise border controls due to their sovereignty.<sup>52</sup> In recent years, the border controls at the external border of the EU have been increased and led to tighter removal procedures for nationals of non-EU Member States.<sup>53</sup> However, the jurisdiction over immigration and decisions of whom to allow access to the national territory does not free a State from its liability for any human rights violations occurring during the performance of these tasks.<sup>54</sup> Thus, the recognition of a State’s jurisdiction at its borders runs parallel to its obligations under and the applicability of human rights treaties, which include “affirmative measures to guarantee that individuals subject to their jurisdiction can exercise and enjoy [their] rights”.<sup>55</sup> In other words, its sovereign right of border controls by no means impedes the respective State’s human rights obligations and can, as such, not be promoted as an argument to curtail these rights. This understanding also resonates in the judgment on the case of *Khlaifia and Others v. Italy*, which deals with the internment of Northern African refugees on the Italian island of Lampedusa in 2011. The Grand Chamber of the ECtHR made clear that it

<sup>50</sup> BALIBAR, *We, the People of Europe? Reflections on Transnational Citizenship*, Princeton, 2004, p. 5; KESBY, *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford, 2010, p. 103.

<sup>51</sup> *Ibid.*, p. 110. Similarly, DEMBOUR, KELLY, “Introduction”, in DEMBOUR, KELLY (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Abingdon, 2011, p. 5.

<sup>52</sup> See e.g. discussion in European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, para. 67.

<sup>53</sup> GRANT, “Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity”, in DEMBOUR, KELLY (eds.), *cit. supra* note 51, p. 59.

<sup>54</sup> OCHR, Recommended Principles and Guidelines on Human Rights at International Borders, available at: <<https://www.ohchr.org/en/issues/migration/pages/internationalborders.aspx>>, pt. 22 (discussed in European Court of Human Rights, *M.A. and others v. Lithuania*, Application no. 59793/17, Judgment of 11 December 2018, Concurring Opinion of Judge Pinto de Albuquerque, para. 19).

<sup>55</sup> Report on the Human Rights Situation of Refugees and Migrant Families and Unaccompanied Children in the United States of America, p. 30, para. 42 (discussed in European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 19).

“an increasing influx of migrants cannot absolve a State of its obligations”.<sup>56</sup> Although this specific case dealt with the prohibition of torture, the same logic will apply to any other freedom and right of migrants within the jurisdiction of the High Contracting parties to the ECHR (see Article 1 ECHR). The Court moreover pointed out that the “objective difficulties related to a migrant crisis” cannot function as a legitimate excuse of the violation of human rights.<sup>57</sup> The Court thereby acknowledges both the European States’ struggles in dealing with the sudden influx of migrants and the migrants’ human rights that need to be respected, especially given their vulnerable situation. The ECtHR’s sister court, the Inter-American Court of Human Rights, explicitly recognized that “immigrants are ‘the most vulnerable to potential or actual violations of their human rights’”.<sup>58</sup> Henceforth, the interpretation of their human rights and freedoms has to take into consideration their vulnerability and heightened need for protection.

Despite the fact that irregular arrivals to Europe have been brought down to so-called ‘pre-crisis levels’, a notable reduction of 90% since the height of the migration crisis in 2015,<sup>59</sup> certain Member States of the European Council still consider migration as the biggest threat to Europe.<sup>60</sup> Equally, in the view of Europeans, immigration remains the main concern facing the EU, and is mentioned twice as often as terrorism.<sup>61</sup> Arguably, as long as migration is perceived as a threat, the governments of the respective Member States will not approve of a liberal jurisprudence of the European courts regarding the rights of migrants and immigrant minorities. The adverse political climate regarding migrants and the interrelated mounting pressure on the ECtHR on the part of certain European governments is even explicitly noted by Judge Pinto

<sup>56</sup> European Court of Human Rights, *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment (Grand Chamber) of 15 December 2016, para. 184.

<sup>57</sup> *Ibid.*

<sup>58</sup> Inter-American Court of Human Rights, *case of Vélez Loor v. Panama*, Judgment of 23 November 2010, para. 98.

<sup>59</sup> <<https://www.consilium.europa.eu/en/meetings/european-council/2018/12/13-14/>>. On the reduction see: <<https://www.consilium.europa.eu/en/policies/migratory-pressures/>>.

<sup>60</sup> See, “Migration Biggest Threat to Europe, Says Defence Minister”, available at: <<https://hungary-today.hu/migration-biggest-threat-to-europe-says-defence-minister/>>.

<sup>61</sup> European Commission, *Standard Eurobarometer 90: Public opinion in the European Union*, Report (2018), p. 12.

de Albuquerque in a very recent judgment.<sup>62</sup> This trend is yet another worrisome challenge to the rule of law in Europe and correlates with research on the progressive interpretation of human rights law on the national level: in the post-war era, European domestic courts expanded the rights of minorities and migrants, foremost by transplanting national rights with universal human rights.<sup>63</sup> Yet, it appears that the more the courts expanded the rights of the migrants, the stronger the pushback was against an acceptance of these ‘others’ in society. Current developments on the European regional level suggest that the European courts curb the attribution of rights and, thus, adjust to expectations and perceptions of their constituency.<sup>64</sup> Most remarkably, this ostensible development, whereby the European governments adjust to their constituency’s fear of the migrant ‘other’ and increase pressure on the ECtHR, cannot be reproduced statistically: the general attitudes of Europeans toward immigration did not become more negative during the years of the “refugee crisis”, quite contrary to what most media and right-wing politicians suggest.<sup>65</sup>

Migration is not a new phenomenon in Europe. Minority immigrant communities have often been successfully integrated, and new national identities have developed over time.<sup>66</sup> In more recent years, however, migration has been associated with inter-group conflicts and violence, with incompatible national identities, with the rise of populism, xenophobia, and nationalism.<sup>67</sup> “[A]t some point in our lives or another, we are all minorities”, remarked Stavros Lambrinidis, the EU Special Representative for Human Rights at the United Nations Human Rights Council in February 2018. “If, when in the majority”, he stressed, “we are tolerant when ‘minorities’ we may

<sup>62</sup> European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 16. See an extended discussion of his concurring opinion below.

<sup>63</sup> ÇALI, “Coping With Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights”, *Wisconsin International Law Journal*, 2018, pp. 20 and 23.

<sup>64</sup> *Ibid.*, p. 22. See also: DEMBOUR, *cit. supra* note 15, pp. 117-119.

<sup>65</sup> CAUGHEY, O’GRADY, WARSHAW, “Policy Ideology in European Mass Publics, 1981-2016”, *American Political Science Review*, 2019; KUSTOV, LAAKER, RELLER, “The Stability of Immigration Attitudes: Evidence and Implications”, 1 May 2019, available at: <<https://ssrn.com/abstract=3322121>>.

<sup>66</sup> CESARANI, FULBROOK, “Introduction”, in CESARANI, FULBROOK (eds.), *Citizenship, Nationality and Migration in Europe*, London, 1996, p. 2.

<sup>67</sup> Report of the UN Secretary-General, “Making Migration Work for All”, *cit. supra* note 43, para. 1; BAUMGÄRTEL, *cit. supra* note 6, p. 4; FØLLESDAL, “Third Country Nationals as European Citizens: The Case Defended”, in SMITH, WRIGHT (eds.), *Whose Europe? The Turn towards Democracy*, Oxford, 1999, p. 105.

not ‘like’, or that may not be ‘like us’, are repressed, then beware: We are opening the floodgates to our own future repression and discrimination as well”.<sup>68</sup> The UN Secretary-General, António Guterres, equally stressed the importance of reversing those trends and of recommitting to the protection of the rights of all migrants.<sup>69</sup>

The concurring opinion of the ECHR Judge Pinto de Albuquerque in the recent *M.A. and others v. Lithuania* case resonates the same chorus. In unusually strong language, the judge compares the treatment of migrants who have been rejected at land borders and who are returned without an individual assessment of their claims with the treatment of animals: “Migrants are not cattle that can be driven away like this”.<sup>70</sup> The judge might be talking figuratively, but the image of the unwanted ‘others’ who are treated not like humans, but like beasts, is haunting. It reverberates research from social sciences on othering, especially of cases of dehumanisation, where the ‘others’ are perceived as lacking a human essence. They are seen as inferior, unworthy of dignified treatment, and of a lesser value.<sup>71</sup> If the ‘others’ — the migrants in our case — are understood as animals, ‘we’ will never be able to accept them as equals, as humans with the same inherent rights. The full recognition of the ‘other’ migrants as humans with inalienable human rights is crucial for their approval and integration in ‘our’ society. Interrelated, the acceptance of the rights of ‘others’ is considered one of eight key domains that comprise positive peace.<sup>72</sup> Hence, the recognition and enforcement of the human rights of migrant ‘others’ appears to have a positive effect on peace.

Judge Pinto de Albuquerque is clear in his opinion that the ECtHR must ensure the effective protection of migrants. Furthermore, he holds that land borders are not

<sup>68</sup> EU Special Representative for Human Rights, High-level segment by Stavros Lambrinidis at the United Nations Human Rights Council, 27 February 2018, available at: <[https://eeas.europa.eu/delegations/un-geneva/40477/hrc-37-high-level-segment-statement-he-mr-stavros-lambrinidis-eu-special-representative-eusr\\_en](https://eeas.europa.eu/delegations/un-geneva/40477/hrc-37-high-level-segment-statement-he-mr-stavros-lambrinidis-eu-special-representative-eusr_en)>.

<sup>69</sup> Report of the UN Secretary-General, “Making Migration Work for All”, *cit. supra* note 43, paras. 1, 4(b), 5 and 39.

<sup>70</sup> European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 29.

<sup>71</sup> HASLAM et al., ‘Humanness, Dehumanization, and Moral Psychology’, in MIKULINCER, SHAVER (eds.), *The Social Psychology of Morality: Exploring the Causes of Good and Evil*, Washington, 2012, p. 205; TAJFEL, *Human Groups and Social Categories*, Cambridge, 1981, pp. 241-243

<sup>72</sup> INSTITUTE FOR ECONOMICS AND PEACE, *Global Peace Index 2017: Measuring Peace in a Complex World*, p. 81.

zones of exclusion or exception from States' human-rights obligations. What is remarkable in this case, is the continued and strong emphasis of the judge that the ECtHR must remain the "conscience of Europe", especially considering that he concurs with the majority's judgment.<sup>73</sup> It could, indeed, be argued that there is no need to further dwell on what the majority already has decided, especially since Pinto de Albuquerque agrees with their conclusion. However, his concern with the respect of the migrants' rights and the Court's corresponding jurisprudence could be explained by an undeniable trend of increased nationalism, which is fuelled by populist views and results in attitudes of fear and hate.<sup>74</sup> Judge Pinto de Albuquerque clearly goes beyond a restrained, objective legal analysis, when he takes a passionate stance on current developments and urges the Court not to surrender to destructive political developments. His fervent appeal merits a quote in full length:

"In the wake of a new and dangerous 'post-international law' world, this opinion is a plea for building bridges, not walls, for the bridges required by those in need of international protection, not walls arising from the fear that has been percolating in recent years through global sewers of hatred. Although justified as an attempt to curb illegal immigration, human trafficking or smuggling, these physical barriers reflect an ill-minded isolationist policy and represent, as a matter of fact, the prevailing malign political *Weltanschauung* in some corners of the world, which perceives migrants as a cultural and social threat that must be countered by whatever means necessary and views all asylum claims as baseless fantasies on the part of people conniving to bring chaos to the Western world. The culture of fear, with its delirious ruminations against 'cosmopolitan elites' and 'foreign' multiculturalism, and its most noxious rhetoric in favour of 'our way of life' and 'identity politics', has burst into the mainstream."<sup>75</sup>

Pinto de Albuquerque probably oversteps the tasks assigned to him as a judge of the ECtHR on the bench of the *M.A. and others v. Lithuania* case, namely the interpretation and application of the ECHR (see Article 32(1) ECHR). Although his plea could arguably be considered a breach of his duties, the judge demonstrates a very "high moral character", as required by Article 21(1) ECHR. He points to several noteworthy developments that have been topic of research in numerous disciplines,

<sup>73</sup> European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 27.

<sup>74</sup> STOYANOVA, *cit. supra* note 6, pp. 85-86.

<sup>75</sup> European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 26.



albeit not so much from law: hatred, threat, and fear of the ‘others’ that stand in opposition to ‘our’ identity. These are issues worth highlighting because of their potential to negatively affect our society, a democratic order and the respect of human rights. The perceived threat of the ‘others’ is also one of the characteristics of violent clashes, among other before the outburst of genocides.<sup>76</sup> The analysis of this chapter, by no means, has an intention to imply the imminent danger of a genocide. However, it concurs with the worries of Judge Pinto de Albuquerque on how issues of identity politics permeate the *Weltanschauung* of a growing number of individuals in Europe, and elsewhere.<sup>77</sup> The pledge equally reveals a fear of a weakening ECtHR, a court that surrenders to developments of the political mainstream, a court whose jurisprudence reflects ‘our’ view of the ‘others’ that are not welcome to Europe. Of a court that becomes a part in the political game rather than remaining an independent pillar and the guardian of everyone’s human rights within the territories of the member States of the Council of Europe.

## 6. – Migration, Human Rights, and Values

The promotion and protection of human rights is at the heart of multilateralism, a central pillar of the UN system, and a core and founding value of the EU itself.<sup>78</sup> The Treaty on the Functioning of the European Union (TFEU or ‘Treaty of Lisbon’) vows to draw inspiration from the cultural, religious and humanist inheritance of Europe, from which the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law have developed.<sup>79</sup> Yet, do these ‘inalienable rights’ today apply to European citizens only and are the ‘universal values’ in fact regional values? This section will briefly explore the value system that underlies the European human rights regime and how it is interpreted in the case-law of the courts.

<sup>76</sup> STAUB, “The Roots and Prevention of Genocide and Related Mass Violence”, in ZARTMAN, ANSTEY, MEERTS (eds.), *The Slippery Slope to Genocide: Reducing Identity Conflict and Preventing Mass Murder*, Oxford, 2012, p. 39; BAUMANN, *The Multicultural Riddle: Rethinking National, Ethnic, and Religious Identities*, New York, 1999, pp. 62-63.

<sup>77</sup> For a similar concern, see BALIBAR, *cit. supra* note 50, p. 24, discussing the connection of collective identities, national identity, xenophobia, racism, ‘us’, and genocide and ‘ethnic purification’.

<sup>78</sup> EU Special Representative for Human Rights, High-level segment by Stavros Lambrinidis at the United Nations Human Rights Council, *cit. supra* note 68.

<sup>79</sup> OJ C 306, 17 December 2007, p. 1, preamble.

The Global Strategy for the European Union's Foreign and Security Policy of 2016 (EU Global Strategy), a non-binding policy document, reconfirms the EU's commitment to human rights as embossed in the Charter of Fundamental Rights.<sup>80</sup> Albeit its vow to human rights, the EU Global Strategy, unlike earlier strategic documents, treats migration as a challenge and reveals the internal crisis that the EU is facing due to migration inflows. Research has shown that the Global Strategy provides different narratives of migration, for instance in connection with purported values.<sup>81</sup> The Global Strategy even explicitly emphasises that "remaining true to our values is a matter of law as much as of ethics and identity".<sup>82</sup> Importantly, such value narratives are indicators of the community's understanding of social relations and factors legitimising political decisions.<sup>83</sup> Thus, the value system of strategic documents can influence the European polity, and, arguably, also its judiciary. The Global Strategy is so recent that it has not found its way into the case-law of the ECtHR or the CJEU. But it is not unlikely that either court, in the near future, will refer to the Global Strategy in a case that concerns migrants. By way of comparison, take, for instance, the ECtHR judgment in the case of *Shindler v. UK*. It scrutinises on more than five pages (of a total length of 39 pages) resolutions and recommendations of the Parliamentary Assembly of the Council of Europe regarding migration issues. In addition, on two more pages, the judgment discusses the take of the Committee of Ministers on migration, globalisation, and development. Although the Parliamentary Assembly terms itself a "hotbed of ideas" and a "factory of radical ideas",<sup>84</sup> its recommendations can hardly be considered of a legal nature and, as such, not a source

<sup>80</sup> *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign And Security Policy*, 2016, pp. 4, 8, 10, available at: < [https://eeas.europa.eu/sites/eeas/files/eugs\\_review\\_web\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf)>. References to human rights contained in the EU Global Strategy have been discussed by numerous commentators, e.g. CECCORULLI, LUCARELLI, "Migration and the EU Global Strategy: Narratives and Dilemmas", *The International Spectator*, 2017, p. 88; HACKENESCH, CASTILLEJO, "The European Union's Global Strategy: Making Support for Democracy and Human Rights a Key Priority", European Think Tanks Group, April 2016, available at: <[https://www.diegdi.de/uploads/media/16-10252\\_ETTG\\_Briefs\\_01.pdf](https://www.diegdi.de/uploads/media/16-10252_ETTG_Briefs_01.pdf)>; WAGNER, ANHOLT, "Resilience as the EU Global Strategy's new *leitmotif*: Pragmatic, Problematic or Promising?", *Contemporary Security Policy*, 2016, pp. 414-416.

<sup>81</sup> CECCORULLI, LUCARELLI, *cit. supra* note 80, p. 88.

<sup>82</sup> *Shared Vision, Common Action: A Stronger Europe*, *cit. supra* note 80, p. 15.

<sup>83</sup> See, CECCORULLI, LUCARELLI, *cit. supra* note 80, p. 84. Similarly, KESBY *cit. supra* note 50, p. 102.

<sup>84</sup> <<http://www.assembly.coe.int/nw/Page-EN.asp?LID=InBrief>>.

of law for the ECtHR. The reference of the Court to political documents is problematic. Not only does it interfere with the check and balances, as discussed above in section 3, the narratives of migration contained in such documents will in all probability be reflected in the case-law of the courts.<sup>85</sup>

### 7. – *Constructing a European Identity: ‘Otherness’ in the Case-law of the ECtHR*

Any law contains certain values and interests.<sup>86</sup> Courts, in turn, interpret the respective legislation by reference to the preparatory work in order to determine these underlying values. Yet, should courts even be legitimised to make value judgments, beyond the obvious intent of the drafters as manifested in the drafting history? The question arises whether the courts, in their legal reasoning, revert to values beyond the ones expressly stated by the drafters, such as inherent ‘European values’ that imply a difference between ‘us’ (Europeans) and ‘them’ (the others from beyond our borders).<sup>87</sup> There is also a possibility that the judges refer to ‘European values’ as the implicit values contained in the ECHR, values upon which the European human rights system was erected. From an interpretative point of view, such teleological approach is hardly debatable. However, a seemingly unresolvable issue arises: a reference to values that guided the drafting of the ECHR in 1950 might stand in contrast to a dynamic interpretation of today. At the same time, it should not be ruled out that a dynamic interpretation could reflect current anti-migratory sentiments, which, in return, stand in contrast to the original *telos* of the ECHR.

The reasoning of the courts is, at times, based on moral rather than legal norms. While high morals are part and parcel of an international judge’s desirable characteristics,<sup>88</sup> there are (at least) two downsides to reverting to ethical arguments in a

<sup>85</sup> An (unverified) HUDOC search returned 457 instances of case-law that contain ‘Committee of Ministers’ in connection with a violation of Art. 14. Related, see European Court of Human Rights, *Samsunkov v. Estonia*, Application No. 52178/10, Judgment of 3 July 2012, para. 53, discussing a Recommendation of the Committee of Ministers of the Council of Europe on migrants prior to discussing European human rights law.

<sup>86</sup> See e.g. European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment of 24 May 2016, Dissenting Opinion of Judge Yudkivska, p. 84.

<sup>87</sup> On the relation of threat perception and integration policies, see: CALLENS, MEULEMAN, “Do Integration Policies Relate to Economic and Cultural Threat Perceptions? A Comparative Study in Europe”, *International Journal of Comparative Sociology*, 2017, pp. 367-391.

<sup>88</sup> See the related discussion *supra* in Section 5 on the position of ECtHR Judge Pinto de Albuquerque.

judgment: first, moral standards are exposed to changing values and, second, due to the principle of legality the judges cannot build their legal arguments on moral standards that are not embossed in binding law. Two dissenting opinions to two judgments of the ECtHR exemplify these issues. They do, notably, not deal with issues of migration. Yet, since migration is an area that is bound to evoke issues of values, (in)justice, and ethics, similar challenges could arise. In his dissenting opinion in the case of *Ždanoka v. Latvia*, Judge Zupančič ferociously holds that the ECtHR “must take an unambiguous and unshakable *moral* stand on [aggression deriving from regressive nationalism]”.<sup>89</sup> In the view of the judge, inter-ethnic tolerance is a categorical imperative of modernity and from intolerance too many violations of human rights derive.<sup>90</sup> While his argument is important and laudable, he nonetheless does not base it on law, but rather on ethics, hence making it more susceptible to attacks. The second judgment is in the case of *Vasiliauskas v. Lithuania*. The minority judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris cautioned against a too formalistic line of reasoning in the fight against impunity, because of the ECtHR’s role as “the conscience of Europe”.<sup>91</sup> Yet, if judges do not apply the law formalistically, but rather based on conscience or ethics, their decisions become void of legitimacy. A weakening of the legitimacy risks entailing a lack of adherence to the law given that its application and interpretation is not foreseeable and not governed objectively or formalistically. Such unpredictability is not advisable. Because while in both cases above, the judges had the best of intentions in guarding the interest of the weaker or suppressed party, the pendulum might swing the other way and be detrimental, for example to migrant, who claim a breach of human rights before a court.

Indeed, research indicates that the ECtHR in recent times has shown increased willingness to depart from its standard jurisprudence in order to accommodate the shifts in attitude of its fractured national audience.<sup>92</sup> Whether this adjustment occurs as a response to the backlash against the Court or is an expression of a new realist jurisprudential attitude has yet to be determined.<sup>93</sup> The nature of the ECHR as a living

<sup>89</sup> European Court of Human Rights, *Ždanoka v. Latvia*, Application No. 58278/00, Judgment of 16 March 2006, Dissenting Opinion of Judge Zupančič, p. 59, emphasis in original.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Id.*, *Vasiliauskas v. Lithuania*, Application No. 35343/05, Judgment (Grand Chamber) of 20 October 2015, Dissenting Opinion of Judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris, paras. 11, 16 and 18.

<sup>92</sup> ÇALI, *cit. supra* note 63, pp. 22, 44.

<sup>93</sup> See for related discussions, *ibid.*, pp. 4-5, 45-46.

instrument arguably enables an adaptation of the ECtHR's jurisprudence to any present-day conditions.<sup>94</sup> Yet, if a change of values occurs at the level of the national constituencies, which in turn is mirrored in the respective elected governments, will the courts adjust their interpretation of the law accordingly, in order to accommodate 'modern' ideas? What if these contemporary ideas contradict the original high standards of the protection of human rights and fundamental liberties – and as such are detrimental to the rights of migrants? According to recent scholarship there is indeed a risk of a politicization of the ECtHR.<sup>95</sup> Moreover, as indicated above, the intrinsic value narrative of many a political document will be reflected in the case-law of the Court by way of reference. Thus, the value question will become part of the legal interpretation of human rights law.<sup>96</sup> With regard to migration, scholars have pointed to the incoherence and disharmony between a value-led polity and the respect of national, European, and international law that is central to the EU's values; they identify a recent tendency of increasing restrictive legislation that “seem to pay lip service to largely shared fundamentals of international law (...), while instead serving the EU's interests.”<sup>97</sup> Conversely, as discussed above in Section 4, if the EU and the Council of Europe streamline their (human rights) jurisprudence and pledge to respect the UN human rights regime, then international law is harmonised and, largely, builds on the same values. The question remains how susceptible these constructions are to a change in values.

#### 8. – *Migration, Expatriation, Globalisation*

The jurisprudence of the ECtHR reveals a paradox: some judgments, in discussing expatriation and migration, emphasize their positive aspects on globalisation. Yet, these positive sides are seemingly limited to pan-European movements of individuals only. For instance, in the case of *Shindler vs. The United Kingdom*, the EC-

<sup>94</sup> See, European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment of 7 January 2010, para. 277.

<sup>95</sup> ÇALI, *cit. supra* note 63, p. 46.

<sup>96</sup> See value discussions e.g. in European Court of Human Rights, *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, para. 101; Id., *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, Judgment of 11 July 2002, para. 71.

<sup>97</sup> CECCORULLI, LUCARELLI, *cit. supra* note 80, p. 94. See also, CARDWELL, *cit. supra* note 1, pp. 68-69.

tHR holds that “expatriation could be a positive effect of globalisation that contributed to building diverse, tolerant and multicultural societies”.<sup>98</sup> Is the globalism that the Court refers to limited to Europe only and, in the interpretation of the Court, is globalism a regional development rather than a global one? Expatriation within Europe is associated with a dynamic, modern, positive, and economic development, while expatriation from beyond Europe’s borders is perceived as a threat. It might seem as though migration, expatriation, and globalisation are considered positive if related to citizens of the EU Member States. The migration of EU citizens is, notably, protected under the rights of free movement (Article 45 TFEU). Yet, the court does not stop with the acknowledgment of this fundamental right. Rather, the Court applies a string of positively loaded words like ‘opportunities’, ‘multi-culturalism’, ‘tolerant’ in its discussion of the movement of individuals within the legal boundaries of Europe.<sup>99</sup> Several scholars, however, raise concerns of the not only positive effects of globalisation. Arjun Appadurai, for instance, stresses that globalisation exacerbates uncertainties where the lines between ‘us’ and ‘them’ have been blurred. He points to a development of two Europes: the inclusive and multicultural one, and the anxious xenophobic other one, in which minorities activate worries about belonging.<sup>100</sup> In his dissenting opinion in the above-mentioned case of *Ždanoka v. Latvia*, Judge Zupančič chooses to accentuate the negative effects of globalisation. In reference to the Harvard legal scholar, Roberto Mangabeira Unger, the judge asserts that the current developments of preserving national identity (or nationalism) are a reaction to globalisation. Zupančič equally discerns a parallel trend of more aggressive attitudes towards minorities in a society, such as the Roma in Bulgaria (*Nachova and Others v. Bulgaria*), the Serbians in Croatia (*Blečić v. Croatia*), and immigrant workers in Germany and France. He concludes that in “many of these realms, we detect the unhealthy trend from [sic] patriotism on the one hand, to nationalism, chauvinism

<sup>98</sup> European Court of Human Rights, *Shindler v. The United Kingdom*, cit. supra note 8, para. 56, discussing Recommendation 1650 (2004) of the Committee of Ministers.

<sup>99</sup> *Ibid.*, para. 43, referring to the same recommendation: “The recommendation further noted that expatriation was the outcome of increasing globalisation and should be viewed as a positive expression of modernity and dynamism, bringing real economic benefit for both host countries and the countries of origin”.

<sup>100</sup> APPADURAI, *Fear of Small Numbers: An Essay on the Geography of Anger*, Durham, 2006, pp. 7-8, 43.

and racism on the other”.<sup>101</sup> Thus, although migration within the borders of Europe is associated with (economic) prosperity and a paradoxical construct of ‘regional globalism’, the downside of peoples’ movements, particularly if they are perceived as members of a minority group of ‘other’ Europeans, is incontestable.

## 9. – Conclusion

“If nationality is the mirror image of citizenship which defines the individual in international law (...), to what extent can citizenship of the [European] Union be considered to have such an identity?”, asks Elspeth Guild.<sup>102</sup> Traditionally, citizenship has been attached to the belonging to a nation State, defined by its stable territory, sovereignty, and population.<sup>103</sup> This belonging entailed a number of rights and duties of the individuals and formed their collective national identity.<sup>104</sup> At the same time, this national citizenship – by a territorially bound population – also defined who was excluded therefrom. The borders that delimit a national as well as a regional belonging, inevitably contain a system of exclusion.<sup>105</sup> This chapter examined several aspects of (non-) belonging to Europe, the identity of Europe, and the creation of Europeaness within the jurisprudence of the European regional courts. In particular, this chapter worked with a hypothesis that the European regional courts are influenced by the current political sentiments and, as such, reflect value judgments against migrants in their judgments. The case-law coming out of the European regional courts does, so far, not openly discuss migrants as the ‘others’. It also refrains from deliberating on common European values and thereby tries to function as a bulwark against exclusionism: However, there are a number of indications that call for attention. The detrimental effect of the ECtHR jurisprudence on migrants is particularly apparent in the area of immigration control, where States enjoy a wide margin of appreciation, and where the human rights of migrants are curtailed on behalf of State

<sup>101</sup> European Court of Human Rights, *Ždanoka v. Latvia*, Application No. 58278/00, Judgment of 15 March 2006, Dissenting Opinion of Judge Zupančič, pp. 58-59. See for an in-depth discussion of these different notions, HEDETOFT, *Discourses and Images of Belonging Migrants Between ‘New Racism’, Liberal Nationalism and Globalization’*, Aalborg, 2002.

<sup>102</sup> GUILD, “The Legal Framework of Citizenship of the European Union”, in CESARANI, FULBROOK (eds.), *Citizenship, Nationality and Migration in Europe*, London, 1996, p. 39.

<sup>103</sup> Art. 1 of the Convention on Rights and Duties of States (Montevideo Convention of 1933).

<sup>104</sup> FØLLESDAL, *cit. supra* note 67, p. 108. For further reading see, BOELES et al., *cit. supra* note 2, pp. 9-11.

<sup>105</sup> BALIBAR, *cit. supra* note 50, p. 8.

sovereignty.<sup>106</sup> The European courts' current jurisprudence does, unfortunately, not "offer a reliably effective venue for promoting migrant rights".<sup>107</sup> The fact that dissenting and concurring judges in separate opinions fervently urge the ECtHR to resist the treatment of migrants as 'others' in their case-law, points to the Court's susceptibility to political pressure.<sup>108</sup> At the same time, the judges have to maintain strict adherence to the law under their jurisdiction only, without surrendering to (purely) ethical arguments, no matter how passionate they are about the matter at hand. The high legal standards and the legitimacy of the courts are at risk if the judges cross the boundaries assigned to them. It remains to be seen how the courts will manage the balancing act between their judicial impartiality, the expectation of the constituency, and the aim of being 'the lighthouse for those who seek protection'.

<sup>106</sup> For a in-depth discussion of ECtHR and CJEU jurisprudence and how the judgments provide different levels of protection to migrants, see: BAUMGÄRTEL, *cit. supra* note 6, p. 46 ff., and 101 ff.; ALAN, "The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?", *European Journal of International Law*, 2018, pp. 261-265; DEMBOUR, "Human Rights Law and the National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg", *Netherlands Quarterly of Human Rights*, 2003, pp. 68-69. For a (short) discussion of CJEU case-law, see, COSTELLO, "European Justice for Migrants and Refugees", 14 June 2015, available at: <<https://verfassungsblog.de/european-justice-for-migrants-and-refugees-2/>>.

<sup>107</sup> BAUMGÄRTEL. *cit. supra* note 6, p. 156.

<sup>108</sup> For a partial confirmation, *ibid.*