An EU Sustainable Migration: Institutional Discourse and Migration Politics

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1. Introduction

From the migration crisis of 2015-2016 onwards, sustainable migration has become the central goal of the EU migration policy. On a first reading, the term sustainable migration carries a positive connotation and is perceived as hinting to better law and policy making for the future of the EU. The link between sustainability and migration implies that the EU is in pursuit of a migration policy with specific characteristics. Yet it is not clear what these characteristics might be, as sustainable migration remains a concept without definition. What is more sustainability as a primary law objective in the EU legal order does not *prima facie* create legal obligations of any kind.

This raises the question: what would a sustainable EU migration look like in terms of legal design? The article suggests that this question cannot be answered, because sustainable migration should be perceived as a political concept whose power and risk lies in its lack of definition. The link between sustainability and migration created a powerful tool at a time of broader political disagreement. In essence, the concept of sustainable migration has been used by the Commission to create the political impetus necessary to drive the EU agenda on migration forward, with little change in the legal apparatus that regulates migration as evidenced by the political agreement reached in December 2023 on the Pact.

To develop the argument, the article zooms in on sustainability and maps the appearance of the concept in the EU migration policy, as well as in EU law and policy more generally. Drawing on the work of Foucault, Anne Orford has suggested a turn to description as a mode of legal writing.[1] Following Orford, by

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[1] Anne Orford, 'In Praise of Description' (2012) 25 Leiden Journal of International Law 609.

describing what is visible, rather than by discovering what is hidden,[2] this article argues that sustainable migration is a political concept that has been used to unite the various political agendas on migration after 2015 and to overcome the backlog that they created for EU migration politics.

To do so, the article first provides an overview of the concept of sustainability, its relevance in EU law and policy and its disconnect from EU migration policy. Following, Section 3 maps the diverse ways in which sustainability appears in EU migration policy. The various manifestations of the actions that could fit under sustainable migration are incoherent and do not assist in drawing conclusions on the potential implications of legal design. Section 4 looks at scholarly research on sustainable migration and presents how migration studies and human geography have approached the concept of sustainable migration. It explains the value of these definitions, but also the impossibility to use them as means to inform the EU legal framework. Finally, Section 5 draws on the work of political scientists and suggests that sustainable migration has been used as a powerful political concept at times of extreme disagreement on the future of EU migration policy. Section 6 concludes the analysis and highlights that sustainable migration has been the central promise for the future of EU migration policy since 2015. The main function of the concept was to create consensus behind an overarching goal that could unblock the reform of the EU asylum system, without however leading to any groundbreaking legal transformation.

2. The Disconnect of Migration from Sustainability in EU Policy and Scholarship

Sustainability is a concept which has been shaped within the UN framework, before being transposed to the EU legal framework. Specifically, sustainability became popularized in the 1970s as a central part of environmental ethics, which at that time emerged as a distinct philosophical discipline.[3] The emergence of the concept was linked to concerns over the finite nature of planetary resources and the danger posed by human activities to the preservation of the environment.[4] The concept of sustainability has evolved in international policy through soft law documents of

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[2] ibid 617, where the author cites excerpts from Michel Foucault, 'La philosophie analytique de la politique' in Daniel Defert, François Ewald and Jacques Lagrange (eds), *Dits et écrits, 1954–1988* (vol 3, Gallimard 1994), 534, at 540–1.

[3] Andrew Brennan and Lo Y.S. Norva, 'Environmental Ethics' in Edward N. Zalta and Uri Nodelman (eds) *The Stanford Encyclopedia of Philosophy* (Spring 2023 Edition) https://plato.stanford.edu/archives/spr2023/entries/ethics-environmental/.

[4] Donella Meadows et al, *The Limits to Growth: A report for the Club of Rome's Project on the Predicament of the Mankind* (Universe Books 1972).

different kinds and has found its most recent articulation in the 2030 Agenda for Sustainable Development.[5] Throughout the years numerous sectors have been linked to sustainability and many nouns have followed the adjective 'sustainable', with sustainable migration being one of the most recent manifestations first appearing under the Sustainable Development Goals.

In EU law, sustainability first made its appearance in the 1990s, and, currently, under the Lisbon Treaty sustainable development is a primary law objective of the EU connected with economic growth, social progress, environmental protection, and external action.[6] Despite this, the evolution of the EU Sustainable Development Strategy throughout these years has taken place in complete disregard of any aspect of migration.[7] The first time the EU Sustainable Development Strategy was connected to migration was under the Von Der Leyen Commission. Arguably, this link is connected to a diffusion of sustainability related goals across all EU policies. Specifically, Von Der Leyen's political programme aimed at integrating the 2030 Agenda in all commission proposals, thus streamlining sustainability in EU policy.[8] In a working document issued in 2020, the Commission elaborated on the different policies adopted with the aim of implementing the Sustainable Development Goals at EU level. In that working document, and in the Sustainable Development Goals mapping tool developed by the Commission, it appears as if all the EU policies currently pursued, and all the legal acts adopted by the EU, relate to one or more Sustainable Development Goals.[9] Among all the different policies, the Commission mentioned the New Pact on Migration and Asylum as linked to sustainability.[10]

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[5] For an overview of the relevant developments see Margherita Pieraccini and Tonia Novitz, 'Sustainability and Law: A Historical and Theoretical Overview' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020) 11.

[6] Sustainable development first appeared in the Maastricht Treaty in relation to development cooperation in Article 130u TEC. Amsterdam Treaty introduced sustainable development as an EU objective, see Preamble, Article 2, Treaty on European Union (Amsterdam consolidated version); Article 2, Article 6 and Article 177, Treaty establishing the European Community (Amsterdam consolidated version). In Lisbon Treaty the references are in Article 3(3) TEU, Articles 3(5), 21(2) (d) and (f) TEU where sustainability is set an objective of the Union in its external action; Article 11 TFEU and Article 37 of the Charter of Fundamental Rights.

[7] Migration is absent from all the core EU policy documents in this field. See: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, EU Sustainable Development Strategy, (Commission's proposal to the Gothenburg European Council COM(2001)264 final; Towards a global partnership for sustainable development COM(2002)82 final; 'EUROPE 2020 A strategy for smart, sustainable and inclusive growth' COM(2010)2020 final; Next steps for a sustainable European future, European action for sustainability COM(2016)739 final.

[8] Commission Staff Working Document, Delivering on the UN's Sustainable Development Goals-A comprehensive approach SWD(2020)4000 final.

[9] See SDG policy mapping tool available at https://knowsdgs.jrc.ec.europa.eu/intro-policy-mapping.

[10] Commission Staff Working Document SWD(2020)4000 final, Box 1 at 6.

Despite this recent link, which in practice obfuscates the concept's meaning and implications, the EU Sustainable Development Strategy has evolved in silo from EU migration policy. A similar siloed approach exists in EU scholarly research in sustainability. Specifically, sustainability-related research in EU law has not hitherto engaged with the links between sustainability and migration. Rather, EU law scholars have investigated sustainability in relation to environmental law, economic law and more recently labour law. In the literature, there have been two broad ways of engagement of EU law scholars with sustainability over the last twenty years. The first is scholarship that looks at how EU law could be used as a tool to address environmental challenges with a focus on environmental and competition law.[11] A second strand of scholarship developed later in time and is tied to the conceptual evolution of sustainability within the UN framework, the evolution of EU law itself after the Lisbon Treaty, and the many different crises have been experienced at EU level (economic/financial crisis, Brexit, migration crisis, public health crisis more recently) which have pointed to the inability of the existing system to achieve sustainability objectives.[12] In view of the above, different scholars have argued on how different fields of EU law should be developed or applied as means to achieve more just and sustainable societies.[13] Still, any migration related consideration is entirely absent from all the relevant works. This creates a particularly salient scholarly gap in light of the incoherent appearance of sustainable migration as a goal of the EU migration policy from 2015 onwards as will be demonstrated in the following section.

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[11] See Richard Macrory, Ian Havercroft and Ray Purdy (eds), *Principles of European Environmental Law, Proceedings of the Avosetta Group of European Environmental Lawyers* (Europa Law Publishing 2004); Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002); Christina Voigt and Hans Christian Bugge (eds), *Sustainable Development in National and International Law, What Did the Brundtland Report Do to Legal Thinking and Legal Development, and Where Can We Go from Here?* (Europa Law Publishing 2008); Beate Sjåfjell and Anja Wiesbrock (eds), *The greening of European business under EU law: Taking Article 11 TFEU seriously* (Routledge 2015); Sander RW Van Hees, 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) 10 Utrecht Law Review 60; Maria M Kenig-Witkowska, 'The Concept of Sustainable Development in the European Union Policy and Law' (2017) 1 Journal of Comparative Urban Law and Policy 64; Matthew Humphreys, *Sustainable Development in the European Union: A General Principle* (Routledge 2017).

[12] Takis Tridimas, 'Foreword' in Beate Sjåfjell, Georgina Tsagas and Charlotte Villiers (eds), *Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future through Crises* (Cambridge University Press 2022).

[13] See Tonia Novitz, 'Social Sustainability, Labour and Trade: Forging Connections' in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (Bristol University Press 2020); Konstantinos Alexandris Polomarkakis, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' (2020) 29 Social & Legal Studies 183.

3. The Incoherent Appearance of Sustainability in EU Migration Policy

Migration was first linked to sustainability in the 2030 Agenda on Sustainable Development. Among the 17 Sustainable Development Goals and under the umbrella of reducing inequalities, goal 10.7 targets the facilitation of 'orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'.[14] Following the adoption of the Agenda, the UN Global Compact on Migration was adopted in December 2018.[15] The Compact was the first intergovernmental effort to holistically address migrant protection. Specifically, and building on already binding human rights obligations, it addressed issues of migrant protection at all stages of their journey (origin, transit, and destination countries).

The EU discourse on sustainable migration predated the adoption of the Compact and developed in complete disconnect to the international policy on the matter. The analysis in this section demonstrates that there is a semantic difference between sustainable development and its relation to migration as it appears in the UN framework, and sustainable migration in the way it appears in EU migration policy documents, serving to complicate the matters. Specifically, after 2015, sustainable migration has become the new buzzword describing the future of EU migration policy. In different documents issued by the Commission from 2015 to this day, sustainability appears as the central objective of EU migration policy. Nevertheless, the connection made between sustainability and migration is nowhere elaborated in a manner which can clarify any legal implications. By reviewing EU policy and legislative documents on migration from 2015 to the present, I have categorized the diverse and inconclusive ways in which sustainability appears in the Table 1 below, based on indicative phrasing used in the relevant texts.

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[14] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, Goal 10.7. See also Michele Klein Solomon and Suzanne Sheldon, 'The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration' (2019) 30 International Journal of Refugee Law 584 referring also to the relevance of goal no 8.6 on the eradication of forced labour, modern slavery and human trafficking and 8.8 on protecting labour rights for all.

[15] Points 3 and 6, Preamble, UN General Assembly, Compact for Safe, Orderly and Regular Migration, 19 December 2018, A/RES/73/195.

Indicative appearances of sustainability in EU migration policy

Literal meaning	Abstract meaning	Specific actions
Sustainable reduction of numbers of persons	1. Sustainable migration 2. Sustainable approach/solutions to migration	1. Sustainable returns and reintegration 2. Sustainable legal pathways 3. Sustainable sharing of responsibility

From the table 1, we see that sustainability appears in some EU policy documents in its literal meaning, implying the maintenance of something for the future. References to sustainability in a literal manner exist in documents regarding the implementation of the EU-Turkey agreement that refer to the 'sustainable reduction of numbers of persons irregularly crossing the border from Turkey into the European Union as a result of Turkey's actions'.[16] The same holds true for documents related to the Schengen area that mention 'the sustainability of the substantial reduction of the migratory flow'.[17] These references mean that a situation of decreasing arrivals, referred to as sustainable, is capable of being maintained in the future.

Next to this literal reference to sustainability, there are references to sustainable migration as an abstract characteristic of EU migration policy. It seems to be an overarching goal for the Commission to achieve an 'integrated, sustainable and holistic EU migration policy';[18] 'a responsible and sustainable migration policy';[19]

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[16] Commission Recommendation of 11 January 2015 for a voluntary humanitarian admission scheme with Turkey C(2015)9490; Report from the Commission to the European Parliament and the Council, 'EU-Turkey Joint Action Plan - Third implementation report' COM(2016)0144 final. Similarly, in Report from the Commission to the European Parliament, the European Council and the Council, Fifth Report on the progress made in the implementation of the EU-Turkey statement COM(2017)0204 final; Report from the Commission to the European Parliament, the European Council and the Council, Sixth Report on the progress made in the implementation of the EU-Turkey statement COM(2017)0323 final; Report from the Commission to the European Parliament, the European Council and the Council, Seventh Report on the progress made in the implementation of the EU-Turkey statement COM(2017)0470 final.

[17] Proposal for a Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk COM(2016)0275 final; Back to Schengen - A Roadmap COM(2016)0120 final.

[18] Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe COM(2016)0197 final; Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) no 516/2014 of the European Parliament and the Council COM(2016)0468 final.

[19] Commission contribution to the EU Leaders' Thematic Debate on a Way Forward on the External and the Internal dimension of Migration Policy COM(2017)820 final.

an 'efficient, responsible and sustainable migration policy';[20] or as the New Pact suggested 'fair, efficient and sustainable' EU migration policy.[21] However, it is not clear what this policy would entail in terms of legal measures.

On an equally abstract level, sustainability appears as adaptability or resilience of EU policies in the face of crisis. In different documents, there are mentions such as '[a] sustainable resolution of the crisis needs a step change in the Union's migration policies'[22] or '[t]he 2015 migration and refugee crisis exposed the limitations of our asylum system … it also demonstrated that a future-proof policy requires a more predictable, cooperative and sustainable approach.'[23] The resilience of EU migration policy in the face of crisis is intimately connected to the demand of shaping an EU asylum and migration system through long-term planning and solutions as opposed to *ad hoc* measures.[24] Such declaratory demands for an EU sustainable migration capable of addressing future crises do not point to concrete legal measures that are premised on specific legal principles. While presenting the promise of better migration management, the Commission does not provide any information on what legal principles sustainable migration should follow.

Finally, sustainable migration appears closely related to more specific actions which will be reviewed next. These are partnerships with third countries and returns and reintegration, the creation of sustainable legal pathways, and sustainable sharing of responsibility. Even if we were to accept that these actions form part of an EU sustainable migration, the analysis following shows that they come with great incoherence and create challenges for the EU legal order, which complicate them as a basis for an EU sustainable migration.

The reference to sustainable migration when it comes to partnerships with third countries does not add anything novel to the existing EU policy on the matter. Even after the adoption of the Pact, the relevant partnerships built on what was already on the table since the 2011 EU Global Approach to Migration.[25] Already back then, EU migration policy articulated the need for cooperation with third countries and

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[20] Proposal for a Regulation of the European Parliament and of the Council Establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management And Visa Policy COM(2018)473 final.

[21] New Pact on Migration and Asylum COM(2020)609 final 28.

[22] Communication to the European Parliament, the European Council and the Council, Managing the refugee crisis: immediate operational, budgetary and legal measures under the European agenda on migration COM(2015)0490 final.

[23] Managing migration in all its aspects: Progress under the European Agenda on Migration COM(2018)798 final. See also Progress report on the Implementation of the European Agenda on Migration COM(2019)126 final.

[24] New Pact on Migration and Asylum COM(2020)609 final 41.

[25] The Global Approach to Migration and Mobility COM(2011)0743 final.

put emphasis on the external aspects of EU migration. In this context, the EU-Turkey agreement has been suggested as the blueprint for EU migration policy in the future.[26] In parallel, returns and reintegration are presented as a central element of an EU sustainable migration. Sustainable migration is understood in this context as a means to address the root causes of migration by ensuring better living conditions for people in third countries.[27] This policy was previously connected to Development Cooperation and, relatedly, the sustainable development of third countries under the EU external action. It is not clear, however, what constitutes a sustainable return and reintegration policy. Nor is it clear what framework should be put in place to implement such policies with full respect to fundamental rights and the principle of non-refoulement.

Overall, partnerships with third countries and returns and reintegration reinforce the link of migration policies as part of the Area of Freedom, Security and Justice and the EU Common Foreign and Security Policy and Development Cooperation. As a result, the instruments used to pursue such policies come with significant challenges for the EU constitutional structure that have already been explored in literature.[28] In brief, such practices raise issues with respect to the horizontal division of competences, the division of powers between the EU and the Member States and the limitation of judicial review by the Court of Justice of the EU.[29] This has been exemplified in the legal issues raised by the EU-Turkey deal and which continue to

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[26] On Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration COM(2016)385 final. On critiques of the EU Turkey-Agreement see Mauro Gatti and Andrea Ott, The EU-Turkey statement: legal nature and compatibility with EU institutional law' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times* (Edward Elgar Publishing 2019); Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) 31 Journal of Refugee Studies 216

[27] See Report from the Commission to the European Parliament, the European Council and the Council, Fifth Progress Report on the Partnership Framework with Third Countries under the European Agenda on Migration COM(2017)0471 final.

[28] Sergio Carrera, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019); Juan Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU' in Sergio Carrera, Juan Santos Vara and Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019).

[29] Articles 40 TEU and 275 TFEU. See Emilio De Capitani, 'Progress and Failure in the Area of Freedom, Security and Justice' in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020). See also Paula García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 Common Market Law Review 15; Claudio Matera, 'An External Dimension of the AFSJ? Some Reflections on the Nature and Scope of the Externalisation of the AFSJ Domains' in Ester Herlin-Karnell, Maria Fletcher and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2019).

be raised in the informal cooperation pursued by the EU with various third countries.[30] Scholars have demonstrated in great length the human rights issues raised by the growing informalization of EU action in the external aspects of migration.[31] Cardwell and Dickinson have coined the term 'formal informality' to describe the governance framework guiding EU migration policy on the matter.[32] By this they refer to the proliferation of instruments that resemble formal tools of EU action while lacking procedural safeguards. Such instruments can by no means inform a sustainable EU migration without endangering core principles of the EU constitutional architecture (such as rule of law, democratic accountability and access to justice).

In addition to this, there is a demand for sustainable legal pathways both for people in need of protection and to attract talent to the EU.[33] Two rationales currently underpin sustainable legal pathways: preventing deaths at sea and connecting migration to the EU economic growth. In the first, safe legal pathways are presented as means to tackle unsafe and irregular routes, which create more deaths at sea.[34] On this matter, a Recommendation was made by the Commission in 2020 on continuing the resettlement schemes in place, while the Regulation Establishing a Union Resettlement and Humanitarian Admission Framework will soon be adopted.[35] Contrary to what might be imagined, the proposed Regulation harmonizes the procedure that should apply to resettlement and humanitarian

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[30] For a detailed analysis see Juan Santos Vara, Paula García Andrade and Tamás Molnár (eds), 'Special Section, The Externalisation of EU Migration Policies in Light of EU Constitutional Principles and Values', (2023) 8(2) European Papers-A Journal on Law and Integration.

[31] See Eleonora Frasca and Emanuela Roman, 'The Informalisation of EU Readmission Policy: Eclipsing Human Rights Protection Under the Shadow of Informality and Conditionality' (2023) 8(2) European Papers - A Journal on Law and Integration 931; Peter Slominski and Florian Trauner, 'Reforming Me Softly – How Soft Law Has Changed EU Return Policy since the Migration Crisis' (2021) 44 West European Politics 93; Violeta Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law' in Evangelia (Lilian) Tsourdi and Philippe De Buycker (eds), *Research handbook on EU migration and asylum law* (Edward Elgar Publishing 2022)

[32] Paul James Cardwell and Rachel Dickson, 'Formal Informality' in EU External Migration Governance: The Case of Mobility Partnerships' (2023) 49(12) *Journal of Ethnic and Migration Studies* 3121.

[33] New Pact on Migration and Asylum COM(2020)609, Section 1.

[34] ibid 3–4.

[35] Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways [2020] OJ L 317/13 2020. Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM(2016)0468 final; European Commission Factsheet, A New Pact on Migration and Asylum, State of Play, 23 March 2023, FS/23/1850. According to the Factsheet, political agreement has been reached on the Resettlement Framework Regulation.

admission, but does not create any obligation for Member States to create such pathways.[36] Overall, it is unclear how the Commission envisions tackling unsafe routes and preventing deaths at sea, while continuing to adopt policies which promote Member State discretion and undermine human rights.[37] The lack of innovative proposals should not come as a surprise if we also consider the CJEU and ECtHR case-law on humanitarian visas, both of which found no obligation of creating a humanitarian corridor to EU Member States stemming from either EU law or human rights.[38]

In parallel with protection related pathways, labour related pathways link migration to the economic needs of the EU. In the relevant references, various actions, especially those targeting highly skilled workers, are mentioned as a means to ensure growth and address the long-term economic and demographic challenges faced by the EU.[39] In these mentions, it is the EU welfare and economic system that is to be sustainable, thanks to specific labour needs covered by migrants.[40] After the adoption of the recast Blue Card Directive in 2021, the Commission issued a communication where different measures were suggested as means to achieve the objective of an EU sustainable migration policy.[41] On the legislative side, the Commission referred to the revision of the Long-Term Residents Directive and the Single Permit Directive in order to enhance the rights and mobility of third-country nationals in the EU.[42] At the same time, Talent partnerships to attract workers from

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[36] See Recital 19 of the proposed Regulation; Recital 19, Article 1(2) and (2a) Amended Proposal.

[37] For more analysis see Alezini Loxa, 'Complementary Pathways: Pledging Protection at the Edges of EU Law' (2023) 25(2) European Journal of Migration and Law; Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' (2020) 32 International Journal of Refugee Law 54.

[38] Judgment of 7 March 2017, *X and X*, C-638/16 PPU, ECLI:EU:C:2017:173 16; *MN and others* v *Belgium,* app No 3599/18.

[39] See Recital 3, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17; A European Agenda on Migration COM(2015)240 final; Action plan on the integration of third country nationals COM(2016)0377 final. See also Proposal for a Regulation of the European Parliament and of the Council Establishing The Asylum And Migration Fund COM(2018)471 final.

[40] New Pact on Migration and Asylum COM(2020)609 final 25; Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment COM(2016)378 final.

[41] See Attracting skills and talent to the EU COM(2022)657 final.

[42] Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final. Proposal for a Directive of The European Parliament and of the Council On a single application procedure for a single permit for third-

specific third countries, a European Youth Mobility scheme that could create rights to reside, travel and work for a limited time in the EU, a framework to facilitate access to innovative entrepreneurs, and the possibility of harmonizing admission for care workers were also discussed.[43]

Finally, there are also references to 'sustainable and fair distribution of applications' or 'sustainable sharing of responsibility'. [44] Behind such references lies the idea that the Dublin system is unsustainable, and that EU asylum policy should be revisited to ensure its functioning for the future. And yet, references to sustainable sharing of responsibility under the Pact, and the attempt to shape EU asylum law accordingly, have not delivered results. The agreement reached at the Council on the proposed Regulation on Asylum and Migration management did not change the responsibility rules under Dublin, whereas a flexible solidarity mechanism was put in place as means to ensure sustainable migration.[45] This appears problematic. The principle of solidarity has been subject to much scrutiny in relation to its normative status and the constant attempt of Member States to circumscribe it.[46] Despite the increasing positioning of solidarity at the center of the EU legal order, the concept remains elusive, but at the same time, it is connected to an underlying idea of shared

country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) COM(2022)655 final.

[42] Attracting skills and talent to the EU COM(2022)657 final 18.

[43] ibid.

[44] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) no 439/2010 COM(2016)0271 final which led to Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L 468/1; Proposal for a regulation of the European Parliament and of the Council Establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM(2016)270 final which was withdrawn and superseded by the Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM(2020) 610 final; Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM(2016)0465 final.

[45] Council Document 10084/23, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] General Approach, 6 June 2023. See also European Council on Refugees and Exiles, Editorial: Migration Pact Agreement Point by Point, at https://ecre.org/editorial-migration-pact-agreement-point-by-point/ .

[46] Judgment of 6 September 2017, *Slovakia* v *Council* and *Hungary* v *Council* (C-643/15 and C-647/15) ECLI:EU:C:2017:631; Eleni Karageorgiou, 'Rethinking Solidarity in European Asylum Law : A Critical Reading of the Key Concept in Contemporary Refugee Policy' (PhD, Faculty of Law, Lund University 2018). See also Nordic Journal of European Law Special Issue 2023(2) on solidarity.

identities that motivate common objectives and obligations between groups.[47] Sustainable migration is also elusive. Even if we were to turn to the UN framework for guidance (which as we shall see in the next section is not of assistance) a central demand would be a balancing of interests of host states, states of origins and the migrants themselves, which extends beyond bounded communities with shared identities. In that sense, mixing sustainability with sharing of responsibility through solidarity owed by the Member States could go in two ways. A first would be that sustainability would conceptually open up solidarity beyond bounded communities, which would be highly implausible in light of the long intellectual history of solidarity and the difficulty of devising a universal type of solidarity.[48] The other way is that the elements of balancing inherent of sustainability would be introduced in solidarity, further undermining the principle.[49]

Overall, the goal of sustainable migration appears both at an abstract and a specific level. It is tied to many areas of EU migration law that have different objectives and are based on different rationales. Specifically, sustainability with regard to the development of third countries refers to policies that develop across different areas of EU law, which come with different levels of fundamental rights guarantees. The references add nothing to the existing policies and reinforce the model of outsourcing migration control and evading responsibility for asylum seekers, as the relevant actions continue to develop through informal channels of cooperation which evade democratic and judicial scrutiny.[50] Moreover, safe legal pathways are presented as means to ensure the protection of asylum seekers, who should not be forced to embark on perilous journeys. But when it comes to binding measures that create rights for migrants, legal instruments related to labour migration are prioritized. This is not a negative evolution, as labour related pathways are indeed necessary for the development of the EU economy.[51] Rather the point of tension is the following. Sustainable legal pathways are framed as a way to reinforce the role of the EU as a promoter of human rights, but in practice the framework does not

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[47] See Esin Küçük, 'Solidarity in the EU: What Is In A Name?' (2023) 6 Nordic Journal of European Law 1, 20.

[48] See Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) 24 Maastricht Journal of European and Comparative Law 740, 744–746.

[49] For a detailed analysis of the flexible solidarity mechanisms as presented in the Commission Proposal on a Regulation on asylum and migration management COM(2020)610 final and their constitutional implications see Alezini Loxa and Vladislava Stoyanova, 'Migration as a Constitutional Crisis for the European Union' in Stijn Smet and Vladislava Stoyanova (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022).

[50] Maarten den Heijer, Jorrit Riijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Comnon Market Law Review 607.

[51] Attracting skills and talent to the EU COM(2022)657 final, Introduction.

fundamentally transform pathways for people in need of international protection. Hence it is impossible to conclude on what legal design sustainable migration demands. Finally, sustainable sharing of responsibility serves to further blur the principle of solidarity under Article 80 TFEU and does not seem to have any concrete legal implication. All these inconsistencies and the divergent objectives of EU migration policy, which are all set under the umbrella of sustainable migration, necessitate the closer examination of this concept. The next section engages more closely with literature on the concept of sustainable migration and examines whether scholarly analysis can provide insight into the potential implications of this concept.

4. Attempts to Define Sustainable Migration

The link between sustainability and migration which was made in Sustainable Development Goals and the 2018 Global Compact has resulted in literature focused on the nature of the compact as a soft law instrument and its interaction with international human rights law.[52] Despite the references to sustainable migration in EU and international policy as section 3 showed, scholarship has not engaged in research on the legal implications of this objective. Some authors have used the term 'sustainable migration' in a declaratory manner, as a demand for a type of migration policies, without any clear definition of what these should entail.[53]

Outside legal scholarship, migration studies have been investigating the relation between development and migration for a long time.[54] From the 1960s to this day, migration has been connected to development by outlining how the flow of people and, consequently, of money (through remittances) as well as of knowledge

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[52] See Alan Desmond, 'A New Dawn for the Human Rights of International Migrants? Protection of Migrants' Rights in Light of the UN's SDGs and Global Compact for Migration' (2020) 16 International Journal of Law in Context 222; Elspeth Guild and Raoul Wieland, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Does It Mean in International Law?' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2019* (Oxford University Press 2020); Peter Hilpold, 'Opening up a New Chapter of Law-Making in International Law: The Global Compacts on Migration and for Refugees of 2018' (2020) 26 European Law Journal 226.

[53] Klein Solomon and Sheldon (n 18); Eva Dick and others, 'Regional Migration Governance: Contributions to a Sustainable International Migration Architecture' (2018) Briefing Paper Deutsches Institut für Entwicklungspolitik (DIE).

[54] See Thomas Faist, Margit Fauser and Peter Kivisto (eds), *Migration-Development Nexus: A Transnational Perspective (Migration, Diasporas and Citizenship Series)* (Palgrave Macmillan 2011).

(acquired in the host country and employed in the country of origin upon return) can impact the development of host countries and countries of origin of migrants.[55]

In this regard, it should not come as a surprise that research into potential definitions of the term 'sustainable migration' have been explored outside the field of legal science and with an emphasis on development considerations.[56] Specifically, the Peace Research Institute of Oslo produced two papers, which offered definitions of sustainable migration from the perspective of migration studies and human geography. In these papers, it was acknowledged that the concept of sustainable migration, especially without an established definition, is a powerful one, in the sense that its rhetorical effects can be seen as fitting both liberal and restrictive migration agendas.[57]

The first definition, proposed by Bivand Erdal *et al*, suggested that sustainable migration is 'migration that ensures a well-balanced distribution of costs and benefits for the individuals, societies and states affected, today and in the future'.[58] The second definition, proposed by Betts and Collier, took a different stance, suggesting that sustainable migration is 'migration that has the democratic support of the receiving society, meets the long-term interests of the receiving, sending society, and migrants themselves, and fulfils basic ethical obligations'.[59] These

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[55] For an overview of the evolution of the scholarly analysis throughout the years see Thomas Faist and Margit Fauser, 'The Migration–Development Nexus: Toward a Transnational Perspective' in Thomas Faist, Margit Fauser and Peter Kivisto (eds), *The Migration-Development Nexus* (Palgrave Macmillan 2011).

[56] See for example Pierre Picard and Tim Worrall, 'Sustainable Migration Policies' (Université catholique de Louvain, Center for Operations Research and Econometrics (CORE) 2011) 2011/40 where sustainability of migration is examined in light of the development of formulas examining the costs and benefits of labour migration under different schemes; Judith Janker and Susan Thieme, 'Migration and Justice in the Era of Sustainable Development Goals: A Conceptual Framework' (2021) 16 Sustainability Science 1423 have tried to develop a framework for sustainable migration based on trade-offs between costs and benefits at different levels (individual, household, community/regional, national); Mohammed Al-Husban and Carl Adams, 'Sustainable Refugee Migration: A Rethink towards a Positive Capability Approach' (2016) 8 Sustainability 451 where alternative governance models are proposed on the basis of ethnographic field studies.

[57] Jørgen Carling and Marta Bivand Erdal, 'Is "Sustainable Migration" a Valuable Concept?' (PRIO Policy Brief 2018) 5. This can be seen in parallel to arguments raised in the context of environmental justice. See for example Christina Voigt, 'From Climate Change to Sustainability: An Essay on Sustainable Development, Legal and Ethical Choices' (2005) 9 Worldviews 112, 120; See also John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Third Edition, Oxford University Press 2012) 132 where sustainable development is mentioned as a 'rhetoric of reassurance'.

[58] Marta Bivand Erdal and others, 'Defining Sustainable Migration' (PRIO Paper 2018) EMN Norway Occasional Papers 9.

[59] Alexander Betts and Paul Collier, 'Sustainable Migration: A Framework for Responding to Movement from Poor to Rich Countries' (2018) EMN Norway Occasional Papers 9.

definitions offer a starting point for conceptualizing sustainable migration policies, but they cannot provide much guidance as to the legal implications of the concept. Apart from the fact that the distribution of costs and benefits and the evaluation of long-term interests of different societies cannot be easily translated into law, these definitions encounter another obstacle, namely the position of individuals and their agency as rights-bearers in law.

On this matter, Guild has highlighted the risk that arises from linking sustainable development and migration, by reviewing the link of the Global Compact on Migration to the 2030 Sustainable Development Agenda.[60] The risk arises due to the fact that 'The economic objectives of development that are not framed in legal terms are extended to migration, framing migration as a development tool.'[61] However, migration involves individuals who have human rights protected under international law, and balancing their rights against state interests risks further diminishing migrants' protection.[62] In the same article, Guild also examines how policies linking migration to development (i.e., addressing brain drain, remittances and circular migration) could potentially lead to conflict with human rights, suggesting that the Global Compact on Migration should be applied within the framework of human rights standards rather than Sustainable Development Goals.[63]

Similarly, the EU legal system is centred on individual agency, and human dignity is at the core of this legal order under Article 2 TEU and the Charter of Fundamental Rights. The caveats regarding migrants' rights relate more to the (intended or unintended) creation of spaces of liminal legality, which exclude migrants' legal protection of migrants, rather than to the provisions of the EU legal framework. In such a context, viewing migrants as transactional tokens whose value is measured by their capital contribution to the country of origin and the country of destination could hardly inform the legal implementation of an EU sustainable migration, in that such a view would conflict with the centrality of human dignity in its legal order.

The above analysis highlights the difficulty of identifying elements that can inform a legal framework structured around the objective of sustainable migration. What is more, it shows that the fuzziness of sustainability allows for different types of migration policies and for different underlying notions of human rights protection: from utmost respect for all to cost-benefit analysis of human lives under the pretext of realism. It is precisely the flexibility of sustainable migration and the lack of

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[60] Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: To What Extent Are Human Rights and Sustainable Development Mutually Compatible in the Field of Migration?' (2020) 16 International Journal of Law in Context 239.

[61] ibid 248.

[62] ibid.

[63] ibid 249.

concrete legal demands from sustainability that can frame the concept as a political one with a very specific function in EU migration politics in the period following the migration crisis of 2015.

5 Sustainable Migration as a Political Concept

Given the difficulties in defining sustainable migration and the divergent goals that can be pursued under the pretext of sustainability, the following question arises: How should we understand the overarching objective of shaping a sustainable EU migration policy as presented by the Commission? Before suggesting an answer, it is worth reflecting on the time when sustainable migration became the core objective of EU migration policy. Despite the long existence of sustainability in the EU legal order and in the international scene, the promise of sustainable migration came to the fore in a period characterized by intense political disagreements at national and EU level as to how the EU should approach the area of migration. Specifically, a link between sustainability and migration in EU migration policy appears for the first time after 2015 and the collapse of the Common European Asylum System in 2015.[64] And while various concepts have at times appeared in EU migration policy without a specified legal meaning, none has been set as the new overarching goal framing the future of EU action in the field in the way sustainable migration does.[65]

At this stage, is also important to note that among the various actors implicated in EU law making, the Commission has been the central one using the discourse of sustainable migration. This should not come as a surprise as the Commission has historically used its monopoly of initiative 'skilfully' as put by Thym, to present itself as a source of expertise in the area of migration.[66] In contrast, the Council operates under a veil of secrecy, making it almost impossible to access the discussions that preceded the negotiation of different instruments and to thereby closely examine the various positions of the Member States therein and the way in which they did or did not use sustainable migration.[67] In light of this and the analysis above, I suggest that sustainable migration has been used inconclusively by the

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[64] Daniel Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 Common Market Law Review 1545, 1549.

[65] One example would be integration whose meaning and legal implications are unclear, while it also appears in both policy documents and legal provisions. See Moritz Jesse, *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany and the United Kingdom* (Brill Nijhoff 2016) for a study on the potential legal meaning of integration.

[66] Daniel Thym, 'Institutional and Constitutional Framework' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 60.

[67] ibid 63.

Commission and without any attempts for definition during particularly challenging times for EU migration policy, to draw support from many and opposing sides. The term has allowed for flexibility as to what kind of migration policies can be associated with this overarching objective.

Sustainable migration should, thus, be understood as a political concept whose power and risk lies precisely in the lack of any legal implications. Understanding sustainable migration as a political concept can inform our perception of the many references of sustainability in EU migration policy, it can explain the appearance of the concept after the 2015 migration crisis, as well as the agreement reached in December 2023 on the Pact, which shows no fundamental change in the legal principles underlying EU migration.[68] At the same time this situates sustainable migration, as expressed in the EU migration policy, in a longer theoretical tradition which views sustainability and sustainable development as concepts located in political discourse with contested and potentially antithetical meanings.[69] The framing of sustainable migration in this way perfectly captures the diversity and incoherence of the various manifestations of sustainable migration as demonstrated in Section 3. The different approaches to sustainability in EU migration policy since 2015 should not create confusion. There is no unitary meaning of sustainable migration which creates demands of a particular legal design and which is obfuscated in EU migration policy. Rather, sustainable migration has been 'a powerful tool for political consensus' at a time when an intense lack of consensus was threatening the future of the EU project in many respects. [70]

6. Conclusion

This article critically investigated the appearance of sustainable migration as the overarching goal of EU migration policy after 2015. The analysis engaged with EU law, policy and scholarship on sustainable development and demonstrated the

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[68] See the series of blogposts by Steeve Peers analysing parts of the package in detail The New EU Asylum Laws, part 1: the Qualification Regulation, part 2: the Reception Conditions Directive and part 3:the Resettlement Regulation, EU Law Analysis blog.

[69] See Susan Baker, 'Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernisation in the European Union' (2007) 16 Environmental Politics 297, 312 specifically on the EU Sustainable Development Strategy as a political construct. Michael Jacobs, 'Sustainable Development as a Contested Concept' in Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999) drawing on Walter B Gallie, 'Essentially Contested Concepts' 56 (1955-1956) Proceedings of the Aristotelian Society, New Series 167 on sustainable development on a more abstract level.

[70] Susan Baker and others (eds), The Politics of Sustainable Development: Theory, Policy and Practice within the European Union (Routledge 1997) 69.

complete absence of migration from the relevant area. Subsequently it mapped the diverse ways in which sustainability has appeared in EU migration policy documents. The analysis demonstrated that there is a semantic difference between sustainable development and its relation to migration as it appears in the UN framework, and sustainable migration in the way it appears in EU migration policy documents. Rather, after the migration crisis, sustainable migration has become a central buzzword of EU policy. The term operates both as an abstract goal of EU migration policy and as connected to more specific actions. However, there is no clarity or coherence as to the legal implications that such a goal might have.

Looking at scholarly research on sustainable migration and drawing on the work of political scientists on sustainability, the article argues that sustainable migration should be understood as a political concept whose central function has been to unite Member States and overcome the blockage created in the attempt to reform the EU asylum system after the 2015 migration crisis, without however bringing a fundamental change. Looking into sustainable migration through the lenses of political sciences and the similar approach to sustainable development, allows us to understand its power and risk. By analogy to Baker's suggestion on sustainable development, the commitment to sustainable migration has been key for the creation of consensus over the future of EU migration, while at the same time it has allowed a great flexibility as to what such future might look like.[71]

It is important to reflect on how the concept of sustainable migration has become central since 2015. The collapse of the Common European Asylum System and its failed reform, the practical collapse of Schengen, the heated debates on migration at EU and national level and the growing support for restrictive migration policies, frame the setting in which sustainable migration was put forward as the central promise of future law and policy making. Eventually, after years of negotiations which perpetuated a sense of crisis in EU migration politics, the recent agreement reached on the Pact was presented as historic.[72] Understanding the past references to sustainable migration in light of it being a political concept captures the advantages of shaping a political compromise, while presenting the promise of future amelioration. In practice however, this symbolical commitment of the EU to sustainable migration throughout these years did not signal any transformation from

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[71] ibid 28.

[72] See Natascha Zaun and Ariadna Ripoll Servent, 'Perpetuating Crisis as a Supply Strategy: The Role of (Nativist) Populist Governments in EU Policymaking on Refugee Distribution' (2023) 61 JCMS: Journal of Common Market Studies 653. See also Directorate General for Migration and Home Affairs, Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum, News Article, 20 December 2023.

past policies, but rather only a necessary political consensus for further limitation of migrants' rights.[73]

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[73] Cf. Natasja Reslow, 'Transformation or Continuity? EU External Migration Policy in the Aftermath of the Migration Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019). See also Human Rights Watch, EU's Migration Pact is a Disaster for Migrants and Asylum Seekers, December 21 2023.