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Facilitating Mobility Through Migration as Humanitarian Protection: Building on Lessons Learned from the North American and European Policies Regarding Haiti and Syria

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Résumé de l'article

Cet article aborde la contribution de trois principaux donateurs d'aide humanitaire, le Canada, les États-Unis d'Amérique et l'Union européenne (UE), à la diplomatie humanitaire, ainsi que les moyens d'articuler la politique migratoire et la politique humanitaire dans l'action de ces trois acteurs pour faciliter la mobilité. S'appuyant sur les leçons tirées du traitement de la question migratoire dans les crises humanitaires syrienne et haïtienne, cette étude pose la question suivante : alors que les conflits, les catastrophes naturelles et autres calamités augmentent les besoins humanitaires, conformément à l'esprit du *Pacte mondial pour les migrations*, comment et dans quelle mesure le Canada, les États-Unis et l'UE pourraient-ils, en tant que principaux donateurs humanitaires, mieux promouvoir l'action humanitaire en cohérence avec leur politique migratoire et faire de la migration humanitaire un moyen de protéger les droits des individus touchés par une crise humanitaire complexe ? L'étude soutient que, tout en étant de nature non contraignante en tant que *soft law*, le *Pacte mondial pour les migrations* prévoit une interrelation prometteuse entre migration et crise humanitaire dans une perspective de facilitation de la mobilité à travers la migration à titre de protection humanitaire, en articulant des normes et des politiques qui, autrement, conduisent à l'instrumentalisation de l'aide humanitaire. Une telle articulation devrait concilier les considérations humanitaires et la politique migratoire dans le contexte de conflits armés et de crises humanitaires provoquées par des catastrophes naturelles. À cet égard, les pratiques dans les contextes haïtien et syrien montrent les défis pour l'articulation proposée étant donné la primauté des intérêts de l'État et la discrétion qui règne en la matière. Il en résulte une tension entre un discours enthousiaste sur l'aide humanitaire et une approche restrictive de l'immigration humanitaire, conduisant à des pratiques contradictoires. En effet, comme l'illustrent les actions des États-Unis et de l'UE dans les crises syrienne et haïtienne, le pouvoir discrétionnaire de l'État en matière de politique migratoire et en droit de l'immigration, la confusion créée autour de la migration, la lutte contre le terrorisme, le populisme et la xénophobie témoignent d'une politisation de la protection internationale et d'une instrumentalisation de l'aide humanitaire qui conduit à l'externalisation de la politique migratoire. Dès lors, de nouvelles voies dans le droit de l'immigration et la politique migratoire des États, telles que la redéfinition des critères pour le regroupement familial et l'implication croissante des organisations axées sur les migrants dans le parrainage, contribueraient à concilier les intérêts de l'État, l'aide humanitaire et la migration en tant que protection humanitaire.

FACILITATING MOBILITY THROUGH MIGRATION AS HUMANITARIAN PROTECTION: BUILDING ON LESSONS LEARNED FROM THE NORTH AMERICAN AND EUROPEAN POLICIES REGARDING HAITI AND SYRIA

Mulry Mondélice[*]

This paper addresses the contribution of three major humanitarian assistance donors, Canada, the United States of America (US), and the European Union (EU), to humanitarian diplomacy, and ways to articulate migration policy and humanitarian policy in the action of these three actors to facilitate mobility. Building on lessons learned from the Syrian and Haitian humanitarian crisis-related migration, this study asks: while conflicts, natural disasters and other calamities increase humanitarian needs, based on the spirit of the *Global Compact for Migration*, how and to what extent could Canada, the US and the EU, as major humanitarian donors, better promote humanitarian action in coherence with their migration policy and make humanitarian migration a means to protect the rights of individuals affected by the complex humanitarian crisis? The paper argues that, while being of soft law character, the *Global Compact for Migration* provides for a promising intersection between migration and humanitarian crisis to facilitate mobility through migration as humanitarian protection, by articulating norms and policies that lead, otherwise, to the instrumentalization of humanitarian assistance. Such an articulation should reconcile humanitarian considerations and migration policy in the context of multidimensional armed conflicts and natural-disaster-made humanitarian crises. In this regard, practices in the Haitian and Syrian contexts show challenges to the proposed articulation given the primacy of state interests, and discretion that governs in the field. This results in a tension between an enthusiastic narrative on humanitarian assistance and a restrictive approach to humanitarian-immigration admission, leading to contradictory practices. Indeed, as illustrated by actions of the US and the EU in the Syrian and Haitian crises, state discretion in migration policy and law, amalgamation surrounding migration, the fight against terrorism, populism, and xenophobia show politicization of international protection and instrumentalization of humanitarian assistance, that have led to the externalization of migration policy. Thus, new pathways in states' domestic law and policy, such as redefining family reunification and increasing involvement of migrants-focused organizations in sponsorship, would help reconcile State interests, humanitarian assistance, and migration as humanitarian protection.

Cet article aborde la contribution de trois principaux donateurs d'aide humanitaire, le Canada, les États-Unis d'Amérique et l'Union européenne (UE), à la diplomatie humanitaire, ainsi que les moyens d'articuler la politique migratoire et la politique humanitaire dans l'action de ces trois acteurs pour faciliter la mobilité. S'appuyant sur les leçons tirées du traitement de la question migratoire dans les crises humanitaires syrienne et haïtienne, cette étude pose la question suivante : alors que les conflits, les catastrophes naturelles et autres calamités augmentent les besoins humanitaires, conformément à l'esprit du *Pacte mondial pour les migrations*, comment et dans quelle mesure le Canada, les États-Unis et l'UE pourraient-ils, en tant que principaux donateurs humanitaires, mieux promouvoir l'action humanitaire en cohérence avec leur politique migratoire et faire de la migration humanitaire un moyen de protéger les droits des individus touchés par une crise humanitaire complexe ? L'étude soutient que, tout en étant de nature non contraignante en tant que *soft law*, le *Pacte mondial pour les migrations* prévoit une interrelation prometteuse entre migration et crise humanitaire dans une perspective de facilitation de la mobilité à travers la migration à titre de protection humanitaire, en articulant des normes et des politiques qui, autrement, conduisent à l'instrumentalisation de l'aide humanitaire. Une telle articulation devrait concilier les considérations humanitaires et la politique migratoire dans le contexte de conflits armés et de crises humanitaires provoquées par des catastrophes naturelles. À cet égard, les pratiques dans les contextes haïtien et syrien montrent les défis pour l'articulation proposée étant donné la primauté des intérêts de l'État et la discrétion qui règne en la matière. Il en résulte une tension entre un discours enthousiaste sur l'aide humanitaire et une approche restrictive de l'immigration

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humanitaire, conduisant à des pratiques contradictoires. En effet, comme l'illustrent les actions des États-Unis et de l'UE dans les crises syrienne et haïtienne, le pouvoir discrétionnaire de l'État en matière de politique migratoire et en droit de l'immigration, la confusion créée autour de la migration, la lutte contre le terrorisme, le populisme et la xénophobie témoignent d'une politisation de la protection internationale et d'une instrumentalisation de l'aide humanitaire qui conduit à l'externalisation de la politique migratoire. Dès lors, de nouvelles voies dans le droit de l'immigration et la politique migratoire des États, telles que la redéfinition des critères pour le regroupement familial et l'implication croissante des organisations axées sur les migrants dans le parrainage, contribueraient à concilier les intérêts de l'État, l'aide humanitaire et la migration en tant que protection humanitaire.

Este artículo aborda la contribución de tres importantes donantes de asistencia humanitaria, Canadá, los Estados Unidos de América, y la Unión Europea (UE), a la diplomacia humanitaria, y las formas de articular la política migratoria y la política humanitaria en la acción de estos tres actores para facilitar la movilidad. A partir de las lecciones aprendidas de la migración relacionada con las crisis humanitarias de Siria y Haití, este estudio pregunta: si bien los conflictos, los desastres naturales y otras calamidades aumentan las necesidades humanitarias, basándose en el espíritu del *Pacto Mundial para la Migración*, ¿cómo y en qué medida podrían Canadá, los Estados Unidos de América y la UE, como principales donantes humanitarios, promover mejor la acción humanitaria en coherencia con su política migratoria y hacer de la migración humanitaria un medio para proteger los derechos de las personas afectadas por crisis humanitarias complejas? El estudio sostiene que, aunque tenga carácter no vinculante (*soft law*), el *Pacto Mundial para la Migración* prevé una intersección prometedora entre la migración y las crisis humanitarias para facilitar la movilidad a través de la migración como protección humanitaria, articulando normas y políticas que conduzcan a la instrumentalización de la asistencia humanitaria. Dicha articulación debería conciliar las consideraciones humanitarias y la política migratoria en el contexto de conflictos armados multidimensionales y crisis humanitarias provocadas por desastres naturales. En este sentido, las prácticas en los contextos haitiano y sirio muestran desafíos a la articulación propuesta dada la primacía de los intereses y la discrecionalidad del Estado. Esto da como resultado una tensión entre una narrativa entusiasta sobre la asistencia humanitaria y un enfoque restrictivo a la inmigración humanitaria, lo que lleva a prácticas contradictorias. De hecho, como lo ilustran las acciones de los Estados Unidos de América y la UE en las crisis de Siria y Haití, la discrecionalidad estatal en las políticas y leyes migratorias, la amalgama en torno a la migración, la lucha contra el terrorismo, el populismo, y la xenofobia muestran que la politización de la protección internacional y la instrumentalización de la asistencia humanitaria han conducido a la externalización de la política migratoria. Por lo tanto, nuevas vías en las leyes y políticas internas de los Estados, como redefinir la reunificación familiar y aumentar la participación de las organizaciones centradas en el patrocinio a migrantes, ayudarían a conciliar los intereses del Estado, la asistencia humanitaria, y la migración como protección humanitaria.

Humanitarian crises have become major global challenges over the last decades. Recently, conflicts and natural disasters resulting in forced migration have contributed to increasing humanitarian needs, internally and internationally. Indeed, 243.8 million people, including 82.1 million in forced migration in 2020, were in need of humanitarian assistance in 75 countries worldwide[1]. While the COVID-19 pandemic has exacerbated humanitarian aid affecting migrants, the United Nations High Commissioner for Refugees (UNHCR) reports 102.6 million people of concern in 133 countries and territories,[2] including 5.429.739 displaced from invaded Ukraine since 24 February 2022[3]. Indeed, war and other types of conflicts, natural disasters, climate change, weaknesses in the rule of law, epidemics and the resulting food insecurity will increase humanitarian needs in multiple places.[4] Such a trend illustrates that migration and humanitarian crises are intertwined. Therefore, migration policy and humanitarian policy should be considered within the framework of states' foreign policy, actions of international organizations (IOs) and global governance.

In this regard, adopted by the UN General Assembly on 10 October 2018, the *Global Compact for Safe, Orderly and Regular Migration* (*Global Compact for Migration* or *GCM*)[5] consequently addresses linkages between humanitarian crisis and migration in several aspects. So did the resolution on *Global Compact on Refugees*[6] adopted by the UN General Assembly on 17 December 2018 with regard to refugee protection. Thus, humanitarian assistance and migration policy offer an opportunity of analyzing how major state donors and IOs approach humanitarian assistance, respectively in their foreign policy and diplomacy. Where humanitarian migration has been researched, particularly in the United States of America (US),[7] there is a need to better understand how the *Global Compact for Migration* approaches humanitarian crisis and how it can contribute to improve humanitarian donors' migration policy.

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[1]   "Global Humanitarian Assistance Report" (2021) at 17, online (pdf): *Development Initiatives* <devinit.org/documents/1008/Global-Humanitarian-Assistance-Report-2021.pdf> ["Global Humanitarian"].

[2]   "Global Appeal 2022" (21 December 2021) at 9, online (pdf): *UNHCR* <reporting.unhcr.org/globalappeal2022#_ga=2.222182168.1096265>.

[3]   The following link could be helpful: "Ukraine: USG Response to the Complex Emergency" (29 April 2022), online (pdf): USAID <www.usaid.gov/sites/default/files/2022-05/2022-04-29_USG_Ukraine_Complex_Emergency_Program_Map.pdf>.

[4]   Dennis Dijkzeul & Diana Griesinger, "Ambivalent Humanitarian Crises and Complex Emergencies" (27 August 2020), online: *Oxford Research Encyclopedia* <doi.org/10.1093/acrefore/9780190228637.013.1606> [Dijkzeul & Griesinger]; Christina Bennett, "The Development Agency of the Future. Fit for Protracted Crises?" (2015) Overseas Development Institute Working Paper at 6, online (pdf): *ODI Working Paper* <cdn.odi.org/media/documents/9612.pdf> [Bennett].

[5]   *Global Compact for Safe, Orderly and Regular Migration,* GA Res 73/195, UNGAOR, 73rd Sess, UN Doc A/RES/73/195 (2018) [*GCM*].

[6]   *Global Compact on Refugees*, GA Res 73/151, UNGAOR, 73rd Sess, UN Doc A/RES/73/151 (2019).

[7]   Jeanne Batalova, Mary Hanna & Christopher Levesque, "Frequently Requested Statistics on Immigrants and Immigration in the United States" (11 February 2021), online: *Migration Policy Institute* <www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020>

In fact, one of the most popular policies at the international stage, humanitarian action, has become a significant expression of solidarity as a shared value.[8] Following an accelerated normative and institutional evolution, particularly in the 1990s, Canada and the United States have placed humanitarian policy at the heart of their foreign policy, as has the European Union (EU) in its diplomacy.[9]

However, "the manifold and different interpretations of the term 'humanitarian' often led to ambiguities regarding intentions and interpretations in practice."[10] Indeed, practices of states and IOs include a wide range of actions taken under the umbrella of "humanitarian." For the purposes of this paper focusing on mobility under humanitarian grounds, humanitarian migration refers to humanitarian admission as

> an expedited process offering a pathway for admission into a country on a temporary or permanent basis to persons or groups of persons with protection needs, […] including but not limited to refugees, migrants in vulnerable situations, extended family members, or persons in need of medical assistance and care […] [allowing for states or IOs to use it] for an identified population in an extremely insecure or vulnerable situation and in need of urgent protection.[11]

Humanitarian migration includes humanitarian visa, permanent residency granted under humanitarian considerations, refugee and asylum protection, temporary protected status, granted on "humanitarian grounds as specified in the applicable national or regional law, often aimed at complying with relevant human rights and refugee law."[12]

Thus, humanitarian migration must be distinguished from humanitarian assistance (food, water, sanitation, shelter, medicine, and clothing) provided in the context of conflicts or natural disasters, while humanitarian assistance and protection are "the most important components of the provision of humanitarian aid" under international law.[13] Consequently, whereas practices differ from one state to another and derive from different legal regimes, humanitarian migration may be understood in the framework of the concept of "protection," which leads states and IOs to extend the scope of their actions, based on human rights considerations,[14] "in order to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence."[15]

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8   Sandra Szurek, Marina Eudes & Philippe Ryfman, "Introduction" in Sandra Szurek, Marina Eudes & Philippe Ryfman, eds, *Droit et pratique de l'action humanitaire* (Paris : LGDJ, 2019) 47 at 53 [Szurek, Eudes & & Ryfman].

9   Charlotte Dany, "Politicization of Humanitarian Aid in the European Union" (2015) 20:3 European Foreign Affairs Rev 419 at 429.

10 Dijkzeul & Griesinger, *supra* note 4.

11 "Key Migration Terms" (last visited 26 April 2022), s.v. "Humanitarian admission", online: *IOM* <www.iom.int/key-migration-terms> [IOM, "Key Migration Terms"].

12 *Ibid*, s.v. "Humanitarian Visa".

13 Dijkzeul & Griesinger, *supra* note 4.

14 David P Forsythe, "Humanitarian Protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees" (2001) 83:843 IRRC 675 at 677.

15 "Protection Policy" (September 2008), online: *ICRC* <casebook.icrc.org/case-study/icrc-protection-policy>.

Humanitarian migration raises the question of the articulation between humanitarian considerations and migration policy. In fact, humanitarian action is difficult to reconcile in practice with migration policy, where the sovereignty of the State dictates that its own interests be considered when it comes to defining criteria for granting migration status or humanitarian protection to aliens. Thus, while conflicts, natural disasters and other calamities increase humanitarian needs, based on the *Global Compact for Migration*, how and to what extent could Canada, the United States and the EU promote humanitarian assistance in coherence with their migration policy in order to reconcile state interests, humanitarian assistance and migration as humanitarian protection?

This paper addresses the contribution of three major donors to humanitarian diplomacy—two states in North America, Canada and the US, and an international organization, the European Union—as well as the lack of and the possibility of articulation between migration policy and humanitarian policy of those three actors. It builds on lessons from the actions of Canada, the EU, and the US in the humanitarian crisis regarding Syria and Haiti to analyze how the *Global Compact on Migration* approach to humanitarian migration and humanitarian crisis could help articulate American, Canadian, and European migration and humanitarian policies given the challenges they face in result of humanitarian crisis.

The paper argues that, while being of soft law character, the *Global Compact for Migration* provides a promising intersection between migration and humanitarian crisis to improve migration policy and foster mobility through migration as humanitarian protection. However, this requires social acceptance of an articulation of norms and policies avoiding the instrumentalization of humanitarianism to reconcile humanitarian considerations and migration policy in the context of multidimensional humanitarian crises, such as armed conflicts, natural disasters and epidemics. Lessons from the study of the Haitian and Syrian cases show the promises and challenges of the proposed articulation for the three major donors given the primacy of nation-state interest shaped, among others, by political context, nationalist populism and law interpretation that reinforce the vulnerability of people affected by humanitarian crisis.[16]

Focusing on diversity, including cultural values and conceptions based on human rights theory,[17] the study proposes a new pathway that emphasizes places and values to facilitate mobility through family reunification and the definition of "family members". Additionally, migrant organizations representing "diasporas" can play a pivotal role in migration processes to effectively reconcile immigration policy with humanitarian considerations in the context of severe or protracted humanitarian crises.

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[16]   Pablo S Bose, "The Shifting Landscape of International Resettlement: Canada, the US and Syrian Refugees" (2020) 27:2 Geopolitics 375 at 376 [Bose, "Shifting Landscape"].

[17]   François Crépeau & Colleen Sheppard, "Introduction" in François Crépeau & Colleen Sheppard, eds, *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge: Cambridge Scholars Publishing, 2013) 1 at 1.

Severe humanitarian crises may refer to spontaneous and devastating natural disasters (earthquakes, hurricanes, etc.), whereas protracted crises are situations "when a significant proportion of the population is vulnerable to death, disease or disruption of their livelihoods over a long period of time […] [that] are complicated by violence and natural disasters such as flooding and drought […] result[ing] in a mixture of acute and long-term needs."[18] In 2020, 34 countries, including Afghanistan, Haiti and Syria, required action to reconcile humanitarian assistance and development aid.[19]

Based on desk study, this paper firstly analyzes the perspective on humanitarian crisis management and mobility under the *GCM*. Secondly, to better explain challenges for humanitarian migration in the action of the three major donors considered in this paper, the ensuing section analyzes how processes and the normative and institutional advances that allow those leading actors to act internationally through an evolving humanitarian diplomacy can contribute to politicization of humanitarian assistance, which can jeopardize humanitarian migration by promoting and instrumentalizing humanitarian assistance, instead of promoting humanitarian admission. Thirdly, beyond the commonalities and divergences surrounding European and North American approaches to humanitarian action, the subsequent sections, building on intersections between discourses, perceptions, power, spaces, culture and peoples in contemporary immigration policy,[20] show the (in)coherence between the stance of Canada, the US and the EU on humanitarian assistance and, where applicable, their humanitarian admission practices when it comes to protecting aliens affected by severe humanitarian crisis. Here, it shows that dynamics factors surrounding the geopolitical scheme regarding humanitarian action have led to or can result in the Americas and Europe to analyze the quest, paths taken and resistance to humanitarian migration in American and Canadian foreign policy, and the EU's external action. To this end, using the cases of the North American and the European approaches to humanitarian protection in the Syrian conflict and the Haitian crisis, the paper illustrates the incoherence shown in some instances between humanitarian action and immigration policy. Lastly, this study explores an analytical grid based on other values and other actors to facilitate the mobility of people affected by severe or protracted humanitarian crisis to articulate humanitarian policy with migration policy.

I.   Humanitarian crisis, between assistance and migration under the *Global Compact for Migration*

Since the *GCM* aims at facilitating human mobility by reconciling state sovereignty in shaping policy and international cooperation touching migration and human rights of migrants,[21] such a focus on human rights affects people impacted by humanitarian crisis. This means that this non-binding instrument offers opportunities

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[18]   Bennett, *supra* note 4 at 6.
[19]   "Global Humanitarian", *supra* note 1 at 17, 34.
[20]   Bose, "Shifting Landscape", *supra* note 16 at 379.
[21]   François Crépeau, "Towards a Mobile and Diverse World: 'Facilitating Mobility' as a Central Objective of the Global Compact on Migration" (2018) 30:4 Intl J Refugee L 650 at 651–52.

for actions that states, IOs, non-governmental organizations (NGOs) and other actors can play in both humanitarian assistance and migration[22] within the five objectives related to humanitarian assistance and migration in the *GCM*.

Indeed, under Objective 2, the *GCM* envisages to "minimize the adverse drivers and structural factors that compel people to leave their country of origin"[23] in the context of natural disasters, the adverse effects of climate change, and environmental degradation, by calling on states to "[s]trengthen collaboration between humanitarian and development actors [...] in order to develop long-term responses and outcomes that ensure respect for the rights of affected individuals [...] and by ensuring these efforts take migration into account."[24] Additionally, Objectives 7 and 8 aim to respectively "address and reduce vulnerabilities in migration,"[25] and to "save lives and establish coordinated international efforts on missing migrants,"[26] setting out that migrants should have access to humanitarian assistance in countries of transit and destination, and that states

> [d]evelop procedures and agreements on search and rescue of migrants, [...] [to] protect [the] right to life, [...] the prohibition of collective expulsion, guarantee due process and individual assessments, enhance reception and assistance capacities, and ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful.[27]

Touching directly humanitarian immigration policy, Objectives 5 and 19 respectively invite states to consider humanitarian considerations with regard to admission and stay as a means to "enhance availability and flexibility of pathways for regular migration"[28] and to "create conditions for migrants and diasporas to fully contribute to sustainable development in all countries [...] [through] voluntary or philanthropic engagement [...], especially in humanitarian emergencies."[29]

Thus, on one hand, the *GCM* contributes to reinforce humanitarian assistance within state's foreign policy, while crisis management has become more and more challenging. Indeed, considerations regarding humanitarian crisis and humanitarian assistance are not new in states and other international actors' practices.[30] Additionally, setbacks regarding the implementation of humanitarian principles in practice have been observed,[31] such as the Ukrainian situation at the time of writing. However, given the

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[22] Anna Triandafyllidou, "Decentering the Study of Migration Governance: A Radical View" (2022) 3 Geopolitics 811 at 813.
[23] *GCM*, *supra* note 5 at 9.
[24] *Ibid* at 10.
[25] *Ibid* at 15.
[26] *Ibid* at 17.
[27] *Ibid*.
[28] *Ibid* at 12.
[29] *Ibid* at 28.
[30] Dijkzeul & Griesinger, *supra* note 4.
[31] Daniele Nascimento, "One Step Forward, Two Steps Back? Humanitarian Challenges and Dilemmas in Crisis Settings" *Journal of Humanitarian Assistance* (18 February 2015) at 8, online (pdf): <reliefweb.int/report/world/one-step-forward-two-steps-back-humanitarian-challenges-and-dilemmas-crisis-settings>.

increasing development of humanitarian diplomacy particularly since World War II,[32] and the geopolitical dimension of humanitarian assistance, the *GCM*'s invitation to provide humanitarian assistance will reinforce the place of humanitarian assistance in state's foreign policy. Consequently, inscribing humanitarian assistance in foreign policy allows states to advance their interests[33] with the risk of instrumentalization, since the situations in Syria and Haiti have illustrated the challenges posed to the international community due to a lack of political consensus at the UN during conflict-related humanitarian crisis, added to the multidimensional scope of a protracted crisis.

On the other hand, the *GCM* paves the way to the sensitive issue of immigration policy on the basis of humanitarian considerations. As Bose notes "the shifting notions of 'refugee' and 'migrant' and how such terms are deployed and contested have at their core geopolitical questions,"[34] given that "migration is not just about migrants, but is entangled with multiple policies, practices and processes that stretch across time, spaces and places."[35] Indeed, humanitarian admission is shaped by the states' interests surrounding the discretion exercised by their organs. Except in the case of refugees and asylum seekers covered by domestic law in compliance with international law under the 1951 *Convention Relating to the Status of Refugees*,[36] and of other migrants under international human rights law leading to subsidiary protection when the right to life and the right against torture and other cruel, inhuman and degrading punishment are of concern, humanitarian admission is a matter of state domestic jurisdiction.[37] Consequently, humanitarian migration has led to differing practices of states.[38] Humanitarian visas generally, and the Temporary Protected Status (TPS) in the US and other humanitarian admissions issued in cases of conflicts, natural disasters, serious illnesses and lack of adequate treatment in the country of origin, are limited in terms of duration and social guarantees. Exceptionally, permanent residency granted under humanitarian and compassionate grounds for the undocumented migrants inside Canada[39] may be regarded as an interesting protection. However, it has become rarely granted over the years, with a rejection rate of 35% in 2019 to nearly 70%

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[32]   Joanna Dobrowolska-Polak, "Humanitarian Diplomacy of the European Union" in Barbara Curylo, Joanna Kulska & Aleksandra Trzcielinska-Polus, eds, *Open Europe: Cultural Dialogue across Borders. Volume 5: New Diplomacy in Open Europe* (Opole: Uniwersytet Opolski, 2014) 115; Michel Veuthey, "Diplomatie humanitaire: Préserver les chances de la diplomatie humanitaire au moment où elle est la plus nécessaire" *La revue géopolitique* (2 October 2011), online: <www.diploweb.com/Diplomatie-humanitaire.html> [Veuthey].

[33]   Stephen Brown, "The Impact of COVID-19 on Development Assistance" (2021) 76:1 Intl J 42; Kim Richard Nossal, Stéphane Roussel & Stéphane Paquin, *The Politics of Canadian Foreign Policy*, 4th ed (Montreal: McGill-Queens University Press, 2015) at 315.

[34]   Bose, "Shifting Landscape", *supra* note 16 at 379.

[35]   William Allen et al, "Who Counts in Crises? The New Geopolitics of International Migration and Refugee Governance" (2017) 23:1 Geopolitics 217 at 220.

[36]   *Convention Relating to the Status of Refugees*, 28 July 1951 (entry into force: 22 April 1954), online: *Office of the High Commissioner for Human Rights* <www.ohchr.org/sites/default/files/refugees.pdf>.

[37]   James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 617.

[38]   IOM, "Key Migration Terms", *supra* note 11, sv "Humanitarian admission", "Humanitarian Border Management" and "Humanitarian Visa".

[39]   UNHCR Resettlement Handbook, Country Chapters- Canada, 2017, online <UNHCR Resettlement Handbook: Country Chapter - Canada | UNHCR>.

in 2020.[40] This means that refugee status, asylum and subsidiary protection are the most beneficial or protective measures for people affected by a humanitarian crisis, while humanitarian permanent residency could ensure a better protection, unless the situations where humanitarian visas lead to immigration or asylum statuses. [41].

By considering humanitarian crisis through assistance and migration—in the same spirit of the *Global Compact for Refugees*—the *GCM* seems to illustrate a comprehensive approach to migration in the context of serious humanitarian crisis. We must wait and observe states' behaviour in this regard. However, the second report[42] of the UN Secretary-General shows interesting steps taken in humanitarian migration, mostly in the Global South, with Colombia granting a 10-year protection status to Venezuelans with access to services, and Bolivia regularizing migrants, including Venezuelan children. Consequently, since humanitarian migration advances states' interests within the framework of their foreign policy, humanitarian diplomacy can both promote and jeopardize humanitarian admission.

II.   Risk of manipulation of humanitarian assistance through humanitarian diplomacy

Leading humanitarian assistance donors and active actors in the development of humanitarian diplomacy face an imminent risk of politicization or manipulation of humanitarian assistance through norms, institutions, and processes. In 2021, the US, the EU and Canada were among the leading humanitarian contributors worldwide, alongside Germany, the United Kingdom, Sweden, Norway and the Netherlands. In 2022, Japan and Switzerland joined this group. The US, the EU and Canada respectively allocated USD$8.9 billion, USD$2.6 billion and USD$683 million in 2021.[43] With institutions and processes of humanitarian diplomacy aiming to, among others, promoting humanitarian assistance in coordination and in compliance with international law, particularly regarding access to humanitarian assistance for people affected by conflicts, natural disasters, and other calamities[44], the interactions involving those leading humanitarian donors are threefold.

First, in addition to the role of humanitarian assistance in American and Canadian foreign policy and the EU's external action, these actors also interact with the Inter-Agency Standing Committee (IASC) of the United Nations Office for the Coordination of Humanitarian Affairs. Established in June 1992, the IASC is the highest-level humanitarian structure for the orientation and coordination of

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[40]   "Canada Rejected Double the Number of Humanitarian Applications for Immigration in 2020" (13 July 2021), online: *Migrants Rights Network* <migrantrights.ca/hc202rejections>.

[41]   IOM, "Key Migration Terms", *supra* note 11, sv "Humanitarian visa".

[42]   *Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary General*, GA Res 76/642, UNGAOR, 76th Sess, UN Doc A/76/642 (2021) [*Global Compact: Report of the SG*].

[43]   United Nations Office for the Coordination of Humanitarian Affairs, "Humanitarian Aid Contributions" (2023), online: *Financial Tracking Service* <fts.unocha.org>.

[44]   Veuthey, *supra* note 32.

humanitarian action, gathering 18 UN organizations and agencies as well as non-UN organizations, aiming to strengthening humanitarian assistance.[45]

Second, the US, Canada and the EU are members of the Good Humanitarian Donorship, "an informal donor forum and network [that fosters] collective advancement of [humanitarian principles] and good practices."[46] Moreover, summit diplomacy—where multiple actors address challenging issues regarding humanitarian action as a "shared responsibility"—has been a geopolitical new trend in this field. For instance, the *Grand Bargain*, as part of the outcome of the first UN World Humanitarian Summit held in Istanbul in 2016, aims to, among others, give more place to local actors, including through funding to increase efficiency and transparency.[47] In the same vein, the EU, jointly with the French Presidency of the Council of the European Union, held the first European Humanitarian Forum from 21 to 23 March 2022. This forum is envisioned to become "an annual platform for a strategic exchange between the EU's political decision-makers and the wider international humanitarian community on key humanitarian challenges the EU's humanitarian action for the years to come."[48] It is a step taken by the EU in exploring a "European humanitarian response" by developing the capacity and the influence of the organization in this field, in line with the European Commission Communication to the European Parliament and the Council in 2021.[49] This policy envisions to broaden the donor base for humanitarian action, both inside and beyond the EU, to promote international humanitarian law in conflicts, to make sure the EU support represents the best possible value for Europeans while having the greatest possible impact on the ground and strengthening local humanitarian actors, and to project a "strong European voice and presence on humanitarian issues around the world."[50]

Third, while their approaches to humanitarian assistance may differ in this regard, Canada, the US, and the EU have adopted norms and institutions that reinforce their contribution to humanitarian assistance and humanitarian diplomacy, with a focus

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[45]   Nina W T Hall, ''A Catalyst for Cooperation: The Inter-Agency Standing Committee and the Humanitarian Response to Climate Change'', (2016): 22: 3, Global Governance 369; OCHA, The Inter-Agency Standing Committee | IASC <(interagencystandingcommittee.org)> See also Mulry Mondélice,« Appréhension européenne et nord-américaine de l'aide humanitaire au développement : différents régimes, mêmes enjeux » in O. Delas, M. Mondelice, O. Bichsel (dir.), L'Union européenne, puissance globale dans les relations internationales et transatlantiques, Bruxelles, Bruylant, 2022, pp.579-605, from which this section stems.

[46]   "About GHD" (last visited 18 June 2023), online: *Good Humanitarian Donorship* <www.ghdinitiative.org/ghd/gns/about-us/about-ghd.html>.

[47]   *One Humanity: Shared Responsibility*. *Report of the Secretary General for the World Humanitarian Summit*, UNGAOR, 70th Sess, UN Doc A/70/709 (2016) at 44.

[48]   European Commission, "Follow-up Report to the Communication on the EU's Humanitarian Action: New Challenges, Same Principles" (March 2022) at 3, online (pdf): European Humanitarian Forum <humanitarian.forum.europa.eu/system/files/2022-03/KR0122171ENC_ECHO_Brochure_WEB.pdf>.

[49]   European Commission, "Communication From the Commission to the European Parliament and the Council on the EU's Humanitarian Action: New Challenges, Same Principles", COM (2021) 110 final (10 March 2021), online (pdf): *European Union* <ec.europa.eu/echo/files/aid/hacommunication2021.pdf> [EC, "Communication 2021"].

[50]   "2021 Annual Activity Report. Directorate General for Civil Protection and Humanitarian Aid Operations" (28 March 2022) at 21, online (pdf): *European Commission* <commission.europa.eu/system/files/2022-05/annual-activity-report-2021-echo_en.pdf>.

on cooperation in this field. In 2013, the conservative government of Canada abolished the Canadian International Development Agency (CIDA), an institution created in the sixties that was responsible for humanitarian assistance under the umbrella of "Development Assistance," the United States Agency for International Development (USAID), created in 1963 under the *Foreign Assistance Act*[51]. The Canadian Department of Foreign Affairs, Trade and Development, under the 2013 eponymous act,[52] absorbed the functions of CIDA. Such a change means that Canada inscribes humanitarian assistance in the wider framework of foreign policy and commercial objectives, with humanitarian assistance and development aid conducted under the state interests.[53] This also explains that Canada shapes humanitarian aid according to values and orientations of Canadian foreign policy, as illustrated by Canada's Feminist International Assistance Policy[54] adopted in 2017. In contrast, the way USAID conducts humanitarian assistance seems to offer an opportunity for greater professionalism and expresses a certain degree of independence from politicization. That said, the interactions between USAID and the Department of State, as well as the role played by the President of the United States in humanitarian assistance under Chapter 9, Section 491(b) of the *Foreign Assistance Act*,[55] reinforce areas for politicization of humanitarian assistance.[56]

In the same vein, after the devastating earthquake of 12 January 2010 in Haiti, the deployment of 17,000 members of the US Defense Forces Operation Unified Response[57]—which gave rise to a diplomatic incident with France—and of 2,050 members of the Canadian Armed Forces in the context of Operation HESTIA[58] to provide humanitarian assistance in the country, illustrates the high political dimension of humanitarian assistance. Another example is the membership of Canada, the US, and the EU to the Interim Haiti Recovery Commission (IHRC). Indeed, the 2010 earthquake led to interesting steps taken in humanitarian diplomacy, such as the establishment of the IHRC, an unprecedented institutionalization gathering members, being Haitian and

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[51]   *Foreign Assistance Act*, 75 Stat 424 (1961) [*FAA*].

[52]   *Department of Foreign Affairs, Trade and Development Act*, SC 2013, c 33, s 174.

[53]   David R Black, Stephen Brown & Molly Den Heyer, "Conclusion: Rethinking Canadian Development Cooperation - Towards Renewed Partnerships?" in Stephen Brown, Molly Den Heyer & David R Black, eds, *Rethinking Canadian Aid*, 2nd ed (Ottawa: University of Ottawa Press, 2016) 295 at 303.

[54]   Global Affairs Canada, *Canada's Feminist International Assistance Policy–#HerVoiceHerChoice*, (Ottawa: Global Affairs Canada, 2017), online (pdf): *Global Affairs Canada* <www.international.gc.ca/world-monde/assets/pdfs/iap2-eng.pdf?_ga=2.243145794.131231235.1687115621-72738219.1687115621>.

[55]   *FAA*, *supra* note 51, s 491b); Rhoda Margesson, "International Crises and Disasters: US Humanitarian Assistance Response Mechanisms" (16 October 2015) at 2, online (pdf): *Federation of American Scientists* <sgp.fas.org/crs/row/RL33769.pdf>.

[56]   Mulry Mondélice, "Les mirages de l'action humanitaire de l'Union européenne et des États-Unis en Haïti" in Loïc Grard, ed, *L'Union européenne et les Amériques* (Paris: Pedone, 2016) 181 [Mondélice, "Mirages"].

[57]   David R DiOrio, "Operation Unified Response–Haiti Earthquake 2010" (1 November 2010) at 3, online (pdf): *Joint Forces Staff College* <jfsc.ndu.edu/portals/72/documents/jc2ios/additional_reading/4a_haiti_hadr_case_study_revnov10.pdf>.

[58]   "Operation HESTIA" (12 January 2015), online: Government of Canada <www.canada.ca/en/department-national-defence/services/operations/military-operations/recently-completed/operation-hestia.html>.

major donors including Canada, the European Union, France and the United States.[59]
However, failures to involve Haitian actors, lack of information, and NGOs without
any consistent plan and accountability illustrate, among others, the complex context of
humanitarian assistance and the reconstruction in Haiti.[60]

Regarding the EU's approach to humanitarian assistance, the EU promotes
humanitarian action on the basis of EU law, including Article 21 of the *Treaty on
European Union* (*TEU*) and Article 214 of the *Treaty on the Functioning of the
European Union*.[61] Additionally, through wider agreements such as the *Post-Cotonou
Partnership Agreement*,[62] the EU promotes humanitarian assistance in its relationship
with the new Organization of African, Caribbean and African States, which gathers
79 states[63]. Noticeably, based on the *Council Regulation (EC) No 1257/96 of 20 June
1996 Concerning Humanitarian Aid*,[64] the EU cooperates with nearly 200 UN
organizations and agencies, as well as NGOs, which are the actors that implement the
EU humanitarian aid through EU funding.[65] Here, too, given the intersections between
the EU diplomacy and humanitarian assistance, and procedures used in the field, the
EU's humanitarian assistance has contributed to politicization, as it has been the case
in the Syrian crisis where the EU externalized its migration policy in exchange for
humanitarian assistance.[66] Moreover, under Article 42(1) of the *TEU*, within the
framework of the *Common Security and Defense Policy*[67] as an integral part of the EU's
Common Foreign and Security Policy,[68] the EU may have recourse to hybrid—military
and civilian—operations in its interactions with the UN. This was consolidated in 2016
when the Council adopted the *Global Strategy on the EU's Foreign and Security*

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[59]   Clément Paule, "Les catastrophes naturelles, technologiques, environnementales" in Szurek, Eudes &
        Ryfman, *supra* note 8, 89 at 95.

[60]   Mondélice, "Mirages", *supra* note 56.

[61]   *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the
        European Union*, [2016] OJ, C 202/01.

[62]   *Partnership Agreement between the European Union/European Union and its Member States, of the one
        part, and members of the Organisation of African, Caribbean and Pacific States, of the other part*, 15
        April 2021, online (pdf): *European Commission-International Partnerships* <international-
        partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-
        negotiators-20210415_en.pdf>.

[63]   Mulry Mondélice, "Les relations Union européenne-Caraïbe au-delà des échanges commerciaux: un
        partenariat évolutif dans un contexte complexe" in Olivier Delas, ed, *Les relations économiques
        internationales à l'heure de la nouvelle route de la soie* (Bruxelles: Bruylant, 2020) 199 [Mondélice,
        "Échanges commerciaux"].

[64]   EC, *Council Regulation (EC) No 1257/96 of 20 June 1996 Concerning Humanitarian Aid*, [1996] OJ, L 163/1.

[65]   EC, "Communication 2021", *supra* note 49.

[66]   Dany, *supra* note 9 at 431; Francesca Pusterla, "The European Union Humanitarian Aid Policy and
        Migration to Europe: New Challenges, New Commitments" (9 March 2022), online (blog): *University
        of Oxford Law Blogs* <blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-
        criminologies/blog/2022/03/european-union>; Bastian A Vollmer, "New Narratives from the EU
        External Border–Humane Refoulement?" (2016) 21:3 Geopolitics 717.

[67]   EU, "The Common Security and Defence Policy" (12 August 2021), online: *Diplomatic Service of the
        EU* <www.eeas.europa.eu/eeas/common-security-and-defence-policy_en>.

[68]   European Commission, "Common Foreign and Security Policy" (nd), online: *Service for Foreign Policy
        Instruments* <fpi.ec.europa.eu/what-we-do/common-foreign-and-security-policy_en>.

Policy,[69] focusing on an integrated approach to external conflicts and crises identified as the framework for a more coherent and holistic engagement by the EU to external conflicts and crises, bearing in mind the "linkages between sustainable development, humanitarian action and conflict prevention and peacebuilding,"[70] as well as by the creation of the European Peace Facility.[71]

Among the institutional paths taken, chief is the Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), vested with the responsibility of humanitarian assistance and civil protection and operating under the regular budget. In the case of the EU-OACP relations, the former EU Development Fund, now incorporated in the EU 2021-2027 Multiannual Financial Framework, is the main instrument. This institutional architecture separating the ECHO from the EU Commission Directorate responsible for international development and the focus on international law, including international criminal law[72], as well as the European Voluntary Humanitarian Aid Corps, aiming to involve particularly young Europeans in humanitarian assistance, are particular features of the EU's approach to humanitarian aid. However, the EU has to cooperate with its Member States in this field since humanitarian assistance is a shared competence.[73] This means that while humanitarian diplomacy and institutions give a voice and influence in the course of humanitarian affairs, humanitarian assistance remains under states' jurisdiction, allowing them to advance their interests.

III.   (In)coherence between humanitarian assistance and humanitarian migration in the Syrian crisis

The Syrian situation provides for concrete examples of incoherence shown by states and IOs, how those actors interpret the discretionary "humanitarian action," and how humanitarian assistance does not translate into humanitarian admission.

The Syrian case where the humanitarian needs have been created by war, has been, along with the Ukrainian situation, one of the greatest humanitarian crises since World War II. As of the end of 2022, the crisis had spurred into 6.8 million refugees,

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[69]   Council of the European Union, *Council Conclusions on the Global Strategy on the European Union's Foreign and Security Policy*, 13202/16 (17 October 2016), online (pdf): *European Council* <data.consilium.europa.eu/doc/document/ST-13202-2016-INIT/en/pdf>.

[70]   Council of the European Union, "Operationalising the Humanitarian–Development Nexus: Council Conclusions", 9383/17 (19 May 2017) at 2, online (pdf): *European Council* <www.consilium.europa.eu/media/24010/nexus-st09383en17.pdf>.

[71]   EU, *Council Decision (CFSP) 2021/509 Establishing a European Peace Facility, and Repealing Decision (CFSP) 2015/528*, [2021] OJ, L 102/14.

[72]   European Commission, *Follow-Up Report to the Communication on the EU's Humanitarian Action: New Challenges, Same Principles* (Luxembourg: Publications Office of the European Union, 2022) at 16, online (pdf): *European Humanitarian Forum* <humanitarian.forum.europa.eu/system/files/2022-03/KR0122171ENC_ECHO_Brochure_WEB.pdf>.

[73]   Mulry Mondélice, "Les insuffisances de la prise en compte de la mer dans l'Accord CARIFORUM-UE face à la complexité du phénomène migratoire dans la Caraïbe" in Loïc Grard, ed, *La mer: droit de l'Union européenne, droit international* (Paris: Pedone, 2018) 91.

6.7 million internally displaced persons, and 14.6 million people in need of humanitarian assistance.[74] Furthermore, one of the lessons of the crisis is the enlargement of humanitarian needs from the country to regions, mostly in the Middle East and Europe, leading to geopolitical dynamics in dealing with the crisis-related migration. Indeed, the crisis not only creates humanitarian needs, particularly in Turkey, Lebanon and Jordan, but also in Europe. From 2011 to the summer of 2016, this region reportedly received 653,442 asylum applications from Syrians, mostly in Greece and Italy, while in 2015 alone, approximately 3,770 people perished while attempting to reach Europe by sea.[75] With its consequences for neighbouring countries and Europe, the Syrian crisis has given rise to the concept of "cross-border humanitarian action." How did Canada, the EU, and the US respond to that serious humanitarian crisis? One must distinguish the humanitarian assistance provided by those actors from their decisions touching humanitarian migration admission.

On humanitarian assistance, those three actors have logically contributed to support both internally displaced persons in Syria and refugees. The US provided more than USD\$14 billion,[76] while Canada funded CAD\$1.8 billion.[77] Unsurprisingly, the EU organized conferences addressing the future of Syria and the whole region. In addition to the EU and its Member States funding for more than €25 billion since 2011, the EU humanitarian funding inside Syria has totaled over €150 million,[78] while the EU and its Member States have also provided material assistance through the Emergency Response Coordination Centre of the European Commission's Civil Protection Mechanism[79]. However, the EU's humanitarian action is carried out in the field in partnership with humanitarian organizations, including the Red Cross and Red Crescent Movement. Nevertheless, the humanitarian actors (IOs, states, Syrian opposition forces, armed groups, NGOs), operating with differing agendas make it difficult to define common objectives. Given the situation on the ground, the humanitarian response has been challenging as to reaching the internally displaced persons, with a

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[74] "Refugee Data Finder" (last modified 14 June 2023), online: *UNHCR* <www.unhcr.org/refugee-statistics>. Syria situation | Global Focus (unhcr.org).

[75] Europe: Syrian Asylum Applications From Apr 2011 to Feb 2016 (EU+ Countries Including Norway and Switzerland) (26 April 2016), online: UNHCR, Europe: Syrian Asylum Applications From Apr 2011 to Feb 2016 (EU+ Countries Including Norway and Switzerland) - World | ReliefWeb; IOM, Over 3,770 Migrants Have Died Trying to Cross the Mediterranean to Europe in 2015" (31 December 2015), online: International Organization for Migration <www.iom.int/news/over-3770-migrants-have-died-trying-cross-mediterranean-europe-2015>

[76] "Syria – Complex Emergency" (1 April 2022), online (pdf): *United States Agency for International Development* <www.usaid.gov/sites/default/files/2022-05/2022-04-01_USG_Syria_Complex_Emergency_Fact_Sheet_5.pdf>.

[77] "Canada announces \$50.4 million in support for Haiti" (21 January 2022), online: *Global Affairs Canada* <www.canada.ca/en/global-affairs/news/2022/01/canada-announces-504-million-in-support-for-haiti.html> ["Canada Announcement"].

[78] European Commission, "Syria Factsheet" (20 March 2023), online: *European Civil Protection and Humanitarian Aid Operations* <civil-protection-humanitarian-aid.ec.europa.eu/where/middle-east-and-northern-africa/syria_en>.

[79] European Commission, "Annual report of the EU's humanitarian aid and civil protection policies and their implementation in 2015" (1 December 2016), online: *EU Monitor* <www.eumonitor.eu/9353000/1/j4nvhdfcs8bljza_j9vvik7m1c3gyxp/vk9u7wdbeazf> [European Commission, "Humanitarian Aid"].

certain "criminalization of humanitarian assistance."[80] Second, given the dimension of the crisis affecting several states, the EU's action is required to meet the basic needs of refugees in neighbouring countries. In this regard, significantly, for the first time, the EU humanitarian action touched a Member State, leading to new mechanisms. Indeed, on 2 March 2016, the EU granted Greece emergency humanitarian aid of €300 million, increased by €400 million until 2019, through a Special Fund for Humanitarian Aid. Likewise, this crisis has been an opportunity to deploy the EU Civil Protection Mechanism to various states that have received tents and other materials for refugees for humanitarian purposes.[81] This means the scope of the Syrian crisis has created enormous needs in the country, in the Middle East and Europe, resulting in geopolitical tensions given the multiple places impacted by the crisis.

With regard to migration, American and Canadian domestic law, as well as EU law, help understand the legal regime of humanitarian migration and how discretion rules in this field.

Under the US *Immigration and Nationality Act*, in addition to refugee settlement, asylum and humanitarian visa, the Department of Homeland Security can designate countries whose citizens within the US may be granted the Temporary Protection Status for six to 18-month periods, protecting the holder from deportation.[82] First, as Bose puts it,

> The prospect of accepting Syrians as refugees has, of course, become a deeply controversial debate […] It has resulted in a serious backlash against Syrians and Muslims, in particular, and against refugees, in general within many western liberal democracies that have for several decades been the bedrock of the global resettlement system.[83]

This explains why Syrian refugee protection by the US has been less enthusiastic, even under the Obama administration, while under the tumultuous Trump campaign and administration, the Syrian crisis has been subject to an amalgamation of the fight against terrorism, Islamophobia and xenophobia. Ultimately, the US accepted 33,000 refugees.

Second, since 1990, the US has occasionally granted TPS "when the origin countries of foreign nationals in the United States experience natural disasters, armed conflicts, or other circumstances making return unsafe,"[84] with 22 countries having been designated, including Haiti and Syria. While the situation has not improved in El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, Trump attempted to terminate the TPS for immigrants from those countries. This decision led the organization *African*

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80   Boris Martin, " 'Le régime syrien a criminalisé toute action humanitaire': Entretien avec un représentant de Life4Syria" (2013) 34 Humanitaire, online: <https://journals.openedition.org/humanitaire/1795>.

81   European Commission, "Humanitarian Aid", *supra* note 79.

82   Jill H Wilson, "Temporary Protected Status and Deferred Enforced Departure" (19 April 2022) at 3, online (pdf): *Federation of American Scientists* <sgp.fas.org/crs/homesec/RS20844.pdf> [Wilson].

83   Bose, "Shifting Landscape", *supra* note 16 at 385.

84   Jeanne Batalova, Mary Hanna & Christopher Levesque, "Frequently Requested Statistics on Immigrants and Immigration in the United States" (11 February 2021), online: *Migration Policy Institute* <www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020>.

Communities Together to file a complaint against Trump on 8 March 2019 before the Massachusetts District court[85], to rule that the humanitarian situation had to be taken into consideration for those countries.[86] In addition, under Section 212(d)(5) of the Immigration and Nationality Act, the secretary of homeland security can discretionary « authorize parole [allowing] an individual, who may be inadmissible or otherwise ineligible for admission into the United States, to be paroled into the United States for a temporary period (…) for urgent humanitarian reasons or significant public benefit».[87] In this regard, starting January 6, 2023, the US Department of Homeland Security decided to grant parole to Cubans, Haitians, Nicaraguans, and Venezuelans outside of the US on a case-by-case basis, allowing those nationals or immediate family members regardless of their nationality, to enter and stay for up to two years, given the severe humanitarian crisis they face.[88] While this decision of the Biden Administration could be considered as a good path taken in considering humanitarian reasons, it creates uncertainty since it is a temporary measure. Based on the humanitarian tradition of the country,[89] in Canada, in accordance with Section 25 of the *Immigration and Refugee Protection Act*,[90] other than refugee settlement, asylum and humanitarian visa, the Minister of Immigration, Citizenship and Refugee can grant permanent residency to individuals within Canada under humanitarian and compassionate grounds. The electoral context of the Liberal Party's openness to the protection of Syrians contributed to making Canada the most generous country for refugees in North America. Indeed, Canada has accepted 54,560 refugees with an important involvement of public-private sponsorship.[91] Furthermore, Canada should renew its commitment to humanitarian protection after shortcomings over the years. Yet, the fact that Canada grants permanent residency under humanitarian grounds facilitates mobility under humanitarian considerations. Noteworthy, such a residency allows the beneficiary to proceed with family reunification. As discussed in the last section, humanitarian admission can be beneficial to the state when it fosters the realization of the rights of people affected by the crisis.

That being said, the American and Canadian approaches to humanitarian admission show a tendency to reject applications on the basis of humanitarian considerations, whereas in the EU, humanitarian admission is less protective.

Regarding EU law, humanitarian migration has been considered under the *Visa Code*[92] in exceptional cases. Therefore, the EU humanitarian visa must be distinguished from the Temporary Protection concerning the admission of persons of

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[85]   *African Communities Together v Trump*, No 1:19-cv-10432 (MA 2019).
[86]   Wilson, *supra* note 82 at 15.
[87]   *Immigration and Nationality*, 8 USC §§ 1104-1401 (Suppl 2 1964).
[88]   "Processes for Cubans, Haitians, Nicaraguans, and Venezuelans" (last modified 12 July 2023), online: US Citizenship and Immigration Services <https://www.uscis.gov/CHNV#:~:text=Individuals%20granted%20parole%20under%20these,employ ment%20authorization%20under%20existing%20regulations.>.
[89]   Denise Helly, "Les politiques d'immigration au Canada de 1867 à nos jours" (1996) 1200 *Hommes & Migrations* 6.
[90]   *Immigration and Refugee Protection Act*, SC 2001, c 27.
[91]   Bose, "Shifting Landscape", *supra* note 16 at 388.
[92]   EC, *Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 Establishing a Community Code on Visas*, [2009] OJ, L 243/1.

third countries by EU Member States generally for a one-year limited duration in the event of a mass influx of displaced persons who are unable to return to their country of origin. Its legal source is the Temporary Protection Directive adopted by the Council of the EU in 2001, which has been activated for the first time in the Ukrainian situation.[93] Conversely, the Visa Code regulation adopted in 2009 establishes a common visa policy where EU Member States can discretionarily grant Schengen Visas for a three-month maximum period and sets outs a special regime for humanitarian visas. Indeed, Article 25 of the *Visa Code*, entitled "Issuing of a visa with limited territorial validity," sets out that "a visa with limited territorial validity shall be issued exceptionally [...] when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations."[94]

However, the Court of Justice of the EU limits the scope of Article 25 in a case where a Syrian filed an application for a humanitarian visa at a Belgium Consular Post in order to enter Belgium and claim refugee protection. According to the Court in the case *X and X v État belge*[95] of 7 March 2017:

> [Regulation] [...] must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the Code, to the representation of the Member State of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law.[96]

Such a ruling is in practice a severe obstacle to humanitarian migration protection. This is especially true since the EU was a place where the resettlement of Syrian refugees was a controversial topic of debate between Member States under the quota regime established by the EU.[97]

Consequently, humanitarian assistance was instrumentalized as a means for the EU to externalize migration policy in its relations with Turkey, from where refugees left to reach Europe. Indeed, in addition to €3 billion granted to this country by the EU in October 2015 for the reception of refugees and the control of what it calls "irregular migrants," by an agreement of 29 November 2015, the EU established a Fund for Refugees in Turkey of €3 billion to provide humanitarian assistance.[98] The

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[93] EC, *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, [2001] OJ, L 212.

[94] *Ibid.*

[95] *X and X v État belge*, C-638/16 (7 March 2017) (European Court of Justice, Grand Chamber).

[96] *Ibid* at para 51.

[97] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European agenda for migration", COM (2015) 240 final (13 January 2015).

[98] European Commission, "Humanitarian Aid", *supra* note 79.

Fund allows for grants and other financial assistance for Turkey to curb the entry of refugees into Europe. In fact, the Syrian crisis has led to increasing humanitarian needs, with a twofold expansion, geographically and substantively.

Additionally, the EU–Turkey Statement[99] of 18 March 2016, provides for increased humanitarian aid as part of the cooperation between the two signatories. This humanitarian action, intended in principle as a gesture of solidarity, raises, however, questions regarding the arrangements made with Turkey which give the impression of a perversion of humanitarian assistance. Indeed, paragraph 9 of the Statement states that "The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe."[100] Yet, the EU's humanitarian action is intended to be independent, with one of its principles referring to the autonomy of humanitarian objectives in saving lives and alleviating human suffering beyond political, economic, military or other objectives. The question is whether the inclusion of humanitarianism in the Statement does not make humanitarian assistance a tool for the externalization of the EU's immigration and asylum policy in managing the crisis. In particular, the inclusion of humanitarian aid in the EU–Turkey Statement is a manipulation of treaty law[101] in managing the arrival of migrants in Europe, reflecting the incoherence of the European responses illustrating what Millet-Devalle named the "externalization of the EU's immigration and asylum policy,"[102] instead of protecting Syrians. Obviously, the EU "solidarity" shown with humanitarian assistance contradicts the EU's humanitarian admission of Syrian refugees. Various reports[103] criticized the EU's behaviour in the Syrian crisis. It has also been said that, "In Germany, over half a million Syrians were granted asylum, while the EU agreed to take smaller numbers in other countries as well as to provide support to Turkey in exchange for lessening the flow of migrants through that country and into Europe."[104]

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[99]   European Council, Press Release, "EU–Turkey Statement" (18 March 2016), online: *Council of the European Union* <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement>.

[100] *Ibid*.

[101] Olivier Corten & Marianne Dony, "Accord politique ou juridique: Quelle est la nature du 'machin' conclu entre l'UE et la Turquie en matière d'asile?" (10 June 2016), online: *EU Immigration and Asylum Law and Policy* <eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile>.

[102] Anne-Sophie Millet-Devalle, "La protection des migrants et des réfugiés dans le cadre des accords entre l'Union européenne et les États tiers" in Anne-Sophie Millet-Devalle, ed, *L'Union européenne a protection des migrants et des réfugiés* (Paris: Pedone, 2010) 91 at 93.

[103] "Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey deal" (1 April 2016), online: *Amnesty International* <www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal>; "Human Rights Concerns Regarding the Ongoing Crisis of Europe's Migration System" (23 March 2016) at 1, online (pdf): *European Network of National Human Rights Institutions* <www.ennhri.org/IMG/pdf/ennhri_ga_statement_on_migration_21.3.16-2.pdf>.

[104] Pablo S Bose, "The United States and Migration Crises: Refugees in the Past and Present" in Cecilia Menjívar, Marie Ruiz & Immanuel Ness, eds, *The Oxford Handbook of Migration Crises* (New York: Oxford University Press, 2019) 553 at 559, citing Nicole Ostrand, "The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States" (2015) 3:3 J Migration Hum Security 255.

Indeed, given that migration admission is governed by state's interests and law, political context, economic considerations, social pressure, perceptions regarding migrations, xenophobia and racism can jeopardize liberal discourse and cooperation touching migration. This explains why Canada, the EU and the US have adopted differing practices.[105] Hyndman suggests that "the securitisation of migration, in particular, is a defining feature of current geopolitics."[106] This explains that humanitarian action, in the context of international protection of internally displaced persons and refugees, has been undermined by the EU and its Member States, especially with Frontex. Although the EU adopted the *Pact on Migration and Asylum*[107] to establish an EU migration management system and enhance solidarity across Member States with more sharing of responsibility regarding asylum seekers and returning those whose applications have failed, and reinforced Frontex, the system remains led by Member States' political will to externalize migration policy regarding the Syrian crisis.[108]

Simply put, the American and European actions illustrate two trends. On the one hand, states and IOs tend to behave as active humanitarian assistance contributor in the face of protracted crisis that diplomacy fails to successfully respond to. In this regard, the Syrian crisis has been a catalyzer to the evolution of humanitarian assistance, as illustrated by the adoption of the *Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency aid within the Union,*[109] which makes ECHO responsible for managing emergency aid in the EU. On the other hand, regarding humanitarian admission, states build on their discretion provided for in domestic and international law to protect their interests, which makes humanitarian admission exceptional, when humanitarian assistance is not instrumentalized to constrain people to stay away, whatever the humanitarian situation may be. Conversely, the EU shows a different perspective to humanitarian admission in the Ukrainian crisis, leading to criticism of the EU's double standard on humanitarian admission.[110] In any case, beyond humanitarian considerations, states' foreign policy focuses on the political impact of their decisions and can jeopardize the quest for articulating humanitarian and migration policies. This is what the Haitian case also teaches.

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[105]   Bose, "Shifting Landscape", *supra* note 16.

[106]   Jennifer Hyndman, "The Geopolitics of Migration and Mobility" (2012) 17:2 Geopolitics 243.

[107]   Costica Dumbrava, Katrien Luyten & Anita Orav, "EU Pact on Migration and Asylum: State of Play" (December 2022), online (pdf): *European Parliament* <www.europarl.europa.eu/RegData/etudes/BRIE/2022/739247/EPRS_BRI(2022)739247_EN.pdf>.

[108]   Kyilah Terry, "The EU–Turkey Deal, Five Years on: A Frayed and Controversial but Enduring Blueprint" (8 April 2021), online: *Migration Policy Institute* <www.migrationpolicy.org/article/eu-turkey-deal-five-years-on>.

[109]   EC, *Council Regulation (EU) 2016/369 of 15 March 2016 on the Provision of Emergency Support Within the Union*, [2016] OJ, L 70/1.

[110]   Eric Reidy, "What the EU's Policy Toward Ukrainians May Mean for Other Refugees", *The New Humanitarian* (21 April 2022), online: <www.thenewhumanitarian.org/analysis/2022/04/21/what-the-EUs-policy-toward-ukrainians-may-mean-for-other-refugees>.

IV.   (In)coherence between humanitarian assistance and humanitarian migration in the Haitian crisis

The actions of major humanitarian donors in the Haitian situation illustrate the challenges that articulating immigration policy and humanitarian considerations following natural disaster in a political turbulence pose to states and the EU.

Indeed, since the nineties, Haiti has illustrated a complex humanitarian protracted crisis, the country located in the Caribbean experiencing severe political and economic crisis, while being exposed to natural disasters.[111] Indeed, with 4.6 million Haitians in humanitarian needs, Haiti is one of the most serious humanitarian crises worldwide exacerbated by the COVID-19 pandemic.[112] Haiti is the only least developed state in the Americas, with a gross domestic product per capita of USD$1,235.50 and a Human Development Index ranking of 170 out of 189 countries.[113]

Furthermore, the Caribbean region being characterized by a public health crisis,[114] the Haitian health system has been facing serious challenges following natural disasters. In fact, a devastating earthquake of magnitude 7.0 struck Haiti on 12 January 2010, resulting in more than 316,000 deaths, 300,000 injuries and 1.5 million homeless, added to material losses estimated between USD$10 and USD$13 billion.[115] The earthquake that hit Haiti in 2010 showed challenges in coordination between multiple actors and a lack of coherence between various humanitarian initiatives.[116] On 14 August 2014, another earthquake of magnitude 7.2 ravaged the economy of the southern region. The disaster caused 2,248 deaths, about 320 missing persons, and nearly 12,800 injuries. It affected around 800,000 people and approximately 650,000 required emergency humanitarian aid.[117] Furthermore, the introduction of

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[111] Louis Herns Marcelin & Toni Cela, *After Hurricane Matthew: Resources, Capacities, and Pathways to Recovery and Reconstruction of Devastated Communities in Haiti* (Port-au-Prince: Interuniversity Institute for Research and Development, 2017) at 3, online (pdf): *Interuniversity Institute for Research & Development* <www.inured.org/uploads/2/5/2/6/25266591/reportonline__051117.pdf>.

[112] United Nations Office for the Coordination of Humanitarian Affairs, *Global Humanitarian Response Plan COVID-19* (Geneva: UN Office for the Coordination of Humanitarian Affairs, 2020) at 53, online (pdf): *UNOCHA* <www.unocha.org/sites/unocha/files/Global-Humanitarian-Response-Plan-COVID-19.pdf>.

[113] United Kingdom, "Haiti Economic Factsheet" (October 2021) at 1, online (pdf): *Publishing Service* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/931260/Economic_Factsheets_October2020_Haiti.pdf>.

[114] Evan R Ellis, "Strategic Insights: Caribbean Security Issues" in Michael A Matera, ed, *The Relevance of US–Caribbean Relations: Three Views* (Washington, DC: Center for Strategic & International Studies, 2017) 4 at 5, online (pdf): *Center for Strategic and International Studies* <csis-website-prod.s3.amazonaws.com/s3fs-public/publication/170630_Matera_RelevanceUSCaribbeanRelations_Web.pdf>.

[115] *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, UN SC, UN Doc S/2013/493 (2013); Reginald DesRoches et al, "Overview of the 2010 Haiti Earthquake" (2001) 27:S1 Earthquake Spectra S1.

[116] Mulry Mondélice, "L'action humanitaire de l'Union européenne à travers l'exemple d'Haïti" (2012) Hors-série décembre RQDI 85 at 100.

[117] Haiti & UNOCHA, *Haïti: Stratégie de réponse humanitaire au séisme du 14 août 2021*, février 2022 (Port-au-Prince: UN Office for the Coordination of Humanitarian Affairs, 2022) at 3, online (pdf): *Humanitarian   Response*

cholera in Haiti in 2010, in the UN's peacekeeping context, has been "one of the most aggressive cholera epidemics recorded worldwide."[118] Noticeably, the treatment of the cholera case by the UN has been catastrophic. Indeed, as Phillip Alston puts it, the UN's existing legal approach is one of simply abdicating responsibility, which is, "morally unconscionable, legally indefensible and politically self-defeating"[119] and contributed to exacerbate the humanitarian situation.

This serious humanitarian crisis has been exacerbated by the political situation. Politically, Haiti has definitely experienced a quasi-permanent political crisis due to institutional weaknesses.[120] However, the assassination of President Jovenel Moïse in 2021 and the absence elections have worsened the context. As a result, the insecurity context marked by battles opposing armed gangs growing in influence, namely in the Haitian capital and neighbouring cities, has led to increasing humanitarian needs for internally displaced persons, particularly in Martissant—more than 19,000 people in Port-au-Prince[121]—and Croix-des-Bouquets from 2020 to 2022.[122]

The history, the geographical and strategic location of Haiti within the Caribbean Sea, as well as the Haitian culture and diaspora make the country interesting not only to the Americas, but also to Europe, since Haiti interacts with the EU's outermost regions, namely Guadeloupe, Saint-Martin, French Guyana and Martinique, where Haitians migrants is a sensitive political issue.[123] This explains that Canada, the US and the EU are major donors of humanitarian assistance in Haiti, while their differing immigration policy raise questions as to how they interpret the situation of Haiti when it comes to humanitarian admission, between refugee and asylum protection, temporary protection status and humanitarian-based permanent residency in Canada.

<www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/hti_gran
dsud_strategie_369_fr_final.pdf>.

[118] Stanislas Rebaudet et al, "Epidemiological and Molecular Forensics of Cholera Recurrence in Haiti" (2019) 9:1 Scientific Report 1164. On the consequences of the cholera epidemics in Haiti, see International Human Rights Clinic of Harvard Law School, Bureau des Avocats Internationaux & Institute for Justice & Democracy in Haiti, "Violations of the Right to Effective Remedy: The UN's Responsibility for Cholera in Haiti" (2 June 2020), online (pdf): *Institute for Justice & Democracy in Haiti* <www.ijdh.org/wp-content/uploads/2020/02/FINAL-HLS-IHRC-IJDH-BAI-Submission-to-Special-Procedures-Cholera-2-6-2020.pdf>.

[119] *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UNGAOR, 71st Sess, UN Doc A/71/367 (2016) at 4.

[120] Ricardo Seitenfus, "The Nature of Haitian Politics and International Challenges" (2011) 6:3 J Peacebuilding & Development 85 at 88.

[121] OCHA, *Haiti: Impact of the deteriorating security situation on humanitarian access: Background note - 8 July 2022*, online, <Haiti: Impact of the deteriorating security situation on humanitarian access: Background note - 8 July 2022 - Haiti | ReliefWeb>; "Haiti–Complex Emergency" (4 May 2022), online (pdf): *United States Agency for International Development* <www.usaid.gov/sites/default/files/2022-05/2022-05-04_USAID-BHA_Haiti_Complex_Emergency_Fact_Sheet_5.pdf>.

[122] *Ibid*; Insecurity Insight, "Haiti: Situation Report: Gangs and the Haitian State" (12 November 2021) at 4-5, online (pdf): *Reliefweb* <reliefweb.int/sites/reliefweb.int/files/resources/Haiti-Vigil-Insight-Situation-Report-11-November-2021.pdf>.

[123] Mulry Mondélice, "L'Europe peut-elle faire l'économie du modèle fédéral ? Conclusion de la table ronde des experts, avec quelques observations sur la gouvernance et la quête du changement" (2018) Hors-série novembre RQDI 357 at 365.

In this respect, the EU remains one of the active donors of humanitarian assistance and development aid in Haiti under the EU-ACP relations.[124] Indeed, EU humanitarian aid totals €471.5 million since 1994.[125] Contrarily, regarding humanitarian migration, the immigration policy falls under the jurisdiction of EU Member States. For instance, in the aftermath of the earthquake in 2010, the limited actions of France included the acceleration of admissions for adopted children, the allocation of scholarship to 700 students and student visas to pursue their studies in Martinique.[126]

In the Americas, Canada shows that conversely, humanitarian assistance can go hand in hand with humanitarian admission. Indeed, as of 2021, Canada has provided CAD$1.8 billion in funding to Haiti since the 2010 earthquake.[127] On humanitarian admission, while "humanitarian" reasons consider, among other criteria, the best interest of children and women's rights, the Canadian federal government, stimulated by Premier Jean Charest of the Quebec government as a sub-state actor sharing the power in immigration, considered the devastating earthquake in Haiti in 2010 as ground to decide on extended family reunification. The extended family reunification included brothers, sisters and dependent adults beyond the classical group of spouses, common-law partners or conjugal partners, and dependent children, parents, grandparents or orphaned relatives under the age of 18.[128] Coupled with the special measures adopted by Canada in 2016[129], which allowed Haitian migrants to stay and apply for permanent residency in Canada, the family reunification case is a rare example where the interpretation of humanitarian crisis facilitates sustainable humanitarian admission through family reunification, meaning humanitarian grounds allow the beneficiary to have access to services in the host country on a long-term basis.

Regarding the US humanitarian action in Haiti, on the one hand, according to the Department of State, since 2010, an amount over USD$5.6 billion has been spent "for assistance to Haiti to support life-saving post-disaster relief as well as longer-term recovery, reconstruction, and development programmes."[130] This figure must be taken with caution,

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[124]   Mondélice, "Échanges commerciaux", *supra* note 63.

[125]   European Commission, "Haiti Factsheet" (12 October 2022), online: *European Civil Protection and Humanitarian Aid Operations* <civil-protection-humanitarian-aid.ec.europa.eu/where/latin-america-and-caribbean/haiti_en>.

[126]   Cour des comptes, *L'aide française à Haïti après le séisme du 12 janvier 2010* (Paris: Cour des comptes, 2013) at 59, online (pdf): *Cour des comptes* <www.ccomptes.fr/sites/default/files/EzPublish/20130111_rapport_thematique_emploi_fonds_Haiti.pdf>.

[127]   "Canada Announcement", *supra* note 77.

[128]   House of Commons, Standing Committee on Citizenship and Immigration, "Briefing by the Department of Citizenship and Immigration on its role in the Government of Canada's response to the earthquake in Haiti", *Meeting*, 40-3 (27 April 2010) at 15:40 (David Tilson), online: *Our Commons* <https://www.ourcommons.ca/Committees/en/CIMM/StudyActivity?studyActivityId=3041579>; "Quebec relaxes immigration rules for Haitians", CBC News (3 February 2010), online: *CBC* <https://www.cbc.ca/news/canada/montreal/quebec-relaxes-immigration-rules-for-haitians-1.910157>.

[129]   House of Commons, Standing Committee on Citizenship and Immigration, *Apply without fear: Special immigration measures for nationals of Haiti and Zimbabwe: Report of the Standing Committee on Citizenship and Immigration* (May 2016) (Chair: Borys Wrzesnewskyj), online (pdf): *Our Commons* <https://www.ourcommons.ca/Content/Committee/421/CIMM/Reports/RP8274817/CIMMrp04/CIMMrp04-e.pdf>.

[130]   "US Relations With Haiti" (1 January 2023), online: *US Department of State* <www.state.gov/u-s-relations-with-haiti>.

since the US do not clearly distinguish humanitarian assistance from development aid. Concerning humanitarian admission, on the other hand, the US adopted and made questioning decisions concerning Haitian migrants while the humanitarian situation in their country of origin remains serious. Four observations can be made on this point.

First, while the TPS is an expression of solidarity and a response to natural and man-made humanitarian crisis, the discretion surrounding both the designation of Haiti as deserving TPS admission and the duration of the designation, added to the limits surrounding the TPS do not make this a sustainable response for migrants who remain in an unstable situation. This is particularly true when considering that Trump attempted to terminate the TPS designation for Haiti.

Second, US deportations involving undocumented migrants contradict the recognition of the "complex" nature of the humanitarian crisis in Haiti. For instance, in the context of the cholera, the US decided to proceed with deportation of Haitians where the right to life is in danger. Called to examine the case of a petitioner, the Inter-American Commission on Human Rights ordered precautionary measures to the US to protect the rights of the petitioner, because in Haiti, where the public health system in the country "is battling extreme poverty and diseases such as cholera,"[131] the right to life would not be protected. This is an invitation to articulate migration policy and humanitarian situation in the country of destination.[132]

Third, incoherence appeared when the US invoked on 20 March 2020, under *Title 42*, the COVID-19 pandemic context in order not to allow aliens, including Haitians, to seek protection in the US, by deporting most adult migrants to Mexico or to their country of origin.[133] Blanchard observed that by transforming a health issue into a security issue, the US practice translated a threefold dimension: racial discrimination, suspicion against the movement of the poorest, and hostility toward refugees when arrival labelled as massive serve as a pretext for xenophobic mobilization[134]. In doing so, the US approach consolidates a practice of "securitization" where the localized border violence risk has become a national security issue.[135] In fact, from October 2020 to August 2021, border law enforcement officials arrested more than 30,000 Haitians who arrived in Del Rio, Texas.[136]

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[131] OAS, Inter-American Commission on Human Rights, *Precautionary Measure No 347-13. Matter of Carl E Vincent Regarding the United States of America*, OR Res 8/2014 (2014) at 1, online (pdf): *Organization of American States* <www.oas.org/en/iachr/decisions/pdf/2014/mc347-13-en.pdf>.

[132] Mulry Mondélice, "The UN and the Haiti Cholera Case: Articulating the Rule of Law, Immunities and Responsibility of International Organizations in International Law" in Shinya Murase & Suzanne Zhou, eds, *Epidemics and International Law* (Leiden/Boston: Brill|Nijhoff, 2021) 565.

[133] "Rising Border Encounters in 2021: An Overview and Analysis" (4 March 2022), online: *American Immigration Council* <www.americanimmigrationcouncil.org/rising-border-encounters-in-2021>.

[134] Emmanuel Blanchard, "La 'libre-circulation': retour sur le monde d'hier" (March 2018), online: *GISTI* <www.gisti.org/spip.php?article5891>.

[135] Élisabeth A Vallet, "Border Walls and the Illusion of Deterrence" in Reece Jones, ed, *Open Borders: In Defense of Free Movement* (Athens: University of Georgia Press, 2019) 156 at 157.

[136] Caitlin Yates, "Haitian Migration through the Americas: A Decade in the Making" (30 September 2021), online: *Migration Policy Institute* <www.migrationpolicy.org/article/haitian-migration-through-americas>.

Lastly, the recent geodynamics of Haitian migration in the Americas raise questions regarding the refugee or economic status of those migrants given the complex situation in Haiti.[137] The letter sent by the US Special Envoy to Haiti to Secretary of State, Antony Blinken, consolidates this view. Indeed, Daniel Foote resigned following the stance of the US on the Haitian situation, stating:

> I will not be associated with the United States inhumane, counterproductive decision to deport thousands of Haitian refugees and illegal immigrants to Haiti […] simply cannot support the forced infusion of thousands of returned migrants lacking food, shelter, and money without additional, avoidable human tragedy. […] The collapsed state is unable to provide security or basic services, and more refugees will fuel further desperation and crime.[138]

All in all, on one hand, states behaviour concerning humanitarian assistance is well established even though the humanitarian system is so complex that it cannot ensure human security with sustainable solutions. On the other hand, states and IOs adopt different perspectives to humanitarian migration, pressured by their populations and because of the discretion states enjoy in the field. In the context of increasing humanitarian crises and human rights violations in multiple contexts, there is a need to articulate humanitarian assistance and humanitarian migration.

V.   Articulating migration and humanitarian policy though law reform and cooperation

States and IOs should better articulate the actions in situations where humanitarian needs are increasingly serious and humanitarian-related migration in states' migration policy is a developing trend in foreign policy. Indeed, among the objectives of the *GCM* is to facilitate mobility.[139] In the spirit of the *GCM*, mobility could be facilitated not only by revising state's discretion in domestic law regarding humanitarian admission, but also by reconciling states' interests and human rights by decentering migration policy through a liberal interpretation of family reunification. Such an articulation would bring coherence to the actions of major donors of humanitarian assistance, given the fact that at the heart of humanitarian assistance and humanitarian migration is the idea that any person in need due to a natural or man-made calamity is worthy of protection of their dignity.

As discussed in the previous sections, states' discretion allows them to determine what type of authorization they can decide in humanitarian admission to protect people who are seriously affected by a complex humanitarian crisis. Revising this discretion would help ensure a longer duration of humanitarian protection and access to services and rights for beneficiaries of humanitarian migration and members of their families. The

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[137] Cedric Audebert, "The Recent Geodynamics of Haitian Migration in the Americas: Refugees or Economic Migrants?", *Revista Brasileira de Estudos de População* 34:1 (April 2017) 55.

[138] Nick Niedzwiadek & Jonathan Custodio, "US Envoy to Haiti Resigns Over Migrant Deportations", *Politico* (23 September 2021), online: <www.politico.com/news/2021/09/23/us-haiti-migrant-deportations-513833>.

[139] Crépeau, *supra* note 21 at 651.

examples of permanent residency under humanitarian considerations in Canada and family reunification authorized by Canada in the aftermath of the earthquake that struck Haiti in 2010 are two promising pathways that facilitate mobility in approaching humanitarian crisis.

First, given that the Trump administration practically revealed that the *Canada-United States Safe Third Country Agreement*[140] (*STCA*) is problematic for the protection of the rights of migrants, Canada should build on humanitarian grounds to grant permanency residence to migrants in compliance with domestic law. Second, with serious humanitarian consequences that the expansion of the *STCA* and the closure of the Roxham Road will cause[141], the two states should consider humanitarian grounds and mobilize diplomacy to advance better humanitarian protection. While such a dialogue would be particularly demanding for Canadian diplomats given that migration remains a sensitive issue, Canada and the US should foster dialogue on migration as humanitarian protection within the Organization of American States' Migration and Development Program, aiming to facilitate dialogue and share information on migration systems, including law, in the Americas.[142]

The US should also look closely at humanitarian protection, particularly in terms of the duration of the granted TPS protection. Indeed, while TPS up to 18 months in the US resulting in an employment document authorization is better than no such humanitarian protection in Europe, it creates insecurity for beneficiaries and does not sufficiently protect their rights. Moreover, discretion also means that states decide what can substantively constitute a rationale for humanitarian protection. It is remarkable that "the United States of America recommended the creation of a legal pathway for humanitarian protection for people facing serious threats to their lives because of climate change."[143] In this regard, in light of the *Global Compact on Refugees*, states could use discretion to

> facilitate effective procedures and clear referral pathways for family reunification, or to establish private or community sponsorship programmes that are additional to regular resettlement, including community-based programmes […], humanitarian visas, humanitarian corridors and other humanitarian admission programmes; educational opportunities for refugees (including women and girls) by granting scholarships and student visas, including through partnerships between governments and academic institutions; and labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries.[144]

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[140] Muzaffar Chishti & Julia Gelatt, "Roxham Road Meets a Dead End? US-Canada Safe Third Country Agreement is Revised" (27 April 2023), online: *Migration Policy Institute* <www.migrationpolicy.org/article/us-canada-safe-third-country-agreement>.

[141] *Ibid*.

[142] Mônica Herz, The Organization of American States (OAS): Global Governance Away From the Media, London ; New York, Routledge, 2011 at 55.

[143] *Global Compact: Report of the SG, supra* note 42 at para 64; Nisha Agarwal et al, *Task Force Report to the President on the Climate Crisis and Global Migration: A Pathway to Protection for People on the Move* (Washington, DC: Refugees International, 2021).

[144] UN, *Global Compact on Refugees* (New York: UN, 2018) at 38, online (pdf): *Global Compact on Refugees* <globalcompactrefugees.org/sites/default/files/2019-12/Global compact on refugees EN.pdf>.

However, discretion is protected under international and public domestic law. Furthermore, humanitarian protection falls under state's foreign policy. Therefore, revising discretion means that politicians of major donors of humanitarian assistance should show willingness to convince their population and legislative branch of the state that it is in the state's interest to better embrace humanitarian protection.[145] In reality, when authorizing humanitarian admission, states can still advance their interests. For instance, in 2010, Canada following Quebec stated that "immigration officials will check the applicant's level of distress and capacity to integrate into Quebec society."[146] Furthermore, since Global North countries face tremendous labour shortages due to demographic concerns,[147] promoting family reunification in the context of crisis would help them kill two birds with one stone in granting humanitarian admission.

Second, Global North countries and organizations should raise awareness of the benefits of humanitarian migration. To this end, multiple actors can be mobilized. Given the increasing number of humanitarian crises worldwide, National Human Rights Institutions (NHRIs), particularly the regional branches of the Global Alliance of National Human Rights Institutions, could become new partners in advocating for humanitarian migration. Indeed, benefiting from increased promotion in international cooperation, NHRIs, vested with the responsibility of promoting and protecting human rights in accordance with the Paris Principles relating to the status of national institutions and characterized by their independence and pluralism, are well placed to help raise awareness through human rights diplomacy.[148]

Third, based on research focusing on the role that pluralism, values, culture and neglected actors and variables can play in migration,[149] decentering migration from states to include other actors affected by a humanitarian crisis would facilitate mobility. As mentioned in the *GCM*, migrant organizations that gather residents or citizens from affected countries can be important actors in humanitarian migration sponsorship. Beyond legal capacity of those organizations to sponsor migrants, particular consideration should be given to access to justice. However, chief among those actors is the "family" through reunification processes. Indeed, there is an argument to consider family reunification as a new pathway to facilitate mobility. As discussed above, the Canadian humanitarian admission based on a liberal interpretation of "family members" in the context of the Haitian humanitarian crisis in 2010 is a concrete illustration of how a state can build on humanitarian crisis to facilitate mobility. In the same vein, the UNHCR called on EU Member States to adopt a liberal approach in defining "family members" when interpreting the *Council*

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[145]   Bose, "Shifting Landscape", *supra* note 16 at 394-95.

[146]   "Quebec Relaxes Immigration Rules for Haitians", *CBC News* (3 February 2010), online: <www.cbc.ca/news/canada/montreal/quebec-relaxes-immigration-rules-for-haitians-1.910157>.

[147]   UN, Advanced economies are facing large-scale labour shortages,Economic Analysis, 155:1, November 2021, <World Economic Situation and Prospects: November 2021 Monthly Briefing (un.org)>.

[148]   Jan Wouters & Katrien Meuwissen, eds, *National Human Rights Institutions in Europe: Comparative, European and International Perspectives* (Cambridge: Intersentia, 2013) at 4.

[149]   Triandafyllidou, *supra* note 22 at 813-14.

Directive 2003/86/ECof 22 September 2003 on the right to family reunification[150] adopted in 2003, in the context of the Syrian crisis.[151]

In this regard, Global North countries should better understand how residents or citizen originating from the Global South experience relations with their "family members" in practice. More research and dialogue would likely help approach migration in a win-win-win manner if Global North countries were open to better understand how people within their territory culturally experience their "family dependency." Indeed, as a former President of the board of directors of a migrant organization based in Montreal, the author of this paper has interacted with migrants who send money to take care of not only their spouses, children, parents, grandparents and orphans under the age of 18 in Haiti, but also their brothers, sisters, nephews, nieces and cousins, regardless of their age, if needed. Consequently, redefining "family members" for reunification purposes, including in humanitarian admission, would facilitate the involvement of willing persons who meet states' defined criteria to help their "family members" benefit from humanitarian protection and contribute to their integration in the host country.

<p style="text-align:center">***</p>

In the context of increasing humanitarian needs in our world, and given the attention paid to humanitarian assistance as illustrated by the actions of Canada, the United States of America and the EU, humanitarian migration requires a closer look in order to protect human dignity in the spirit of the *GCM*. This does not mean that humanitarian migration is or should be the solution to crisis management surrounding humanitarian crisis. On the contrary, the perspective is that migration must be approached as part of humanitarian protection in cases where crises put the lives of people in a country affected by a major humanitarian crisis in danger.

This view results from the practice of states and IOs, even though states' practices show a tension between an enthusiastic narrative on humanitarian assistance, which has been an important part of states' foreign policy and humanitarian diplomacy, and a restrictive approach to migration admission policy. Such tension results in contradictory practices, as illustrated by the actions of the US and the EU in the Syrian and the Haitian crises. On the one hand, due to the amalgamation surrounding migration, the fight against terrorism, populism and xenophobia, the Syrian crisis shows the politicization of refugee protection in the US and the instrumentalization of humanitarian assistance in externalizing the EU's migration policy in its relations with Turkey. On the other hand, the complex Haitian crisis where humanitarian needs derive from, among other things, natural disasters, human rights violations, political crises,

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[150]   EC, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, [2003] OJ, L 251/12.
[151]   "Family Reunification in Europe" (October 2015) at 4, online (pdf): *UNHCR* <www.unhcr.org/56fa38fb6.pdf>.

poverty and dependence on international cooperation, illustrates the porosity of frontiers between economic migration and humanitarian protection that Canada, the US and the EU and its Member States interpreted with a large discretion. Such a discretion, resulting in contradictory measures, such as the designation of Haiti for TPS purposes in the US and the deportation of Haitians in an exacerbated humanitarian context, sheds light on the political and legal challenges to humanitarian protection. Conversely, while the government will need to reconnect with the humanitarian tradition of the country, Canada offers concrete examples as to how to reconcile state interests, humanitarian assistance and migration as humanitarian protection.

The *GCM* calls on states to further cooperation to facilitate mobility. In this view, redefining "family members" in reunification processes in the context of humanitarian migration and enhancing the involvement of migrant organizations in sponsorship programmes would be promising pathways in facilitating mobility in the face of serious humanitarian crises. Further research should explore the extent to which those recommendations could help improving migration policy. In addition, the role that immigration judges and the Board of Immigration Appeals play in granting or maintaining the TPS in the US is crucial under the rule of law requirements. In this regard, access to justice and constructive interpretation of immigration law by judges can be promising to migrants affected by humanitarian crises. Indeed, while immigration is a sensitive issue, humanitarian protection is a promising avenue for humanity.