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Valsamis Mitsilegas

The Criminalisation of Migration in Europe

Challenges for Human Rights and the Rule of Law

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This book develops further ideas and arguments expressed in a number of recent publications. Chapter 3 is an updated and extended version of V. Mitsilegas, 'The Changing Landscape of the Criminalisation of Migration in Europe. The Protective Function of European Union Law' published in M. Guia, M. Van der Woude and J. Van der Leun (eds.), *Social Control and Justice. Crimmigration in an Age of Fear*, Eleven International Publishing, 2012, pp. 87–114. Parts of Chap. 4 develop further ideas and arguments presented in V. Mitsilegas, 'Solidarity and Trust in the Common European Asylum System' published in *Comparative Migration Studies*, vol. 2, 2014, pp. 231–253 and V. Mitsilegas, 'Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive' to be published in M. Guia, V. Mitsilegas and R. Koulish (eds.), *Immigration Detention, Risk and Human Rights*, Springer, forthcoming.

This book is dedicated to my EU Justice and Home Affairs LLM students and to the group of brilliant Queen Mary Ph.D. candidates currently researching their theses on migration and criminal law under my supervision. You are inspirational.

Contents

Chapter 1
Conceptualising the Criminalisation of Migration

Recent years have witnessed a growth in scholarly interest in the phenomenon of the criminalisation of migration. Academic interest in the field has followed the proliferation of state enforcement practices in immigration control on both sides of the Atlantic, with a number of leading scholars offering different conceptualisations of and approaches to the criminalisation of migration and its legal implications. In the United States, Stephen Legomsky has highlighted the use of criminal law to punish immigration violations, combined in parallel with the attachment of immigration law consequences to criminal convictions.[1] This twofold link, underpinned by what Legomsky has called importing criminal law enforcement strategies in the field of immigration control, has also been highlighted by Juliet Stumpf under her analysis of the now widely used term of 'crimmigration', which also encompasses an analysis of the impact of the criminalisation of migration on inclusion and exclusion.[2] In the United Kingdom, a recent study by Ana Aliverti has focused on the criminal prosecution and punishment of migrants in domestic law,[3] while Lucia Zedner has highlighted the potential consequences of the criminalisation of migration for fundamental principles of criminal law.[4] From a European perspective, Elspeth Guild, writing for the Council of Europe Commissioner for Human Rights, has adopted a more general approach including within the criminalisation of migration the adverse consequences for migrants in terms of residence and social rights, including employment rights,[5] while I have explored the criminalisation of migration at EU level in a narrower sense by focusing on the relationship between the use of substantive criminal law and European Union law in this context.[6] Issues related to the criminalisation of immigration have also been addressed by a number

[1] Legomsky (2007).
[2] Stumpf (2006).
[3] Aliverti (2013).
[4] Zedner (2013).
[5] Issue paper prepared by Guild (2009).
[6] Mitsilegas (2012a).

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of scholars in the United States and Europe within wider analyses of the link between migration and illegality,[7] as well as of the process of the securitisation of migration and its legal implications.[8] Research on the criminalisation of migration has not been confined only to academic lawyers, with important insights being provided by scholars in international relations, political sociology[9] and, more recently, criminology.[10]

Informed by these contributions and the diversity of approaches contained therein, the analysis in this book will be based on a conceptualisation of the criminalisation of migration based primarily on the use of the law in this process and the legal consequences of such criminalisation. Criminalisation will thus be understood in a narrow sense as including the use of substantive criminal law to regulate migration (in particular via the creation of immigration-related criminal offences and the imposition of criminal sanctions for these offences), but will also encompass more generally the use of criminal law tools including surveillance[11] and detention[12] to deal with migrants. The definition of the criminalisation of migration will also include the recent shift observed in both crime and immigration control towards prevention, leading to what has been characterised as a model of preventive justice.[13] **The criminalisation of migration for the purposes of this book will be understood as the threefold process whereby migration management takes place via the adoption of substantive criminal law, via recourse to traditional criminal law enforcement mechanisms including surveillance and detention, as well as via the development of mechanisms of prevention and pre-emption.**

The book will analyse the main elements of such criminalisation in the law of the European Union, by focusing on the position of migrants who do not have a link otherwise with EU law (by being, for instance, family members of EU nationals). The book will address the consequences of the criminalisation of migration for human rights and the rule of law. The analysis of the rule of law will include implications for legal certainty, arbitrariness, gaps in the law and legality (which, in the case of European Union law, also includes competence). Affected human rights are in particular the rights to liberty, to seek asylum, to private life and data protection and to non-discrimination. The structure of the book aims to reflect the migrant trajectory and align instances of criminalisation with the different stages of

[7] Dauvergne (2008).

[8] See inter alia Chacón (2007), Mitsilegas (2007), and for a comparative analysis, Mitsilegas (2012b).

[9] On the international relations/political sociology nexus see the work of Bigo (1996) on the securitisation of migration.

[10] See a number of contributions in Aas and Bosworth, *call out.*

[11] See Mitsilegas, *call out. (references in note 8).*

[12] See Joao Guia (2015).

[13] See Ashworth and Zedner (2014).

migrant experience. The book will thus be structured on the basis of three stages of the migrant experience: before entry (and before migrants reach the border); during stay (looking at how substantive criminal law is used to regulate migration in the territory); and after entry and towards removal (examining efforts to exclude and remove migrants from the territory and jurisdiction of EU Member States). The book will thus aim to provide a holistic typology of the criminalisation of migration in the law of the European Union.

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Chapter 2
Before Entry: Criminalisation as Prevention

2.1 Introduction

A key element in the immigration enforcement strategy adopted by the European Union in recent years has been the focus on preventing migrants from reaching the territory of the European Union in the first place, with the aim of shielding the European Union and Member States from assuming legal obligations towards migrants. This emphasis on prevention has been reflected in a two-fold change from traditional immigration control on the physical border.[1] The first change is temporal, with border controls taking place *before* an individual has reached the actual physical border. The second change is spatial, with border controls taking place increasingly extraterritorially, outside the territory of the European Union, most commonly on the high seas or in the territory of third states.[2] This chapter will analyse how migrants are being criminalised before reaching the borders of Europe (i.e. the external borders of the European Union) by presenting a typology of preventive criminalisation through categorising four main levels of criminalisation as prevention and highlighting the human rights and rule of law challenges such preventive approach entails. The chapter will thus focus on: the link between criminalisation and prevention in extraterritorial immigration control; the emergence of a prevention paradigm via the use of delegation by European Union law, to both the private sector (the privatisation of immigration control) and to specialised agencies (and in particular the European Borders Agency, FRONTEX); and the link between prevention, criminalisation and securitisation, by focusing on preventive immigration control via the growing recourse to technology, databases and invasive surveillance using a wide range of personal data (including sensitive data such as biometrics) and allowing access to immigration data to law

[1] See Mitsilegas (2015a).
[2] See Ryan and Mitsilegas (2010).

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enforcement authorities. The analysis of this multi-level paradigm of criminalisation as prevention will be accompanied by a critical analysis of legislative and judicial responses to the rule of law and human rights challenges it entails.

2.2 The Rise of Extraterritorial Immigration Control

The rise of extraterritorial immigration control has presented a number of challenges to the rule of law and human rights. Extraterritorial immigration control practices have been linked with attempts by the European Union and its Member States to evade legal responsibility for migrants wishing to reach the external border of the European Union, by conducting border control operations on the high seas or in the territory of third states. This practice runs the risk of creating gaps in the rule of law and the applicability of European human rights standards in operations conducted extraterritorially. The rule of law and human rights challenges of extraterritorial immigration control, linked with the broader question of the extraterritorial application of European human rights law and in particular the European Convention on Human Rights (ECHR) have been addressed by the European Court of Human Rights. On a number of occasions, the Strasbourg Court has attempted to clarify the extent of state responsibility for complying with the European Convention on Human Rights when acting extraterritorially. In its ruling in *Al-Skeini,* the court confirmed that in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's jurisdiction under Article 1 of the Convention.[3] Reiterating its earlier case law, the Court added that "[w]hat is decisive in such cases is the exercise of physical power and control over the person in question."[4] A case cited in *Al-Skeini* which is of particular relevance to the issue of extraterritorial immigration control is *Medvedyev*.[5] The Court ruled there that the ECHR applied extraterritorially in enforcement actions by France in a case of suspected drug trafficking on the high seas. As this was a case of France having exercised "full and effective control" over the boat in question and its crew, "at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention".[6] The case is of relevance for extraterritorial immigration control not only because it involved the use of force and actual interception at sea, but also because this happened in a relative legal vacuum with few developed international law rules in the field. The court recognized this vacuum by stating that "it is regrettable … that the international effort to combat drug

[3] *Al-Skeini v. United Kingdom,* App. No. 55721/07, Eur. Ct. H.R. 1 (2011).

[4] Paragraphs 58–59.

[5] *Medvedyev v. France*, App. No. 3394/03 Eur. Ct. H.R. (2010).

[6] Paragraph 67.

trafficking on the high seas is not better coordinated bearing in mind the increasingly global dimension of the problem"[7] and found "that the deprivation of liberty" in this case "was not 'lawful' … for lack of a legal basis of the requisite quality to satisfy the general principle of legal certainty".[8] The court rejected the French Government's claim that interception on the high seas is a special case, stating that

> The special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".[9]

The European Court of Human Rights has thus attempted to address the rule of law and fundamental rights issues arising from the existence of gaps in legal protection in extraterritorial state acts by expanding state jurisdiction under the Convention. The case-law of the Court is particularly relevant in cases of extraterritorial immigration control, as the Court's approach, in effect, exports the border to places and instances where the state exercises enforcement action.[10] This has been characterised as a functional approach to border control focusing not on a general test of personal or geographical control, but rather on the specific power or authority assumed by the state acting extraterritorially in a given capacity.[11]

The Court of Human Rights had the opportunity to address the human rights challenges of extraterritorial immigration control directly in its ruling in the case of *Hirsi*.[12] The case involved eleven Somali nationals and thirteen Eritrean nationals who were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were 35 nautical miles south of Lampedusa, that is, within the Maltese Search and Rescue Region of responsibility, they were intercepted by three ships from the Italian Revenue Police (Guarda di Finanza) and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli and handed over to the Libyan authorities.[13] The Strasbourg Court had no difficulty in asserting jurisdiction. It stated that Italy cannot circumvent its jurisdiction under the Convention by describing the events at issue as rescue operations on the high seas[14] and noted that, while in *Medvedyev* the events took place on board of a vessel flying the flag of a third state, here the events took place entirely on board ships of the Italian armed forces, the crews of which were

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[7] Paragraph 101.

[8] Paragraph 102.

[9] Paragraph 81.

[10] See Mitsilegas (2012).

[11] See Gammeltoft-Hansen (2011).

[12] *Hirsi Jamaa and Others v Italy*, Application no. 27765/09. For an analysis, see Mitsilegas, call-out (The Law of the Border), whereupon the part on Hirsi is based.

[13] Paragraphs 9–12.

[14] Paragraph 79.

composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.[15]

Having established jurisdiction, the Court found that Italy was in breach of both Article 3 ECHR (prohibition of inhuman and degrading treatment) and of Article 4 of Protocol number 4 (prohibition of collective expulsion of aliens). As regards Article 3, the Court rejected Italy's claim that Libya was a safe third country. It noted that the mere ratification of international treaties by a third country is not by itself a guarantee of compliance with human rights[16] and added that Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya.[17] The Court added that the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country and that it was for the national authorities, faced with a situation where human rights were being systematically violated as described above, to find out about the treatment to which the applicants would be exposed after their return.[18] In the present case substantial grounds have been shown for believing that there was a real risk that the applicants would be subjected to treatment in Libya contrary to Article 3 of the Convention.[19] The Court also found a violation of Article 3 on account of the fact that the applicants were exposed to the risk of arbitrary repatriation to Eritrea and Somalia. According to the Court, when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from being arbitrarily returned to their countries of origin.[20] More importantly, Italy is not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya. The Court reiterates that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.[21]

As regards Article 4 of Protocol number 4 on the prohibition of collective expulsion of aliens, the Court developed its case-law by stating the following:

> It is therefore clear that, while the notion of 'jurisdiction' is principally territorial and is presumed to be exercised on the national territory of States, the notion of expulsion is also

[15] Paragraphs 79–80.

[16] Paragraph 128.

[17] Paragraph 129.

[18] Paragraphs 130–131.

[19] Paragraph 136.

[20] Paragraph 156.

[21] Paragraph 157.

> principally territorial, in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of the application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention should be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (*Medvedyev* para 81).[22]

In the light of the above, the Court found that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, *the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State*, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.[23] The Court found that the transfer of applicants to Libya was carried out without any form of examination of each applicant's individual situation and that there was therefore a violation of Article 4.[24]

Hirsi is of great importance in affirming the extraterritorial application of human rights law and emphasising that states cannot evade their human rights responsibilities towards migrants by exercising extraterritorial immigration control including by cooperating with third states. Following its reasoning in its earlier case-law in *M.S.S.* (concerning the transfer of asylum seekers within the EU under the Dublin Regulation),[25] as reflected in the subsequent ruling of the Court of Justice of the European Union in *N.S.*,[26] the Court affirmed the positive obligations of states to ascertain whether the fundamental rights of affected migrants are protected in the state to which the migrant is to be transferred to. Moreover, in an extremely important finding, the Court extended the protection of migrants under the ECHR in cases of collective expulsion. As den Heijer has noted, the Court's reasoning allows for an interpretation that any interception activity that factually prevents migrants from effectuating an entry may be construed as expulsion.[27] In *Hirsi*, the Court applied the Convention in cases where state action has resulted to the deflection of migrants, i.e. to acts the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State. State jurisdiction applies here even if the migrant has not

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[22] Paragraph 178.

[23] Paragraph 180, emphasis added.

[24] Paragraphs 185–186.

[25] *M.S.S.* v. *Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.

[26] Joined Cases C-411/10 and C-493/10, *N. S. and M. E.*, judgment of 21 December 2011. For further details, see Chap. 4.

[27] See den Heijer (2013).

reached the physical, territorial border of the state. States can no longer hide behind deflection techniques under a logic of prevention. In *Hirsi,* the Court reiterated the importance of the rule of law and the rejection of 'areas outside the law'. In doing so, it focused heavily on the impact of immigration control by the state on the affected individuals in what has been eloquently characterised the 'individualisation of jurisdiction'.[28] By placing the individual at the heart of the system of protection of the Convention, the European Court of Human Rights had to address the borders of the law related to extraterritorial immigration control operations.

While *Hirsi* is extremely important and has already been influential in the development of EU legislation in the field,[29] it involves a situation where there has been clear state intervention on migrants. What is less evident the extent to which the Court's reasoning would apply in cases where there is no actual state enforcement action taking place, but where there are attempts to deflect movement via the use of surveillance extraterritorially (for instance via the use of EUROSUR) or in cases where the attribution of responsibility is difficult because multiple authorities are involved. This is in particular in cases of FRONTEX operations, including operations on the high seas and cooperation with third states.[30] An expansive interpretation of jurisdiction will address these issues and remedy the legal uncertainty stemming from gaps in legal responsibility arising from delegation in border control in this context. As Guy Goodwin-Gill has noted, interception operations are initiated and coordinated by the EU agency, FRONTEX, and collaboratively or individually by EU Member States. Directly *or indirectly*, they affect the rights of individuals, some or many of whom may be in need of international protection. Within the terms of the ILC articles on state responsibility, particularly Articles 4 and 6, interceptions continue to be carried out in the exercise of governmental authority by the state, or in the equivalent exercise of its executive competence by the EU's agency.[31] Nothing in the evidence of practice to date, Goodwin-Gill continues, reveals any break in the chain of liability. Neither the onboard presence of a third-state official, nor the use of joint patrols in which actual interception is undertaken by a third state, disengage the primary actor from responsibility for setting the scene that allows the result, if nothing more. In each case, the EU agency or Member States exercise a sufficient degree of effective control; it may not be solely liable for what follows, but it is liable nonetheless.[32] This view is strengthened the finding of the Court in *Hirsi* as regards collective expulsion, where the Court established jurisdiction under the ECHR in cases of attempts to prevent migrants reaching the EU external border. It is also strengthened, as will be seen below, by the recently adopted EU legislation on surveillance and search and rescue at sea with regard to FRONTEX operations.

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[28] See Nussberger (2012).

[29] See part on FRONTEX below.

[30] See Baldaccini (2010).

[31] See Goodwin-Gill (2011).

[32] Ibid.

2.3 Delegation of Immigration Control to Specialised Agencies: The Case of FRONTEX

The geopolitical and legal changes in Europe resulting in the abolition of internal border controls within the European Union on the one hand, and the extension of EU territory via the successive enlargements of the EU (in particular the eastward enlargements) on the other, have led to the establishment of a European agency responsible for border controls (FRONTEX).[33] The establishment of FRONTEX has been to a great extent a product of the lack of trust of 'old' EU Member States towards the new EU members from Central and Easter Europe with regard to their capacity to guard effectively the new external border of the European Union.[34] The establishment of FRONTEX has aimed to strengthen the powers of EU Member States, and the European Union as a whole, to manage its external border. As such, FRONTEX has been perceived as largely a security agency, aiming at managing migrants as perceived risks.[35] Rather than diluting state sovereignty in the field of immigration control, the establishment of FRONTEX has strengthened, rather than weakened, the border control powers of Member Stares by establishing an additional layer of control.[36] Establishing a border management agency at European Union level has however posed a number of significant challenges for the reconfiguration of immigration control in Europe. First of all, the discussion of delegation of powers from the state to agencies must be viewed in the specific light of EU law, where the additional layer of the contested relationship between the competence of the Union (and its agencies) and the Member States exists. This aspect is particularly relevant in the field of immigration control, traditionally linked to state sovereignty. In this context, a key questions as regards the delegation of immigration control powers at EU level is who has the power, and thus the legal responsibility, for immigration control: is it the Member States of the EU, or the EU agency (FRONTEX)? As will be demonstrated below, the lines between national and Union competence in the field are on many occasions blurred, resulting in gaps in the legal protection of those affected by immigration control at EU level. These gaps in upholding the rule of law and fundamental rights are particularly acute when FRONTEX conducts joint operations extraterritorially.

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[33] See Council Regulation 2007/2004 establishing a European Agency for the 'management of operational cooperation at the external borders of the Member States of the European Union, [2004] OJ L 349/1, 25 November 2004.

[34] For a background, see Mitsilegas (2007a).

[35] On the securitisation aspect, see also Neal (2009).

[36] Mitsilegas (*Immigration Control in an Era of Globalisation*).

2.3.1 The 2004 FRONTEX Regulation

The difficult task of establishing a European agency for immigration control while respecting state sovereignty in the field is reflected in the careful articulation of the Agency's powers. The opening Article to the initial FRONTEX Regulation states that the aim of the Agency is to improve the integrated management of the external borders of the Member States of the EU.[37] While the responsibility for the control and surveillance of external borders lies with Member States, the provision continues, the Agency will facilitate and render more effective the application of EC measures by co-ordinating Member States' actions in the implementation of these measures, thereby contributing to 'an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.'[38] To achieve this, the main tasks of the Agency are: to co-ordinate operational co-operation between Member States, including the evaluation, approval and co-ordination of proposals for joint operations and pilot projects and the launching, in agreement with Member States concerned, of initiatives for such operations and projects[39]; to assist Member States with training of border guards[40]; to carry out risk analysis by developing a common risk analysis model[41]; to follow up research development on border control[42]; to assist Member States in circumstances requiring increased technical and operational assistance at external borders[43]; and to provide Member States with the necessary support in organising joint return operations.[44]

The key to the question of the extent to which FRONTEX has replaced national border controls is to determine the extent of the Agency's coordination powers.[45] Two main questions arise in this context. The first is whether Agency staff will have enforcement powers in the territory of Member States (and consequently which rules will apply to them); secondly, whether the Agency has coercive powers over Member States when organising joint operations. As to the first question, Article 10 of the FRONTEX Regulation states that the 'exercise of executive powers by the

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[37] Article 1(1).

[38] Article 1(2).

[39] Articles 2(1)(a) and 3(1).

[40] Articles 2(1)(b) and 5. In this context, developments such as the Community Borders Code are particularly relevant. Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L105/1, 13 April 2006.

[41] Articles 2(1)(c) and 4.

[42] Articles 2(1)(d) and 6.

[43] Articles 2(1)(e) and 8–8(2)(b) which calls for the deployment of the Agency's experts to support national authorities.

[44] Articles 2(1)(f) and 9.

[45] The Preamble further confirms that the development of policy and legislation on external border control and surveillance remains a responsibility of the EU institutions, in particular the Council. Recital 20.

Agency's staff and the Member States' experts acting on the territory of another Member State shall be subject to the national law of that Member State.'[46] What constitutes 'executive power' in this context is not defined in the Regulation. The latter however avoids explicitly excluding operational powers of Agency staff from its scope, a view that is reinforced by the similar treatment of Agency staff with experts from Member States. There is less ambiguity with regard to the second question, i.e. whether the Agency can compel Member States to participate in joint operations without their agreement. Article 3(1) second indent states that the Agency may itself, and *in agreement with the Member State(s) concerned*, launch initiatives for joint operations and pilot projects.[47] Thus, Member States cannot be made to participate in joint projects without their agreement. Article 20(3) of the Regulation provides an additional safeguard by stating that proposals for decisions on specific activities to be carried out at, or in the immediate vicinity of, the external border of any particular Member State requires a vote in favour of their adoption by the Member of the Management Board representing that Member State.

2.3.2 The 2007 RABITS Regulation

The powers of FRONTEX were further developed via the amendment of its legal basis to allow for the deployment of so-called Rapid Border Intervention Teams Regulation (RABITS).[48] There is a greater pooling of state sovereignty and a greater clarity and detail as to the tasks of these teams, which are deployed for the purposes of providing rapid operational assistance for a limited period to a requesting EU Member State facing a situation of urgent and exceptional pressure.[49] The tasks and powers of these teams, the first of which was deployed at the request of Greece in the autumn of 2010 on the Greek-Turkish land border,[50] are described in Article 6 of the RABITs Regulation, which states that Members of the teams shall have the capacity to perform all tasks and exercise all powers for border checks or border surveillance in accordance with the Schengen Borders Code and that are necessary for the realisation of the objectives of that Regulation[51] and that

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[46] It is noteworthy and indicative of the sensitivity of the issue that in his evidence before the House of Lords EU Committee on the role of the Agency on returns of irregular immigrants, the Director, Mr Laitinen, stated that they 'do not have executive powers.' See House of Lords EU Select Committee, *Illegal Migrants*: *Proposals for a Common EU Returns Policy*, 32nd Report, Session 2005–2006, HL Paper 166 (Q581).

[47] Emphasis added.

[48] Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

[49] Article 1(1) of the RABITs Regulation.

[50] For details, see the *FRONTEX General Report 2011*, at pp. 29–30.

[51] Article 6(1).

they may only perform tasks and exercise powers under instructions from and, as a general rule in the presence of border guards of the host Member State.[52] The RABITs Regulation further contributes towards the militarisation of the EU external border, as they are allowed to carry weapons[53] and to use force, including weapons.[54] According to the provision on applicable law, while performing the tasks and exercising the powers, the members of the teams shall comply with Community law and the national law of the host Member State.[55]

The RABITs Regulation has added detail on the legal framework of some aspects of FRONTEX operations, and represents a clear shift from purely national to EU border control involving executive measures and coercive powers. However, a number of concerns with regard to gaps in the accountability and legal responsibility of the Agency remained. Delegation of immigration control to an EU agency increases enforcement powers by providing an additional layer of immigration control and its actions may have significant consequences for the individuals affected, with FRONTEX already being actively coordinating Member State action in the field.[56] However, the extent of the powers and accountability of the agency are unclear. FRONTEX has been established as a management agency, and its annual reports are dominated by management-speak and management-style targets—something that may lead to a depoliticisation of border controls at EU level and fundamental decisions on EU borders strategy being taken on the basis of the FRONTEX operational plan and the decisions of its management board rather than on the basis of a more open debate.[57] Decisions on FRONTEX operations have been shrouded in secrecy,[58] with transparency as to its operational plans lacking. Moreover, while its parent Regulation has emphasised coordination as a key FRONTEX task, it is not clear whether such coordination of national responses leads to FRONTEX responsibility. FRONTEX is officially a 'management' agency

[52] Article 6(2).

[53] According to Article 6(5) of the RABITs Regulation 'while performing their tasks and exercising their powers, members of the teams may carry service weapons, ammunition and equipment as authorised according to the home Member State's national law. However, the host Member State may prohibit the carrying of certain service weapons, ammunition and equipment, provided that its own legislation applies the same prohibition to its own border guards'.

[54] According to Article 6(6), 'While performing their tasks and exercising their powers, members of the teams shall be authorised to use force, including service weapons, ammunition and equipment, with the consent of the home Member State and the host Member Sate, in the presence of border guards of the host Member State and in accordance with the national law of the host Member State.' However, the following paragraph allows the use of weapons, ammunition and equipment 'in legitimate self-defence and in legitimate defence of members of the teams or of other persons, in accordance with the national law of the host Member State' (Article 6(7)).

[55] Article 9.

[56] For details of FRONTEX planning and coordinating of joint border control operations see their annual Reports at www.frontex.europa.eu.

[57] On FRONTEX and depoliticisation, see Mitsilegas, *Border Security in the European Union, call-out.*

[58] See Moreno-Lax (2011).

but cannot fit in easily with the various typologies of Union agencies,[59] which have been established primarily in a market regulation context.[60] The emphasis on management in the FRONTEX Regulation cannot mask the fact that FRONTEX is essentially an operational agency, involved in actions with a significant impact on the relationship between the individual and the State.[61]

Notwithstanding the growth in FRONTEX activities in recent years, it has been increasingly difficult to pin down its responsibilities when it comes to its action. FRONTEX may be operational in practice, yet it may also claim that it has no legal responsibility for border controls, as it has merely a 'co-ordinating' role. This may lead to a situation where FRONTEX denies any responsibility claiming that the exercise of border controls are for Member States,[62] while Member States frame controls at their external borders as controls by FRONTEX—with Member States increasingly viewing FRONTEX as an answer to their expectations with regard to their border control responsibilities.[63] The potential to the creation of gaps in the legal responsibility of actors in FRONTEX operations is magnified if one looks at the legal framework underpinning the relations between FRONTEX one the one hand and other bodies and agencies (in particular law enforcement agencies) and third countries on the other. The FRONTEX Regulation provides for cooperation between the Agency and international organisations (including Europol) and third countries on the basis of 'working arrangements.'[64] FRONTEX has already entered in a number of such 'working arrangements' with security/law enforcement agencies both within[65] and outside the EU,[66] as well as with a number of third states.[67] The ambiguity regarding the legal force of working arrangements and the lack of transparency with regard to their negotiation and content may lead to the emergence of FRONTEX as an actor in a securitised, global system of immigration control

[59] For attempts at categorisation of EU agencies, see inter alia Chiti (2000), Kreher (1997), see also the overview by Vos (2000).

[60] See in particular Majone (1997).

[61] V. Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: the Individual and the State Transformed', in Ryan and Mitsilegas, *call-out*, pp. 39–66. As Curtin notes, it can be argued that in the case of FRONTEX the Council did not delegate its own existing executive powers but rather the tasks in question had been exercised by Member States—Curtin (2009).

[62] See in this context the striking FRONTEX news release according to which FRONTEX 'would like to state categorically that the agency has not been involved in diversion activities to Libya', the latter being based on a bilateral agreement between Italy and Libya—http://www.frontex/europa.eu/newsroom/news_releases/art70.htm.

[63] See for instance the July 2009 statement of the then Press Secretary of the Greek Government: 'We have to strengthen FRONTEX activities': in http://www.kathimerini.gr/4Dcgi/_w_articles_kathremote_1_16/07/2009_289089.

[64] Articles 13 and 14 of the FRONTEX Regulation respectively.

[65] See the Strategic Co-operation Agreement between FRONTEX and Europol, at https://www.europol.europa.eu/sites/default/files/flags/frontex.pdf.

[66] See *Frontex signs Working Arrangement with Interpol*, News Release of 29 May 2009, at http://www.frontex.europa.eu/newsroom/news_releases/art63.html.

[67] See *Frontex. External Relations* at http://www.frontex.europa.eu/external_relations/.

without being accompanied by clearly defined standards of legal responsibility either for itself or for its interlocutors.

2.3.3 The 2011 FRONTEX Regulation

In the light of these challenges, the FRONTEX legal framework was revised for a third time in 2011 to address inter alia sustained criticism with regard to the lack of emphasis on the protection of human rights of migrants as well as concerns regarding accountability and the rule of law in FRONTEX operations.[68] Regulation (EU) No 1168/2011[69] has amended the FRONTEX Regulation to include detailed rules governing FRONTEX operations but also a series of specific provisions on human rights and accountability. The Regulation states expressly that FRONTEX will fulfil its tasks in full compliance with the relevant Union law, including the Charter; the relevant international law, including the Geneva Convention; obligations related to access to international protection, in particular the principle of *non-refoulement* and fundamental rights.[70] The Regulation further states that no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or rom which there is a risk of expulsion or return to another country in contravention of that principle and that the special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law.[71] Fundamental rights will also be respected via procedural and governance developments. The Regulation calls upon the Agency to draw up and further develop and implement its Fundamental Rights Strategy and to put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.[72] The Regulation further calls for the establishment of a Consultative Forum by the Agency to assist the Executive Director and the Management Board in fundamental rights matters[73] and for the designation by the Management Board of a Fundamental Rights Officer.[74] The protection of fundamental rights is further addressed in the context of

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[68] For an overview of these challenges, see Council of Europe Parliamentary Assembly, *Frontex: Human Rights Responsibilities*, Report, Committee on Migration, Refugees and Displaced Persons, 8.4.2013 (*Rapporteur:* Mikael Cederbratt). See also the ensuing Resolution 1932(2013).

[69] Regulation (EU) No 1168/2011of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L304/1, 22.11.2011.

[70] Amended Article 1(2) of Regulation 2007/2004: second indent.

[71] New Article 2(1a).

[72] Article 26a(1).

[73] Article 26a(2).

[74] Article 26a(3).

broader rule of law and accountability innovations. The Regulation calls for the drawing up by FRONTEX of a Code of Conduct applicable to all operations coordinated by the Agency. The Code of Conduct will lay down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights with particular focus on unaccompanied minors and vulnerable persons, as well as on persons seeking international protection, applicable to all persons participating in the activities of the Agency. FRONTEX will develop the Code of Conduct in cooperation with the aforementioned Consultative Forum.[75] In a further move towards greater transparency and accountability, the Regulation provides for the drawing up by the Executive Director of an operational plan for FRONTEX joint operations and pilot projects.[76] The operational plan will include inter alia, in cases of operations at sea, specific information on the application of the relevant information and legislation in the geographical area where the rapid intervention takes place, including references to international and Union law regarding interception, rescue at sea and disembarkation.[77]

The 2011 Regulation goes some way towards addressing criticisms regarding the lack of emphasis on the protection of the rights of migrants in FRONTEX operations, as well as concerns with regard to transparency and the accountability of the agency. The Regulation represents an attempt to incorporate and mainstream fundamental rights in the work of FRONTEX, and the requirement to draw up an operational plan enhances accountability by setting out in detail the role of FRONTEX in specific operations. However, these developments do not address fully questions of the legal responsibility of FRONTEX in joint operations, especially when these operations have an impact on the fundamental rights of migrants. In particular, the FRONTEX legal framework in its various iterations continues not to grant a specific and express avenue of complaint or remedy for affected migrants within the FRONTEX structure. This gap has been addressed in detailed inquiries by the European Ombudsman. In an inquiry conducted in 2012, the Ombudsman found that FRONTEX had no mechanism in place by which it could deal with individual incidents of breaches of fundamental rights alleged to have occurred in the course of its work. The Ombudsman saw the lack of an internal complaints mechanism as a significant gap in FRONTEX's arrangements and recommended to FRONTEX that it should take any possible action to enable the FRONTEX Fundamental Rights Officer to consider dealing with complaints on infringements of fundamental rights in all FRONTEX activities submitted by persons individually affected by the infringements and also in the public interest.[78] FRONTEX decided not to accept this recommendation. A key element in the position being adopted by

[75] New Article 2a.

[76] New Article 3a(1).

[77] Amended Article 8e(1).

[78] European Ombudsman, *Draft Recommendation of the European Ombudsman in his inquiry into complaint OI/5/2012/BEH-MHZ against the European Agency for the Management of Operational Cooperation at the External Borders* (*Frontex*), 9.4.2013, point M.

FRONTEX is that individual incidents, which become the subject of complaint, are ultimately the responsibility of the particular Member State on whose territory the incident occurred. In a follow-up Report, the Ombudsman did not accept that FRONTEX does not carry responsibility for the actions of staff operating under its banner and that it is not tenable that FRONTEX has no responsibility and that, thus, it should not deal with complaints arising from actions in which it is involved.[79] According to the European Ombudsman, FRONTEX would be the logical first resort for submitting complaints.[80] The Ombudsman recommended that FRONTEX should establish a mechanism for dealing with complaints about infringements of fundamental rights in all FRONTEX-labelled joint operations. The mechanism should receive complaints from persons who claim to be individually affected, or who complain in the public interest. This role could be entrusted to the FRONTEX Fundamental Rights Officer, who should be resourced accordingly. The recommendations of the European Ombudsman are based on the acceptance that FRONTEX has legal responsibility for its operations and cannot hide behind the responsibility of Member States. The recommendations will strengthen the human rights scrutiny of FRONTEX operations in providing a remedy for affected migrants *within* the structure of FRONTEX. This remedy will be in addition to the avenue provided by the Treaty of Lisbon which grants the Court of Justice jurisdiction to review the legality of acts of bodies, offices and agencies of the Union intended to produce legal effects vis-à-vis third parties.[81] This provision is certainly applicable to FRONTEX operations but the additional lodging of complaints within FRONTEX will facilitate the speedy investigation of human rights issues and enable a thorough assessment of FRONTEX operations on the ground and closer to the time of the FRONTEX operations affecting migrants.

2.3.4 *FRONTEX and Rules on Sea Border Operations and Search and Rescue at Sea*

The existence of legal responsibility of FRONTEX when conducting joint operations with Member States is further confirmed by EU law governing sea border operations and search and rescue at sea. The European Union first adopted rules in the field in 2010, not via a further amendment of the FRONTEX Regulation, but on the basis of the comitology procedure established by Article 12(5) of the Schengen Borders Code. The relevant Council Decision[82] introduced in Annexes rules for sea

[79] Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 7.11.2013.

[80] Point 43.

[81] Article 263(1) TFEU.

[82] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by

border operations coordinated by FRONTEX and mere guidelines for search and rescue situations for disembarkation in the context of sea border operations coordinated by the Agency. The adoption of the Decision raised important rule of law issues. Important rules relating to FRONTEX operations at sea with potentially significant consequences for the human rights of affected migrants were adopted not via the ordinary EU legislative procedure (which would ensure the application of the full scrutiny powers of the European Parliament) but via the more opaque comitology procedure: rules on FRONTEX operations have thus been treated as non-essential, merely technical rules. The European Parliament challenged the legality of the adoption of the Decision before the Court of Justice.[83] The Court emphasised the principle that the adoption of rules essential to the subject-matter is reserved to the legislature of the European Union adding that the essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated.[84] In relation to the specific case before it, the Court found that although the Schengen Borders Code, which is the basic legislation in the matter, states in Article 12(4) that the aim of such surveillance is to apprehend individuals crossing the border illegally, it does not contain any rules concerning the measures which border guards are authorised to apply against persons or ships when they are apprehended.[85] The adoption of such rules constitutes a major development in the Schengen Borders Code system.[86] The impact of these rules on fundamental rights was a crucial factor in the Court's finding that these are essential and constitute a major development of the Schengen Borders Code. According to the Court, provisions on conferring powers of public authority on border guards—such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location—mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required.[87] The Court confirmed that parts I and II of the Annex of the contested Decision contain essential elements of external maritime border surveillance and found that, notwithstanding the Decision's reference to 'guidelines' on search and rescue, this reference cannot affect their classification as essential rules: the Court noted in this context that this part of the Annex forms part of the FRONTEX operational plan and that since the conditions provided for by that plan must be complied with, it necessary follows that the rules in paras 1.1 and 2.1 of Part II to the Annex of the contested decision are intended to produce binding legal

(Footnote 82 continued)
the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU), OJ L111/20, 4.5.2010.

[83] Case C-355/10, European Parliament v Council, judgment of 5 September 2012.

[84] Paragraph 64.

[85] Paragraph 73.

[86] Paragraph 76.

[87] Paragraph 77.

effects.[88] The Court's ruling is significant from a rule of law perspective not only by stopping Member States and the Commission hiding behind the comitology procedure in shielding key rules on FRONTEX operations from scrutiny but also by treating these rules as essential on the basis of their impact on fundamental rights and by treating rules on FRONTEX operations—regardless of how they are labelled—as legally binding.

The Court's ruling triggered a fresh round of negotiations for new EU legislation on the surveillance of the EU external border, taking place this time under the ordinary legislative procedure with the full involvement of the European Parliament. The ensuing Regulation[89] contains detailed legally binding rules on the surveillance of the EU external sea borders in the context of FRONTEX operations. It includes special rules on detection,[90] interception in the territorial sea,[91] interception on the high seas,[92] interception in the contiguous zone,[93] search and rescue situations[94] and disembarkation.[95] The Regulation contains three major developments aimed at addressing gaps in the protection of fundamental rights and the rule of law: it includes a series of detailed provisions aimed at ensuring respect with fundamental rights and refugee law, in particular when third countries are involved in sea operations; it places emphasis on the assessment of the human rights situation in third countries; and it introduces a series of provisions aiming at enhancing the accountability of FRONTEX, most notably as regards the drawing up of operational plans and the reporting of FRONTEX. The Regulation contains a number of strong Preambular provisions related to compliance with human rights when third countries are involved. When cooperation with third countries takes place on the territory or the territorial sea of those countries, the Member States and the Agency should comply with norms and standards *at least equivalent to those set by Union law*.[96] Moreover, in a provision reflecting the judgment of the European Court of Human Rights in *Hirsi,* it is stated explicitly that the possible existence of an arrangement between a Member State and a third country does not absolve Member States from their obligations under Union and international law, in particular as regards compliance with the principle of *non-refoulement,* whenever they are aware or ought to be aware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that third country amount to substantial

[88] Paragraphs 78–82.

[89] Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L189/93, 27.6.2014.

[90] Article 5.

[91] Article 6.

[92] Article 7.

[93] Article 8.

[94] Article 9.

[95] Article 10.

[96] Preamble, recital 5. Emphasis added.

grounds for believing that an asylum seeker would face a serious risk of being subjected to inhuman and degrading treatment or where they are aware of ought to be aware that that third country engages in practices in contravention of the principle of *non-refoulement.*[97] Protection of fundamental rights and the principle of *non-refoulement* is also upheld expressly in the body of the Regulation which states that no person shall, in contravention of the principle of *non-refoulement*, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subject to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement.*[98] This is a welcome and broad provision which is applicable to a wide range of FRONTEX operations. As Peers has noted, the European Parliament successfully insisted on adding the words 'forced to enter' and 'conducted to' in this Article, which clearly covers push-backs.[99]

These express commitments to protect fundamental rights and the principle of *non-refoulement* are backed up by detailed and concrete provisions aiming on the one hand to ensure a detailed assessment of the level of human rights protection in a third country, and on the other hand to provide a series of procedural safeguards to the affected migrants during sea operations. When considering the possibility of disembarkation in a third country, in the context of planning a sea operation, the host Member State, in coordination with participating Member States and the Agency, must take into account the general situation in that third country. In a passage reminiscent of the practice of the European Court of Human Rights in *M.S.S.* and of the Court of Justice in *N.S.*[100] the Regulation further states that the assessment of the general situation in a third country will be based on information derived from a broad range of sources, which may include other Member States, Union bodies, offices and agencies, and relevant international organisations. Intercepted or rescued persons shall not be disembarked, forced to enter, conducted to or otherwise handed over to the authorities of a third country when the host Member State or the participating Member States are aware or ought to be aware that that third country engages in practices as described in Article 4(1).[101] In terms of procedural safeguards, the Regulation stipulates that during a sea operation, before the intercepted or rescued persons are disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country and taking into account the assessment of the general situation in that third country in

[97] Preamble, recital 13.

[98] Article 4(1). See also Preamble, recital 12.

[99] See Peers (2014).

[100] For an overview, see Chap. 4.

[101] Article 4(2).

accordance with para 2, the participating units must use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*. For those purposes, further details must be provided for in the operational plan including, *when necessary*, the availability of shore-based medical staff, interpreters, legal advisers and other relevant experts of the host and participating Member States.[102] According to the Preamble, the operational plan should include procedures ensuring that persons with international protection needs, victims of trafficking in human beings, unaccompanied minors and other vulnerable persons are identified and provided with appropriate assistance, including access to international protection.[103] It has been pointed out by a Report prepared for the Parliamentary Assembly of the Council of Europe that this assessment can take place during operations at sea and that it can be questioned if this is a meaningful assessment if safeguards such as legal aid or an effective remedy against a negative decision are not in place.[104] It has also been pointed out that the Regulation ultimately allows FRONTEX and Member States to let migrants disembark in third countries.[105] While such gaps in protection may still exist, the Regulation constitutes a decisive step forward compared with previous EU law in the field. The Regulation enhances accountability and transparency in FRONTEX operations at sea by enhanced requirements for operational plans.[106] The Regulation further includes specific fundamental rights commitments[107] backed up by robust requirements of assessment of the situation in third countries during FRONTEX operations as well as by provisions granting expressly some procedural rights to migrants affected by operations at sea. Article 4(3) will assume particular importance in future FRONTEX operations as it must in turn be interpreted in accordance with the Charter of Fundamental Rights. Most importantly, the

[102] Article 4(3). Emphasis added.

[103] Preamble, recital 17.

[104] Council of Europe Parliamentary Assembly, *The 'Left-to-Die' Boat*: *Actions and Reactions*, Report, Committee on Migration, Refugees and Displaced Persons, *Rapporteur*: Tineke Strik, para 64.

[105] Ibid.

[106] See also the reporting requirements in Article 13 of the Regulation according to which the yearly FRONTEX Report will include a description of the procedures put in place by the Agency to apply this Regulation in practice, including detailed information on compliance with fundamental rights and the impact on those rights, and any incidents which may have taken place (Article 13(2)).

[107] The emphasis on protecting fundamental rights is further reiterated in Article 4(7) of the Regulation which states expressly that Article 4 will apply to all measures taken by Member States or FRONTEX in accordance with the Regulation.

Regulation confirms the legal responsibility of FRONTEX in operations at sea and affirms the applicability of EU human rights standards in instances of operational cooperation between FRONTEX and Member States with third countries in the context of migrant push-backs.

2.4 Delegation and the Privatisation of Immigration Control

Another key strand of delegation of immigration control in European Union law involves the adoption of a series of legislative measures imposing liability to carriers who fail to comply with immigration control-related obligations. Issues surrounding delegation from the state to the private sector in the context of carriers' liability have been analysed extensively in the literature.[108] This part will examine the detail of such privatisation and attempt to demonstrate that, rather than asking the private sector *to replace* state functions in the field, privatisation in the field of immigration control means that the state delegates *additional* tasks (such as the examination and assessment of identity documents) to the private sector. This process of privatisation is reminiscent of what has been deemed in the field of crime control as the 'responsibilisation' strategy, whereby the state co-opts the private sector in order to achieve crime control and security governance objectives.[109] In this manner, the involvement of the private sector serves to add an extra layer of immigration control, in addition to the exercise of expanding state powers in the field.[110] This chapter will examine the preventative aspect of the privatisation of immigration control, by examining legislation placing duties on carriers aiming to identify and transmit information on passengers *before* they reach the border. Preventive privatisation in this context entails criminalisation, in pushing carriers, when in doubt, not to allow the travel of passengers deemed as a risk to immigration control (and, as will be seen below, security). This paradigm of preventive privatisation is complemented by the privatisation of immigration control *ex post*, once migrants have reached the territory of the European Union. The key example of this paradigm are measures on employers' sanctions, which will be analysed later in this volume.[111]

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[108] See inter alia: Lahav (1998), Guiraudon (2001), and in the UK context, Nicholson (1997).

[109] The term was introduced by Garland (1996).

[110] Mitsilegas, *call-out* (*Immigration Control in an Era of Globalisation*).

[111] Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L168, 30 June 2009, p. 24. See Chap. 3.

2.4.1 Carriers' Liability

The original flagship measure of the privatisation of immigration control in European Union law is the Carriers liability Directive.[112] The Directive takes forward the provisions of Article 26 of the Schengen Implementing Convention and imposes two main duties on carriers: to take all the necessary measures to ensure that an alien carried out by air or sea is in possession of the travel documents required for entry into the territories[113]; and to assume responsibility for third country nationals who have been refused entry into the territory, including their return or assuming the cost of their return.[114] If carriers transport third country nationals who do not possess the necessary travel documents, they face a series of financial sanctions.[115] In this manner, carriers are asked to provide an extra layer of immigration control in identifying passengers and checking travel documents. EU law also privatises immigration control at the level of enforcement, by requiring carriers to take charge or bear the cost of the return of third country nationals whom they have transported into EU territory.[116] In addition to the carriers' liability Directive, EU Member States adopted in 2003 on a Directive requiring the transmission by carriers of passenger data, but this Directive covered the transmission of data for journeys to the EU, and required the transmission of much more limited categories of personal data (API data, namely data which can be found primarily on the passport).[117] Notwithstanding the fact that the API Directive was adopted under Title IV and its stated aim was to combat illegal immigration, there have been attempts by the UK Government during negotiations to frame it also as a national security and counter-terrorism matter and thus align it with its domestic approach on border security and e-borders.[118]

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[112] Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L187, 10 July 2001, p. 45.

[113] Article 26(1)(b) of the Schengen Implementing Convention.

[114] Articles 2 and 3 of the Directive and Article 26(1)(a) of the Schengen Implementing Convention.

[115] Articles 4 and 5 of the Directive and 26(2) of the Schengen Implementing Convention.

[116] For an overview of the challenges facing carriers in the implementation of the Directive, see Scholten (2014).

[117] Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [2004] OJ L 261/24, 6 August 2004. For an analysis of the Directive see Mitsilegas (2005).

[118] Caroline Flint, then a Home Office Minister, argued that the proposal 'is all about border control, whether it is illegal immigration or criminals coming in, or people who are a threat to national security' See her evidence in see House of Lords, EU Committee, *Fighting illegal immigration*: *should carriers carry the burden?*, 5th Report, session 2003–2004, HL Paper 29, at para 9.

2.4.2 The Collection and Transfer of Passenger Name Record (PNR) Data

The link between privatisation, prevention and securitisation has been provided expressly in EU law by introducing obligations to air carriers to transfer Passenger Name Records (PNR) to state authorities not of EU Member States, but of third states starting primarily with the United States.[119] The imposition of duties to air carriers to collect and transfer to state authorities of PNR data has been a key component of US Homeland Security strategy post-9/11, in the light of the way in which the 9/11 attacks occurred.[120] Carriers flying to the US from Europe were thus placed under duties imposed by unilateral US legislation to transfer PNR data to the US authorities and concerns were raised that compliance with US requirements would render carriers in breach of EU law and domestic Member States' law on data protection.[121] In order to address this conflict of interest, EU institutions proceeded to conclude an agreement between the European Community and the United States authorities legitimising the transfer of PNR data to the US. On the basis of a Decision by the Commission confirming the adequacy of US data protection standards,[122] a transatlantic agreement on the transfer of PNR data to the US Bureau of Customs and Border Protection was signed in 2004. The Agreement was subsequently litigated before the Court of Justice of the European Union, with the European Parliament bringing an action for annulment of the Decision authorising the conclusion of the Agreement on grounds of legality, proportionality and infringement of the fundamental rights of privacy and data protection. In what can be characterised as a 'pyrrhic victory' for the European Parliament, the Court annulled the measure on legality (competence) grounds, but without examining the substance of the Parliament's fundamental rights non-compliance allegations.[123] The annulment of the Agreement resulted in the conclusion of an interim third pillar Agreement, and eventually in 2007 of a third pillar EU–US PNR Agreement.[124]

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[119] See the Agreement between the European Union and Australia on the processing and transfer of European Union sourced PNR data by air carriers to the Australian Customs Service (OJ L186, 14.7.2012, p. 4). The European Union and Canada have signed a new PNR Agreement on 25 June 2014 (*Signature of the EU–Canada agreement on Passenger Name Records* (*PNR*), Council doc. 10940/14, Brussels, 25 June 2014, PRESSE 339), The Agreement is expected to replace its pre-Lisbon predecessor (OJ L82, 21.3.2006).

[120] Mitsilegas *call-out* (*Immigration Control in an Era of Globalisation*).

[121] Mitsilegas *call-out* (*Controle des Etrangers*).

[122] Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection, [2004] OJ L 235/11, 6 July 2004. The Undertakings of the US Homeland Security Department are annexed in pp. 15–21. The list of PNR data is annexed in p. 22.

[123] Joint cases C-317-04 and C-318/04 *European Parliament v Council*, judgment of 30 May 2006.

[124] For details, see Mitsilegas (2007b).

The entry into force of the Lisbon Treaty meant that the European Parliament, which had a limited role with regard to the conclusion of international agreements under the old third pillar, was called to consent to the 2007 EU–US PNR Agreement. The Parliament expressed concerns about the compatibility of the Agreement with EU privacy and data protection law and called upon the Commission to put forward a single set of principles to serve as a basis for negotiations with third countries.[125]

The new EU–US PNR Agreement was eventually approved by the European Parliament in early 2012 and took effect on June 1, 2012.[126] The legal bases for the Decisions to sign and conclude the Agreement are Articles 82(1)(d) and 87(2)(a) in conjunction with Article 218(6)(a) TFEU.[127] The Agreement will remain in force for a period of 7 years after its entry into force and, unless one of the Parties notifies of its intention not to renew further, will be renewable for subsequent 7 year periods.[128] Its structure is a significant improvement from a rule of law perspective, as the main provisions and safeguards are set out largely in the text of the EU–US Agreement itself, rather than in a Letter by the US to the EU, as was the case with the 2007 Agreement. The purpose of the Agreement is defined in rather broad terms: 'to ensure security and to protect the life and safety of the public.'[129] This broad wording may challenge calls for the inclusion of strict purpose limitation safeguards under the Agreement. It applies to a wide range of carriers: to carriers operating passenger flights between the European Union and the United States[130] as well as to carriers incorporated or storing data in the European Union and operating passenger flights to or from the United States.[131] The Agreement establishes an obligation for carriers to provide PNR data contained in their reservation systems to the US Department of Homeland Security (DHS) as required by DHS standards and consistent with the Agreement.[132] Data transmission will occur initially 96 h before departure and additionally either in real time or for a fixed number of routine and scheduled transfers as specified by DHS.[133] The Agreement defines PNR data by

[125] European Parliament Resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada P7_TA(2010)0144.

[126] On entry into force, see Article 27(1) of the Agreement.

[127] Council Decision of 13 December 2011 on the signing, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ L215/1, 13.8.2012; Council Decision of 26 April 2012 on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ L215/4, 13.8.2012.

[128] Article 26(1) and (2).

[129] Article 1(1).

[130] Article 2(2).

[131] Article 2(3).

[132] Article 3.

[133] Article 15(3). But see exceptions in Article 15(5).

reference to the Guidelines of the International Civil Aviation Organisation (ICAO).[134] As with the previous transatlantic PNR Agreements, the actual categories of PNR data to be transferred to the US Homeland Security Department are listed in an Annex to the Agreement. The Annex contains 19 categories of PNR data, which include broad categorisations such as frequent flier information, payment information, travel itinerary, travel status, seat number, general remarks and historical changes. DHS will retain PNR in an active database for up to 5 years.[135] After this active period, PNR shall be transferred to a dormant database for a period of up to 10 years.[136] Following the dormant period, data retained must be rendered fully anonymised.[137] However, data related to a specific case or investigation may be retained in an active PNR database until the case or investigation is archived and even so, this paragraph is without prejudice to data retention requirements for individual investigation or prosecution files.[138] Moreover, the Agreement does allow the onward transfer to PNR data to third countries.[139]

The Agreement thus maintains the paradigm of the privatisation of crime control set out in earlier Agreements and imposes extensive obligations on carriers to transmit a wide range of everyday personal data to the US Homeland Security Department. It constitutes a key example of the trend towards generalised, pre-emptive surveillance, whereby masses of every day personal data is collected by the private sector and transferred to state authorities in order to enable them to predict future behaviour and manage risk.[140] The transfer of PNR data affects every passenger, migrants and citizens alike.[141] The surveillance system the Agreement establishes poses grave challenges to fundamental rights, in particular the rights to privacy and data protection. These challenges are compounded by calls for the European Union to internalise the US approach on pre-emptive surveillance by mirroring the US system in creating a system whereby airlines flying into the EU are required to collect and transfer PNR data to European authorities before travel. The EU–US PNR Agreement itself envisages the potential establishment of such an EU PNR system states that if and when an EU PNR system is adopted, the Parties will consult to determine whether this Agreement would need to be adjusted accordingly to ensure full reciprocity. Such consultations will in particular examine whether any future EU PNR system would apply less stringent data protection

[134] Article 2(1).

[135] Article 8(1).

[136] Article 8(3). According to Article 8(6), the Parties agree that, within the framework of the evaluation as provided for in Article 23(1), the necessity of a 10-year dormant period of retention will be considered.

[137] Article 8(4).

[138] Article 8(5).

[139] Article 17(1)—The US may transfer PNR to competent government authorities of third countries only under terms consistent with this Agreement and only upon ascertaining that the recipient's intended use is consistent with those terms. See also Article 17(2).

[140] See Mitsilegas (2015b).

[141] See Mitsilegas (2009).

safeguards than those provided for in this Agreement and whether, therefore, this Agreement should be amended.[142] The European Commission tabled a proposal for a Framework Decision on an EU PNR system as early as 2007.[143] The Commission explained that the proposal was a result of the "policy learning" from inter alia the existing EU PNR Agreements with the United States and Canada.[144] Agreement on the proposal was not reached before the entry into force of the Lisbon Treaty, a fact which led the Commission to table new legislation post-Lisbon, this time in the form of a Directive.[145] The Commission justified the establishment of a European system of PNR transfer as necessary for law enforcement purposes due to its potential for risk assessment of passengers and proposed a system which is very similar to the US PNR system, at least as regards the categories of transferred data[146] and the emphasis on risk assessment.[147] In parallel to such calls for the establishment of an EU PNR system and negotiations by the EU to conclude PNR agreements with other third countries including Australia and Canada, the Commission has also been calling for the development of a global regime for the collection and transfer of PNR data. In its Communication on a Global Approach to Transfers of PNR Data to Third Countries,[148] the Commission called upon the European Union to consider initiating discussions with international partners that use PNR data and those that are considering using such data in order to explore whether there is common ground between them for dealing with PNR transfers on a multilateral level. In this manner, a system of generalized pre-emptive surveillance of mobility based on the involvement of the private sector which has been imposed unilaterally by the United States as an emergency post-9/11 response potentially becomes normalised via EU action on a global scale, notwithstanding the persistent concerns with regard to the compatibility of such a system with European human rights law.[149]

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[142] Article 20(2). See also the wording of the US Letter to the EU within the framework of the 2007 Agreement according to which DHS expected not to be asked to undertake data protection measures in its PNR system that are more stringent than those applied by the US for its PNR system—point IX, para 1—see also Preamble of the Agreement, recital 5.

[143] *Commission Proposal for a Council Framework Decision on the Use of Passenger Name Record (PNR) for Law Enforcement Purposes*, COM (2007) 654 final (Nov. 6 2007).

[144] *Id.* at 2.

[145] *Commission Proposal for a Directive of the European Parliament and of the Council on the Use of Passenger Name Record Data for the Prevention, Detection, Investigation, and Prosecution of Terrorist Offences and Serious Crimes*, COM (2011) 32 final (Feb. 2, 2011).

[146] Requested data includes all forms of payment information, including billing address, travel status of passenger (including confirmations), check-in status, no show or go show information, seat number and other seat information, number and other names of travelers on PNR, and "general remarks".

[147] V. Mitsilegas, *call-out* (*Immigration Control in an Era of Globalisation*).

[148] COM (2010) 492 final, 21.9.2010.

[149] Mitsilegas, *call-out* (*The Transformation of Privacy*).

2.5 Immigration Control as Security Governance

The imposition to carriers of obligations to transfer PNR data to the authorities of third states is only one example of the securitisation of migration at EU level. The development of EU law and policy in recent years has been marked by growing linkages between immigration control and security governance. In this two-fold process of securitisation of migration, immigration control is used to achieve security objectives, while security and crime governance methods are being used to conduct border and immigration controls. Conceived in both sides of the Atlantic as 'border security', this process of securitisation of migration has a strong preventive aspect.[150] In addition to the collection and transfer of a wide range of personal data emanating from every day legitimate activity to state authorities responsible for security and crime prevention and control that PNR transfer systems entail, the securitisation of migration in Europe has also taken the form of the establishment of large scale EU immigration databases and mobility surveillance systems, as well as efforts to interlink and make interoperable these databases. The establishment of databases is linked with the focus on the collection by the state of a wide range of personal data from migrants, including sensitive data such as biometrics. Securitisation is also strongly premised upon negating the specificity of the purpose of the collection by state authorities of personal data of migrants (which is immigration control) and arguing that this purpose is not only immigration control but also security governance. This attack on purpose limitation has led to EU law now allowing access to a wide range of immigration data collected in EU databases to authorities responsible for crime control and security. A multi-layered system of securitisation and criminalisation of migration has thus been established.

2.5.1 Migration and Security in EU Law and Policy

The link between immigration control and security was clearly articulated in the 5 year Programme for EU Justice and Home Affairs law and policy agreed by the European Council in 2004 (the Hague Programme). According to the latter,

> the management of migration flows, including the fight against illegal immigration should be strengthened by establishing *a continuum of security measures* that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonised solutions in the EU on biometric identifiers and data are necessary.[151]

[150] On the emergence of the concept of Border Security see Mitsilegas, *call-out* (*Border Security in the European Union*); Mitsilegas (2011).

[151] Paragraph 1.7.2. Emphasis added.

In this manner, the wording of the Hague Programme represents the creation of what scholars have already identified in the 1990s as the so-called '(in)security continuum' which consists of linking, in law and policy discourse, the disparate and very different aims of controlling immigration on the one hand and fighting 'security threats' such as crime and terrorism on the other.[152] Intervention *before* entry, prevention and the collection and exchange of personal data (including biometrics) are all key in this context. The renewal of such (in)security continuum emerged at EU level following attacks in a European capital, Madrid. In the Declaration on combating terrorism of 25 March 2004 following these attacks, the European Council linked the monitoring of the movement of people with counter-terrorism by stressing that 'improved border controls and document security play an important role in combating terrorism'. There were two elements in this approach: the inclusion of biometrics in EU visas and passports, which should be prioritised and relevant measures be adopted by the end of 2004; and the enhancement of the interoperability between EU databases and the creation of 'synergies' between existing and future information systems (such as the Schengen Information System II, the Visa Information System and Eurodac) in order to exploit their added value within their respective legal and technical frameworks in the prevention and fight against terrorism.[153]

The emphasis on the use of technology in the securitisation of migration in the European Union was clearly reflected in a Commission Communication on the 'interoperability' of databases.[154] The purpose of the Communication was to highlight how, beyond their present purposes, databases 'can more effectively support the policies linked to the free movement of persons and serve the objective of combating terrorism and serious crime'.[155] On the basis of this approach, the Commission argued strongly in favour of access of authorities responsible for internal security to immigration databases including the Visa Information System.[156] The Communication provided a definition of 'interoperability', which is the 'ability of IT systems and of the business processes they support to exchange data and to enable the sharing of information and knowledge'.[157] According to the Commission, interoperability is a technical rather than a legal/political concept.[158]

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[152] See Bigo (1996).

[153] See V. Mitsilegas, *call-out* (*Contrôle des étrangers*).

[154] *Communication on Improved Effectiveness, Enhanced Interoperability and Synergies among European Databases in the Area of Justice and Home Affairs,* COM (2005) 597 final, Brussels, 24 November 2005.

[155] Ibid., p. 2.

[156] Ibid., p. 8. The Commission also took the opportunity to float proposals for longer-term developments, including the creation of a European Criminal Automated Fingerprints Identification System, the creation of an entry-exit system and introduction of a border crossing facilitation scheme for frequent border crossers, and European registers for travel documents and identity cards (pp. 8–9).

[157] Ibid., p. 3.

[158] Ibid.

This attempt to treat interoperability, which is a term now increasingly used by EU institutions,[159] as a merely technical concept, while at the same time using the concept to enable maximum access to databases containing a wide range of personal data (which become even more sensitive with the sustained emphasis on biometrics) is a striking attempt to depoliticise the issue and shield developments from the enhanced scrutiny that the adoption of legislation in the field would provide.[160]

2.5.2 The Visa Information System

A key example of the preventive securitisation of migration in Europe via the establishment of an EU database containing a wide range of personal data (including biometrics) which is also accessible by law enforcement authorities is the development of the Visa Information System (VIS). The VIS is a management tool of the EU instrument of extraterritorial immigration control *par excellence,* the visa.[161] The Justice and Home Affairs Council adopted detailed conclusions on the development of VIS in February 2004, stating clearly that one of the purposes of the system would be to 'contribute towards improving the administration of the common visa policy and towards internal security and combating terrorism.'[162] It also called for access to VIS to be granted to border guards and 'other national authorities to be authorised by each Member State such as police departments, immigration departments and services responsible for internal security.'[163] In June 2004, the Council adopted a Decision forming the legal basis for the establishment of VIS[164] and negotiations began to define its purpose and functions and formulate rules on access and exchange of data. The Commission subsequently tabled a draft Regulation aiming to take VIS further by defining its aims and rules on data access and exchange.[165] The Justice and Home Affairs Council of 24 February 2005 called for access to VIS to be given to national authorities responsible for 'internal

[159] See for instance the Justice and Home Affairs Council Conclusions of 5–6 June 2008 'on the management of the external borders of the member states of the European Union', where it is stated that pilot projects developing future EU border management measures should allow for 'maximum interoperability' (para 16).

[160] See Mitsilegas, *call-out* (*Extraterritorial Immigration Control in the 21st Century*).

[161] See Guild (2003).

[162] Doc 5831/04 (Presse 37). The Council called for the inclusion in VIS of biometric data on visa applicants.

[163] Ibid.

[164] Council Decision of 8 June 2004 establishing the Visa Information System (VIS), [2004] OJ L 213/5, 15 June 2004.

[165] Proposal for a Regulation of the European Parliament and of the Council concerning the VIS and the exchange of data between Member States on short-stay visas, COM (2004) 835 final, 28 December 2004.

security', when exercising their powers in investigating, preventing and detecting criminal offences, including terrorist acts or threats and invited the Commission to present a separate, third pillar proposal to this end.[166] The Commission tabled such a proposal in November 2005.[167] The two texts were linked and thus negotiated in parallel (co-decision was required formally for the first pillar Regulation, while for the third pillar Decision the European Parliament had a consultation role).[168] Agreement on both proposals was confirmed at the Justice and Home Affairs Council of 12–13 June 2007[169] and they were published in the Official Journal in August 2008.[170]

Reflecting the logic of the Conclusions of the 2005 Justice and Home Affairs Council, the VIS Regulation expressly states that one of the purposes of the Visa Information System is to contribute to the prevention of threats to internal security of the Member States.[171] The Regulation also contains a bridging clause to the third pillar Decision allowing access to VIS by Europol within the limits of its mandate and when necessary for the performance of its tasks, and by the relevant national authorities 'if there are reasonable grounds to consider that consultation of VIS data will substantially contribute' to the prevention, detection or investigation of terrorist offences and of other serious criminal offences.[172] The terms of access of internal security authorities and Europol to the VIS are set out in detail in the third pillar Decision.[173] The VIS will also include biometric data.[174] Some detail with regard to the introduction of biometrics to EU visas can be found in a Regulation amending the Common Consular Instructions.[175] The link between the collection and use of biometrics on the one hand and the identification of the visa holder on the other is made clear already in the Preamble to the Regulation.[176] The Regulation calls upon Member States to collect biometric identifiers comprising the facial image and 10 fingerprints from the applicant.[177] The development of the Visa Information System constitutes a paradigm in EU law of the routine inclusion of biometrics in EU

[166] Doc. 6228.05 (Presse 28), pp. 15–16.

[167] COM (2005) 600 final, 24 November 2005.

[168] For further details see V. Mitsilegas, '*Human Rights, Terrorism and the Quest for Border Security*', *call-out.*

[169] Council doc. 10267/07 (Presse 125).

[170] Regulation (EC) No 767/2008, OJ L218, 13 August 2008, p. 60; Decision 2008/633/JHA, OJ L218, 13 August 2008, p. 129.

[171] The Regulation also enables the recording of biometric data into VIS—see Article 5(1).

[172] Article 3(1).

[173] In particular Articles 5–7.

[174] Regulation, Preamble recital 10, Articles 5 and 9.

[175] Regulation (EC) No 390/2009, L131, 28 May 2009, p. 1.

[176] 'The integration of biometric identifiers in the VIS is an important step towards the use of new elements, which establish a more reliable link between the visa holder and the passport in order to avoid the use of false identities'—recital 2.

[177] Amended Part III point 1.2(a). See also the exceptions in Part III point 1.2(b).

immigration databases[178] as well as of legitimising the tenuous link between extraterritorial immigration control via the imposition of visa requirements and security and crime control imperatives. The inclusion of biometrics in EU databases lies also at the core of EURODAC, the EU database containing information on individuals lodging an asylum application in EU Member States. Following intense inter-institutional debate, the new post-Lisbon EURODAC Regulation now allows access to the system by law enforcement authorities.[179] EU law has also introduced —under an immigration legal basis—an obligation for Member States to introduce biometrics in EU passports.[180] The use of biometrics is also key to current proposals for the establishment of an EU entry-exit system, with access to this system by law enforcement authorities being a possibility.[181] The securitisation of migration has thus been normalised.

2.5.3 *The Entry-Exit System and Registered Traveller Programme*

Another example of the new generalised surveillance based on monitoring movement, applying to both EU and third country nationals, is the collection of sensitive personal data has been the new move by the European Commission to propose the creation of an entry-exit system at the external borders of the European Union, coupled with facilitation of border crossings for *bona fide* travellers and the creation of an electronic travel authorisation system.[182] The entry/exit system would be a new database, applying to third country nationals admitted for a short stay; bona

[178] On the use of biometrics in EU immigration databases, see Baldaccini (2008), see also Brouwer (2007).

[179] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country nationals or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L180/1, OJ 29.6.2013. For a critical analysis, see Vavoula (2015).

[180] Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel docs issued by Member States, [2004] OJ L 385/1, 29 December 2004. For a critical analysis, including on the legality of the Regulation, see Mitsilegas, *call-out* (*The Borders Paradox*).

[181] See *Draft Regulation of the European Parliament and of the Council establishing an Entry/Exit System* (*EES*) *to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union—Access for law enforcement purposes*, Council doc. 10720/14, Brussels, 12 June 2014.

[182] Commission Communication on *Preparing the Next Steps in Border Management in the European Union*, COM (2008) 69 final, Brussels, 13 February 2008.

fide travellers would be 'low risk' third country nationals, but also EU citizens—both would cross external borders via 'automated gates'. The Electronic Travel Authorisation System (ETA) would apply to third country nationals not subject to a visa requirement who would be required to make an electronic application in advance of travelling. These proposals are similar to the US model of border security, and are reminiscent of the recommendation by the 9/11 Commission to 'balance' the collection of biometrics by US citizens with measures aimed at speeding 'known travellers'.[183] Both interoperability and the use of biometrics is central to these proposals, in particular to the proposals for the establishment of a system of border crossings via automated gates. The Commission noted that:

> In the run-up to *full introduction of biometric passports*, the current legal framework allows for schemes based on voluntary enrolment to be deployed by Member States, under the condition that the criteria for enrolment correspond to those for minimum checks at the borders *and that the schemes are open for all persons enjoying the Community right to free movement*. Such schemes should be *interoperable* within the EU, based on common technical standards, which should be defined to support the *widespread and coherent use of automated border control systems*.[184]

The added value of a new database on an entry-exit system for third country nationals is however not evident, especially in the light of the recent setting up of the Visa Information System. Moreover, and along with the evident proportionality concerns, there have been serious legality concerns with regard to the extension of legislation on the management of the EU external border to EU citizens.[185] However, the momentum for the establishment of an entry-exit system along these lines is currently high. The European Council invited the Commission to present proposals for an entry/exit and registered traveller system by the beginning of 2010,[186] and agreed in the European Pact on Immigration and Asylum (endorsed by the European Council in October 2008) to deploy 'modern technological means to ensure that systems are interoperable' and stated that from 2012 the focus should be 'on establishing electronic recording of entry and exit, together with a fast-track procedure for European citizens and other travellers'.[187] The political prioritisation of the establishment of an entry-exit system has been reaffirmed in the 5 year plan succeeding the Hague Programme, the Stockholm Programme, which emphasised once more the link between security, mobility and technology.[188]

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[183] For an overview of US initiatives, see Mitsilegas, *call-out* (*Immigration Control in an Era of Globalisation*).

[184] Ibid., p. 7. Emphasis added.

[185] For further details on this point, see V. Mitsilegas, *call-out* (*The Borders Paradox*).

[186] Presidency Conclusions of the Brussels European Council of 19/20 June 2008, Council doc. 11018/08, Brussels, 20 June 2008, para 10.

[187] Council doc. 13440/08, Brussels, 24 September 2008, point III(e).

[188] European Council, *The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens,* OJ C 115, 4 May 2010, p. 1.

The opening sentence of the Stockholm Programme chapter entitled 'access to Europe in a globalised world' states that '[t]he Union must continue to facilitate legal access to the territory of its Member States while in parallel taking measures to counteract illegal immigration *and cross-border crime* and maintaining a high level of security.'[189] Noting that the possibilities of 'new and interoperable technologies hold great potential for rendering border management more efficient as well as more secure but should not lead to discrimination or unequal treatment of passengers' the European Council invited the Commission to present proposals for an entry/exit system alongside a fast track registered traveller programme with a view to such a system becoming operational as soon as possible; to prepare a study on the possibility and usefulness of developing a European system of travel authorisation and, where appropriate, to make the necessary proposals; and to continue to examine the issue of automated border controls and other issues connected to rendering border management more efficient.[190] The Commission Action Plan on the implementation of the Stockholm Programme envisaged the tabling of legislative proposals setting up an Entry Exit System and a Registered Traveller Programme in 2011.[191] The Commission has now published two draft Regulations on the establishment of an Entry-Exit System[192] and on the establishment of a Registered Traveller Programme[193] respectively. They both apply to third-country nationals only.

By establishing an entry-exit system—which is remarkably similar to developments in US law analysed above—the EU introduces a system of surveillance of movement based on automaticity, interoperability, and the collection and consultation of sensitive personal data such as biometrics. As I have noted elsewhere, merging the logic of risk prevention with the logic of border security, this model has far-reaching consequences for the protection of fundamental rights and the relationship between the individual and the State.[194] Movement is monitored on the basis of profiling—and the establishment of individual, subjective assessments on each traveller. Migrants are criminalised as they can be deemed as 'suspects' under these assessments, and their freedom of movement curtailed accordingly. The introduction of the concept of 'bona fide' traveller is extremely worrying in this context. As the European Data Protection Supervisor has noted in his preliminary comments on the initial Commission proposals:

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189 Chapter 5, para 5.1, emphasis added.

190 Ibid.

191 Commission Communication, *Delivering an Area of Freedom, Security and Justice for Europe's Citizens. Action Plan Implementing the Stockholm Programme,* COM (2010) 171 final, p. 44.

192 Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM (2013) 95 final, Brussels, 28.2.2013.

193 Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme, COM (2013) 97 final, Brussels, 28.2.2013.

194 Mitsilegas, *call-out* (*The Borders Paradox*).

> The underlying assumption in the communications (especially in the entry/exit proposal) is worrying: all travellers are put under surveillance and are considered a priori as potential law breakers. For instance in the Registered Travellers system, only the travellers taking specific steps, through ad hoc registration and provision of detailed personal information, will be considered 'bona fide' travellers. The vast amount of travellers, who do not travel frequently enough to undergo such a registration, are thus, by implication, de facto in the 'mala fide' category of those suspected of intentions of overstay.[195]

Concerns with regard to the discriminatory impact of the Registered Traveller Programme, as well as with regard to the necessity and proportionality of the new Commission proposals, have also been expressed by the European Data Protection Supervisor in his Opinion on the two draft Regulations tabled by the Commission in 2013.[196]

2.5.4 EUROSUR

The nexus between the preventive turn in border control via shifts in time and space, the move towards delegation and the use of technology and risk management in the securitisation of migration are all clearly reflected in the recently adopted European Union Regulation establishing the European Border Surveillance System (EUROSUR).[197] EUROSUR is a common framework for the exchange of information and for the cooperation between Member States and FRONTEX in order to improve situational awareness and to increase reaction capability at the external borders of the Member States of the Union for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants.[198] A key component of the system is the development of situational pictures at national and EU level[199] and, importantly, a common pre-frontier intelligence picture which will be maintained by FRONTEX in order to provide the national coordination centres with effective, accurate and timely information and analysis on the pre-frontier area.[200] The latter is defined as the geographical area beyond the external borders.[201] Key to the operation of EUROSUR is the common application of surveillance tools which will be coordinated by FRONTEX.[202] FRONTEX will provide a national coordination

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195 Opinion of 3 March 2008, pp. 5–6.

196 Opinion of 18 July 2013.

197 Regulation No 1052/2013, OJ L295/11, 6.11.2013.

198 Article 1.

199 Articles 8–10.

200 Article 11(1).

201 Article 3g.

202 Article 12(1).

centre, at its request, with information on the external borders of the requesting Member State and on the pre-frontier area which may be derived from inter alia: selective monitoring of designated third-country ports and coasts which have been identified through risk analysis and information as being embarkation or transit points for vessels or other craft used for illegal immigration or cross-border crime; tracking of vessels or other craft over high seas which are suspected of, or have been identified as, being used for illegal immigration or cross-border crime; monitoring of designated areas in the maritime domain in order to detect, identify and track vessels and other craft being used for, or suspected of being used for, illegal immigration or cross-border crime; and selective monitoring of designated pre-frontier areas at the external borders which have been identified through risk analysis and information as being potential departure or transit areas for illegal immigration or cross-border crime.[203] The system also provides for exchange of information with neighbouring third countries.[204] EUROSUR is thus designed to be a system of supranational extra-territorial surveillance, involving information gathering outside the border and in third states, based on technology, with the aim of in essence providing intelligence which will help prevent or deflect migration flows to the EU external border.[205] The terms of its establishment are yet another example of the prioritisation of security considerations in EU immigration control policy.[206]

2.5.5 Pre-emptive Surveillance, Privacy and the Rule of Law

The securitisation of immigration control with an emphasis on the prevention of migrant flows has significant consequences for migrants. EU law has created a multi-layered system of pre-emptive surveillance whereby a vast array of personal data (including every day data emanating from legitimate activities such as applying for a visa or booking a flight ticket and sensitive data such as biometrics) is collected on a routine basis and ending into databases which are accessible by law enforcement and security authorities.[207] State authorities have thus access to a wealth of personal data enabling practices such as profiling and data mining. The impact of state intervention on the individual is intensified when one considers the

[203] Article 12(2).

[204] Article 20.

[205] For a critical analysis of the use of technology in the development of EUROSUR, see Jeandesboz (2011).

[206] See also the concerns expressed in the United Nations General Assembly, Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau: *Regional Study*: *Management of the External Borders of the European Union and its impact on the human rights of migrants,* 24 April 2013, para 44.

[207] On the concept of pre-emptive surveillance for counter-terrorism purposes see de Goede (2012).

potential of combining personal data from different databases collected for different purposes in order to create a profile of risk or dangerousness. In addition to the substantive privacy challenges these developments pose, risk assessment in these terms poses acute rule of law challenges in reconfiguring the place of the individual in a democratic society.[208] Key in this context is what has been deemed as the adiaphorisation in surveillance: according to Lyon,

> Data from the body (such as biometrics, DNA) or triggered by the body … are sucked into databases to be processed, analysed, concatenated with other data, then spat out again as a 'data double.' The information that proxies for the person is made up of 'personal data' only in the sense that it originated with a person's body and may affect their life chances and choices. The piecemeal data double tends to be trusted more than the persontrans-formation of privacy in an era of.[209]

The use of personal data in these terms leads to a process whereby individuals embarking on perfectly legitimate everyday activities are constantly being assessed and viewed as potentially dangerous without having many possibilities of knowing or contesting such assessment. At any time, anybody can be a 'trusted' or a 'suspect' passenger. As Amoore has noted, 'read in this way the border becomes a condition of being that is always in the act of becoming, it is never entirely crossed, but appears instead as a constant demand for proof of status and legitimacy.'[210] In this manner, EU law creates a permanent system of risk assessment and categorisation of individuals, leading to the normalisation of practices of inclusion and exclusion.[211] These practices are manifestly deficient from a rule of law perspective as they undermine legal certainty and the legitimate expectations individuals have from the state. As Solove has noted, predictive determinations about one's future behaviour are much more difficult to contest than investigative determinations about one's past behaviour.[212] To the extent that these practices are applicable also to citizens of the Union, they challenge fundamentally the bond between the citizen and the state and the relationship of trust inherent in citizenship.[213]

In addition to rule of law challenges, the securitisation of migration via the normalisation of pre-emptive surveillance poses acute challenges to the rights of privacy and data protection. Everyday personal data is collected and transferred to state authorities and EU databases *en masse* and the principle of purpose limitation as regards the use of personal data for immigration control purposes is largely inapplicable under the logic that 'it is all about security.' The danger of profiling in such a system of constant data collection and risk assessment is present. A significant step forward towards addressing these challenges has been made by the

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[208] See Mitsilegas (2014).

[209] See Bauman and Lyon (2013).

[210] See Amoore (2006).

[211] See Franco Aas (2011).

[212] See Solove (2008).

[213] On the applicability of border surveillance to EU citizens, see V. Mitsilegas, *The Borders Paradox, call-out.*

European Court of Human Rights in the case of *Marper*,[214] where the retention of DNA data by the British police of individuals not associated with any crime was deemed contrary to Article 8 of the ECHR (private and family life). In *Marper* the European Court of Human Rights examined the compatibility with the ECHR of the systemic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued in the UK. The Court found that such blanket and indiscriminate retention of data is disproportionate and thus non-compliant with Article 8 of the Convention. The ruling is important in rejecting the retention of DNA data *per se*: according to the Court, the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having a direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data.[215] It is also important in highlighting the broader impact of retention on the affected individuals and in particular the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons.[216]

A further significant step forward in setting limits to surveillance has been made by the Court of Justice of the European Union in a case concerning the compatibility with human rights of the EU Directive on data retention, which introduced the obligation of blanket retention of a series of telecommunications data to mobile phone providers.[217] Following up to a number of significant rulings by national constitutional courts in Europe finding that the implementation of the Directive was unconstitutional in their respective legal orders,[218] in its landmark ruling in the case of *Digital Rights Ireland,*[219] the Court of Justice annulled the data retention Directive on the grounds that the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52 (1) of the Charter. The Court developed its ruling in six main steps.[220] The first step has been to focus on proportionality and to emphasise the importance of the principle by reference to CJEU case-law,[221] but also by reference to the Strasbourg

[214] Case of *S. And Marper v. The UK*, Application nos. 30562/04 and 30566/04.

[215] Paragraph 121.

[216] Paragraph 122.

[217] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13 April 2006, p. 54.

[218] For an overview see Mitsilegas, *call-out* (*The Value of Privacy in an Era of Security*).

[219] Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger*, judgment of 8.4.2014.

[220] See Mitsilegas, *call-out* (*The Transformation of Privacy*).

[221] According to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to

jurisprudence in *Marper*.[222] The second step has been to view data protection as a means of protecting privacy: according to the Court, it should be noted that the protection of personal data resulting from the explicit obligation laid down in Article 8(1) of the Charter is especially important for the right to respect for private life enshrined in Article 7 of the Charter.[223] The third and key step has been to focus on the generalised and unlimited collection of personal data under the Directive. According to the Court, the directive requires the retention of all traffic data concerning fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony. It therefore applies to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives. Furthermore, in accordance with Article 3 of Directive 2006/24, the directive covers all subscribers and registered users. It therefore entails an interference with the fundamental rights of practically the entire European population.[224] In this respect, it must be noted, first, that Directive 2006/24 covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime.[225] The Court further noted that Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime.[226] Neither does the Directive require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious

(Footnote 221 continued)
achieve those objectives (see, to that effect, Case C-343/09 *Afton Chemical* EU:C:2010:419, para 45; *Volker und Markus Schecke and Eifert* EU:C:2010:662, para 74; Cases C-581/10 and C-629/10 *Nelson and Others* EU:C:2012:657, para 71; Case C-283/11 *Sky Österreich* EU:C:2013:28, para 50; and Case C-101/12 *Schaible* EU:C:2013:661, para 29)—para 46.

[222] With regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V)—para 47.

[223] Paragraph 53.

[224] Paragraph 56.

[225] Paragraph 57.

[226] Paragraph 58.

offences.[227] The fourth step for the Court has been to focus on the absence of meaningful limits on access to personal data in the Directive[228] and on the fact that no prior authorisation by a judicial or independent administrative authority is required.[229] The fifth step has been to highlight the shortcomings in the Directive's provisions on the length of data retention.[230] The sixth step for the Court, which is of great importance in the light of moves towards data transfer to third countries and the globalisation of surveillance, has been to highlight the absence of safeguards on data security and protection especially in the light of the lack of geographical limits to data retention: the Court has pointed out that the Directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data.[231]

The implications of the rulings in *Marper* and *Digital Rights Ireland* for the reconfiguration of the relationship between pre-emptive surveillance and privacy cannot be underestimated. These rulings place considerable limits to the surveillance powers of the state. Courts have emphasised that the very retention of personal data as such can challenge the right to privacy; that the retention of data by the state on individuals who have not been convicted of a criminal offence leads to stigmatisation and discrimination; and that generalised surveillance by the general retention of everyday personal data changes fundamentally the relationship between

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[227] Paragraph 59.

[228] Paragraph 61: Article 4 of the directive, which governs the access of those authorities to the data retained, does not expressly provide that that access and the subsequent use of the data in question must be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating thereto; it merely provides that each Member State is to define the procedures to be followed and the conditions to be fulfilled in order to gain access to the retained data in accordance with necessity and proportionality requirements.

[229] Paragraph 62: access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions. Nor does it lay down a specific obligation on Member States designed to establish such limits.

[230] Article 6 of Directive 2006/24 requires that those data be retained for a period of at least 6 months, without any distinction being made between the categories of data set out in Article 5 of that directive on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned. Furthermore, that period is set at between a minimum of 6 months and a maximum of 24 months, but it is not stated that the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary (paras 63–64).

[231] Paragraph 68.

the individual and the state by placing affected individuals under a constant state of suspicion. All these findings are applicable to the collection of personal data for border control purposes, and become even more relevant in cases where border controls are used for security purposes. Privacy challenges along the lines articulated by the judiciary in Europe are particularly acute in systems involving the mass collection and exchange of personal data (such as the PNR and entry-exit systems), as well as in the development of massive immigration databases such as the Visa Information System and in the collection and use of sensitive personal data such as biometrics. The limits to state power to collect and use personal data for border control purposes have been highlighted by the Court of Justice in its recent ruling in *Schwarz*.[232] The Court found that the EU Regulation on the inclusion of biometric data in the passports of EU citizens met both legality and human rights standards as set out in Articles 7 and 8 of the Charter. However, the Court put forward two important findings in relation to the collection of biometrics: that persons applying for passports cannot be deemed to have consented to the processing of their fingerprints[233]; and that since the Regulation does not provide for the storage of fingerprints except within the passport itself, and does not provide for any other form or method of storing those fingerprints, it cannot in and of itself be interpreted as providing a legal basis for the centralised storage of data collected thereunder or for the use of such data for purposes other than that of preventing illegal entry into the European Union.[234] The Court's ruling in favour of the compatibility of the Regulation with fundamental rights was based largely on this finding. As with the cases analysed above, the ruling of the Court of Justice in *Schwarz* raises serious questions regarding the compatibility of the blanket and multi-purpose collection and storage of personal data, including biometrics, in centralised large-scale EU and national databases (such as the Visa Information System or databases containing PNR data) with the right to privacy.[235]

2.6 Conclusion

The preventive turn in immigration control in European Union law has led to a significant increase in the powers of the state and the parallel targeting of migrants. The emphasis on extraterritorial immigration control revealed Member States' efforts (with the help of FRONTEX) to shield their jurisdictions from the legal obligations towards migrants and demonstrated the serious rule of law gaps extraterritorial immigration control entails. EU law has further strengthened the hand of the state by delegating immigration control-related responsibilities to the

[232] *Michael Schwarz v Stadt Bochum*, Case C-291/12, judgment of 17 October 2013.

[233] Paragraph 32.

[234] Paragraphs 60–61.

[235] Mitsilegas, call-out (The Law of the Border).

private sector and to the European Border Agency (FRONTEX). The increase in the reach of the state in this context has been accompanied by a decrease in its accountability, with serious rule of law questions arising with regard to the allocation of legal responsibility for immigration control to the delegated level. These gaps in the rule of law have been accompanied by a strong criminalisation/securitisation agenda, whereby EU law (via the establishment of databases, surveillance systems, the normalisation of biometrics as a form of immigration control, the imposition of obligations to transfer personal data to the state by the private sector and the blurring of the boundaries between the purposes of immigration control and security governance) has led to the proliferation of measures targeting migrants, again with the aim to prevent them reaching the jurisdiction of EU Member States. As it has been demonstrated throughout the chapter, the proliferation of these measures of control before the border has profound implications for human rights, most strongly for the rights to seek asylum, privacy, data protection and non-discrimination. On both the rule of law and human rights grounds, this 'criminalisation as prevention' paradigm has been challenged by the European judiciary. The European Court of Human Rights in *Hirsi* has upheld the rule of law and underpinned extraterritorial immigration control by legal guarantees. *Hirsi* is of further significance in that it has led and influenced law reform at European Union level. The Strasbourg Court also addressed privacy and data protection concerns in *Marper,* which, while not an immigration ruling, has set clear limits on the legality of the collection and retention by the state of sensitive personal data of individuals not been convicted of a criminal offence. *Marper* is clearly applicable to EU immigration law, as is *Digital Rights Ireland*, where the Luxembourg Court struck down the blanket retention of mobile phone data set out in the data retention Directive. The Luxembourg Court has established further limits on state surveillance in the *Schwarz* ruling which is directly related to immigration control. All these rulings challenge the legitimacy, legality and scope of the current far-reaching EU legal instruments establishing large-scale databases and systems of surveillance at European Union level. The follow-up to *Hirsi* and to *Digital Rights Ireland*, where the Court of Justice did not hesitate to invalidate the data retention Directive, demonstrates that judicial intervention is bound to lead to a rethinking of the 'criminalisation as prevention' paradigm and the reform of legislation in order to address the acute challenges to human rights and the rule of law this paradigm entails. Such rethinking is urgent. The legality of the maintenance at EU level of large-scale databases including sensitive personal data without further specifications and of systems and arrangements entailing the blanket transfer of personal data and the development of new initiatives such as a European PNR system—the adoption of which the European Council has again prioritised in the recent post-Stockholm Guidelines on the Area of Freedom, Security and Justice-[236] is highly questionable after *Marper* and *Digital Rights Ireland.*

[236] European Council Conclusions, 26/27 June 2014, point 10 (Council document EUCO 79/14, Brussels, 27.6.2014).

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Chapter 3
In the Territory: The Use of Substantive Criminal Law to Regulate the Presence of Migrants

3.1 Introduction

The past decade witnessed a growing emphasis on the use of substantive criminal law as a means of enforcing immigration control in Europe. This chapter will map the evolution and content of such criminalisation at the European Union and national level, by exploring the intersection between migration law and criminal law at the level of the European Union and by examining the challenges that criminalisation poses for the relationship between European Union law and national immigration law. For these purposes, the chapter will employ a narrow definition of criminalisation, which is defined as the use of substantive criminal law to treat conduct related to migration flows as a criminal offence and to impose sanctions for the breach of criminal law. The analysis will take place at two levels: at the level of criminalisation of migration in the law of the European Union; and at the level of the criminalisation of migration by European Union Member States. The first part of the chapter will thus examine the various ways in which European Union law has employed criminal law in order to deal with immigration enforcement. The second part will examine the ways in which Member States of the European Union have criminalised migration and will highlight the limits that European Union law has posed on state sovereignty and the power of the state to criminalise. The chapter will thus test the protective function of European Union law, in setting limits to state power and safeguards for the migrants who fall within the reach of criminal law.

V. Mitsilegas, *The Criminalisation of Migration in Europe*,
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3.2 The Criminalisation of Migration in the Law of the European Union

The European Union legislator has adopted a number of measures dealing with the criminalisation of migration. However, and unlike recent trends in certain EU Member States, European Union law has not criminalised the conduct of migrants as such. Rather, the law has focused primarily at targeting individuals who facilitate in one way or another irregular migration. Such criminalisation has been founded on a broader process of securitization of migration, with phenomena of human trafficking and human smuggling viewed as global security threats linked to the threat of transnational organized crime. A second wave of criminalisation measures has been linked with the broader trend towards the privatisation of immigration control, whereby the private sector (including in this case employers) are co-opted by the State to assist in immigration control and to prevent irregular movement or stay. While such criminalisation does not necessarily lead to the imposition of criminal sanctions on migrants themselves, it has potentially a significant impact on their rights and their visibility vis-à-vis the State.

3.2.1 Criminalisation as Securitisation: The Criminalisation of Human Trafficking

The criminalisation of human trafficking and human smuggling in European Union law follows closely the approach adopted by the 2,000 United Nations Convention on Transnational Organised Crime (the Palermo Convention), with the European Union playing a key part in its negotiation.[1] The Convention includes two Protocols, one on human trafficking and one on human smuggling. The first major global effort to legislate on immigration control was thus made possible on the basis of security considerations.[2] According to Gallagher, "[w]hile human rights concerns may have provided some impetus (or cover) for collective action, it was clearly the sovereignty/security issues surrounding trafficking and migrant smuggling, as well as the perceived link with organized criminal groups operating across national borders, that provided the true driving force behind such efforts."[3] Rather than focusing on the rights of migrants, the Trafficking and Smuggling Protocols were justified primarily on the basis of the need to protect states from transnational criminality. This securitisation approach has been criticized heavily for effectively criminalizing migration and extending the reach of the state, with James Hathaway arguing that "the focus of the transnational effort against human trafficking on the

[1] See Mitsilegas (2011).

[2] See Mitsilegas (2012).

[3] Anne T. Gallagher, The International Law of Human Trafficking 71 (2010).

prevention of cross-border movements created a legal slippery slope in which it proved possible to set a transnational duty to criminalize not only 'human trafficking' … but also the much broader phenomenon of human smuggling,"[4] and that the U.N. intervention is really a pretext for the globalization of border control.[5]

The first major legal instrument criminalising human trafficking at EU level has been the 2002 Framework Decision on combating trafficking in human beings.[6] The Framework Decision put forward a comprehensive criminalisation framework[7]: it established criminal offences for the trafficking in human beings which mirrored to a great extent the definitions of trafficking included in the Palermo Convention[8] and called upon Member States to punish these offences with substantial sanctions.[9] The Framework Decision prioritised criminalisation and enforcement over the rights of the victims of trafficking, containing only limited and general provisions on the protection of victims.[10]

A similar approach to victims' rights was also reflected in the subsequent Directive on Residence Permits to Victims of Trafficking,[11] which was adopted with the specific purpose "to define the conditions for granting residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country

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[4] James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 Va. J. Int'l L. 1, 5 (2008). *But see* Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway* 49 Va. J. Int'l L. 789 (2009).

[5] Hathaway, supra note 4, at 25–35.

[6] COUNCIL FRAMEWORK DECISION of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) L203/1, 1.8.2002.

[7] For an analysis of the 2002 Framework Decision see Obokata (2003).

[8] Article 1(1) of the Framework Decision calls upon Member States to take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person *for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.*

[9] See in particular Article 3(2) which called for high levels of sanctions (imprisonment with a maximum penalty of no less than 8 years) if any of the following aggravating circumstances have occurred: (a) the offence has deliberately or by gross negligence endangered the life of the victim; (b) the offence has been committed against a victim who was particularly vulnerable (a victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography) (c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victim; (d) the offence has been committed within the framework of a criminal organisation.

[10] See Article 7.

[11] Council Directive 2004/81, 2004 O.J. (L 261) 19 (EC).

nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration".[12] The Directive places a duty on Member States to consider issuing a residence permit for victims of trafficking if the following conditions are met: the opportunity presented for the victim to prolong his or her stay on its territory for the investigations or the judicial proceedings; the demonstration by the victim of a clear intention to cooperate; and the victim having severed all relations with those suspected of human trafficking.[13] The residence permit provided is entirely conditional upon the progress of the criminal proceedings—it will not be renewed if the above conditions cease to be satisfied or if a decision adopted by the competent authorities has terminated the relevant proceedings.[14] Security of residence may thus be provided to victims only if they facilitate the prosecution of suspected traffickers.

The relationship between the enforcement and protective aspects of EU trafficking legislation has been somewhat rebalanced after the entry into force of the Lisbon Treaty by the recent adoption of the 2011 Directive on Trafficking in Human Beings.[15] The Directive, which is the outcome of a co-decision process between the Council of Ministers and the European Parliament replaces the 2002 Framework Decision in relation to Member States who participate in it.[16] The Directive extends and intensifies criminalisation, in particular by expanding the concept of exploitation in the definition of the trafficking offences,[17] by raising the penalty levels for trafficking in human beings[18] and by expanding the concept of vulnerability as an

[12] See Article 1.

[13] See Article 8.

[14] See Article 13(1).

[15] Council Directive 2011/36, 2011 O.J. (L 101) 1 (EU). DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L101/1, 15.4.11).

[16] Article 21.

[17] Article 2(3) of the Directive calls for the punishment of the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs (Article 2(5)).

[18] The Directive now provides for a penalty threshold for all trafficking offences defined therein (a maximum penalty of at least 5 years of imprisonment). The sentence level rises to a maximum penalty of at least 10 years of imprisonment where one of the following aggravating circumstances occur: the offence was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims; the offence was committed within the framework of a criminal organization; the offence deliberately or by gross negligence endangered the life of the victim; or was committed by use of serious violence or has caused particularly serious harm to the victim. Member States must also treat the commission of trafficking by public officials in the performance of their duties is regarded as an aggravating circumstance (Article 4).

aggravating circumstance enhancing the penalty threshold for trafficking.[19] However, at the same time it includes a wide range of provisions on the rights of victims of trafficking. The Directive includes provisions on the protection of victims of trafficking in human beings in criminal investigation and proceedings[20]; on assistance, support and protection measures for child victims of trafficking in human beings[21]; on assistance and support to child victims[22]; on protection of child victims of trafficking in human beings in criminal investigations and proceedings[23]; on assistance, support and protection for unaccompanied child victims of trafficking in human beings[24]; on compensation to victims and access to national compensation schemes[25]; and on the non-prosecution or imposition of penalties on victims for their involvement in criminal activities they have been compelled to commit as a direct consequence of being subjected to trafficking.[26] The new trafficking Directive thus combines a strong criminalisation focus with an emphasis on the need to protect victims of trafficking. The Directive provisions must also be viewed in the light of the judgment of the European Court of Human Rights in *Rantsev*, where the Court held that trafficking was prohibited by Article 4 of the ECHR (on the prohibition of slavery and forced labour) and stressed that compliance with Article 4 requires Member States to comply with a series of positive obligations to protect victims of trafficking.[27] However, and notwithstanding these developments, it should be noted that a number of the victims' provisions in the new trafficking Directive continue to be framed in whole or in part under a logic of prosecutorial efficiency.[28] Moreover, the fact remains that victim protection continues, after the adoption of the 2011 Directive, to be disassociated from security of residence as the 2004 Directive on residence permits for victims of trafficking remains in force.

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[19] A position of vulnerability is defined generally as a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved (Article 2(4)).

[20] Article 12.

[21] Article 13.

[22] Article 14.

[23] Article 15.

[24] Article 16.

[25] Article 17.

[26] Article 8.

[27] *Rantsev v Cyprus and Russia,* judgment of 7 January 2010, Application no. 25965/04. For a critical analysis, see Stoyanova (2012).

[28] Referring to the justification for Article 8 of the Directive, the Preamble states that, "[t]he aim of such protection is to safeguard the human rights of victims, to avoid further victimisation *and to encourage them to act as witnesses in criminal proceedings against the perpetrators*." (emphasis added) *Id.* at 3.

3.2.2 Criminalisation as Securitisation: The Criminalisation of the Facilitation of Unauthorised Entry, Transit and Residence

An extensive criminalisation approach has been adopted in the context of the aim of combating human smuggling (or, in more neutral EU terminology, the facilitation of unauthorized entry, transit and residence), with a key question in this context being whether the criminalisation of smuggling would lead to the criminalisation of smuggled migrants themselves. This issue has been partly addressed by the Palermo Convention Protocol on the Smuggling of Migrants. While the Protocol expressly states that migrants will not become liable to criminal prosecution for the fact of having been the object of smuggling,[29] the provision on the criminalisation of smuggling expressly states that it does not prevent states from taking measures against a person whose conduct constitutes an offense under their domestic law.[30] The Smuggling Protocol thus does not prevent states from treating illegal entry, stay, or residence as such as criminal offenses under their domestic law.[31] Moreover, the Smuggling Protocol does not exclude the criminalisation of individuals or organizations providing assistance to individuals for the purposes of them accessing or remaining in the territory of states in order to lodge an application for asylum.

An expansive approach to the criminalisation of human smuggling is reflected in EU law. The relevant legal framework is set out by a Directive defining what is called in EU law the "facilitation of unauthorized entry, transit and residence"[32] accompanied—in the light of the first pillar competence limits regarding criminalisation at the time[33]—by a third pillar Framework Decision confirming that conduct which is defined as facilitation in the Directive will be treated as a criminal offence.[34] The EU Directive goes further than the Smuggling Protocol in that it dispenses with the condition of obtaining a financial or other material benefit for the smuggling offence to be established.[35] The Directive calls upon member states to adopt criminal sanctions for "any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens … ". The Framework Decision contains a general obligation for Member

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[29] *Id.* at 7.

[30] Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the Convention Against Transnational Organized Crime Article 6(4), Nov. 15, 2000, *available at* http://www.unhcr.org/refworld/docid/479dee062.html [hereinafter Smuggling Protocol].

[31] *Id.*

[32] Council Directive 2002/90, 2002 O.J. (L 328) 19 (EC).

[33] See Mitsilegas (2009).

[34] COUNCIL FRAMEWORK DECISION of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA), L 328/1, 5.12.2002.

[35] *See* Article 1(1)(a), *id.*

States to criminalise such conduct[36] and imposes specific high levels of sanctions only when certain aggravating circumstances occur.[37] In spite of the lack of specificity as regards the level of criminal sanctions to be imposed by Member States,[38] it is clear that the scope of criminalization at EU level is very broad as it can cover any form of assistance to enter or transit the territory of an EU Member State in breach of what is essentially administrative law (such as cases where the migrant is traveling without travel documents).

Such broad criminalisation may have a negative impact on the position of third-country nationals seeking access to the European Union in order to apply for international protection. The scope of the criminal offences prescribed in EU law may lead to the prosecution of any individual or member of an organisation who provides advice or assistance to migrants. The Directive does attempt to address this issue by providing Member States the option not to impose sanctions for human smuggling by applying their national law and practice for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned.[39] However, this provision is discretionary and its value in redressing the balance set out by the broad definition and criminalisation of human smuggling under EU law is questionable. By using the threat of criminal sanctions, the EU measures on human smuggling essentially aim at deterring individuals and organisations from coming into contact and assisting any third-country national wishing to enter the territory of EU Member States. As has been noted in an issue paper published by the Council of Europe Commissioner for Human Rights, "the message which is sent is that contact with foreigners can be risky as it may result in criminal charges."[40]

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[36] According to the Framework Decision, Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of the Directive are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition (Article 1 (3)). Article 1(6) of the Framework Decision further states that If imperative to preserve the coherence of the national penalty system, the actions defined in para 3 shall be punishable by custodial sentences with a maximum sentence of not less than 6 years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

[37] According to Article 1(3), Member States must ensure that,when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than 8 years where they are committed in any of the following circumstances: the offence was committed as an activity of a criminal organization; and the offence was committed while endangering the lives of the persons who are the subject of the offence.

[38] According to the European Commission, this has led to a wide range of penalties imposed by Member States in the transposition of the Framework Decision—*Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, COM (2006) 770 final, Brussels, 6.12.2006.

[39] See Article 1(2), Council Directive 2002/90, supra note 28.

[40] Elspeth Guild, *Criminalisation of Migration in Europe: Human Rights Implications*, Council of Eur., Comm'r Hum. Rts. 39 (2009).

3.2.3 Criminalisation as Privatisation: The Introduction of Employers' Sanctions

A more recent expansion of the criminalisation of migration at EU level concerns the imposition of criminal sanctions on employers of irregular migrants. This move is part of a general trend towards the privatisation of immigration control, whereby the private sector is co-opted by the state in order to conduct what are essentially state functions of immigration control.[41] Thus far the privatisation of immigration control has focused primarily on the prevention of entry into the territory by requiring the private sector (in particular carriers) to conduct immigration controls *before* entry into the territory—with privatisation acting thus as a form of extra-territorial immigration control.[42] The imposition of criminal sanctions on employers of irregular migrants extends the privatisation of immigration control *after* entry in the territory, thus multiplying the criminal law enforcement avenues for those deemed to facilitate irregular residence. However, and along with the broader question of whether the private sector can legitimately be asked to assume immigration control duties, the extent to which *criminal* law is the most effective and proportionate means of privatising immigration control is contested.

The debate on the extent to which criminalisation is the optimal way forward towards privatising immigration control by imposing obligations on employers is reflected in the content of the recently adopted EU Directive on employers' sanctions.[43] The Directive prohibits the employment of 'illegally staying' third-country nationals.[44] An 'illegally staying' third-country national are defined as 'a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State.'[45] The scope of the Directive is thus broad, apparently including the employment of both third-country nationals who have entered the territory of a Member State irregularly, and the employment of overstayers. In addition to this prohibition, the Directive imposes a series of extensive immigration-related duties upon employers, including identification, record-keeping and reporting duties on employers.[46] Sanctions for the infringement of the prohibition to employ 'illegally staying' third-country nationals are mainly financial,[47] but the Directive provides also for alternative sanctions such as exclusion from public procurement.[48] Failure to comply

[41] See Mitsilegas in *Indiana Journal of Global Legal Studies, call-out.*

[42] Mitsilegas (2010).

[43] Council Directive 2009/52, 2009 O.J. (L 168) 24 (EC).

[44] See Article 3(1). However, Member States are granted the discretion not to apply this provision to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in accordance with national law (Article 3(3)).

[45] Article 2(b).

[46] See Article 4(1).

[47] See Articles 5–6.

[48] See Article 7.

with the identification and reporting duties imposed by Article 4(1) of the Directive also triggers liability for the infringement of the prohibition of illegal employment set out in Article 3: the Directive obliges Member States to ensure that employers who have fulfilled these obligations are not held liable for an infringement of the prohibition of illegal employment unless the employers knew that the document presented as a valid residence permit or another authorization for stay was a forgery.[49] The Directive thus attempts to strike a balance between the aim of rendering employers responsible for checking and recording residence permits of third-country nationals on the one hand, and the aim of addressing the employers' concerns that they are in no position to proactively identify forged documents on the other. However, it is clear that by equating liability for illegal employment with liability for failure to comply with identification obligations, the Directive aims at establishing a far-reaching layer of privatised control of third-county nationals residing in the territory of EU Member States.

While the employers' sanctions Directive imposes a wide range of duties to the private sector, the use of criminal law for the breach of these duties is limited to specific circumstances. Criminal law sanctions apply only for the intentional infringement of the prohibition of illegal employment under Article 3 (and not for the breach of the identification, recording and reporting obligations set out in Article 4 of the Directive); in accordance with the limits to the then first pillar (Community) criminal law competence set by the Court of Justice in its ship-source pollution ruling,[50] the level of criminal sanctions is not specified (infringements are punishable in general by effective, proportionate and dissuasive criminal penalties)[51]; and criminal sanctions apply only if the following aggravating circumstances occur as regards the infringement of Article 3: the infringement continues or is persistently repeated; is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals; is accompanied by particularly exploitative working conditions; is committed by an employer who, while not having been charged with or convicted of a human trafficking offence, uses work or services exacted from an illegally staying third-county national with the knowledge that he or she is a victim of trafficking in human beings; or relates to the illegal employment of a minor.[52] The Directive thus uses criminal law to address not only traditional aggravating circumstances (such as persistent offending) but also as a means of acknowledging the need to protect vulnerable migrants who are subject to various forms of exploitation.

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[49] Article 4(3).

[50] *Commission v. Council, Case C-440/05* ECR [2007] I-9097. For an analysis, see Mitsilegas (2009).

[51] Article 10(1). This approach may lead to considerable differences in national implementing law. For an initial overview of implementation trends, see Commission Staff Working Paper accompanying the Commission's Annual Report on Immigration and Asylum (2010), SEC (2011) 620 final, Brussels, 24.5.2011, pp. 27–28.

[52] Article 9(1).

The proclaimed focus of the Directive on tackling exploitation[53] is also reflected in the insertion of further provisions aimed at targeting the private sector when employing irregular migrants under exploitative conditions. At the heart of these provisions is an effort to make irregular migrants come forward and report instances of exploitation. In this light, the Directive places Member States under the duty to ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State.[54] Member States must ensure in this context that third parties which have a legitimate interest in ensuring compliance with the Directive, may engage either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing the Directive.[55] However, the legal position of third parties who assist irregular migrants in this context is uncertain, as, was analysed earlier in the chapter, they may be held criminally liable for facilitating unauthorised residence. Acknowledging this risk of criminalisation, the employers' sanctions Directive includes a safeguard clause according to which providing assistance to third-country nationals to lodge complaints will not be considered as facilitation of unauthorized residence under Directive 2002/90/EC.[56]

The Directive does not stop there, but includes a call to irregular migrants *themselves* to cooperate with state authorities with the view of tackling employer exploitation. Adopting a strategy similar to the content of the Directive on residence permits on victims of trafficking (analysed earlier in the chapter), the employer sanctions Directive states that, in respect of criminal offences covered by Article 9 (1)(c) (the infringement is accompanied by particularly exploitative working conditions) or (e) (the infringement relates to the illegal employment of a minor), Member States will define in national law the conditions under which they may grant, *on a case-by-case basis, permits of limited duration*, *linked to the length of the relevant national proceedings*, to third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC (residence permits for victims of trafficking).[57] As with the Directive on residence permits for victims of trafficking, the employer sanctions Directive provides with extremely limited safeguards on security of residence: residence permits will be granted on a case-by-case basis (thus subject to state discretion), will be of limited duration, and are again framed purely within a logic of prosecutorial efficiency (they are linked to the relevant national proceedings). The Directive thus asks migrants in an irregular situation to

[53] See also recital 13 of the Preamble.

[54] Article 13(1).

[55] Article 13(2).

[56] Article 13(3).

[57] Article 13(4). Emphasis added.

come forward and present themselves to the state without offering any legal certainty as to the rights which will be conferred to them if they cooperate and without excluding the prospect of their subsequent return. It remains to be seen whether this provision when implemented by Member States will have any real impact, especially in view of the fact that the vulnerability of exploited workers is not necessarily reflected in detail in EU law compared to the vulnerability of victims of trafficking.

The above analysis demonstrates a double contradiction at the heart of the employer sanctions Directive: the Directive's main objective is to apply what Garland has called the 'responsibilisation strategy'[58] to the private sector, by requiring employers to (pro)actively cooperate with the state in tackling irregular employment. Employers are thus viewed as allies to the state, but at the same time they are viewed as targets: irregular migrants, trade unions and other organizations are urged to come forward and denounce exploitation in the workplace. This contradiction is also replicated with regard to migrants themselves: irregular migrants are seen as allies to the state (in being helpful in denouncing exploitation) but they are also obviously the main targets of the Directive, whose aim is to make it more and more difficult for these migrants to find work. This double contradiction poses real obstacles to the Directive achieving its stated aims. It is compounded by the fact that the criminalisation of migration in other EU law instruments provides few safeguards for migrants and citizens alike. The extensive criminalisation of the facilitation of unauthorised entry and residence has the potential of minimising contact by NGOs, other organisations and individuals with migrants under the threat of criminal prosecution. On the other hand, migrants are offered with extremely limited rights as a reward for them cooperating with the state to tackle irregular migration. As will be seen in the next part, however, the disassociation of this law and policy area from pure state discretion and the very existence of secondary EU law in these fields may be a step forward towards providing safeguards from migrants, when interpreted in the light of European Union constitutional law and its general principles.

3.3 European Union Law as a Limit to the Criminalisation of Migration by EU Member States

While European Union law has not explicitly treated breaches of immigration requirements by migrants themselves as criminal offences as such, such trends have been increasingly prevalent in the national legislation of a number of EU Member States. Key examples in this context have been the treatment of irregular entry and residence per se as a criminal offence; and the criminalisation of the failure to comply with return instructions. This punitive turn at the national level has posed

[58] Garland (1996).

considerable challenges for European Union law. The shared competence between Member States and the European Union in the field of migration law raises complex issues with regard to the degree of sovereignty or discretion left to Member States when they legislate on irregular migration and when they promote legislative choices resulting in the criminalisation of migration. A key question in this regard is whether European Union law poses limits to the power of Member States to adopt national legislation in the field. This part of the chapter will examine the limits that European Union law places on domestic criminal law in general. The analysis will then focus on two recent judgments of the Court of Justice of the European Union focusing specifically on the compatibility of national legislation criminalizing migration with European Union law. The limits posed to the national legislator by EU law will be dissected, and the protective function of European Union law as regards the position of the migrant will be highlighted.

3.3.1 The Limits of EU Law on National Criminal Law

The debate on the existence and extent of a role for the European Union in the field of criminal law has been long-standing.[59] It appeared long before Member States decided to confer express powers to the European Union (but not to the then European Community) to legislate in criminal matters (in the Maastricht Treaty) and certainly before the entry into force of the Lisbon Treaty which abolished the third pillar and streamlined to a great extent Union powers in the field. Already in the days of the Treaty of Rome, it became clear that it was impossible to draw a neat distinction between legislation related to the four freedoms and the single market on the one hand, and criminal law on the other. While the European Community at the time did not possess express competence to adopt criminal offences and sanctions at EC level, the European Court of Justice confirmed in a number of occasions that Community law places limits on the application of *national* criminal law. The Member States of the European Union are not entirely free to adopt national criminal law but are bound by their EU law obligations when doing so. The Court of Justice has placed limits on domestic criminal law measures if the latter would have as its effect to limit disproportionately rights established by Community law, in particular rights related to free movement. As early as 1981, the Court stated in *Casati* that

> In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets *certain limits* in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be concerned in such a

[59] For an overview, see Mitsilegas (2009).

> way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.[60]

The Court justified this approach on the grounds of the necessity to prevent the erosion of Community law freedoms by national measures.[61] The Court's approach is based on the principle of proportionality.[62] In subsequent cases, and in order to ensure the effective exercise of Community rights, the Court has not hesitated to check the compatibility with Community law of domestic criminal laws penalising conduct as diverse as driving without a licence in the host Member State (resulting from failure to exchange within the time limits prescribed by the law of the host State the home state driving licence with the host state licence),[63] and pursuing the organised activity of collecting bets without a licence or a police authorisation.[64] In addition to prescribing limits to the imposition of criminal sanctions by Member States, the Court has also found that Community law had an influence in the conduct of domestic criminal proceedings—more specifically, national autonomy in prescribing the language of criminal proceedings may be limited in order to ensure non-discrimination against persons to whom Community law grants equal treatment rights, as well as free movement.[65] It is clear from these cases that the fundamental Union law objective of free movement places considerable limits to national sovereignty in legislating in criminal matters, with European Union law acting as a safeguard against overcriminalisation at national level.[66]

This general overview of the limits European Union law places on the power of Member States to criminalise suggests that similar limits apply to the power of Member States to treat breaches of immigration rules as criminal offences. The existence of such limits has now been confirmed by the Court of Justice in two judgments concerning the compatibility of national law criminalising migrants with European Union law. What is significant in these judgments (which will be analysed in detail below), is that the Court examined the compatibility of domestic criminal law not with European Union law on free movement, but with European Union immigration law, and in particular legislation dealing with the enforcement of immigration law (the Returns Directive).

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[60] Case 203/80, [1981] ECR 2595, para 27. Emphasis added.

[61] Paragraph 28.

[62] Tridimas (2006).

[63] Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.

[64] Joint Cases C-338/04, C-359/04 and C-360/04, *Placanica, Palazzese and Sorricchio*, ECR [2007] I-1891. The Court referred therein to the case of *Calfa*, Case 48/96 [1999] ECR I-11, where it was held that the penalty of expulsion of a Community national found guilty of drug possession for personal use was precluded by Articles 48, 52 and 59 of the EC Treaty and Article 3 of Directive 64/221/EC. Being a tourist, Calfa was deemed by the Court to be a recipient of services following the earlier *Cowan* ruling (Case 186/87 *Cowan v Trésor Public* [1989] ECR 195).

[65] Case C-274/96 *Bickel and Franz*, ECR [1998] I-7637.

[66] See also Mitsilegas (2014).

3.3.2 The Limits of EU Migration Law on National Criminal Law—the El Dridi Ruling

In the case of *El Dridi*[67] the Court of Justice examined a preliminary reference request made in proceedings brought against Mr El Dridi, who was sentenced to 1 year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Questore di Udine. He appealed against that decision before the Corte d'appello di Trento (Appeal Court, Trento). That court was in doubt as to whether a criminal penalty may be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures, since such a penalty seems contrary to the principle of sincere cooperation, to the need for attainment of the objectives of Directive 2008/115 (the returns Directive) and for ensuring the effectiveness thereof, and also to the principle that the penalty must be proportionate, appropriate and reasonable. The Court of Appeal noted in particular that the criminal sanction provided for in Italian law came into play *subsequently* to the finding of an infringement of an intermediate stage of the gradual procedure for implementing the return decision, provided for by the returns Directive and that the level of penalty imposed by national law (a term of imprisonment of 1–4 years) seems, to be *extremely severe*. In those circumstances, the Corte d'appello di Trento decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> In the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, do Articles 15 and 16 of Directive 2008/115 … preclude:
>
> - the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?
> - the possibility of a sentence of up to 4 years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with?[68]

3.3.2.1 The Ruling of the Court of Justice

The Luxembourg Court summed up the referring court's question as asking whether Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main

[67] Case C-61/11 PPU, *Hassen El Dridi, alias Karim Soufi,* Judgment of 28 April 2011.

[68] Paragraphs 22–25 of the judgment.

proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period. The CJEU noted in this context the emphasis placed by the national court on the principle of sincere cooperation and on the objective of ensuring the effectiveness of EU law.[69] In the light of this question, the CJEU followed a step-by-step approach in order to assess the compatibility of Italian law with EU migration law (the returns Directive).

3.3.2.2 Step 1: Interpreting the Returns Directive Restrictively in the Light of Fundamental Rights

The first step in the Court's reasoning in *El Dridi* was to provide an interpretation of the returns Directive, which will inform the implementation of the Directive by Member States. The Court confirms a restrictive interpretation of the coercive provisions of the Directive, stressing from the outset that the Directive pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and also their dignity.[70] Member States can depart from the common standards and procedures established by the Directive only as provided for therein.[71] In any case, although Article 4(3) of the Directive allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it, that directive *does not allow those States to apply stricter standards* in the area that it governs.[72] The Court further observes that the returns Directive sets out specifically the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place.[73] It is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than 7 days for voluntary departure or even refrain from granting such a period.[74] In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a

[69] Paragraphs 29–30.

[70] Paragraph 31.

[71] Paragraph 32.

[72] Paragraph 33. Emphasis added.

[73] Paragraph 34. For a detailed overview of these stages see paragraphs.

[74] Paragraph 37.

return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, *in a proportionate manner and with due respect for, inter alia, fundamental rights.*[75] Following from recital 16 in the Preamble to the directive and from the wording of Article 15(1) that the Member States must carry out the removal *using the least coercive measures possible*. It is only where, *in the light of an assessment of each specific situation*, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.[76] Articles 15 and 16 of the Directive places strict limits on detention.[77]

In the light of the above discussion, the Court of Justice confirmed that the return procedure established by the Directive corresponds to a *gradation* of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility. The Court adds that the principle of proportionality must be observed throughout those stages.[78] Even the use of the latter measure, which is the most serious constraining measure allowed under the directive under a forced removal procedure, is strictly regulated, inter alia *in order to ensure observance of the fundamental rights of the third-country nationals concerned*.[79] It is in the light of those considerations that it must be assessed whether the common rules introduced by the returns Directive preclude national legislation such as that at issue in the main proceedings.[80] The assessment of the compatibility of national law with EU migration law (the returns Directive) must thus take into account the need to ensure proportionality and the respect of the fundamental rights of third-country nationals.

3.3.2.3 Step II: Confirming the Direct Effect of the Relevant Provisions of the Returns Directive

Having established the need to assess the compatibility of Italian criminal law in the light of the returns Directive (and taking into account the need to observe proportionality and fundamental rights), the Court was faced with an additional challenge: while Italy had introduced domestic criminal law affecting directly third-country nationals who had not complied with return orders, it had not transposed

[75] Paragraph 38.

[76] Paragraph 39. Emphasis added.

[77] Paragraph 40.

[78] Paragraph 41. Emphasis added.

[79] Paragraph 42. Emphasis added. See also the references to relevant human rights instruments and case-law in para 43.

[80] Paragraph 44.

the returns Directive into Italian law.[81] The question thus arises whether the relevant provisions of the returns Directive (Articles 15 and 16) were applicable in Italy in the first place. The Court did not hesitate to grant to these provisions direct effect, meaning that even in the absence of national implementation, Mr El Dridi (whose situation falls within the scope of the Directive) can rely upon Articles 15 and 16 of the returns Directive against the State.[82] The Court thus sends a clear message that Member States cannot act unilaterally while at the same time disregarding their obligations under EU law. The Court noted in particular that the removal procedure provided for by the Italian legislation at issue in the main proceedings is significantly different from that established by the Directive.[83]

3.3.2.4 Step III: Assessing National Criminalisation Legislation in the Light of the Returns Directive: Asserting the Principles of Effectiveness and Loyal Cooperation

Having set out the interpretative parameters of the returns Directive and confirming that the Directive provisions relevant to the case have direct effect, the Court went on to assess the compatibility of national law with the Directive. The Court began by granting a certain degree of freedom to Member States to adopt national criminal law aimed inter alia at dissuading those nationals from remaining illegally on those States' territory: however, this freedom arises only if it is clear that the coercive measures Member States may adopt in implementing the returns Directive have not led to the expected result being attained, namely, the removal of the third-country national against whom they were issued.[84] The Court went on to limit Member States freedom further. By evoking settled case-law mentioned earlier in the chapter (see inter alia the cases of *Casati* and *Cowan*), the Court reiterated its finding that although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this branch of the law may nevertheless be affected by European Union law.[85] While neither the legal basis of the Directive (or its Lisbon successor) nor the Directive itself precludes the Member States from having competence in criminal matters in the area of irregular immigration and irregular stays, they must adjust their legislation in that area in order to ensure compliance with European Union law.[86]

The Court based the limits on the power of Member States to adopt criminal law upon the principles of effectiveness and loyal cooperation. It reiterated that Member States may not apply rules, even criminal law rules, which are liable to jeopardise

[81] Paragraph 45.
[82] Paragraphs 46–48.
[83] Paragraph 50.
[84] Paragraph 52.
[85] Paragraph 53.
[86] Paragraph 54.

the achievement of the objectives pursued by a Directive and, therefore, deprive it of its effectiveness.[87] It also confirmed the applicability of the principle of loyal cooperation as expressed in the second and third subparagraphs respectively of Article 4(3) TEU, according to which Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall … refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by Directives.[88]

Applying these principles to the specific case before it, the Court found that Member States may not, in order to remedy the failure of coercive measures adopted to carry out removals under Article 8(4) of the returns Directive (measures which are subject to the principle of proportionality) provide for a custodial sentence *on the sole ground* that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.[89] Such a custodial sentence risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals as it is liable to frustrate the application of the measures referred to in Article 8(1) of Directive 2008/115 and delay the enforcement of the return decision.[90] The returns Directive, and in particular Articles 15 and 16 thereof, must thus be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.[91]

This finding does not preclude the possibility for Member States to adopt 'provisions' (note that there is no express reference to criminal law provisions) regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory. However the adoption of these measures must occur with respect for the principles and objective of the returns Directive (which thus continues to provide the benchmark for the adoption of national criminal law).[92] In the light of the above, the national court is called upon to apply and give full effect to the provisions of EU law, to refuse to apply any provision of the Italian law in question which is contrary to the result of the returns

[87] Paragraph 55.
[88] Paragraph 56.
[89] Paragraphs 57–58. Emphasis added.
[90] Paragraph 59.
[91] Paragraph 62.
[92] Paragraph 60.

Directive taking due account of the principle of the retroactive application of the more lenient penalty.[93]

3.3.2.5 European Union Law as a Limit to the Criminalisation of Migration: The Impact of El Dridi

El Dridi is a landmark judgment on two levels: on the level of constitutional law, it reiterates—based on settled case-law in the field—that EU law places limits to the power of EU Member States to criminalise, limits which stem from the obligation of Member States to comply with the EU law principles of effectiveness and loyal cooperation; on the level of migration law, it confirms that EU law, and EU migration law specifically, places limits upon Member States' power to criminalise migration. *El Dridi* in this context marks a departure from earlier case-law: while traditionally, in rulings like *Casati,* the Court of Justice has placed limits on national criminal law in order to achieve free movement objectives, in *El Dridi* these limits are justified in order to achieve the effectiveness of an *enforcement* measure, namely the EU returns Directive whose potential negative impact on the position of migrants has been criticised.[94] Following *El Dridi,* the returns Directive plays a two-fold protective role for the affected migrants: being interpreted in the light of proportionality and fundamental rights, it places limits to Member States' criminalisation powers; and, more generally, it has the potential of bringing the full effect of European Union law on a wide range of Member States' choices to criminalise migration, with domestic criminal law being subject to an assessment in the light of EU law when all aspects of the return of third-country nationals come into play. While the Court is careful to leave a degree of discretion to Member States by stating that the latter retain the power to adopt provisions in cases where coercive measures provided for by EU law have not resulted in the return of the third-country nationals, it adds that these measures must occur with respect for the principles and objective of the returns Directive.

3.3.3 The Limits of EU Migration Law on National Criminal Law—the Case of Achughbabian

The extent to which European Union law places limits on the power of EU Member States to criminalise migration was tested again post-*El Dridi* in the case of *Achughbabian.*[95] The judgment was in response to a reference for a preliminary ruling

[93] Paragraph 61.

[94] For a critical analysis, see Baldaccini (2009).

[95] Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, judgment of 6 December 2011.

from the Cour d'Appel de Paris and concerned the compatibility of French law criminalising migration with EU law. The case differs from *El Dridi* in that it concerns the criminalisation and imposition of criminal sanctions by French law for irregular entry or residence per se. The applicant was placed in police custody for being suspected of having committed the offence described above. An order obliging the applicant to leave France was already imposed in 2009, and a deportation order was issued in 2011. The applicant argued that the provision criminalising irregular entry and residence was incompatible with EU law in the light of *El Dridi.* The *Cour d'Appel* decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

> Taking into account its scope, does Directive [2008/115] preclude national legislation, such as Article L. 621-1 of [Ceseda], which provides for the imposition of a sentence of imprisonment on a third-country national *on the sole ground of his illegal entry or residence* in national territory?[96]

3.3.3.1 Step I: Determining the Applicability of the Returns Directive to National Law Criminalising Irregular Stay

Achughbabian differs from *El Dridi* in that the question referred to Luxembourg concerns the compatibility with EU law of national law concerning the criminalisation of migration *prima facie unrelated to a returns procedure.* The French legislation in question criminalised irregular entry or residence as such. It is thus not surprising that the Court of Justice commenced addressing the question by the *Cour d'Appel* by examining the extent to which the returns Directive applies in this context. The Court confirms that Member States retain a degree of sovereignty in adopting criminal sanctions for the breach of immigration law: the returns Directive is not designed to harmonise in their entirety the national rules on the stay of foreign nationals (note the use by the Court of the term 'stay' and not 'residence' here) and thus does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence.[97] Neither does the Directive (which concerns only the adoption of return decisions and the implementation of those decisions) preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.[98]

However, the above findings do not mean that national action to criminalise or detain third-country nationals necessarily falls outside the scope of the returns Directive. Firstly, the Court states that national authorities are required, in order to prevent the objective of the returns Directive from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay

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[96] Paragraph 25. Emphasis added.

[97] Paragraph 28.

[98] Paragraphs 29–30.

of the person concerned. The finding that the stay is illegal will lead in principle, according to the returns Directive, to a return decision.[99] Detention is thus inextricably linked with the outcome of the return of the third-country national concerned. Secondly, and notwithstanding state power to criminalise or detain along the lines set out above, it needs to be examined whether the returns Directive precludes the criminalisation of irregular entry or residence under French law *in so far as it is capable of leading to an imprisonment in the course of the return procedure* governed by the said Directive.[100] In that respect, the Court reiterated its ruling in *El Dridi* that Member States cannot apply criminal legislation capable of imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness.[101] The Court thus envisages the possibility that national law criminalising irregular entry or residence is assessed in the light of the returns Directive.

3.3.3.2 Step II: Applying the Returns Directive to National Law Criminalising Irregular Stay—the Return of Effectiveness and Loyal Cooperation

Having concluded that national law criminalising irregular entry or stay may be assessed in the light of the returns Directive, the Court found that in the present case the situation of the applicant in the main proceedings fell indeed within that referred to in Article 8(1) of that directive.[102] It is clear to the Court that the imposition and implementation of a sentence of imprisonment during the course of the return procedure provided for by the returns Directive does not contribute to the realisation of the removal which that procedure pursues, namely the physical transportation of the person concerned outside the Member State concerned and that such a sentence does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of the Directive.[103] The Court went on to highlight the differences between national criminalisation and the system put forward by the returns Directive: it is undisputed that the national legislation at issue in the main proceedings, in that it provides for a term of imprisonment for any third-country national aged over 18 years who stays in France illegally after the expiry of a period of 3 months from his entry into French territory, is capable of leading to an imprisonment whereas, following the common standards and procedures set out in Articles 6, 8, 15 and 16 of the returns Directive, such a third-country national must, as a matter of priority, be made the subject-matter of a return procedure and may, as

[99] Paragraph 31.

[100] Paragraph 32. Emphasis added.

[101] Paragraph 33.

[102] Paragraphs 34–36.

[103] Paragraph 37.

regards deprivation of liberty, be subject at most to placing in detention.[104] National legislation such as that at issue in the main proceedings is, consequently, likely to thwart the application of the common standards and procedures established by the returns Directive and delay the return, thereby, like the legislation at issue in *El Dridi*, undermining the effectiveness of the said directive.[105]

Linking the criminalisation of irregular stay with the return of the third-country national enabled the Court to apply *El Dridi* in this case which prima facie involved the criminalisation of irregular stay per se. A key factor in the Court's reasoning was the self-standing nature of criminalisation. The Court noted that in the particular case there was nothing in the evidence before the Court to suggest that Mr Achughbabian has committed any offence other than that consisting in staying illegally on French territory. The situation of the applicant in the main proceedings could not therefore be removed from the scope of the returns Directive, as Article 2 (2)(b) of the latter clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying.[106] The finding of the applicability of the returns Directive led to the Court to apply its *El Dridi* reasoning and stress that the principles of effectiveness and loyal cooperation must be respected in order to ensure the objectives of the returns Directive, in particular that return must take place as soon as possible.[107] That would clearly not be the case if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution followed, in appropriate cases, by a term of imprisonment. Such a step would delay the removal and does not appear amongst the justifications for a postponement of removal referred to in Article 9 of the returns Directive.[108]

3.3.3.3 Step III: Affirming the Power of Member States to Criminalise in Cases Where the Returns Directive has been Applied Unsuccessfully

In *Achughbabian*, the Court of Justice affirmed the fact that national legislative choices to criminalise migration are constrained by Member States' obligations to respect European Union law. Mindful of the impact of this ruling on state sovereignty and in order to address Member States' concerns that EU law limitations

[104] Paragraph 38.
[105] Paragraph 39.
[106] Paragraph 41.
[107] Paragraphs 43–45.
[108] Paragraph 45.

would put an end to the possibility of Member States deterring illegal stays,[109] the Court went on to confirm its finding in *El Dridi* that Member States retain the power to criminalise when the procedure provided for in the returns Directive was applied but did not lead to the return of third-country nationals. According to the Court, while Member States bound by the returns Directive cannot provide for a term of imprisonment for illegally-staying third-country nationals in situations in which the latter must, by virtue of the common standards and procedures established by that directive, be removed and may, with a view to preparation and implementation of that removal at the very most be subject to detention, that does not exclude the possibility of Member States adopting or maintaining provisions, which may be of a criminal nature, governing, in compliance with the principles of the said directive and its objective, the situation in which coercive measures have not enabled the removal of an illegally staying third-country national to take place.[110] The returns Directive does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return.[111] However, the Court added a further limit to such criminalisation stating that the imposition of the sanctions mentioned in the previous paragraph is subject to full compliance with fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights.[112]

3.3.3.4 The Impact of Achughbabian—Affirming the Protective Function of European Union Law

Achughbabian is an important follow-up to *El Dridi* in two respects: in reiterating the Court's finding that Member States are not entirely free to adopt domestic criminal law, but when doing so they are under the obligation to respect European Union law, and the returns Directive in particular; and in extending the scope of *El Dridi* to bring within the ambit of EU law national legislation which at first sight does not appear to be directly related to the returns Directive. It is true that the Court was mindful to leave Member States a degree of freedom to legislate in criminal matters in this context—the Court has followed this strategy in the past in the ship-source pollution ruling,[113] when it affirmed an inroad to state sovereignty in criminal matters (by confirming the earlier ruling in the environmental crime case[114] that the Community had competence to adopt criminal offences and

[109] Paragraph 47.

[110] Paragraph 46. See also the reference to El Dridi, paras 52 and 60.

[111] Paragraph 48.

[112] Paragraph 49.

[113] See part 3.3.3.2 above.

[114] Commission v Council, Case C-176/03 ECR [2005] I-7879.

sanctions) but at the same time left Member States the choice to adopt specific sanctions levels unanimously under the third pillar.[115] However, Member States' freedom to criminalise is placed under strict EU law limits. national criminal law must still be in compliance with the objectives and provision of the returns Directive, as well as with fundamental rights. Moreover, and crucially, the reasoning of the Court leads to the conclusion that it is very unlikely that criminalisation at national level (in particular the criminalisation of irregular entry or stay) can be viewed independently from the returns Directive. As is clear from *Achughbabian*, the criminalisation of irregular entry or stay cannot be an aim in itself but is ultimately linked to the objective of the return of the third-country national affected—thus bringing into play the application of EU law. In this manner, the Court managed to use EU law (and remarkably an enforcement measure such as the returns Directive) in order to protect third-country nationals from extensive criminalisation in Member States.

3.3.4 The Limits of EU Migration Law on National Criminal Law—the Case of Sagor

The case of *Sagor*[116] concerned a reference for a preliminary ruling from the Tribunale di Rovigo in Italy on the compatibility of Returns Directive with national law which penalises illegal stay by third-country nationals by means of a fine which may be replaced by an order for expulsion or home detention. Unlike *Achughbabian*, where the Court was asked to rule on the compatibility of the Directive with national law criminalising irregular stay by the imposition of custodial sentences, *Sagor* addressed the question of the compatibility of the Returns Directive with alternative forms of criminalisation, i.e. the imposition of fines which may be replaced by an expulsion order or home detention. The Court reiterated its finding in *Achughbabian* that in principle the Returns Directive does not preclude the criminalisation of illegal stay by Member States[117] but qualified this statement by reiterating its finding in both *Achughbabian* and *El Dridi* that Member States may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by the Returns Directive and thus to deprive it of its effectiveness.[118] The Court proceeded by distinguishing criminalisation leading to imprisonment from criminalisation under the facts of the present case leading to a fine or to an expulsion order. According to the Court, legislation which provides for a criminal prosecution which can lead to a fine for which an expulsion order may be substituted *has markedly different effects* from those of

[115] Mitsilegas, EU Criminal Law, Chap. 2.

[116] Case C-430/11.

[117] Paragraph 31.

[118] Paragraph 32.

legislation providing for a criminal prosecution which may lead to a term of imprisonment during the course of the return procedure.[119] The key factor here is the impact of such criminalisation on the functioning of the Returns Directive: according to the Court the possibility that *a criminal prosecution as prescribed by the Italian legislation under review may lead to a fine is not liable to impede the return procedure* established by the Returns Directive—the imposition of a fine does not in any way prevent a return decision from being made and implemented in full compliance with the conditions set out in Articles 6–8 of the Directive, nor does it undermine the common standards relating to deprivation of liberty set out in Articles 15 and 16 of the directive.[120] Moreover, the option given to the criminal court of replacing the fine with an expulsion order accompanied by an entry ban of at least 5 years, is also not, in itself, prohibited by the Directive, which does not preclude the decision imposing the obligation to return from being taken—in certain circumstances as determined by the Member State concerned—in the form of a criminal judgment.[121] The Court noted in this context that Article 7(4) of the Directive allows the Member States to refrain from granting a period for voluntary departure, *in particular where there is a risk that the person concerned may abscond* in order to avoid the return procedure.[122] The discourse of risk enabled the Court here to adopt a harsh interpretation of the Returns Directive as regards the process of return, privileging automatic enforced removal over voluntary return.

However, the Court did apply its findings on the link between imprisonment and the effectiveness of the Returns Directive on the imposition by national law of a fine for which a home detention order may be substituted. The Court reiterated its finding in *Achughbabian* that it follows both from the duty of loyalty of the Member States and from the requirements of effectiveness referred to in the Directive that the obligation imposed on the Member States by Article 8 of that directive to carry out the removal must be fulfilled as soon as possible.[123] According to the Court, the imposition and enforcement of a home detention order during the course of the return procedure provided for by the Directive clearly do not contribute to the achievement of the removal which that procedure pursues, namely the physical transportation of the relevant individual out of the Member State concerned. Such an order does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of the Returns Directive.[124] The Court added that the home detention order is liable to delay, and thus to impede, the measures, such as deportation and forced return by air, which can be used to achieve removal. Such a risk of undermining the return procedure is present in

[119] Paragraph 34. Emphasis added.

[120] Paragraph 36.

[121] Paragraphs 37–39.

[122] Paragraph 41, emphasis added. But the Court added that such assessment must be done on an individual basis.

[123] Paragraph 43.

[124] Paragraph 44.

particular where the applicable legislation does not provide that the enforcement of a home detention order imposed on an illegally staying third-country national must come to an end as soon as it is possible to effect that person's removal.[125] The Returns Directive thus precludes national legislation which allows illegal stays by third country nationals to be penalised by means of a home detention order without guaranteeing that the enforcement of that order must come to an end as soon as the physical transportation of the individual concerned out of that Member State is possible. The Directive aim of speedy return thus prevails upon national criminalisation which may take the form of home detention.

3.3.5 The Compatibility of National Criminal Sanctions with the Returns Directive in the Context of the Imposition of Re-entry Bans—Filev and Osmani

In its recent ruling in *Filev* and *Osmani,*[126] the Court examined the compatibility with the returns Directive of German legislation imposing criminal sanctions for irregular entry following the imposition of an entry ban of unlimited duration predating the Directive. In the case of *Osmani*, an additional element has been that initial removal has been a consequence of a criminal conviction for drug trafficking.[127] The referring court made clear that Mr Filev did not appear to pose a serious threat to public policy, public security or national security within the meaning of Article 11(2) of the returns Directive.[128] The Court was called to answer two questions concerning the compatibility of national criminal law with the Directive. The first question involves the compatibility of the imposition of national criminal sanctions for breach of an entry ban. Following its classic effectiveness reasoning in *El Dridi* and *Achughbabian*, the Court reiterated that Member States may not apply criminal legislation capable of imperilling the achievement of the objectives pursued by the Directive, thus depriving it of its effectiveness.[129] The application of this reasoning in the present case led to the conclusion that a Member State may not impose criminal sanctions for breach of an entry ban falling within the scope of the returns Directive if the continuation of the effects of that ban does not comply with Article 11(2) of the Directive.[130] Moreover, Article 11(2) of the Directive precludes a continuation of the effects of entry bans of unlimited length made before the date on which the Directive became applicable, beyond the maximum length of entry ban laid down in that provision, except where those entry bans were made against

[125] Paragraph 45.
[126] Case C-297/12, judgment of 19 September 2013.
[127] Paragraphs 15–18.
[128] Paragraph 21.
[129] Paragraph 36.
[130] Paragraph 37.

third-country nationals constituting a serious threat to public order, public security or national security. As mentioned by the referring court, Mr Filev did not appear to constitute such threat.

The Court was also called upon to answer a second question, on a different aspect of the relationship between the returns Directive and national criminal law. The referring Court asked whether an expulsion order which predates by 5 years or more (i.e. the maximum period of the entry ban) the period between the date on which the Directive should have been implemented and the date on which it was actually implemented may subsequently be used as a basis for criminal proceedings, where that order was based on a criminal sanction within the meaning of Article 2 (2)(b) of the Directive.[131] Article 2(2)(b) allows Member States to decide not to apply the Directive to third-country nationals who are the subject of, inter alia, return as a criminal law sanction or as a consequence of a criminal law sanction in accordance with the provisions of national law.[132] This question is of relevance as regards Mr Osmani, whose conviction for drug trafficking framed him as a high risk third country national. The Court accepted that the Directive will not apply to third-country nationals referred to in Article 2(2)(b) in cases where Member States use the discretion conferred to them by this provision at the latest upon expiry of the period for implementing the returns Directive.[133] By contrast, if Member States have not made use of such discretion after the expiry of the implementation deadline, in particular because of the fact that they have not yet implemented the Directive in national law, they may no longer restrict the scope of the persons covered by the Directive.[134] According to the Court, allowing Member States to use their discretion after the implementation deadline against a third country national such as Mr Osmani in the present case *who could already directly rely* on the relevant provisions of the returns Directive would be to worsen that person's situation.[135] Member States can thus not exclude third-country nationals, whatever the risk they pose, from the scope of the returns Directive and the protection it may offer if they do not loyally enforce EU law. European constitutional law, as reflected in the duty of loyal cooperation as far as Member States are concerned, and the principle of direct effect as far as the affected individual is concerned, has come here to the rescue of a presumably in the eyes of the German authorities high risk third country national.

[131] Paragraph 46.

[132] See para 40.

[133] Paragraph 52.

[134] Paragraph 53.

[135] Paragraph 55. Emphasis added.

3.4 Conclusion: The Protective Function of European Union Law

The intervention of the European Union legislator in terms of using criminal law to control immigration has focused both on preventing the irregular entry of third-country national into the European Union (via the criminalisation of trafficking in human beings and facilitation of unauthorised entry) and on identifying and sanctioning irregular stay and residence after entry (via the criminalisation of the facilitation of unauthorised transit and residence and the imposition of criminal sanctions on employers if a series of aggravating circumstances with regard to the employment of migrants in an irregular situation occur). The criminalisation of trafficking and facilitation of unauthorised entry, transit and residence reflects a confluence of policy objectives between the European Union and the global community, with criminalisation at EU level reflecting the securitisation of migration at global level and the establishment in policy and law of a link between migration and organised crime. This securitisation approach has resulted in the prioritisation of criminal law enforcement needs with little emphasis placed on the impact of these measures on migrants themselves. While it should be noted that the European Union legislator has not chosen to criminalise irregular entry, transit or residence per se, the broad scope of criminalisation (in particular as regards the facilitation offences) and the logic of law enforcement and prosecutorial efficiency as regards the granting of rights to migrants have resulted in a legal framework leading to limited safeguards and legal certainty for vulnerable migrants and significant adverse consequences for access to the EU by those who wish to claim international protection. This securitisation approach has been toned down somewhat in the second wave of criminalisation measures. The Directive on employers' sanctions outs forward a more limited and carefully circumscribed criminalisation approach, and addresses to some extent the precarious situation of irregular migrants. The situation of the migrant is also addressed by the revised Directive on trafficking in human beings, which contains a plethora of provisions on the rights of victims of trafficking. While neither Directive provides with a high level of legal certainty for migrants (in particular as regards security of residence), their provisions (in particular those granting rights to third-country nationals) have the potential to offer significant protection to migrants when interpreted by national courts or by the Court of Justice. The protective function of these measures will be enhanced when interpreted in the light of EU constitutional law which privileges the protection of fundamental rights and the respect of the principle of proportionality.

The protective function of European Union law is already evident as regards the second aspect of the criminalisation of migration in Europe, namely the criminalisation of migration not at the EU level, but by individual Member States. Unlike the European Union legislator, a number of Member States including France and Italy have chosen to criminalise conduct deemed contrary to national immigration law—thus criminalising migrants directly. In the light of the political sensitivity of the issue and the potential the impact of state sovereignty the determination of

whether Member States were free to adopt such legislation was crucial, in particular given the shared competence on migration between the Union and Member States. The Court of Justice was called upon to rule on the relationship between national criminal law and European Union law in this context. Its findings confirmed the limits that European Union law places upon national criminal law. In a departure from earlier case-law, the Court assessed national law in the light of European Union law dealing not with free movement, but with the enforcement of migration law (the returns Directive). In this manner, the Court found a way to apply the protective provisions of European Union law to third-country nationals. The protective function of EU law is expressed in this context in two ways: by reminding Member States that even EU law on immigration enforcement such as the returns Directive must be interpreted in accordance with fundamental principles of EU law including the protection of fundamental rights and the principle of proportionality; and, crucially, by linking national criminalisation of migration, and in particular the criminalisation of breaches of national immigration law such as irregular stay, with the implementation of the returns Directive. Member States cannot shield their criminal law by claiming that the criminalisation of irregular entry or stay is self-standing or an end in itself. Such criminalisation is inevitably linked with the ultimate objective of return, which signifies the applicability of European Union law. The Court's approach signifies a direct challenge to the employment of symbolic criminal law by Member States and makes it increasingly hard for Member States to evade the control of EU institutions and law when they make criminalisation choices in the field. Imprisonment for its own sake or as an end in itself is incompatible with EU law as it is not designed to lead to the eventual return of irregular migrants in accordance with proportionality and fundamental rights, even when these migrants are deemed to be high-risk. In all these ways, the Court has highlighted repeatedly the capacity of European Union law to act as a limit to the criminalisation of migration at the national level.

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Chapter 4
After Entry: Criminalisation as Risk Management, Detention and Removal

4.1 Introduction

In addition to the use of substantive criminal law to enable the prosecution of immigration-related offences, a key strand of the criminalisation of migration is the emphasis on the exclusion of migrants from the legal safeguards applicable in the jurisdiction once they have entered the territory and the strong priority for the EU and its Member States of the removal of irregular migrants from their territory. Exclusion and removal have far-reaching negative human rights and rule of law implications for migrants, especially in cases where the latter are considered to be high-risk. This chapter will analyse the implications of the criminalisation of migration in the context of exclusion and deportation by focusing on two main aspects of criminalisation. The first part will focus specifically on the exclusion and removal of asylum-seekers, either via their exclusion from refugee status or via mechanisms whereby EU Member States have attempted to shield their jurisdiction from the responsibility of examining asylum applications via the transfer of asylum seekers either to other European Union Member States (under the system established by the Dublin Regulation) or, in accordance with the provisions of the asylum procedures Directive, to countries outside the European Union considered to be 'safe'. Attempts by the European Union and Member States to prevent asylum seekers from reaching the EU external border analysed in Chap. 2 are here thus coupled with attempts to evade legal responsibilities with regard to the examination of asylum claims in cases where asylum seekers have made it into the European Union. The second part will examine criminalisation in the context of removal, by focusing in particular on the evolution and provisions of the EU Returns Directive. Following the analysis of the impact of the Court's case-law on using the Returns Directive to limit national criminalisation powers in Chap. 3, this chapter will focus on the impact of the case-law of the Court of Justice in interpreting and shaping the

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provisions of the Directive in the light of human rights law. The chapter will focus in particular on the interpretation by the Court of Justice of the provisions of the Returns Directive on the detention of migrants and examine the extent to which the Court has placed limits to the criminalisation of migration such detention powers entail.

4.2 The Exclusion of Asylum-Seekers

The development of the Common European Asylum System has been marked by efforts to disassociate the legal systems of EU Member States from obligations to examine in detail asylum claims in instances where such claims are deemed to be undeserving. There are three main examples of this trend: the inclusion in European asylum law of provisions allowing for exclusion from refugee status of individuals deemed as posing a security risk to EU Member States under the refugee qualification Directive; the refusal to examine an asylum application combined with the automatic transfer of an asylum seeker to another EU Member State under the system established by the Dublin Regulation; and the treatment of asylum applications in an accelerated procedure in cases involving inter alia asylum seekers who are deemed to be high risk or uncooperative and the non-examination of asylum applications if applicants can be transferred to third countries outside the European Union which are considered to be safe under the system put forward by the asylum procedures Directive. These elements of European asylum law have survived the move from the post-Amsterdam minimum standards in asylum law to the post-Lisbon measures entailing a higher level of harmonisation and leading to a Common European Asylum System. What all these instances have in common is the criminalisation of the asylum seeker on the basis of the perception of the latter and the asylum claims submitted as a security risk, abusive, or posing an unreasonable burden to the asylum system of EU Member States. What all these three instances have in common is the exclusion of the asylum seeker from the asylum determination system of EU Member States, with the Dublin Regulation and the safe third country provisions of the asylum procedures Directive ultimately aiming to remove asylum seekers and their claims to the responsibility of other countries, inside or outside the European Union. While preventive immigration control as analysed in Chap. 2 aims at shielding the territory and jurisdiction of Member States from the very arrival of asylum seekers *before* entry, the measures analysed in this chapter complete this picture of deflection by aiming to exclude asylum seekers from the jurisdiction of Member States and expel them from their territory *after* these asylum seekers have managed to gain entry into the European Union.

4.2.1 Exclusion from Refugee Status

Like the minimum standards Directive it has replaced,[1] the post-Lisbon refugee qualification Directive has maintained the possibility for Member States to exclude third-country nationals from refugee status.[2] Exclusion is linked primarily with the perception of the asylum seeker as a risk to society and to the political system of Member States. While provisions on exclusion from refugee status do exist in international refugee law,[3] efforts to exclude third country nationals from being refugees have intensified post-9/11, within the emergence of a general climate of securitisation of migration and stigmatisation of foreigners.[4] This securitisation of asylum seekers has also been reflected in the adoption of counter-terrorism Resolutions by the United Nations Security Council.[5] According to the refugee qualification Directive, a third-country national is excluded from being a refugee inter alia where there are serious reasons for considering that he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee[6] and if he or she has been guilty of acts contrary to the purposes and principles of the United Nations.[7] The Directive further provides for the exclusion of third-country nationals from subsidiary protection, adding that exclusion can happen if the third country national constitutes a danger to the community or to the security of the Member State in which he or she is present[8] or if, without further specification in the text, he or she has committed a serious crime.[9] The consideration of third country nationals as a security risk may also lead to the revocation of refugee status. Member States may inter alia revoke, end or refuse to renew refugee status when here are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present[10] and when the third country national having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.[11] As Guild and Garlick have noted, exclusion and revocation on

[1] Council Directive 2004/83/EC of 29.4.2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees, OJ L304, 30.9.2004, p. 12.

[2] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337/9, 20.12.2011.

[3] For an overview see Guild and Garlick (2011).

[4] For an overview, see Goodwin-Gill (2008).

[5] See Mathew (2008).

[6] Article 12(2)(b).

[7] Article 12(2)(c).

[8] Article 17(1)(d).

[9] Article 17(1)(b).

[10] Article 14(4)(a).

[11] Article 14(4)(b).

grounds of the third country national constituting a security threat relate not to the past acts of an asylum seeker, but to prospective and hypothetical future acts.[12] The text of the Directive appears to leave open the exclusion of asylum seekers from refugee status on the basis of subjective assessments by the State of them constituting a security risk. This subjectivity and potential exclusion on the basis of labelling third-country nationals as security risks poses significant challenges to human rights and the rule of law, in particular when such assessments are made in a blanket and automatic way without being based on concrete evidence or on the assessment of individual cases.

The rule of law challenges arising from the provisions on exclusion from refugee status have been addressed by the Court of Justice in its ruling in *B and D.*[13] The Court was asked to interpret the exclusion criteria set out in the first refugee qualification Directive in cases where third country nationals were considered to fall under the exclusion grounds falling currently under Article 12(2)(c) of the new refugee qualification Directive on the basis of their membership of an organisation which has been prescribed as a terrorist group under a separate listing EU Common Position. The Court found that the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 which implemented Security Council Resolution 1373 (2001), and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that person has committed a serious non-political crime or acts contrary to the purposes or principles of the United Nations. It added that the finding in such a context that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on *an assessment on a case-by-case basis of the specific facts*, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether *individual responsibility for carrying out those acts can be attributed to the person concerned*, regard being had to the standard of proof required under Article 12(2) of the directive.[14] The Court's ruling thus introduces important rule of law safeguards. While the Court has accepted that the competent authorities of the Member States can also apply Article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension[15] it went on to stress that the mere fact that the person concerned was a member of such an organisation cannot automatically mean that person must be excluded from refugee

[12] Guild and Garlick, *call-out*, p. 74.

[13] Joined Cases C-57/09 and C-101/09, *B and D*, judgment of 9 November 2010. For a recent commentary, see Drywood (2014).

[14] Paragraph 99. Emphasis added.

[15] Paragraph 84.

status.[16] Participation in the activities of a terrorist group cannot come necessarily and automatically within the grounds of exclusion laid down in 12(2)(b) and (c) of the Directive.[17] These provisions presuppose a full investigation into all the circumstances of each individual case.[18] Exclusion from (and revocation of) refugee status must thus be based on a full investigation and an assessment on a case-by-case basis of the specific facts which will lead to the attribution of individual responsibility for specific acts to the third country nationals involved. Member States are thus not allowed to exclude third country nationals from refugee status merely by labelling them as 'terrorists.' The EU legislator has attempted to reintroduce this element of subjectivity in the Preamble to the new refugee qualification Directive, which states that the notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.[19] However, this provision must be applied in compliance with the Court's ruling in *B and D* which requires an individual assessment on a case-by-case basis based on specific facts and an individual attribution of responsibility for specific acts.

4.2.2 Intra-EU Transfers of Asylum-Seekers: The Dublin Regulation

EU harmonisation measures on asylum have been accompanied by a cooperative system of intra-EU allocation of responsibility for the examination of asylum claims. Such a system had already been established in public international law shortly after the fall of the Berlin Wall by the 1990 Dublin Convention,[20] which was replaced post-Amsterdam by the Dublin Regulation.[21] Placed in the broader context of the construction of an Area of Freedom, Security and Justice, the Dublin Regulation has been designed to serve not only asylum policy, but also broader border and immigration control objectives. According to the Preamble to the Regulation, 'the progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the [then] Treaty establishing the European Community and the establishment of [the then] Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders,

[16] Paragraph 88.

[17] Paragraph 92.

[18] Paragraph 93.

[19] Preamble, recital 37.

[20] For a background see Blake (2001).

[21] Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1, 25.2.2003.

makes it necessary *to strike a balance between responsibility criteria in a spirit of solidarity*'.[22]

The significance of border control considerations is evident in the formulation of the criteria established by the Regulation to allocate responsibility for the examination of asylum applications by Member States. The Regulation puts forward a hierarchy of criteria to determine responsibility.[23] While on top of this hierarchical list one finds criteria such as the applicant being an unaccompanied minor,[24] family reunification considerations[25] or a legal relationship with an EU Member State (such as the possession of a valid residence document or a visa),[26] following these criteria one finds the criterion of irregular entry into the Union: if it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, this Member State will be responsible for examining the application for asylum.[27] Irregular entry thus triggers state responsibility to examine an asylum claim. The very occurrence of the criteria set out in the Dublin Regulation sets out a system of automatic inter-state cooperation which has been characterised as a system of negative mutual recognition.[28] Recognition can be viewed as negative here in that the occurrence of one of the Dublin criteria creates a duty for one Member State to take charge of an asylum seeker and thus recognise the refusal of another Member State (which transfers the asylum seeker in question) to examine the asylum claim. The Dublin Regulation thus introduces a high degree of automaticity in inter-state cooperation. Member States are obliged to take charge of asylum seekers if the Dublin criteria are established to apply, with the only exceptions to this rule (on the basis of the so-called sovereignty clause in Article 3 (2) and the humanitarian clause in Article 15 of the Regulation) being dependent on the action of the Member State which has requested the transfer. As in the case of the application of the principle of mutual recognition in criminal matters,[29] automaticity in interstate cooperation is accompanied with the requirement of speed, which is in this case justified on the need to guarantee effective access to the asylum procedure and the rapid processing of asylum applications.[30]

Notwithstanding the claim of the Dublin Regulation that one of its objectives is to facilitate the processing of asylum applications, it is clear that the Regulation has been drafted primarily with the interests of the state, and not of the asylum seeker, in mind. The Regulation establishes a mechanism of automatic interstate cooperation aiming to link allocation of responsibility for asylum applications with border

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[22] Preamble, recital 8. Emphasis added.

[23] Chapter III of the Regulation, Articles 5–14.

[24] Article 6.

[25] Articles 7 and 8.

[26] Article 9.

[27] Article 10.

[28] Guild (2004).

[29] Mitsilegas (2006).

[30] Article 17(1) and Preamble, recital 4.

controls and in reality to shift responsibility for the examination of asylum claims to Member States situated at the EU external border. The specificity of the position of individual affected asylum seekers is addressed by the Regulation only marginally, with the Regulation containing limited provisions on remedies: a non-suspensive remedy to the asylum seeker with regard to the decision not to examine his or her application[31] and the decision concerning his or her taking back by the Member State responsible to examine the application.[32] The asylum determination system envisaged by the Dublin Regulation has been a system aiming at speed. This objective has recently been confirmed by the Court of Justice which in the case of *Abdullahi*[33] stated that one of the principal objectives of the Dublin Regulation is the establishment of a clear and workable method for determining rapidly the Member State responsible for the processing of an asylum application so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum claims.[34] Privileging the interests of the state in relation to the position of the asylum seeker is linked to the perception that the abolition of internal borders in the Area of Freedom, Security and Justice will lead to the abuse of domestic systems by third-country nationals. The terminology of abuse can be found in cases before the Court of Justice of the European Union, with Advocate General Trstenjak recently stating that the purpose of the hierarchy of criteria in the Dublin Regulation is first to determine responsibility on the basis of objective criteria and to take into account of the objective of preserving the family *and secondly to prevent abuse in the form of multiple simultaneous or consecutive applications for asylum.*[35] In the political discourse, this logic of abuse has been encapsulated in the terminology of 'asylum shopping'. Giving evidence before the House of Lords European Union Committee on the draft Dublin Regulation, the then Home Office Minister Angela Eagle stated that the underlying objectives of the Regulation were 'to avoid asylum shopping by individuals making multiple claims in different Member States and to address the problem known as 'refugees in orbit'…it is in everybody's interests to work together to deal with some of the issues of illegal migration and to get some coherence into the asylum seeking issue across the European Union'.[36] Under this logic of abuse, the Regulation aims largely to automatically remove the unwanted, third-country nationals who are perceived as threats to the societies of the host Member States. The legitimate objective of applying for asylum is thus securitised in the law of the European Union.

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[31] Article 19(2).

[32] Article 20(1)(e).

[33] Case C-394/12, *Abdullahi*, judgment of 10 December 2013.

[34] Paragraph 59.

[35] Opinion of Advocate General Trstenjak Case C-245/11, *K,* Opinion of 27 June 2012, para 26, emphasis added.

[36] House of Lords Select Committee on the European Union (2001–2002) *Asylum Applications—Who Decides?*, 19th Report, session 2001–2002, para 27.

As mentioned above, the system of interstate cooperation established by the Dublin Regulation is based on a system of negative mutual recognition. Mutual recognition creates extraterritoriality[37] and presupposes mutual trust[38]: in a borderless Area of Freedom, Security and Justice, mutual recognition is designed so that the decision of an authority in one Member State can be enforced beyond its territorial legal borders and across this area speedily and with a minimum of formality. As in EU criminal law, in the field of EU asylum law automaticity in the transfer of asylum seekers from one Member State to another is thus justified on the basis of a high level of mutual trust. This high level of mutual trust between the authorities which take part in the system is premised upon the presumption that fundamental rights are respected fully by all EU Member States across the European Union. In asylum law, as evidenced in the Preamble of the Dublin Regulation, such mutual trust is based additionally upon the presumption that all EU Member States respect the principle of *non-refoulement* and can thus be considered as safe countries for third-country nationals.[39] In its extreme, this logic of mutual recognition premised upon mutual trust absolves Member States from the requirement to examine the individual situation of asylum applicants and disregards the fact that fundamental rights and international and European refugee law may not be fully respected at all time in all cases in EU Member States, especially in the light of the increased pressure certain EU Member States are facing because of the emphasis on irregular entry as a criterion for allocating responsibility under the Dublin Regulation. Interstate cooperation resulting to the transfer of asylum seekers from EU Member State to EU Member State thus occurs almost automatically, without many human rights questions being asked by the authorities examining requests for Dublin transfers.

This system of interstate cooperation based on automaticity and trust in the field of European asylum law was challenged in Luxembourg in the joint cases of *N.S.* and *M.E.*[40] The Court of Justice was asked to rule on two references for preliminary rulings by the English Court of Appeal and the Irish High Court respectively. The referring courts asked for guidance on the extent to which the authority asked to transfer an asylum seeker to another Member State is under a duty to examine the compatibility of such transfer with fundamental rights and, in the affirmative, whether a finding of incompatibility triggers the 'sovereignty clause' in Article 3(2) of the Dublin Regulation. In a seminal ruling, the Court found that an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with fundamental

[37] Nicolaidis (2007).

[38] Mitsilegas, *call-out* (*The Constitutional Implications of Mutual Recognition*).

[39] Preamble, recital 2.

[40] Joined Cases C-411/10 and C-493/10*, N.S. and M.E.*, judgment of 21 December 2011, hereinafter *N.S.*

rights.[41] Were the Regulation to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.[42] Most importantly, such presumption is rebuttable.[43] If it is ascertained that a Dublin transfer will lead to the breach of fundamental rights as set out in the judgment, Member States must continue to apply the criteria of Article 13 of the Dublin Regulation.[44] The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in the sovereignty clause set out in Article 3(2) of the Regulation.[45] *N.S.* followed the ruling of the European Court of Human Rights in the case of *M.S.S.*[46] In *M.S.S.,* the Strasbourg Court found Dublin transfers from Belgium to Greece incompatible with the Convention and importantly found both the sending and the receiving states in breach of the Convention in this context.[47] *M.S.S.,* which as seen in Chap. 2 has also proven to be influential on subsequent Strasbourg case-law on onward transfers to third countries[48] has contributed to the Court of Justice in opposing the automaticity in the operation of the Dublin Regulation by not accepting the non-rebuttable assumption of compatibility of EU Member States action with fundamental rights.

The Court's rejection of the conclusive presumption that Member States will respect the fundamental rights of asylum seekers has admittedly been accompanied by the establishment by the Court of Justice of a high threshold of incompatibility with fundamental rights: a transfer under the Dublin Regulation would be incompatible with fundamental rights if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter (on the prohibition of torture and inhuman or degrading treatment or punishment), of asylum seekers transferred to the territory of that Member State.[49] Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of the Regulation where they cannot be

[41] Paragraph 99.

[42] Paragraph 100.

[43] Paragraph 104.

[44] Paragraphs 95–97.

[45] Paragraph 98.

[46] *M.S.S.* v. *Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.

[47] Moreno-Lax (2012).

[48] *Hirsi Jamaa*, Application no. 27765/09, concerning the transfer of asylum seekers from Italy to Libya.

[49] Paragraph 85.

unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[50] This high threshold is justified on the basis of the assumption that all Member States respect fundamental rights and by the acceptance of the existence, in principle, of mutual trust between Member States in the context of the operation of the Dublin Regulation. According to the Court, it is precisely because of that principle of mutual confidence that the European Union legislature adopted the Dublin Regulation in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.[51] It cannot be concluded that any infringement of a fundamental right will affect compliance with the Dublin Regulation,[52] as at issue here is the *raison d'etre* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance by other Member States with EU law and in particular fundamental rights.[53] The Court found that it would not be compatible with the aims of the Dublin Regulation were the slightest infringement of other measures in the Common European Asylum System to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible under the Dublin Regulation[54] and reiterated the objectives of the Dublin Regulation to establish a clear and effective method for dealing with asylum applications by allocating responsibility speedily and based on objective criteria.[55]

N.S. constitutes a significant constitutional moment in European Union law and introduces a fundamental change in the development of interstate cooperation in European asylum law. The rejection by the Court of the conclusive presumption of fundamental rights compliance by EU Member States signifies the end of automaticity in interstate cooperation. The end of automaticity operates on two levels. Firstly, national authorities (in particular courts) which are asked to execute a request for a transfer under the Dublin Regulation are now under a duty to examine, on a case-by-case basis, the individual circumstances in each case and the human rights implications of a transfer in each particular case. Automatic transfer of

[50] Paragraph 94.
[51] Paragraph 78.
[52] Paragraph 81.
[53] Paragraph 83.
[54] Paragraph 84.
[55] Paragraphs 84 and 85.

individuals is no longer allowed under EU law. Secondly, national authorities are obliged to refuse to execute such requests when the transfer of the affected individuals will result in the breach of their fundamental rights within the terms of *N.S.* The ruling in *N.S.* has thus introduced a fundamental rights mandatory ground for refusal to transfer an asylum seeker in the system established by the Dublin Regulation.[56] While the Court of Justice in N.S. placed limits to the automaticity in the operation of the Dublin Regulation, it was careful not to condemn the Dublin system as a whole. The requirement for Member States to apply the Regulation in compliance with fundamental rights did not lead to a questioning of the principle behind the system of allocation of responsibility for asylum applications between Member States. There are three main limitations to the Court's reasoning: Firstly, the Court used the discourse of the presumption of the existence of mutual trust between Member States, although as seen above this discourse has been used thus far primarily in the context of cooperation in criminal matters and not in the field of asylum law, where the Dublin Regulation has co-existed with a number of EU instruments granting rights to asylum seekers.[57] Secondly, a careful reading of N.S. also demonstrates a nuanced approach to the sovereignty clause in Article 3(2) of the Regulation: the Court stressed that, prior to Member States assuming responsibility under 3(2), they should examine whether the other hierarchical criteria set out in the Regulation apply. Thirdly, it should be reminded again that the threshold set out by the Court for disapplying the system is high: mere non-implementation of EU asylum law is not sufficient to trigger non-return, systemic deficiencies in the national asylum systems must occur leading to a real risk of breach of fundamental rights.[58]

In addition to its contribution to questioning automaticity in the Dublin system, the Court's ruling in *N.S.* is important in highlighting that the adoption of legislative measures conferring rights to asylum seekers may not be on its own adequate to ensure the effective protection of fundamental rights in the asylum process. *N.S.* has demonstrated that the existence of EU minimum harmonisation on rights may not prevent systemic deficiencies in the protection of fundamental rights in Member States. Monitoring and extensive evaluation of Member States' implementation of European asylum law and their compliance with fundamental rights is essential in this context. In addition to the standard constitutional avenues of monitoring compliance with EU law at the disposal of the European Commission as guardian of the treaties, the Lisbon Treaty includes an additional legal basis in Article 70 TFEU for the adoption of measures laying down the arrangements whereby Member States, in collaboration with the European Commission, conduct objective and impartial evaluation of the Union policies in the field of the Area of Freedom, Security and Justice, in particular in order to facilitate full application of the principle of mutual recognition. The Justice and Home Affairs Council has called

[56] Mitsilegas (2012).

[57] Labayle (2011).

[58] Mitsilegas, *call-out* (*The Limits of Mutual Trust*).

recently for the establishment of evaluation mechanisms in the field of EU asylum law.[59] On the basis of the findings of European courts in *M.S.S.* and *N.S.*, the work of organisations such as the UNHCR and civil society actors must be central in the processes of monitoring the situation of international protection on the ground in EU Member States. However, the question of the value of the findings of civil society organisations and the UNHCR as evidence before national and European authorities remains open. While both the Luxembourg and the Strasbourg Courts have referred to the work of UNHCR in their rulings, the Court of Justice found in a recent ruling[60] that the Member State in which the asylum seeker is present is not obliged, during the process of determining the Member State responsible, to request the UNHCR to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chap. III of the Dublin Regulation is in breach of the rules of European Union law on asylum. However, work done by civil society and UNHCR, the transparency their presence creates and the information produced and its use by national and European authorities, including courts, is key in shifting the focus of solidarity towards the asylum seeker and in contributing towards the establishment of evidence-based trust in the Common European Asylum System.

Following the Court's ruling in *N.S.*, the revision of the Dublin Regulation post-Lisbon has been eagerly awaited. The adoption of the new instrument (the so-called 'Dublin III' Regulation)[61] may come as a disappointment to those expecting a radical overhaul of the Dublin system. The Regulation maintains intact the system of allocation of responsibility for the examination of asylum applications by EU Member States under the same list of hierarchically enumerated criteria set out in its pre-Lisbon predecessor.[62] However, the Dublin III Regulation has introduced an important systemic innovation to take into account the Court's ruling in *N.S.*: according to Article 3(2) of the Regulation, second and third indent,

> Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chap. III in order to establish whether another Member State can be designed as responsible.
> Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chap. III or to the first Member State with

[59] 3151st Justice and Home Affairs Council meeting, Brussels, 8 March 2012.

[60] Case C-528/11, *Halaf v Darzhavna agentsia za bezhantiste pri Ministerskia savet,* judgment of 30 May 2013.

[61] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180/31, 29.6.2013.

[62] See Chap. III of the Regulation, Articles 7–15.

which the application was lodged, the determining Member State shall become the Member State responsible.

The European legislator has thus attempted to translate the Court's ruling in *N.S.* to establish an exception to the Dublin system. The high threshold adopted by the Court in the specific case has been adopted in Dublin III, with the transfer of an asylum applicant being impossible when there are substantial grounds to believe that there are systemic flaws in the asylum system of the receiving Member State which will result in a risk of specifically inhuman and degrading treatment (and not necessarily as regards the risk of the breach of other fundamental rights). Even when such risk has been established, responsibility does not automatically fall with the determining Member State, which only becomes responsible if no other Dublin criterion enabling the transfer of the applicant to another Member State applies. While it could be argued that the new Dublin Regulation could require expressly a higher level of protection of human rights when designing the Dublin system, the legislative recognition of the *N.S.* principles is important in recognising the end of the automaticity in Dublin transfers and placing national authorities effectively under the obligation to examine the substance of the applicants' relevant human rights claims prior to authorising a transfer. Article 3(2) places thus an end to the automatic presumption of human rights compliance by EU Member States and reconfigures the relationship of mutual trust between national executives.

A greater emphasis on the rights of the asylum seeker is also evident in other, specific, provisions of the new Regulation. The provisions on remedies have been strengthened, in particular as regards their suspensive effect.[63] The rights of minors and family members are highlighted, with the Regulation containing strong provisions on evidence in determining the Dublin criteria[64] and in emphasising the possibility of Member States to make use of the discretionary provision which enables them to assume the examination of an asylum claim (the former 'sovereignty clause in Article 3(2) which has morphed into a 'discretionary clause' in Article 17), in particular when this concerns family reunification.[65] The emphasis on the protection of the rights of family reunification and of minors has also been evident in the case-law of the Court of Justice in relation to the pre-Lisbon Dublin Regulation. In a case involving unaccompanied minors, the Court has held that since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than it is strictly necessary the procedure for determining the Member State responsible which means that, as a rule, unaccompanied minors should not be transferred to another Member State.[66] The Court has also extended the scope of the Dublin criterion of examination of a family asylum application on humanitarian grounds, giving a broad meaning to the humanitarian

[63] Article 27(3).

[64] Article 7(3).

[65] Article 17(2).

[66] Case C-648/11, *MA, BT and DA v Secretary of State for the Home Department*, judgment of 6 June 2013, para 55.

provisions of the Regulation.[67] The interpretation of humanitarian, human rights and family reunification clauses in an extensively protective manner by the Court signifies another inroad to the automaticity in interstate cooperation which the Dublin system aims to promote and reiterates the required emphasis on the examination of the substance of individual claims.

4.2.3 Removal of Asylum-Seekers Outside the EU: From the Management of Risk to the Safe Third Country Concepts

As seen above, the main aim of the Dublin Regulation is to establish a system which shields the asylum systems of EU Member States from examining asylum applications by a great number of third country nationals by ensuring their transfer to another State within the European Union which will assume responsibility for the examination of asylum applications. In addition to this system of intra-EU transfers of asylum-seekers, European asylum law has established an additional layer of rules aiming to absolve Member States from their responsibilities to examine fully asylum applications either by providing that these applications are dealt with by accelerated procedures or by providing that applications will not be examined at all if applicants can be further transferred to so-called safe third countries. This additional system of negating the responsibility of Member States to examine fully asylum applications was firmly established post-Amsterdam by the Directive on minimum standards on asylum procedures[68] and has been maintained in principle—albeit with a number of procedural improvements—post-Lisbon by the new asylum procedures Directive.[69] The Directive allows Member States to put forward accelerated examination procedures and/or procedures conducted at the border or in transit zones.[70] These procedures apply inter alia when the applicant is from a safe country of origin.[71] Moreover, as is the case with the Dublin Regulation, the choice to depart from the ordinary process of examining asylum application here is applicable to a great extent to address applications which are deemed by Member States to be abusive or *mala fide*. Accelerated or border procedures may thus apply

[67] Case C-245/11, *K v Bundesasylamt*, judgment of 6 November 2012.

[68] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326/13, 13.12.2005.

[69] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L180/60, 29.6.2013.

[70] Article 31(8).

[71] Article 31(8)(b). The Directive expands on the concept of safe country of origin in Article 36.

when asylum seeker is deemed to be uncooperative[72] or to be acting in bad faith[73] or in a misleading manner.[74] They may also apply in cases where the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.[75] The reference to the applicant being a danger to national security is reminiscent of the grounds for exclusion under the refugee qualifications Directive. The Court's ruling in *B and D*, requiring an assessment on a case-by-case, factual basis, is also applicable in the present context. The requirement for an assessment of whether an application for asylum would fall under an accelerated procedure where a safe country of origin is allegedly involved is also confirmed by the Preamble to the Directive, according to which it is important that, where the applicant shows that there are valid reasons to consider the country not to be safe *in his or her particular circumstances*, the designation of the country as safe can no longer be considered relevant for him or her.[76] Ruling on the legality of accelerated procedures established in the 2005 asylum procedures Directive, the Court of Justice emphasised the requirement that the reasons which led a national authority to examine the merits of the application under such a procedure can be subject to judicial review.[77]

The asylum procedures Directive further provides for cases where Member States are not required to examine asylum applications. This is the case where applications are deemed to be inadmissible,[78] including cases where 'a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38.'[79] Moreover, the Directive allows Member States to undertake no, or no full examination of the application for international protection and of the safety of the applicant in his or her particular circumstances shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a European safe country.[80] The new asylum procedures Directive thus confirms the practice of deflection of asylum seekers from the territory of the European Union

[72] Article 31(8)(h) and (i).

[73] Article 31(8)(d).

[74] Article 31(8)(c).

[75] Article 31(8)(j).

[76] Preamble, recital 42. Emphasis added.

[77] Case C-69/10, *Diouf,* Judgment of 28.7.2011. For a commentary, see Reneman (2014).

[78] Article 33.

[79] Article 33(2)(c).

[80] Article 39(1). On the criteria for a country to be considered as such see Article 39(2). The country: has ratified and observes the provisions of the Geneva Convention without geographical limitations; has in place an asylum procedure prescribed by law; and has ratified the ECHR and observes its provisions, including the standards relating to effective remedies. According to the Preamble to the Directive, these countries observe 'particularly high human rights and refugee protection standards' (recital 45).

via the use of the concept of safe third countries.[81] The procedural use of the safe third countries concepts in the procedures Directive mirrors the system put forward by the Dublin Regulation: asylum seekers are being transferred to third countries (this time outside the European Union) quasi-automatically on the basis of generalised presumptions of safety. The new procedures Directive has taken a number of steps to address the human rights and rule of law concerns that this automaticity entails. New Article 34 of the procedures Directive introduces special rules on the admissibility review regarding inadmissible applications, including those related to safe third countries. It requires Member States to allow applicants to present their views with regard to the application of the grounds referred to in Article 33 *in their particular circumstances* before the determining authority decides on the admissibility of an application for international protection adding that to that end Member State must conduct a personal interview on the admissibility of the application.[82] Moreover, the application of the concept of a safe third country is subject to a series of rules laid down in national law including inter alia rules requiring a connection with the third country and rules in accordance with international law *allowing an individual examination of whether the third country concerned is safe for a particular applicant*, which as a minimum shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe *in his or her particular circumstances*.[83] The move from generalised to individual assessments of safety is also confirmed in the Preamble to the Directive, according to which Member States should only proceed on that basis where that particular applicant would be safe in the third country concerned.[84]

A similar focus on the provision of remedies to the asylum applicant to challenge the applicability of the safe third country concept in his or her individual circumstances arises in the context of European safe countries. According to new Article 39(3), the applicant must be allowed to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his or her particular circumstances. These developments are coupled with the general Directive provisions on remedies: the right to an effective remedy applies to both categories of safe third country concepts[85] with new stronger rules allowing applicants to remain in the territory of Member States until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy[86] and, in the case of European safe countries, giving the power to courts to rule under

[81] For an analysis of the potential impact of the 2005 asylum procedures Directive in this context, see Costello (2005).

[82] Article 34(1).

[83] Article 38(2), emphasis added. Under a new provision introduced in the 2013 procedures Directive, the applicant must also be allowed to challenge the existence of a connection between him or her and the third country-Ibid.

[84] Preamble, recital 44.

[85] Article 46(1)(a)(ii) and (iv) respectively.

[86] Article 46(5).

certain conditions whether or not the applicant may remain on the territory of the Member State.[87] The strengthening of the Directive's provisions on remedies is coupled by calls to Member States to take into account information provided by expert bodies such as the European Asylum Support Office and the UNHCR when applying safe country concepts on a case-by-case basis or designating countries as safe.[88] This move reflects to some extent the evidence-based approach introduced by European courts in *M.S.S., N.S.* and *Hirsi.* These judgments are extremely important in the development and interpretation of safe third country concepts in European asylum law. Human rights concerns arising from the transfer of asylum seekers within the European Union under the Dublin system are equally, if not more, valid in the context of the transfer of asylum seekers in third, non-EU countries. Developments in European case-law have put an end to automaticity in the transfer of asylum seekers to third countries on the basis of generalised presumptions of safety. Not only must Member States' authorities consider the situation of individual applicants on a case-by-case basis when called to apply the safe third country criteria, but any decision not to examine an asylum application in the jurisdiction of an EU Member State must be based on a detailed assessment of the full and on the ground compliance of the third state in question with European human rights and international and European refugee law.

4.3 Detention, Removal and the Management of Risk Under the Returns Directive

4.3.1 The Returns Directive: Background and Content

The removal of migrants from the territory of the European Union has always been a priority for Member States, either by signing (bilaterally or at EU level) readmission agreements with third states[89] or by applying the principle of mutual recognition to expulsion decisions.[90] However, no EU measure is more emblematic of the priority to deport migrants from the territory of the European Union than the Returns Directive, which constitutes a major development of the European Union *acquis* in relation to immigration enforcement. Two features of the Directive are key in contextualising and analysing its impact on immigration detention in EU law: the first feature is the achievement by the Directive of a high level of

[87] Article 46(6)(d).

[88] Preamble, recital 46.

[89] For an analysis see N. Coleman, *European Readmission Policy,* Nijhoff, 2008. On the relationship between re-admission agreements concluded by Member States and EU law, see Panizzon (2012).

[90] Council Directive 2001/40/EC on the mutual recognition of expulsion decisions of third-country nationals, OJ L149/34, 2.6.2001.

harmonisation of aspects of immigration enforcement at EU level; and the second feature is that the Directive contributes to the criminalisation of migration at EU level, in particular by including specific legal provisions on immigration detention. The high level of harmonisation is evidenced by the very title of the measure in question, a Directive 'on common standards and procedures in Member States for returning illegally staying third-country nationals'[91] and is confirmed by the opening Article of the Directive according to which it sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.[92] Unlike EU measures in the field of granting rights to migrants and in particular asylum seekers, where EU action has taken initially the form of minimum standards, the Returns Directive thus reflects a consensus by EU institutions on the need to adopt common rules on immigration enforcement. This consensus is the outcome of different priorities by the different EU institutions involved in the legislative process leading to the adoption of the Returns Directive. Member States have been traditionally keen to adopt at EU level strong standards on immigration enforcement. In the heavily securitised Hague Programme of 2004, the European Council 'called for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity' and for the start of Council discussions on minimum standards for return procedures including minimum standards to support effective national removal efforts taking into account special concerns with regard to safeguarding public order and security.[93]

The securitised approach on returns by Member States is here evident, and it is noteworthy that the EU legislative outcome has surpassed the initial Council ambition for the adoption of mere minimum standards in the field. The achievement of a high level of harmonisation has been facilitated by the integrationist ambitions of the European Commission and the European Parliament, which acted as a co-legislator in the adoption of the returns Directive.[94] The Commission in its proposal for the returns Directive justified the adoption of common standards by arguing that co-operation among Member States is likely to be successful if it is based on a common understanding on key issues and that common standards should be set in order to facilitate the work of the authorities involved and to allow enhanced co-operation among Member States. According to the Commission, in the long term such standards will provide the ground for adequate and similar treatment of illegally staying third-country nationals, regardless of the Member State which carries

[91] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98, 24.12.2008.

[92] Article 1.

[93] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C53/1, 3.3.2005, para 1.6.4. See also recital 2 in the Preamble of the returns Directive.

[94] See Acosta (2009).

out the return procedure.[95] While the common standards set out by the Returns Directive reflect on a number of occasions a draconian policy towards migrants, they can, as will be seen below, act as a limit to further criminalisation of migration by providing clear limits to Member State enforcement action.

Negotiations leading to the adoption of the Directive have proven to be controversial, in view of the different views of the EU institutions involved as regards the content of the Directive and the significant potential consequences of the Directive for the protection of fundamental rights.[96] At the heart of the Directive lies Chap. II which is entitled 'termination of illegal stay' and contains detailed provisions on the return decision, voluntary departure and removal, detention and the relevant safeguards. There are two main areas which underline the criminalisation of migration in the Returns Directive: the combination of a return decision with a re-entry ban, and allowing Member States to detain migrants pending their return. A very broadly worded re-entry ban is set out in Article 11 of the Directive, according to which such a ban is compulsory if no period for voluntary departure has been granted, or if the obligation to return has not been complied with—but Member States may also impose such a ban in other cases.[97] The length of such a ban is also prohibitive and arguably disproportionate—it will in principle not exceed 5 years but this time limit is not absolute—it can exceed 5 years if the third-country national represents a serious threat to public policy, public security or national security.[98] There is a relaxation of the ban under certain conditions for victims of trafficking who co-operate with the authorities under Directive 2004/81/EC[99]and an obligation to apply the provisions on the re-entry ban without prejudice to the right of international protection under EU asylum law.[100] As regards immigrant detention, the key provision signalling the criminalisation of migration is Article 15 of the Directive which confirms detention as an accepted means of enforcing the return of irregular migrants.

However, it must be noted that the Returns Directive places Member States' detention powers under a series of limits. Detention is allowed only for the purposes of removal[101] and only if other sufficient but less coercive measures cannot be applied

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[95] COM (2005) 391 final, Brussels, 1.9.2005.

[96] For an analysis see Baldaccini (2009a), Acosta *call-out*.

[97] Article 11(1).

[98] Article 11(2).

[99] Article 11(3).

[100] Article 11(5).

[101] According to Article 15(1) of the Directive, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process—in particular when:

(a) there is a risk of absconding or
(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

effectively in a specific case.[102] Most importantly, any detention shall be for as short a period as possible and *only maintained as long as removal arrangements are in progress and executed with due diligence*.[103] The requirement for the existence of a link between detention and a prospect of removal is confirmed by Article 15(4) of the Directive according to which when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in Article 15 (1) of the Directive no longer exist, detention ceases to be justified and the person concerned shall be released immediately. These limits to Member States' power to detain are watered down significantly by the length of detention allowed by the Directive. According to Article 15(5), detention will be maintained for as long a period as the conditions laid down in Article 15(1) are fulfilled and it is necessary to ensure successful removal for a period which may not exceed 6 months. The Directive allows Member States to extend this period for a limited period not exceeding a further 12 months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned, or delays in obtaining the necessary documentation from third countries.[104] The Returns Directive allows thus Member States to detain immigrants for the sole purpose of removal for a period up to 18 months.[105] The limits that this lengthy period of detention places upon the proportionality requirement for detention have been noted[106] and the approach of the Directive on the length of detention has been heavily criticised.[107] Further criticism of the Directive has been voiced by the United Nations Special Rapporteur on the rights of migrants, Francois Crépeau, according to whom the systematic detention of irregular migrants has come to be viewed as a legitimate tool in the context of EU migration management, despite the lack of any evidence that detention serves as a deterrent, adding that the Directive can be said to have institutionalised detention within the European Union as a viable tool of migration management.[108] The Returns Directive has indeed normalised the detention of irregular migrants and in this manner constitutes another clear example of the criminalisation of migration. However, as will be seen below, safeguards included in the Directive such as the establishment of a clear

[102] Ibid.

[103] Ibid. Emphasis added.

[104] Article 15(6).

[105] The Directive has attempted to introduce common standards in a highly diverse field, with some Member States having established clearly determined and limited periods of detention under their national law, while others not having laid down any maximum time limit for pre-removal detention in their national law—see European Union Agency for Fundamental Rights (2011).

[106] Cornelisse (2012).

[107] Baldaccini (2009b). As Baldaccini eloquently notes, this is an extremely long period for depriving irregular migrants of their liberty for the sole reason of facilitating their removal and preventing them from absconding in the meantime.

[108] United Nations General Assembly, Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau: *Regional Study: Management of the External Borders of the European Union and its impact on the human rights of migrants,* 24 April 2013, para 47.

link between detention and a prospect of removal on the one hand, and the setting out of maximum—albeit lengthy—periods of detention on the other, have proven to be instrumental towards the limitation of national criminalisation practices in the interpretation of the Directive by the Court of Justice.

4.3.2 Detention and Risk Under the Returns Directive—the Case of Kadzoev

The Court of Justice has now had a number of opportunities to clarify the relationship between immigration detention and European Union law in the context of litigation concerning the implementation of the Returns Directive. A key ruling in this context has been the Court's judgment in Kadzoev.[109] The case concerned the prolonged detention in Bulgaria of Mr Kadzoev, who was eventually declared by the Bulgarian authorities to be a stateless person. According to the order for reference, the help centre for survivors of torture, the office of the United Nations High Commissioner for Refugees and Amnesty International found it credible that Mr Kadzoev was the victim of torture and inhuman and degrading treatment in his country of origin. Moreover, and despite the efforts of the Bulgarian authorities, several non-governmental organisations and Mr Kadzoev himself to find a safe third country which could receive him, no agreement was reached, and he had not as yet obtained any travel documents.[110] The reference by the Administrativen sad Sofia-grad has led to the Court of Justice clarifying a number of aspects of the Returns Directive related to immigration detention. Firstly, the Court confirmed that the period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of the Returns Directive. The Court held that, if it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of the Returns Directive, *namely to ensure a maximum duration of detention common to the Member States*.[111] The Court distinguished the maximum period of detention from the situation concerning suspensive appeals in asylum law, stating that the maximum periods laid down in Article 15(5) and (6) of the Returns Directive *serve the purpose of limiting the deprivation of a person's liberty*.[112] This maximum detention limit also applies

[109] C-357/09 PPU, *Said Shamilovich Kadzoev* (*Huchbarov*).

[110] Paragraphs 22–24.

[111] Paragraphs 53–54, emphasis added.

[112] Paragraph 56, emphasis added.

when the affected individual was deemed to be high risk by state authorities. The referring Court asked whether Article 15(4) and (6) of the Returns Directive allow the person concerned not to be released immediately, even though the maximum period of detention provided for by that directive has expired, on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.[113] To this the Court reiterated that Article 15(6) of the Returns Directive in no case authorises the maximum period defined in that provision to be exceeded and that the possibility of detaining a person on grounds of public order and public safety cannot be based on the Directive.[114]

The Court stressed further the requirement for immigration detention under the Returns Directive to be linked with a reasonable prospect of removal. According to the Court, it is clear that, where the maximum duration of detention provided for in Article 15(6) of the Directive has been reached, the question whether there is no longer a 'reasonable prospect of removal' within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately. Article 15(4) of the Directive can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired.[115] The Court added that under Article 15(4) of the Returns Directive, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.[116] As is apparent from Article 15(1) and (5) of the Directive, the detention of a person for the purpose of removal *may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal*.[117] It must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of the Directive, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive.[118] A reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.[119]

Kadzoev is an important judgment as it confirms the limits of detention under the Returns Directive and reiterates the key principles which govern its interpretation. As regards the length of detention, the Court links the achievement of a high level of harmonisation via the adoption of common standards with the imposition of a

[113] Paragraph 68.
[114] Paragraphs 69–70.
[115] Paragraphs 60–61.
[116] Paragraph 63.
[117] Paragraph 64. Emphasis added.
[118] Paragraph 65.
[119] Paragraph 66.

non-negotiable, maximum duration of immigration detention for the purposes of the Directive. Member States are prohibited by EU law to extend immigration detention beyond the time limits set out by the Returns Directive, even in cases where the individual under detention is deemed to be a risk to public order. This restrictive interpretation is inextricably linked with the teleological interpretation espoused by the Court in relation to the objectives of the Directive. In *Kadzoev*, the Court stresses that detention can be justified only if there is a reasonable prospect of removal and if Member States exercise due diligence in relation to the returns procedure. As in its case-law in the *El Dridi* type cases analysed above, the Court emphasises again here that detention is only justified if it serves the key objective of the Returns Directive which is the removal of irregular migrants. What *Kadzoev* also confirms is that the requirements of the existence of a reasonable prospect of removal and of the exercise of due diligence by States exist throughout the returns process and underpin the legality of immigrant detention. This has been confirmed recently by the European Court on Human Rights in its ruling on *Amie v Bulgaria.*[120] The Court avoided to rule specifically on the compatibility of domestic law with the Returns Directive and the maximum detention periods prescribed therein.[121] However, the Court found a breach of Article 5(1)(f) ECHR as it found that the grounds for the first applicant's detention—action taken with a view to his deportation—did not remain valid for the whole period of his detention due to *the lack of a realistic prospect of his expulsion and the domestic authorities' failure to conduct the proceedings with due diligence.*[122] The Court also confirmed that the length of detention should not exceed that reasonably required for the purpose pursued.[123]

4.3.3 Detention and Asylum Under the Returns Directive—the Case of Arslan

If *Kadzoev* can be read as a judgment setting limits to risk-based immigration detention, the Court's approach to risk in the context of immigration detention appears to be more nuanced in its more recent ruling in *Arslan*.[124] The case involved a request for a preliminary ruling by the Czech Supreme Administrative Court in proceedings between Mr Arslan, a Turkish national arrested and detained in the Czech Republic with a view to his administrative removal who, during his

[120] Application No 58149/08.

[121] Paragraphs 74–75.

[122] Paragraph 79, emphasis added.

[123] Paragraph 72. The Court noted that a similar point was recently made by the ECJ in relation to Article 15 of the returns directive. It should however be pointed out that unlike that provision Article 5(1)(f) ECHR does not lay down maximum time-limits: the question whether the length of deportation proceedings could affect the lawfulness of detention under this provision thus depends solely on the particular circumstances of each case.

[124] Case C-534/11, judgment of 30 May 2013.

detention has made an application for international protection and the Czech police. Mr Arslan's detention was extended notwithstanding his lodging of an asylum application as it was deemed that the extension was necessary for preparing for the enforcement of the decision to remove him in view of the fact that the asylum procedure was still ongoing and it was not possible to enforce the removal decision while the asylum application was being considered. The Czech authorities also stated that the application for international protection had been made with the intention of hindering enforcement of the removal decision.[125] In the light of the above facts, the Czech Court asked Luxembourg whether the Returns Directive does not apply to a third country national who has lodged an application for international protection within the meaning of the asylum procedures Directive, and whether, if the Returns Directive does not apply, the detention of a foreigner for the purpose of return must be terminated if he applies for international protection and there are no other reasons to keep him in detention.

The Luxembourg Court appeared to concur in principle with the referring court in finding that the Returns Directive does not apply to a third-country national who has applied for international protection within the meaning of the asylum procedures Directive during the period from the making of the application to the adoption of the decision at first instance on that application or until the outcome of any action brought against that decision is known.[126] However, this prima facie exclusion of the applicability of the Returns Directive does not result in an unqualified protection of the asylum seeker from detention. In answering the second question, the Court of Justice—rather than applying directly the Returns Directive—used this Directive in order to interpret European asylum law. The Court noted that European asylum law (and in particular Article 7(3) of the reception conditions Directive and Article 18 of the asylum procedures Directive) allows Member States to confine an applicant to a particular place in accordance with their national law.[127] The Court further noted that neither the reception conditions nor the procedures Directive carries out currently a harmonisation of the grounds on which the detention of asylum seekers may be ordered —therefore, for the time being it is for Member States to establish, in full compliance with their obligations under international and EU law, the grounds on which an asylum seeker may be detained or kept in detention.[128] According to the Court,

> As regards a situation such as that at issue in the main proceedings, in which, firstly, the third-country national was detained on the basis of Article 15 of Directive 2008/115 on the ground that his conduct gave rise to the concern that, if not detained, he would abscond and frustrate his removal, and, secondly, the application for asylum seems to have been made with the sole intention of delaying or even jeopardising enforcement of the return decision taken against him, such circumstances can indeed justify that national being kept in detention *even after an application for asylum has been made*.[129]

[125] Paragraph 25.

[126] Paragraphs 40–49.

[127] Paragraphs 53 and 54 respectively.

[128] Paragraphs 55–56.

[129] Paragraph 57, emphasis added.

The Court has thus combined the limited harmonisation in European asylum law with the use of the Returns Directive, interpreted in a highly securitised, risk-based approach, in order to justify Member Sates' discretion to detain asylum seeker s for extensive periods of time. The Court justified this approach further by arguing that a national provision which allows, in such circumstances, the detention of an asylum seeker is compatible with Article 18(1) of the asylum procedures Directive, since that detention does not result from the making of the application for asylum but from circumstances characterising the individual behaviour of the applicant before and during the making of that application.[130] Detention under Article 15 of the Returns Directive acts thus as a factor justifying the detention of asylum seekers under European asylum law, based on the pre-supposition that the asylum seeker in question is a high-risk individual. The objectives of the Returns Directive (the effective return of third country nationals) are used here not to protect third country nationals, but to extend detention under this risk-based approach.[131] However, this approach sits uneasily with the Court's constant finding that detention for the purposes of removal governed by the Returns Directive and detention of asylum seekers under the reception and procedures Directives and national law fall under different legal rules.[132] It also results in the criminalisation of asylum seekers, by allowing their extensive detention under national law which is interpreted in the light of the Returns Directive, which provides a high degree of harmonisation on enforcement. Immigration enforcement law is thus also applied in asylum law, although the objectives and scope of these two areas of law are markedly different. This approach, which is based heavily on the acceptance by the Court of governmental perceptions of risk, leads to clearly disproportionate outcomes for the asylum seekers involved. In the case of *Arslan,* the Court's ruling means that the effects of detention are intensified rather than alleviated by the fact that the third country national in question has lodged an asylum application.

4.3.4 Detention and Undocumented Migrants Under the Returns Directive—the Case of Mahdi

The Court of Justice was called to rule on the limits of detention under the Returns Directive with regard to undocumented migrants in the case of *Mahdi.*[133] The Court was asked to assess inter alia whether Article 15(1) and (6) of the Returns Directive must be interpreted as precluding national legislation under which an initial 6-month period of detention may be extended solely because the third country

[130] Paragraph 58.

[131] Paragraph 60.

[132] *Arslan,* para 52. *Kadzoev,* para 45.

[133] Case C-146/14 PPU, *Mahdi*, judgment of 5 June 2014.

national concerned has no identity documents and, accordingly, there is a risk of him absconding.[134] The Court found that the fact that the third-country national concerned has no identity documents cannot, on its own, be a ground for extending detention under Article 15(6) of the Directive.[135] The Court noted firstly that the concept of 'risk of absconding' is defined in Article 3(7) of the Directive as the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third country national who is the subject of return procedures may abscond.[136] Secondly, the Court reiterated its finding that Article 15(1) of the Directive makes clear that recourse may be had to detention only when other sufficient but less coercive measures cannot be applied effectively in a specific case.[137] The Court went on to reiterate that the extension of detention under Article 15(6) of the Directive may be ordered only if the removal operation is likely to last longer owing either to a lack of cooperation by the third-country national concerned or to delays in obtaining the necessary documentation from third countries, no mention being made of the fact that the person concerned has no identity documents.[138] Any decision to extend detention must be preceded by a re-examination of the substantive conditions which formed the basis for the initial decision to detain the third-country national concerned. That calls for an assessment by the judicial authority, in the course of the examination required under the second sentence of Article 15(3) of the directive, of the circumstances which gave rise to the initial finding that there was a risk of the third-country national absconding.[139] In this context, the Court stressed that any assessment relating to the risk of the person concerned absconding must be based on an individual examination of that person's case and that decisions taken under the directive should be adopted on a case-by-case basis and based on objective criteria.[140]

The application of a proportionality test combined with the emphasis on procedural safeguards and a facts-based assessment on a case-by-case basis[141] have thus led the Court to reject the automatic extension of detention on the basis of a presumption of risk on the sole ground that a third-country national has no identity documents. The Court has further circumscribed the extension of detention by interpreting Article 15(6)(a) of the Returns Directive as meaning that a third-country national who has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned may be regarded as having demonstrated a 'lack of cooperation' within the meaning of that provision only if an examination of his conduct during the period of detention

134 Paragraph 65.
135 Paragraph 73.
136 Paragraph 66.
137 Paragraph 67.
138 Paragraph 68, and reference to para 58.
139 Paragraph 69, and reference to para 61.
140 Paragraph 70.
141 See also para 64 of the judgment.

shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated *because of that conduct*, a matter which falls to be determined by the referring court.[142] Extension of detention can thus take place only if national courts establish a direct and exclusive causal link between the non-cooperative conduct of the third-country national and the lengthening of the removal operation. As the Court has noted, if such removal is taking longer than anticipated for another reason, no causal link may be established between the latter's conduct and the duration of the operation in question and therefore no lack of cooperation on the part of the third country national can be established.[143] The Court's finding here echoes its' findings concerning the requirement for Member States to contribute to the effective implementation of the returns Directive by respecting the time-limits it has established. However, the Court has stopped short of linking the release of third-country nationals following the expiry of the detention deadlines in the Returns Directive with the granting of residence rights. According to the Court, a Member State cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay, to a third-country national who has no identity documents and has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of the Returns Directive—a mere written confirmation of the third-country national's situation is required.[144] This ruling leaves affected migrants in a legal limbo, the consequences of which will have to be addressed in litigation before national and European courts.

4.3.5 *Detention and Defence Rights Under the Returns Directive—the Case of M.G.*

Another recent judgment which is informed by a restrictive, law enforcement approach is the Court's ruling in *M.G.*[145] In this case, the Court of Justice was asked to examine the impact of a breach of the rights of the defence by a decision by a national authority to prolong detention to the actual detention decision. The Court found that irregularities in the exercise of the rights of the defendant do not trigger automatically the release of the third country national in detention.[146] It is for the national judge to ascertain whether such irregularity could lead to a different

[142] Paragraph 85, emphasis added.

[143] Paragraph 82.

[144] Paragraph 89.

[145] Case C-383/13 PPU, *M.G. and N.R. v Staatsecretaris van Veligheid en Justitie,* judgment of 10 September 2013.

[146] Paragraph 39.

result for the third country national.[147] According to the Court, not recognising a margin of appreciation in this context to the national judge, and ruling that any violation of rights would lead automatically to the annulment of the decision prolonging detention would risk to undermine the effectiveness of the Returns Directive.[148] The Court added that coercive measures taken under the Directive are not only subject to the principle of proportionality, but also to the principle of effectiveness[149] and reiterated that the return of irregularly staying third country nationals is a priority for Member States under the Directive.[150] In this manner, the principle of effectiveness is used here by the Court to strengthen coercive action by the state under the Returns Directive and to nuance the protection of fundamental rights. The Court has thus used effectiveness in the field of procedural law in a markedly different manner to its approach in the *El Dridi* type cases involving criminalisation under substantive national criminal law. The ruling in *M.G.* is also another nod of the Court in favour of state sovereignty in the field of immigration control, most notably by stressing the discretion that national authorities, including courts, have in assessing aspects of the compliance of implementing action with the Returns Directive and EU constitutional law more broadly.

4.3.6 *Detention and Imprisonment Under the Returns Directive—the Cases of Thi Ly Pham and Brero and Bouzalmate*

In what has been perhaps the most blatant manifestation of the link between detention of migrants for the purposes of return and the criminalisation of migration, the Court of Justice was called to rule on two cases involving questions from German Courts on whether it is acceptable for migrants to be detained together with ordinary prisoners in prison accommodation. In the case of *Thi Ly Pham,*[151] the Court rejected firmly such a prospect. The Court noted that it is clear from the wording of Article 16(1) of the Returns Directive that it lays down an unconditional obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners when a Member State cannot provide accommodation for those third-country nationals in specialised detention facilities.[152] This obligation is not coupled with any exception and *constitutes a guarantee of observance of the rights* which have been expressly accorded by the EU legislature to those third-country nationals in the context of the conditions relating to detention in prison

[147] Paragraph 40.
[148] Paragraph 41.
[149] Paragraph 42.
[150] Paragraph 44.
[151] Case C-474/13, *Thi Ly Pham*, judgment of 17 July 2014.
[152] Paragraph 17.

accommodation for the purpose of removal.[153] The Court added that the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners, laid down in the second sentence of Article 16(1), is more than just a specific procedural rule for carrying out the detention of third country nationals in prison accommodation and *constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive*.[154] Such is the strength of this finding that the Court ruled that the second sentence of Article 16(1) of the Returns Directive must be interpreted as not permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto.[155] In a further judgment issued on the same day, the Court rejected the justification by Germany of the detention of migrants for the purposes of return in prisons on the basis of the particularities of the German federal system.[156] The Court stated unequivocally that Article 16(1) of the Returns Directive must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility.[157] The Court has thus sent a clear signal against the legality of the criminalisation of migration in Europe when this takes the form of the imprisonment of migrants for the purposes of removal. Immigration detention is not a criminal penalty. There is a clear separation between immigration law and criminal law. As Advocate General Bot stated in his powerful Opinion in *Bero and Bouzalmate,* by referring to the Court's earlier ruling in *El Dridi*[158]:

> …detention does not constitute a penalty imposed following the commission of a criminal offence and its objective is not to correct the behaviour of the person concerned so that he can, in due course, be reintegrated into society. Any idea of penalising behaviour is, moreover, missing from the rationale forming the legal basis of the detention measure. It must not be overlooked that, at that stage, a migrant awaiting removal is not caught by any criminal statute, or be forgotten that, even in the member state concerned classifies, as the Court recognises it has a legitimate right to do, the act of unlawfully entering its territory as a 'criminal offence', the Court has also held that the potentially criminal nature of that conduct must yield to the priority that must be given to removal.[159]

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[153] Paragraph 19. Emphasis added.

[154] Paragraph 21. Emphasis added.

[155] Paragraph 23.

[156] Joined Cases C-473/13 and C-514/13, *Brero and Bouzamate*, judgment of 17 July 2014.

[157] Paragraph 34.

[158] For an analysis of *El Dridi* see Chap. 3.

[159] Opinion of Advocate General Bot delivered on 30.4.2014, Joined Cases C-473/13 and C-514/13, *Brero and Bouzalmate,* para 92.

4.4 Conclusion

The chapter demonstrated how European Union law has resorted to the criminalisation if migrants after their entry onto the European Union by focusing on their exclusion from the jurisdiction of EU Member States and their removal from EU territory, backed up by a series of provisions on detention. As regards asylum-seekers, the evolution of the Common European Asylum System has maintained provisions on exclusion from refugee status and systems whereby EU Member States absolve themselves from the responsibility of examining or examining fully asylum applications by justifying the removal of asylum seekers to other states within the European Union (under the Dublin system) or outside the Union (applying largely concepts of safe third countries). In both these cases, removal of asylum-seekers to third states is justified largely on presumptions of safety and human rights compliance of these states, and was envisaged to take place quasi-automatically if these presumptions were deemed to apply. In parallel to the evolution of European asylum law, the European Union legislator has continued to place emphasis on measures ensuring the removal of irregular migrants from the territory of the European Union. Removing migrants from the territory of the European Union has perhaps unsurprisingly been a high political priority for EU Member States and governments wishing to be seen to have control over their borders.[160] Nowhere else has this political priority to exclude and remove migrants from the European Union been reflected more clearly than with the adoption of the Returns Directive, which aims at ensuring speedy removal while at the same time legitimises the criminalisation of migration by allowing Member States to detain migrants.

However, as with the instances of criminalisation of migration discussed in the previous chapters of this book, the law in these instances has not remained static. The Court of Justice has again intervened to address the human rights challenges arising from EU legislation in the field. The Court's case-law has introduced a paradigm change in European asylum law: in addition to strong rulings on remedies with regard to the refugee qualification and asylum procedures Directives, the Court has put an end to the automaticity inherent in the Dublin system by affirming first that national authorities are obliged to examine the individual circumstances of each case and the impact of removal for the asylum-seeker concerned and second that the Dublin Regulation will be suspended and removal will not take place if removal will lead to serious human rights violations. Not only is the Court's ruling in *N.S.* applicable in the safe country system established in the asylum procedures Directive, but as has been seen above it has led already to law reform within the EU, with the Court's case-law incorporated within the new Dublin Regulation. The Court of Justice has also made a significant contribution towards upholding fundamental rights in the context of the application of the Returns Directive. In addition to the use of the Directive to place limits on national criminalisation powers examined in

[160] On the symbolic and political functions of removal, see Cornelisse (2010).

Chap. 3, in a series of cases the Court has placed clear limits to the detention of migrants in Member States. It is hoped that the Court's case-law will have a real impact on Member States' practice and implementation of the detention provisions of the Returns Directive, which according to the latest Commission implementation Report shows great variation.[161] The Court of Justice has made decisive steps towards decriminalising migration by emphasising the requirement for a link between detention and a real prospect of removal and by distinguishing clearly between imprisonment and immigration detention.

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Chapter 5
Decriminalising Migration in EU Law: Upholding Human Rights and the Rule of Law After Lisbon

This book has demonstrated the extent to which European Union law has in recent years led to the increase of state power in immigration control based to a great extent on the proliferation of legal avenues for the criminalisation of migration. A key element in this move towards the criminalisation of migration has been the emphasis on prevention. The increase in extraterritorial immigration control has been accompanied by the extension of the arm of the state via the delegation of power to both the private sector (land and air carriers) and to European Union agencies (FRONTEX). Moreover, the legal expression of the nexus between prevention, immigration control and security has led to the development of a far-reaching EU framework of pre-emptive surveillance, consisting of the collection and transfer of every day personal immigration data *en masse* to law enforcement authorities, the establishment of large-scale EU databases (such as the Visa Information System) and surveillance systems (such as EUROSUR), the normalisation of the use of sensitive personal data for immigration control purposes such as biometrics and the relaxation of purpose limitation requirements by allowing law enforcement authorities to have access to personal data collected for immigration control purposes. The main aim of this multi-layered system of prevention has been on the one hand to stop migrants from reaching the external border of the European Union, and on the other hand to shield the European Union and its Member States from legal responsibility towards migrants by conducting immigration control outside of EU territory. The rule of law challenges this approach entails (via the creation of gaps in the law) are coupled with real risks of human rights violations, in particular as regards the right to seek asylum and the rights to non-discrimination, privacy and data protection. Towards this seemingly relentless evolution of the preventive paradigm of the criminalisation of migration, it is courts who have provided answers and limitations. The European Court of Human Rights in Strasbourg in its landmark ruling in *Hirsi* has sent the strongest message possible with regard to the requirement for both fundamental rights and the rule of law to be upheld in instances of extraterritorial immigration control. What is crucial to note in this context is that the Court's ruling has generated concrete instances of law reform

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at EU level as regards standards on FRONTEX and Member States' operations and search and rescue at sea. A similar pattern may emerge as regards the securitisation of migration in the form of pre-emptive surveillance, with both the Strasbourg and the Luxembourg Courts having delivered a number of important judgments which limit the retention of sensitive personal data by the state in cases involving individuals not convicted of a criminal offence (*Marper*) and prohibiting the generalised, *en masse* retention of every day personal data by the private sector (*Digital Rights Ireland*). The Strasbourg and Luxembourg Courts have thus challenged radically the paradigm of the preventive criminalisation of migration and have made the re-thinking of this paradigm and ensuing law reform a matter of urgency.

This transformative power of the European judiciary has also been visible as regards the criminalisation of migration after entry into EU territory. With regard to the use of substantive criminal law to regulate migration, it must be reminded that while EU law has aligned itself with the global securitised criminalisation initiatives as regards human trafficking and smuggling, it has not as such imposed criminal sanctions on migrants themselves. Not only that, but EU law has acted as a limit to the introduction of such criminalisation by Member States via the intervention of the Court of Justice. What is significant in the landmark ruling of the Court of Justice in *El-Dridi* and its aftermath, is that the Court used here primarily general principles of EU law (in particular the principle of effectiveness) in order to limit criminalisation. Effectiveness in this context, together with proportionality, may back up human rights obligations and serve in the future as further limits to the criminalisation of migration at both national and EU levels. At the stage of removal, the Court of Justice (following the landmark Strasbourg *M.S.S.* ruling) introduced in *N.S.* a paradigm change as regards the automaticity of exclusion inherent in the Dublin system. As in the case of *Hirsi,* judicial intervention has led here to concrete law reform to address human rights concerns. The Court of Justice has also been active in cases concerning the interpretation of the detention provisions of the Returns Directive, where it has sent strong messages against indefinite detention on the grounds that an individual constitutes a security risk, confirming the necessity of a link between detention and a real prospect of removal, and affirming the distinction between immigration detention and imprisonment. In all three levels of criminalisation, it has thus been the judiciary which has rebalanced the system to take into account rule of law and human rights concerns. This will remain an ongoing process with Courts facing growing litigation following the development of the various strands of EU legislation in the field. The growing synergy between the Strasbourg and Luxembourg Courts, the requirement of compliance with the ECHR not only by EU Member States but also by EU institutions after the accession of the EU to the ECHR and the increasing importance of the Charter of Fundamental Rights in interpreting EU law and its implementation render the further reconfiguration of the current paradigm of criminalisation of migration in EU law in favour of upholding human rights and the rule of law highly probable. In the meantime, current judicial developments render the need to revisit highly invasive EU surveillance systems including in the field of immigration control a matter of urgency.