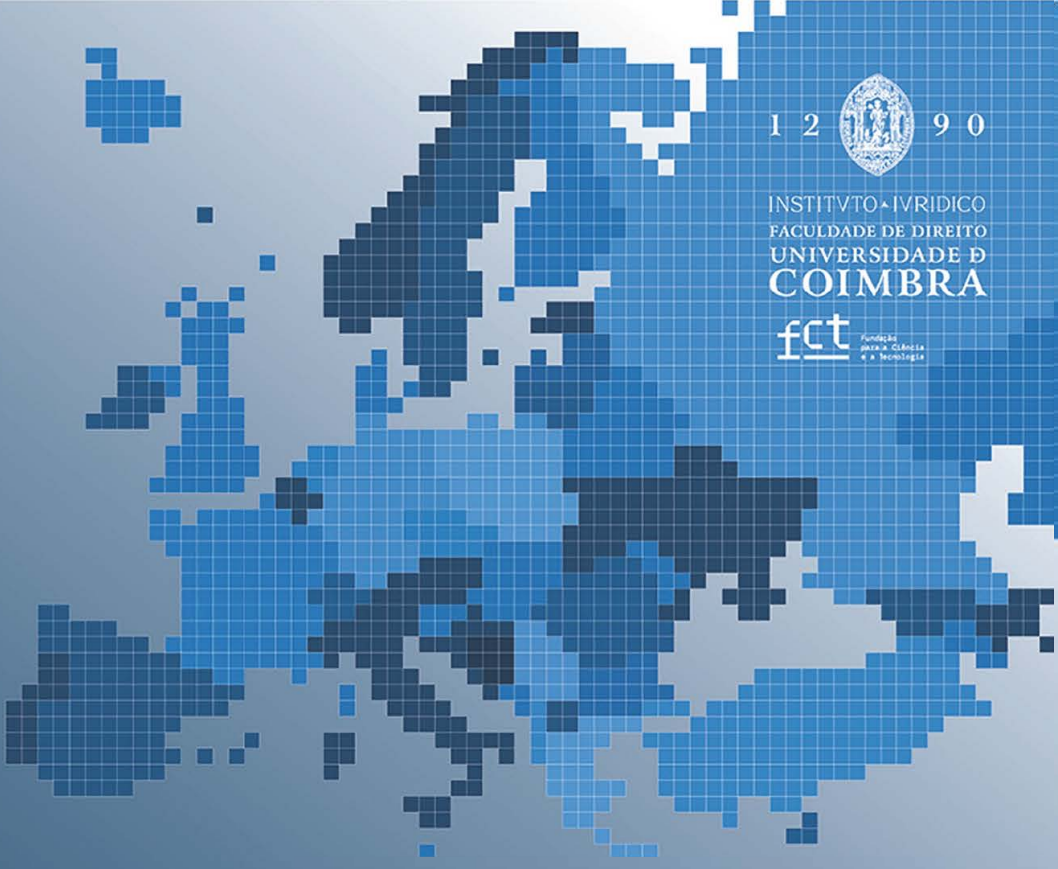

European Security, Borders, Crime and EU Law

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Pedro Caeiro
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European Security, Borders, Crime and EU Law

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Note from the editor

Borders: imaginary lines with very real consequences – legal, social, existential.

Crossing them entails risks, both for the resident population and for the foreigner. In Portuguese, *risco* denotes both risk and a line drawn on a surface, as, for instance, a dividing mark traced on the ground. Hence the expression *pisar o risco* (to step on the line), meaning imminent transgression (the crossing) that exposes the agent to risk. This linguistic peculiarity (I know of no other language in which this semantic overlap exists) is a vivid reminder that the border is more than a geopolitical device – it is also a calculation of exposure. Where a line is drawn, something is at stake – for the entitled and the *non-ayant droit* alike. The border becomes, for all parties, a symbolic locus of security (i.e., the successful management of risk), which, paradoxically, may drive them to adopt diametrically opposite behaviour: if need be, foreigners might be prepared to intrude illegally, whereas territorials might push them back illegally.

Borders are thus sites of power, vulnerability, crime and uncertainty. Over the last decade, the challenges they pose have grown more complex – empirically and normatively – prompting the Instituto Jurídico/UCILeR to host a seminar on the subject on 18 June 2024. We were privileged to welcome a distinguished group of scholars and practitioners, joined by invited guests and stakeholders, to explore topics such as: the outsourcing of border governance, public/private guilds, technocratic guilds (D. Bigo); the murky process of offshoring EU border anxiety to third countries (E. Guild); the several avenues used for criminalising migrants (V. Mitsilegas); the right to migrate as a human right (A. Gaudêncio) and the tensions between EU and (non-harmonised) domestic policies on integration (D. Lopes).

This e-book gathers the thoughtful papers presented at the seminar, followed by a brief epilogue of my own. I am deeply grateful to the authors for their engagement and generosity, and to the Coordination Board of the Instituto Jurídico for their unwavering support from the outset.

Caldas da Felgueira, 18 June 2025.

Questioning the Criminal Law of the Border*

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Valsamis Mitsilegas**

Abstract: The present contribution will provide a critique of the criminal law of the border at EU level, by examining the proliferation of instances of the criminalisation of migration in Europe in the past two decades. New criminal offences with shaky normative foundations have been introduced, ad the boundaries between criminal and administrative law have been increasingly blurred. The contribution will on three of the key elements of the criminalisation model: criminalising the facilitation of entry; criminalising entry; and immigration detention.

Keywords: Facilitation of unauthorised entry; Migrant smuggling; Humanitarian assistance; Irregular entry; Entry bans; Immigration detention.

1. Introduction

The past two decades have witnessed the proliferation of instances of the criminalisation of migration in Europe[1]. Criminal law is increasingly being used to regulate border control, which in essence is an administrative process. The criminalisation of border controls is legally problematic from a number of perspectives. It blurs the boundaries between administrative and criminal law, and resorts to the disproportionate use of criminal law to fulfil administrative objectives. It is based on the creation of criminal offences which are too broad, built on shaky normative foundations and whose justification is unclear from the perspective of the necessity principle – raising the prospect of overcriminalisation. The present contribution will provide a critique of the criminal law of the border at EU level, by focusing

* This contribution builds upon Valsamis Mitsilegas, «The Criminalisation of Migration in the Law of the European Union. Challenging the Preventive Paradigm», in G-L. Gatta / V. Mitsilegas / S. Zirulia, eds., *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on 'Crimmigration'*, Oxford: Hart, 2021, 25-45; Valsamis Mitsilegas, «Contested Sovereignty in Preventive Border Control: Civil Society, the "Hostile Environment" and the Rule of Law», in M. Bosworth / L. Zedner, eds., *Privatising Border Control: Law at the Limits of the Sovereign State*, Oxford: OUP, 2022, 36-56; and Valsamis Mitsilegas, «Reforming the Facilitators' Package through the *Kinsa* Litigation: Legality, Effectiveness and Taking International Law into Account», *Eurojus* 3 (2024), editorial of August 2024 (commissioned editorial to mark the 10th anniversary of *Eurojus*).

** Dean of the School of Law and Social Justice; Professor of European and Global Law, University of Liverpool.

1 Valsamis Mitsilegas, *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*, Cham: Springer, 2015.

on three of the key elements of the criminalisation model: criminalising the facilitation of entry; criminalising entry; and detention. The challenges of this model to fundamental legal principles, fundamental rights and the rule of law will be explored.

2. Criminalising the Facilitation of Entry

A central tool in the development of a paradigm of preventive immigration control at EU level in the past twenty years has been the criminalisation of the facilitation of unauthorised entry. This section will evaluate critically such criminalisation, and argue that the EU has resorted to overcriminalisation, which diverges from international law and challenges fundamental rights and the rule of law. The analysis will begin with an overview of the objectives and content of international law in the field. It will then analyse the current EU legal framework and assess its potential reform in the light of recent Commission proposals for a new criminal law framework and pending litigation before the Court of Justice.

2.1. International Law

International law does not use the term facilitation of unauthorised entry, focusing rather on migrant smuggling. The primary international law framework for the criminalisation of migrant smuggling is the 2000 United Nations Convention on Transnational Organised Crime (the Palermo Convention)[2]. A separate Protocol addresses migrant smuggling, and its opening provision confirms that the Protocol supplements the Palermo Convention and must be interpreted together with it[3]. The European Union (or European Community and European Union as it was then) has negotiated and ratified the Palermo Convention and the smuggling Protocol[4]. Key in the comparison between EU secondary law and the UN smuggling Protocol is the fact that, in international law, migrant smuggling offences are framed as organised crime offences. The framing of migrant smuggling within an organised crime context is further confirmed by its very definition: according to the

[2] The United Nations Convention against Transnational Organized Crime and the Protocols thereto adopted by the UN General Assembly on 15 November 2000.

[3] Article 1(1) of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (Smuggling Protocol).

[4] Valsamis Mitsilegas, «The European Union and the Globalisation of Criminal Law», *Cambridge Yearbook of European Legal Studies* 12 (2010) 337-407.

Protocol, smuggling of migrants means "the procurement, in order to obtain, directly or indirectly, *a financial or other material benefit*, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (emphasis added)[5]. Criminalisation of smuggling must be based on intentional conduct with the aim of obtaining a financial or other material benefit[6]. The express inclusion of the requirement to obtain such a benefit is a clear indication that the drafters of the Protocol on the one hand viewed smuggling within the framework of organised crime, and on the other that they wished to exclude from the definition and criminalisation of smuggling acts which did not have a material/financial motive such as humanitarian assistance. According to an Interpretative Note to the Protocol,

> the reference to 'a financial or other material benefit' was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations[7].

The above analysis helps to clarify what migrant smuggling is about (organised crime) and what it is not about (humanitarian or family assistance) in the eyes of the United Nations legislator[8]. A further question which arises is whether criminalisation under the Protocol includes

[5] Article 3(3) of the Smuggling Protocol.

[6] Article 6(1) of the Smuggling Protocol.

[7] UN General Assembly, Report of the Ad Hoc Committee on the elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, UN Doc. A/55/383/Add.1, 3 November 2000, xxv. See also UNODC, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, New York, 2004, 24, according to which the intention of the drafters was to require legislatures to create criminal offences that would apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-seekers (para 32).

[8] See UNODC, *The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol*, Vienna, 2017, 14, according to which the Protocol does not seek, and cannot be used as the legal basis for, the prosecution of those acting with humanitarian intent or on the basis of close family ties where there is no purpose to obtain a financial or other material benefit.

criminalisation of irregular entry. The smuggling Protocol contains two different provisions which are relevant in this context. On the one hand, Article 5 states that migrants must not become liable to criminal prosecution under the Protocol for the fact of having been the object of the smuggling offences set out therein. On the other hand, Article 6(4) of the Protocol appears to leave a degree of discretion to Member States regarding the criminalisation of non-smuggling related immigration offences, by stating that nothing in the Protocol prevents State Parties from taking measures against a person whose conduct constitutes an offence under its domestic law. The combination of the two provisions does not provide with optimal legal certainty. Gallagher and David are of the view that the Protocol takes a neutral position on whether those who migrate irregularly should be the subject of any criminal offences[9]. McClean notes that the final position reflects disagreement among States, with certain states being apprehensive regarding granting immunity to illegal migrants especially if they had committed a crime, including the smuggling of other illegal migrants[10]. On the other hand, di Martino points out that the Protocol does not apply to those immigrants who, according to international law, should not be criminally liable for the mere fact of their irregular immigration[11].

There are two arguments which militate in favour of the exclusion of criminalisation of irregular entry from the scope of the smuggling Protocol. The first argument relates to the protection of the rights of the smuggled migrants, which forms – together with combatting smuggling and promoting inter-state cooperation – the key purpose of the Protocol[12]. The second argument relates to the Protocol's explicit treatment of human smuggling as a form of organised crime. According to the Legislative Guide for the Implementation of the Protocol,

> [t]wo basic factors are essential to understanding and applying the Migrants Protocol. The first is the intention of the drafters that

[9] Anne T. Gallagher / Fiona David, *The International Law of Migrant Smuggling*, Cambridge: CUP, 2014, 47.

[10] David McClean, *Transnational Organized Crime: A Commentary on the United Nations Convention and its Protocols*, Oxford: OUP, 2007, 388-389.

[11] Alberto di Martino *et al.*, *The Criminalization of Irregular Immigration: Law and Practice in Italy*, Pisa: Pisa University Press, 2013, 83.

[12] Article 2 of the Smuggling Protocol. On the drafting history and importance of adding human rights protection expressly as a Protocol objective see David McClean, *Transnational Organized Crime*, 379; and Anne T. Gallagher / Fiona David, *The International Law of Migrant Smuggling*, 47-48. See also the savings clause in Article 19(1) of the Smuggling Protocol according to which nothing in the Protocol must affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law.

> the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned (see articles 5 and 6, paragraph 4, of the Protocol). Mere illegal entry may be a crime in some countries, but it is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or other material benefit), on the other hand, has been recognised as a serious form of transnational organized crime and is therefore the primary focus of the Protocol[13].

This teleological approach, emphasising the dual primary purposes of the smuggling Protocol to counter transnational organised crime, while at the same time protecting the rights of migrants, has been influential in a major interpretation of the scope of criminalisation of human smuggling by the Canadian Supreme Court. In the case of *Appulonappa*[14], the Canadian Supreme Court rejected the broad criminalisation advocated by the Canadian Government by interpreting domestic law in conformity with international law, in particular with the Smuggling Protocol. The Court stressed the requirement of the Protocol to criminalise smuggling for financial or other material benefit and noted that it would depart from the balance struck in the Protocol to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid[15]. According to the Court, Canada's international commitments support the view that the purpose of domestic criminal law is to permit the robust fight against people smuggling in the context of organised crime, which excludes criminalising conduct that amounts solely to humanitarian, mutual or family aid[16]. While the security goals of domestic law are important, they do not supplant Canada's commitment to humanitarian aid and family unity[17].

In a powerful statement, Judge Beverley McLachlin noted that under the Crown's interpretation, "a father offering a blanket to a shivering child, or friends sharing food aboard a migrant vessel, could be subject to prosecution"[18]. By stressing the need for the existence of the element of the financial gain

[13] UNODC, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, para 28.

[14] *R. v. Appulonappa* [2015] 3 R.C.S. 754.

[15] Para 44.

[16] Para 45.

[17] Para 57.

[18] Para 57.

for the criminal offences of human smuggling to be substantiated, the Canadian Supreme Court has placed important limits to the criminalisation of smuggling and has reminded us of the original purpose of the UN legislator in the field. While one can question the extent to which human smuggling constitutes crime which is highly organised[19], and whether the traditional concepts of a structured criminal organisation apply in this context regarding the operations of looser smuggling networks[20], the approach adopted by the Palermo Convention is important in setting out parameters to criminalisation and in putting forward a clear rationale for criminalisation under international law.

For all the conceptual ambiguities of the term "organised crime", framing the criminalisation of human smuggling within its context and requiring expressly financial gain as an element of the offence will serve to address to some extent the current prevention-led over criminalisation of smuggling in EU law. Such a move would not negate the requirement for direct exemption from criminalisation of acts consisting of humanitarian assistance and acts conducted in order to comply with international and EU law obligations in the field of humanitarian and refugee law and human rights.

2.2. EU Law

The relevant EU legal framework is set out by a Directive defining what is called in EU law the "facilitation of unauthorised entry, transit and residence"[21] accompanied – in the light of the first pillar competence limits regarding criminalisation at the time[22] – by a third pillar Framework Decision confirming that the conduct defined as facilitation in the Directive will be

[19] For a contribution highlighting the operation of human smuggling in North Africa in terms of networks and not necessarily highly organised ground see Paolo Campana, «Out of Africa: The Organisation of Migrant Smuggling across the Mediterranean», *European Journal of Criminology* 15 (2018) 481-502.

[20] On the challenges for the legal definitions of a criminal organisation in international and EU law to address the less structured character of criminality in this context see Valsamis Mitsilegas, «From National to Global, from Empirical to Legal: The Ambivalent Concept of Transnational Organised Crime», in M. Beare, ed., *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*, Toronto: University of Toronto Press, 2003, 55-87.

[21] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, *OJ* L 328, 5.12.2002, 17-18.

[22] For an overview, see Valsamis Mitsilegas, *EU Criminal Law*, Oxford and Portland: Hart Publishing, 2009, chapter n.º 2.

treated as a criminal offence[23]. Both instruments of what is rather "old" law by EU standards predate by far the entry into force of the Lisbon Treaty and, having being proposed not by the Commission but by a Member State (the French Government), they have been negotiated and adopted with minimal scrutiny and debate[24]. The EU Facilitation Directive goes further than the UN Palermo Convention Smuggling Protocol[25] in that it dispenses with the condition of obtaining a financial or other material benefit for the smuggling offence to be established[26]. 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"[27]. Instigation, complicity and attempt are also criminalised[28]. The Facilitation Framework Decision contains a general obligation for Member States to criminalise such conduct[29], includes a general provision on sanctions[30], which may be accompanied by parallel sanctions including confiscation[31], and imposes specific high levels of sanctions only when certain aggravating circumstances occur[32].

[23] Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, *OJ* L 328, 5.12.2002, 1-3.

[24] For a background, see Valsamis Mitsilegas / Jörg Monar / Wyn Rees, *The European Union and Internal Security*, Hampshire and New York: Palgrave/Macmillan, 2003, 106-108.

[25] See section II.C below.

[26] Article 1(1)(a) of the Facilitation Directive.

[27] *Ibid*.

[28] Article 2 of the Facilitation Directive.

[29] According to Article 1(1) of 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 Facilitation Framework Decision further states that if imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than six years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

[30] Article 1(1) of the Framework Decision, infringements shall be punishable by effective, proportionate and dissuasive penalties which entail extradition.

[31] Article 1(2) of the Framework Decision.

[32] According to Article 1(3) of the Facilitation Framework Decision, 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 eight 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.

Notwithstanding the lack of specificity as regards the level of criminal sanctions to be imposed by Member States, it is clear that the scope of criminalisation 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). It is clear that the EU approach aims at preventing entry into EU territory and targets not only the smugglers but also the smuggled. Alessandro Spena makes an insightful point in legal semiotics by drawing our attention to the terminological differences between international law, which defines smuggling as procuring irregular entry, and EU law, which focuses on assistance. Spena notes that "while assisting denotes an ancillary action, which entails that the principal action is performed by the person who is assisted, 'procuring' denotes instead a stand-alone action, with a meaning of its own"[33]. The negative impact of the EU approach towards criminalisation on third country nationals wishing to apply for asylum is evident. The Directive does attempt to address this issue by granting Member States the discretion not to impose sanctions for facilitation and instead apply their national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned[34]. 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. According to a 2017 Commission Report, only seven Member States specifically include in domestic law an exemption from punishment for facilitation for humanitarian assistance[35].

The overcriminalisation of facilitation of entry in EU law has allowed Member States to use domestic criminal law in order to prosecute a wide range of elements of assistance to migrants, which are not motivated by, and do not involve, any financial benefit. Facilitation offences have been used to prosecute NGOs who are addressing state inaction in saving lives at sea[36], as part of a broader strategy of generating a hostile environment

[33] Alessandro Spena, «Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?» in S. Carrera / E. Guild, eds., *Irregular Migration, Trafficking and Smuggling of Human Beings,* Brussels: CEPS, 2016, 37.

[34] Article 1(2) of the Facilitation Directive.

[35] Commission, Staff Working Document – REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence SWD (2017) 117 final, Brussels, 22.03.2017, p 14.

[36] For an overview see Sergio Carrera *et. al.*, *Policing Humanitarianism. EU Policies Against Human Smuggling and their Impact on Civil Society*, London: Bloomsbury, 2020, chapters 4 and 5.

targeting civil society[37]. The Council of Europe Commissioner for Human Rights has noted that:

> A particularly worrying aspect of certain member states' interaction with NGOs engaged in the monitoring in the Mediterranean and, in case of people in distress, operating a rescue operation, is the frequent smear campaigns and media attacks against them, as well as repeated criminal investigations, often on the allegation that NGOs-operated vessels have engaged in smuggling. Whilst states have the authority to investigate and prosecute any criminal acts, this power must be used in good faith and should not simply be deployed as a way to prevent NGOs from doing their work[38].

In addition to targeting of civil society, the overcriminalisation of the facilitation of unauthorised entry has further resulted in the prosecution of citizens assisting migrants[39]. It has also resulted in the prosecution of migrants for assisting other migrants[40], a practice which would be contrary to international law according to *Appulonappa,* and which is currently subject

[37] For an overview see Valsamis Mitsilegas, «Contested Sovereignty in Preventive Border Control: Civil Society, the "Hostile Environment" and the Rule of Law», 36-56.

[38] See Council of Europe Commissioner above.

[39] For examples in Greece, see Nikolaos Chatzinikolaou, «Crimmigration in Greece: A Study of Exceptional Derogations from the Rule of Law within a Permanent Situation of Emergency» in Gatta / Mitsilegas / Zirulia, *Controlling Immigration*, 165-192. And in the context of irregular stay, see the "Fraternité" ruling of the French Conseil Constitutionnel (*Décision* No. 2018/717-718 QPC, 6 July 2018) concerning the prosecution of two individuals (an academic and the activist farmer Cédric Herrou) relating to facilitation offences in the context of the crossing of the land border between Italy and France in Val Roya. The ruling is significant in that the *Conseil Constitutionnel* has used the constitutional principle of *fraternité* as the basis of the freedom to provide humanitarian assistance, without consideration of the regular character of the assisted person's stay in the national territory. However, the *Conseil Constitutionnel* went on to balance (or, in its own words, to reconcile) the principle of *fraternité* with the safeguarding of public order, in whose framework the fight against irregular migration falls. The outcome of this exercise in the particular case was for the *Conseil Constitutionnel* to accept the limitation of criminalisation in cases of facilitating irregular movement (*circulation*) on humanitarian grounds, without this limitation being extended to cases of irregular entry (paras 8-10).

[40] Flavia Patanè *et al.*, «Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy», *Refugee Survey Quarterly* 39 (2020) 123-152. See also Flavia Patanè, «Migrants' Agency in Smuggling Routes: Current Developments, Criminalizing Practices and Socio-Legal Implications in the EU» in V. Mitsilegas / L. Tsourdi / N. Vavoula, *Intertwining Criminal Justice and Immigration Control in the EU*, Abingdon: Routledge, [forthcoming], who points out situations where migrants have been coerced into acting by smugglers and refers to an article from 2022 on *The New Humanitarian*, the number of migrants accused of facilitating irregular migration between 2015 and 2021 amount to more than 2000 in Italy, to hundreds in the UK and to around 7000 in Greece: https://www.thenewhumanitarian.org/investigation/2022/09/01/European-courts-prosecution-asylum-seekers.

to litigation before the CJEU[41]. Moreover, the criminalisation of facilitation has been combined with prosecution on different grounds, such as conspiracy or complicity[42], on different offences, such as organised crime offences[43], and by the use of preventive measures such as boat seizures and entry bans, imposed on legally questionable grounds of organised crime and illegal waste disposal. These prosecutions place NGOs on the defensive, and have a direct negative impact on rescue operations by suspending the work of NGOs or putting a stop to it altogether[44] – with the dismantling of humanitarian NGOs constituting the ultimate preventative tool for states[45].

These practices of criminalisation to create a hostile environment challenge not only the protection of fundamental rights of migrants but also the rule of law, as prosecutions and administrative measures aimed at generating a hostile environment constitute key examples of arbitrariness by the state. Domestic courts have begun to push back to this agenda, as evidenced by the *Kinsa* litigation currently pending before the CJEU, and by a number of domestic rulings[46], including the ruling of the Italian *Corte di Cassazione* in the well-publicised prosecution of Carola Rackete, the captain of SeaWatch 3[47]. The prosecution did not involve facilitation offences, but prosecution on the grounds of resistance to public officials and resistance and violence against warships. In a significant ruling in favour of humanitarianism, the *Cassazione* rejected the appeal to uphold the charges by essentially giving precedence to the duty of rescue as enshrined in international law and to obligations under international refugee law, and rejecting the argument that

[41] See the *Kinsa* litigation, section 2.3. below.

[42] See also in the context of the Jugend Rettet case that the crew was *charged not with being part of a criminal organisation but with complicity to facilitation*: Alessandro Spena, «Migrant Smuggling: A Normative and Phenomenological View from Italy», in V. Militello / A. Spena, eds., *Between Criminalization and Protection. The Italian Way of Dealing with Migrant Smuggling and Trafficking within the European and International Context*, Leiden: Brill, 2019, 5-54, 40.

[43] See Marta Minetti, «The Facilitators' Package, Penal Populism and the Rule of Law», *New Journal of European Criminal Law* 11/3 (2020) 335-350.

[44] The Commissioner for Human Rights has also noted that the mere initiation of an investigation is sufficient to disrupt their activities for a long time, or even permanently (see above).

[45] Valsamis Mitsilegas, «Contested Sovereignty in Preventive Border Control: Civil Society, the "Hostile Environment" and the Rule of Law».

[46] See in this context the recent ruling of the Trapani Court in a case involving the prosecution of NGOs including *Iuventa,* where the Court found that there was no evidence to prove the collaboration between NGOs and smugglers and pointed out to an investigation based on incomplete material and analysed only in a partial perspective (Ruling n. 126/2024, 20 May 2024).

[47] *Corte di Cassazione*, *Terza Sezione Penale*, 16 January 2020 (judgment issuing), 20 February 2020 (judgment release), No. 6626 (www.sistemapenale.it, 24 February 2020).

a ship constitutes a safe place for the purposes of rescue at sea. The Court has thus accepted that bringing migrants recovered in the context of rescue activities in international waters, also in the face of an express ban on entry into territorial waters and / or in the absence of authorization to dock, constitutes fulfilment of the duty of rescue at sea[48]. It has been said that the ruling by the *Cassazione* can be read as enshrining a "right of resistance" against state action in breach of hierarchically higher legal principles[49].

By using the threat of criminal sanctions, the EU measures on facilitation 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, generating thus a hostile environment and a chilling effect towards assistance to migrants. 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"[50]. This message is reinforced by the very broad criminalisation of human smuggling in the national law of Member States, with key examples including the criminalisation of any contact with irregular migrants not only at the point of entry but within the territory of the state up to leading to exit[51], and the, expressly called for by the Facilitation Directive, criminalisation of attempt to smuggle. As Spena has noted commenting on Italian law, the fact that this law does not require that the conduct be successful, with smuggling crimes deemed to be committed independently of the attainment of the result, creates a condition teleologi-

[48] Stefano Zirulia, *La Cassazione sul caso Sea Watch: le motivazioni sull'illegittimità dell'arresto di Carola Rackete*, 24 February 2020, available at https://www.sistemapenale.it/it/scheda/cassazione-sea-watch-illegittimo-larresto-di-carola-rackete. Note also the Court of Justice ruling in *Sea Watch,* (Joint cases C-14/21 and C-15/21, ECLI:EU:C:2022:604) concerning the imposition of administrative measures to *Sea Watch*. The Court relied upon international law of the sea and upheld the rule of law by placing limits upon state arbitrariness in imposing sanctions. See Valsamis Mitsilegas, «Challenging the Hostile Environment for Search and Rescue at Sea: Reflections from the *Sea Watch* litigation», in V. Militello / A. Spena, eds., *The Challenges of Illegal Trafficking in the Mediterranean Area,* Cham: Springer, 2023, 141-149.

[49] Stefano Zirulia, «La Cassazione sul caso Sea Watch: le motivazioni sull'illegittimità dell'arresto di Carola Rackete».

[50] Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications* (Issue paper prepared by Elspeth Guild, 2009), available at rm.coe.int/16806da917.

[51] See the ruling of *Areios Pagos* (the Greek Supreme Court) AP 1344/2016, according to which the terms of transport and onward transfer of irregular migrants are synonymous and apply from the points of entry and internal or external borders to the Greek territory and vice-versa towards the territory of an EU Member State or of a third state. It is not required for criminalisation that the transfer occurs directly from the border – any transfer of the migrant within the country will suffice.

cally linked to illegal entry[52]. The preventive continuum between the criminalisation of facilitation of irregular entry and the criminalisation of entry *per se* is thus clearly highlighted[53].

2.3. The potential for reform: the *Kinsa* litigation

A game changer in the reform of EU criminal law on facilitation has appeared in the form of a reference for a preliminary ruling to the Court of Justice by the Tribunale di Bologna in Italy. In the *Kinshasaa* reference[54] (now renamed as Kinsa), lodged on 21 July 2023, the referring Court has asked the CJEU whether the criminalisation of the facilitation of unauthorised entry in EU law and in national law even where the conduct is carried out on a non-profit-making basis, without providing, at the same time, an obligation on Member States to exclude from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance is compatible with the Charter. The referring Court focuses on the principle of proportionality referred to in Article 52(1), read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17, as well as the rights to life and physical integrity referred to in Articles 2 and 3, the right to asylum referred to in Article 18 and respect for family life referred to in Article 7 of the Charter. The reference is welcome in stressing the potential adverse effect of the overcriminalisation of facilitation on a wide range of fundamental rights.

The facts in *Kinsa* lay bare the shaky normative foundations and adverse effects of overcriminalisation of facilitation of unauthorised entry in EU and Italian law[55]. They involve the prosecution of a Congolese woman arriving at the air border of Bologna for the facilitation of the unauthorised entry of her minor daughter and niece[56]. The referring court queries the compatibility of the national legislation, and the underlying EU law, with the Charter.

[52] Alessandro Spena, «Migrant Smuggling: A Normative and Phenomenological View from Italy», 26.

[53] Valsamis Mitsilegas, «The Criminalisation of Migration in the Law of the European Union. Challenging the Preventive Paradigm».

[54] Case C-460/23 *Kinshasa,* Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 – Criminal proceedings against OB (*OJ* C, C/338, 25.09.2023, 12, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62023CN0460).

[55] Valsamis Mitsilegas, «Reforming EU Criminal Law on the Facilitation of Unauthorised Entry: The new Commission proposal in the light of the Kinshasa litigation», *New Journal of European Criminal Law* 15 (2024) 3-11.

[56] Reference, paras. 1-5.

It states that the offence of facilitation of unauthorised entry in Italian law is by its nature an offence of danger, in that the Italian legislature, in order to prevent in advance the infringement of a legal interest, already seeks to penalise the conduct in itself, on the sole ground that acts are carried out with the intention of procuring the unauthorised entry of non-EU nationals, irrespective of the reasons for those acts – with the need for a specific intention to make a profit from the offence not being foreseen[57]. The Court adds that the offence is that it is "*free-form*", in the sense that the offence may be committed in any way by the perpetrator, using any means[58]. The criminal penalty also applies to those who have facilitated the unauthorised entry of a foreign national for humanitarian assistance purposes and even if the foreign national is in need[59]. The referring court notes that the Italian legislation complies with the Facilitators' Package[60] and that in the present cases it is clear that the conduct of the accused objectively corresponds to conduct punishable for the offence provided for in domestic law[61]. Yet the referring court questions the reasonableness of such criminalisation and its compatibility with fundamental rights enshrined in the Charter, noting in particular that in its view the protection of those fundamental rights must be taken into account in the balancing exercise which must form the basis of the common immigration policy; and that in both the EU regulatory framework and the Italian legislation, there is a lack of proportionality in favour of the protection of the interest in controlling migration flows, which also results in an unnecessary sacrifice of fundamental rights[62].

The *Kinsa* litigation presents a first-class opportunity for reform of the paradigm of overcriminalisation of migration that the Facilitators Package has introduced. The hearing in the case took place on June 18 and the Court's ruling is expected in a few months' time (the Advocate General's Opinion at the time of writing is scheduled for November 5). The ruling will be significant not only in interpreting the current Facilitators' Package and its implementation, but also in giving guidance to the negotiations of the new facilitation proposal the Commission tabled in November 2023[63], which appears to be a response to the *Kinsa* litigation but maintains as will be

[57] *Ibid*., para. 8.
[58] *Ibid*., para. 9.
[59] *Ibid*., para. 11.
[60] *Ibid*., para. 12.
[61] *Ibid*., para. 22.
[62] *Ibid*., para. 17.
[63] COM(2023) 755 final, Brussels, 28.11.2023.

seen below an overcriminalisation paradigm[64]. The CJEU will have a number of options if it finds shortcomings in EU law itself – from annulling the Facilitators' Package in its entirety (following the example of the ruling on data retention[65]) to "re-writing" the package in conformity with the Charter (following the example of the ruling on the EU PNR Directive[66]), in order to limit criminalisation and to inject legal certainty into EU law and its implementation. It is for the Court to further stress the requirement for national legislators and national courts to implement EU law in conformity with the Charter. Moreover, the Court will have the opportunity to provide guidance (as it has done for instance in the *Taricco* ruling in terms of the negotiations of the EU PIF Directive[67]) on the content of the new Commission facilitation proposal as this is negotiated by the EU legislators.

The question of compliance of the existing and future facilitators' package with the Charter, viewed from the prism of proportionality, is obviously central to the litigation. However, this contribution argues that these matters must be viewed in conjunction with, and in the context of, further EU law principles including legality, effectiveness and conformity with international law. It is also argued that *Kinsa* must be an avenue for a holistic assessment of the Facilitators' Package, examining criminalisation as a whole and not only in terms of the specific facts of the case.

a) Legality and the Rule of Law

When examining the current Facilitators' Package it is worth noting its drawbacks in terms of rule of law and quality of law making. This is "old" third pillar law, more than 20 years old. Unlike measures in related areas of criminal law (such as trafficking in human beings where legislation has constantly been revised, also after the entry into force of the Lisbon Treaty), the Commission was for many years reluctant to revise the Facilitators' Package (arguing as recently as 2017 that such reform was not necessary)[68] and only putting forward a new proposal in response to litigation before the CJEU. The Facilitators' Package was a third pillar Member State initiative, adopted with minimal justification and with no impact assessment. The adopted text fails to comply with the principle of legality under Article

[64] Valsamis Mitsilegas, «Reforming EU Criminal Law on the Facilitation of Unauthorised Entry: The new Commission proposal in the light of the Kinshasa litigation».

[65] Case C-293/12, *Digital Rights Ireland,* ECLI:EU:C:2014:238.

[66] Case C-817/19, *Ligue des Droits Humains,* ECLI:EU:C:2022:491.

[67] C-105/14, *Taricco and Others,* EU:C:2015:555.

[68] See reference to the Commission REFIT package above.

49(1) of the Charter in terms of the elliptical use of terms, the breadth of criminalisation and the lack of legal certainty and foreseeability regarding the extent, reach and existence of a humanitarian exception to criminalisation.

b) Effectiveness – EU Asylum Law

Another principle that it is worth considering is the principle of effectiveness of EU law. The Court has used this principle to set limits to the criminalisation of irregular entry and stay under the national law of Member States[69], assessing national criminalisation in the light of the effectiveness not of a rights giving EU law provision, but rather in the light of the effectiveness of the EU Return Directive[70], *Kinsa* is an opportunity for the Court to utilise the principle of effectiveness in order to assess the compatibility of EU and national criminal law on facilitation with EU law. Zirulia has argued that the current criminalisation of facilitation falls short of the principle of effectiveness regarding EU border management policies[71]. I would argue that the criminalisation of facilitation in the Facilitators' Package and in the Commission's new proposal falls fundamentally short of the principle of effectiveness in EU asylum law. Both the existing package in force and the new proposals have a negative impact on access to asylum in the EU, which is a fundamental element of EU asylum law[72] and which forms an essential part of the right to asylum in the Charter.

c) Taking into Account International Law

Examining the conformity of the Facilitators' Package with international law is important in view of the considerably adverse consequences the hostile environment generated by the Facilitators' Package has for international law obligations of saving lives at sea and of enabling access to

[69] Case C-61/11 PPU *Hassen El Dridi, alias Karim Soufi* [2011] ECR I-3031.

Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2011] ECR I-12709.

[70] Valsamis Mitsilegas, «The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law», in M. J. Guia / M. Van der Woude / J. Van der Leun, eds., *Social Control and Justice: Crimmigration in an Age of Fear*, The Hague: Eleven International Publishing, 2012, 87-114.

[71] https://verfassungsblog.de/waiting-for-kinsa/

[72] See Valsamis Mitsilegas, «The EU External Border as a Site of Preventive (In)justice», *European Law Journal* 28 (2022) 263-280.

asylum[73]. The CJEU has already stressed the requirement for EU law to be interpreted taking into account international law (in that case the SOLAS Convention and the Convention on the Law of the Sea) in its ruling in *Sea Watch*[74]. The *Sea Watch* litigation involved the generation of a parallel framework of hostile environment towards NGOs saving lives at sea through the imposition by the state of administrative penalties aiming at de facto stopping the search and rescue operations of NGOs in the high seas. The CJEU took into account international law obligations and set out a series of limits to state enforcement challenging state arbitrariness and the rule of law deficit inherent in this hostile environment[75].

Sea Watch is entirely relevant to the *Kinsa* litigation both in terms of the approach towards the rule of law and in terms of the need to take into account international law when examining the legality of EU law. In the case of *Kinsa,* a further – and key – international law instrument to be considered is the UN Convention on Transnational Organised Crime (the Palermo Convention). Criminalisation of facilitation (or migrant smuggling as per UN legal terminology) in international law differs significantly from the EU law paradigm as it frames criminalisation within the specific aim and context of fighting transnational organised crime, and thus makes criminalisation expressly conditional upon the existence of financial gain – a condition absent in EU law, which leads to overcriminalisation and the hostile environment[76]. *Kinsa* is an opportunity for the Court to limit and set clear parameters to the criminalisation of facilitation in EU law by framing criminalisation within the specific objective of fighting organised crime.

The *Kinsa* litigation presents an opportunity for broader reform of EU criminal law on facilitation, with the ruling providing a framing of criminal law within the Charter and key international law obligations, providing thus legal certainty and setting clear limits to criminalisation. The intervention of the Court is even more significant in view of the recent proposal of the Commission for a reform of the criminal law of facilitation[77].

[73] Valsamis Mitsilegas, «Contested Sovereignty in Preventive Border Control: Civil Society, the "Hostile Environment" and the Rule of Law», 36-56.

[74] Joined Cases C-14/21 and C-15/21, *Sea Watch,* ECLI:EU:C:2022:604.

[75] For an analysis see Valsamis Mitsilegas, «Challenging the Hostile Environment for Search and Rescue at Sea: Reflections from the *Sea Watch* litigation», 141-149.

[76] On the differences between international and EU law see Valsamis Mitsilegas, «The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law», *New Journal of European Criminal Law* 10/1 (2019) 68-85.

[77] COM(2023) 755 final The *Kinsa* litigation has arguably acted as a catalyst for the tabling of new legislation by the Commission. In its evaluation only 6 years ago, the Commission concluded that no new legislation amending the 2002 Facilitators'

Criminalisation remains broad in the new proposal, including by the continuation of not expressly including a humanitarian exception in the legally binding part of the text; the introduction of the criminalisation of facilitation where there is a high likelihood of causing serious harm to a person; and the introduction of a criminal offence of publicly instigating facilitation[78]. The Commission proposal thus maintains the hostile environment towards those who help migrants, and does little to enhance legal certainty and to take the Charter and international obligations seriously. It may be tempting for certain litigants to ask the Court to focus on the facts of the individual case narrowly (which reveal a family context and present a key example of overcriminalisation under the current system) and to focus on the existing legislation in force rather than also on the Commission new proposal, arguing that further discussions on the scope of criminalisation will take pace in negotiations. This contribution is a plea for the Court to take a broader approach, and examine the impact of criminalisation on fundamental rights, international obligations and the rule of law more broadly, by focusing on access to asylum. *Kinsa* is a golden opportunity to take rights and the rule of law seriously in an issue which has been dominated by executive overreach.

3. Criminalising Entry

A continuum underpinning the criminal law of the border consists of the addition, to the criminalisation of the facilitation of entry, also of the facilitation of entry as such. Here again we can observe the use of criminal law in an area which administrative law is sufficient to regulate. This section will evaluate critically the criminalisation of entry in national law, by highlighting its shaky normative foundations and the limits placed on national criminal law by EU law under the case-law of the CJEU. The section will also highlight the challenges posed by a further extension of criminalisation, namely the criminalisation of re-entry through the breach of entry bans.

Package was necessary and rather adopted non-legally binding guidance on the interpretation of the 2002 legislation: Communication from the Commission, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, OJ* C 323, 1.10.2020, 1-6.

[78] For an analysis see Valsamis Mitsilegas, «The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law».

3.1. The Shaky Normative Foundations of Criminalisation of Entry

The analysis of the criminalisation of facilitation of entry, especially as regards efforts by states to broaden the scope of criminal offences, demonstrates that the main purpose behind the criminalisation of human smuggling by certain legislators is really the prevention of migration flows towards their territory. The aim is that the threat of criminalisation and prosecution of smugglers will ultimately target migrants and lead to a reduction of migrant flows. A key question to be addressed in this context is whether the criminalisation of facilitation leads to the direct or indirect criminalisation of migrant mobility *per se*.

As mentioned above, the Smuggling Protocol does not provide expressly for the criminalisation of migrants themselves in the form of irregular entry or stay. Indeed, such criminalisation would not be consistent with the framing of human smuggling as a manifestation of organised crime committed for financial gain. Irregular entry and stay are not criminalised as such in EU law either[79]. Yet they are treated as criminal offences in the legal systems of a number of EU Member States[80]. The criminalisation of irregular migration along these lines has been characterised as "precautionary criminalisation", with irregular entry viewed as a wrong of a public kind (*malum in se*)[81]. The use of criminal law in this manner is however problematic. It is unclear what criminal law is designed to achieve, where the harm in the criminalised conduct lies and what the legal interest to be protected consists of. Prevention is key in the criminalisation of irregular entry and stay, with criminal offences being designed in order to prevent the presence of undesirable individuals within the territory of the state. Criminal law is used here in addition to administrative immigration law, although the arrangements of the latter would suffice to legally regulate migration flows[82].

Spena highlights in this context the stigmatisation of migrants by criminal law, which moves from targeting unlawful conduct to targeting undesirable individuals in a logic of pre-emption, where "crimes should be averted by directly selecting and picking out those persons who, because of their matching a given actor stereotype (*Tätertyp*), can be assumed/presumed to

[79] Valsamis Mitsilegas, *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law.*

[80] See European Union Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014).

[81] Alessandro Spena, «*Iniuria Migrandi*: Criminalization of Immigrants and the Basic Principles of the Criminal Law», *Criminal Law and Philosophy* 8 (2014) 635-657.

[82] See the contribution by Dulce Lopes, «Migration, Borders and EU Law», in this volume.

be dangerous, deviant, disloyal, and so on"[83]. Instead of addressing a concrete harm which has been committed, criminal law is used here to prevent, and to send a strong symbolic message against specific categories of individuals and their undesirable conduct. In this manner, the concept of harm is stretched beyond its limits: criminal law is being used to punish conduct which can be regulated by administrative law, and thus becomes symbolic criminal law in sending a signal on the undesirability and dangerousness of the migrant. As Aliverti has eloquently noted,

> We should resist that expansive conception of harm, which runs the risk of turning it in a meaningless principle because the conducts that can be criminalised under it are too far removed from the causation of actual harm….that diluted version of the harm principle can espouse, buttress and legitimise bigoted and prejudiced interests and demands for criminalisation that are motivated by genuine or fabricated social anxieties and fears about suspicious other….embracing of subjective security[84].

3.2. Limits to national criminalisation by EU law – the Return Directive and its effectiveness

The criminalisation of migration along these lines not only does not sit well within fundamental principles of criminal law, but is also at odds with one of the key aims of immigration enforcement policy, which is the return of irregular migrants. This contradiction has been highlighted in cases where the CJEU was called upon to rule on the compatibility of national law criminalising irregular entry and stay with the EU Return Directive[85], which has introduced a considerable level of harmonisation of national

[83] *Ibid.*, 646.

[84] Ana Aliverti, «The Wrongs of Unlawful Immigration», *Criminal Law and Philosophy* 11 (2017) 375-391, 386.

[85] 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 [2008] *OJ* L 348, 24.12.2008, 98-107 (Return Directive). For an overview of the Return Directive see among others Diego Acosta Arcarazo, «The Returns Directive: Possible Limits and Interpretation» in K. Zwaan, ed, *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishers, 2011, 7; Diego Acosta Arcarazo, «The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115: The Returns Directive)», *European Journal of Migration & Law* 19 (2009) 19-39; Anneliese Baldaccini, «The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive», *European Journal of Migration & Law* 11 (2009) 1-17.

legal systems in terms of return procedures, conditions and deadlines[86]. In a series of rulings, the Court of Justice of the European Union has set limits to national powers to criminalise irregular entry and stay on the basis of the need to achieve the effectiveness of EU law, and in this case the Return Directive. The first of these cases is *El Dridi*[87], who was sentenced to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds. 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 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[88]. The Court added that 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[89]. The Directive 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[90].

The second important ruling was *Achughbabian*[91], which concerned the compatibility of French law criminalising irregular entry and residence with the Return Directive. 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

[86] For an overview of the case law of the EU Court of Justice on criminalisation see Niovi Vavoula, «The Interplay between EU Immigration Law and National Criminal Law – The Case of the Return Directive», in V. Mitsilegas / M. Bergström / T. Konstantinides, eds., *Research Handbook on EU Criminal Law*, Cheltenham: Edward Elgar Publ., 2016, 294-314.

[87] Case C-61/11 PPU *Hassen El Dridi, alias Karim Soufi* [2011] ECR I-3031.

[88] *Ibid.,* para 57-58.

[89] *Ibid.*, para 59.

[90] *Ibid.,* para 62.

[91] Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2011] ECR I-12709.

French territory. National legislation such as that at issue in the main proceedings was likely to thwart the application of the common standards and procedures established by the Return Directive and delay the return, thereby, like the legislation at issue in *El Dridi*, undermining the effectiveness of the Directive[92]. The Court applied the *El Dridi* reasoning and emphasised that the principles of effectiveness and loyal cooperation must be respected in order to ensure the objectives of the Return Directive, in particular that return must take place as soon as possible[93]. 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. According to the Court, 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[94]. Criminalisation was thus incompatible with EU law.

In setting limits to the blanket criminalisation of irregular entry and stay by EU Member States, the CJEU highlighted the protective function of EU law, all the more remarkable because protection against criminalisation has emerged from an EU Directive focusing primarily on enforcement[95]. Such protective function is inextricably linked with the adoption of a teleological approach by the CJEU, stressing the need for Member States to uphold the effectiveness of EU law. This protective function is not unlimited: the Court found that national law imposing custodial sentences[96] or home detention[97] was incompatible with EU law because detention would jeopardise the main objective of the Directive which is actually the expulsion of irregular migrants from the territory of the EU, while punishment not involving detention is not necessarily incompatible with the Directive[98].

[92] *Ibid.,* para 39.

[93] *Ibid.,* para 43-45.

[94] *Ibid.,* para 45.

[95] Valsamis Mitsilegas, «The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law».

[96] See Case C-61/11 PPU, *Hassen El Dridi*, n 77 above and Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, n 91 above. Also see Case C-47/15, *Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai,* Judgment of 7 June 2016.

[97] Case C-430/11, *Md Sagor*, Judgment of 6 December 2012.

[98] Valsamis Mitsilegas, *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*, ch 4.

3.3. Criminalising re-entry

The CJEU has also upheld national criminal law imposing custodial sentences in cases of breaches of re-entry bans, setting up an artificial distinction between first entry and re-entry[99]. Entry bans are intended to supplement a return order by prohibiting the person concerned, for a specified period of time following his return, thus after leaving the territory of the Member States, from again entering and staying in that territory[100]. The Court held in this ruling that the starting point of the entry ban must be calculated from the date on which the person concerned actually left the territory of the Member States[101]. Yet the Court has further justified extended criminalisation within the territory by upholding national legislation providing for the imposition of a custodial sentence to an irregularly staying third-country national for whom the return procedure has been exhausted but who has not actually left the territory of the Member States, where the criminal act consists in an unlawful stay with notice of an entry ban issued in particular on account of that third-country national's criminal record or the threat he represents to public policy or national security[102].

Entry bans are a further reflection of the preventive character of the criminalisation of migration. They have been validly characterised as a feature of forward-looking governance of migration demonstrating the temporal dimension involved in the governance of migration by establishing borders for individuals that can be actualised in the future – creating borders which persist for deportees after the implementation of removal[103]. The difference in the CJEU approach between the criminalisation of entry and the criminalisation of re-entry is questionable and highlights the

[99] Case C-290/14, *Skerdjan Celaj*, Judgment of 1 October 2015. By contrast, see the Opinion of Advocate General Szpunar (28 April 2015), who applied the CJEU's logic in *El Dridi* and *Achughbabian*.

[100] C-225/16, *Mossa Ouhrami*, ECLI:EU:C:2017:590, para. 51.

[101] *Ibid*.

[102] Case C-806/18, *JZ*, ECLI:EU:C:2020:724. The Court attempted to strike a balance by stating that a custodial sentence is justified provided that the criminal act is not defined as a breach of an entry ban and that that legislation is sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness, which is for the referring court to ascertain. In another ruling, the Court applied the Return Directive to an entry ban issued by a Member State which has not exercised the option provided for in Article 2(2)(b) of that directive against a third-country national who is on its territory and is the subject of an expulsion order, for reasons of public security and public policy, on the basis of a previous criminal conviction – C-546/19, *Westerwaldkreis* ECLI:EU:C:2021:432.

[103] Jukka Könönen, «Borders of the Future: policing Unwanted Mobility through Entry Bans in the Schengen Area», *Journal of Ethnic and Migration Studies* 49 (2023) 2799-2816, 2801-2802.

willingness of the Court to assign a greater moral culpability to migrants who have defied the very system of immigration enforcement that the EU and Member States have put in place, although the distinctiveness in the interests protected by national law criminalising re-entry or the harm in re-entry are difficult to pin down unless re-entry is viewed as an additional affront to state sovereignty as translated in its capacity to guard the border effectively[104]. Having said that, the fundamental approach of the Court of Justice in *El Dridi* and *Achuchbabian* remains good law and is important in overturning national symbolic criminal law on irregular migration and placing criminalisation powers within the framework of the effective delivery of immigration enforcement objectives.

4. Detention as Criminalisation

A further element of the criminal law of the border consists of immigration detention. It could be argued that immigration detention falls outside of the scope of criminal law as it consists of an administrative, preventive measure. The aim of this section is to demonstrate that the legal and practical reality is more nuanced, and to highlight the clear interactions between the criminal and preventive aims and reality of detention. The use of detention as a criminalisation tool targeting migrants who are viewed as dangerous will be highlighted and the rule of law deficit in the evolution of immigration detention measures will be evaluated.

4.1. The Criminal and Preventive Nature of Immigration Detention

The use of immigration detention in EU law is widespread – extending from asylum to return procedures. It has been argued that immigration detention differs from imprisonment in that it does not contain the rule of law safeguards of punishment[105] and in that its aims do not involve the rehabilitation of detainees and their integration to society post-detention –

[104] Valsamis Mitsilegas, «The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law», 83.

[105] Jukka Könönen, «Multiple Functions of Immigration Detention: Police Measures in the Governance of Mobile Populations», *Punishment and Society* 26/3 (2023) 507-526. He argues that immigration enforcement measures represent a form of punitive discipline, targeting non-members under the rule of the police, instead of punishment pre-supposing the existence of equals under the rule of law. On the lack of procedural safeguards in immigration detention, see Andrew Ashworth / Lucia Zedner, *Preventive Justice,* Oxford: OUP, 2014, chapter 10.

but rather they are a means to remove individuals from the territory[106]. Yet it is submitted that immigration detention is a key example of the criminalisation of migration. Detention is a measure with a strong punitive dimension and bears heavy consequences for the protection of fundamental rights as it involves deprivation of liberty. It is problematic for this far-reaching measure to be imposed for the purposes of the administrative management of migration, both in terms of proportionality and in terms of legality and the exercise of state arbitrariness in imposing immigration detention. Detention constitutes coercive state intervention which is similar to imprisonment imposed upon persons who are not suspected or convicted of having committed any criminal offence[107]. At the same time, the criminalisation of migration through immigration detention is based on a strong preventive rationale, underpinned by the view of the migrant as a risk. As Campesi has noted, immigration detention is an inherently punitive measure having a powerful stigmatizing effect, strengthening the public perception that irregular migration is tied to crime and disorder and depends on the characterization of migrants not just as unwanted outsiders but also as potentially dangerous subjects[108]. Campesi notes that:

> immigration detention that can be related to the symbolic dimension of penalties… clearly belongs to the family of preventive measures, given that in its implementation it follows the logic of a control model in which the exercise of coercive powers is not justified on account of 'individual responsibility' and 'culpability', but rather is based on the construction of abstract typologies of 'dangerous individuals' identified as presenting risks to society… according to this argument, migrants placed in detention are never considered to be full legal subjects but are taken into custody precisely because they are deemed irresponsible and untrustworthy[109].

This preventive character of immigration detention based on the perception of the migrant as risk is reflected in EU law, which contains a number of provisions allowing immigration detention in the territory. Before the adoption of the EU Migration Pact EU asylum law (the reception

[106] Katja Franko, *The Crimmigrant Other. Migration and Penal Power,* Abingdon: Routledge, 2020, 69, referring to Mary Bosworth, «Subjectivity and Identity in Detention: Punishment and Society in a Global Age», *Theoretical Criminology* 16/2 (2012) 123-140.

[107] Valsamis Mitsilegas, *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law.*

[108] Giuseppe Campesi, «Genealogies of Immigration Detention: Migration Control and the Shifting Boundaries Between the "Penal" and the "Preventive" State», *Social and Legal Studies* 29 (2020) 527-548, 528-529.

[109] *Ibid*., 541.

conditions Directive and the Dublin Regulation) and EU immigration law (the Return Directive) all contain provisions on detention and at the heart of the justification of detention in all three instruments is the perception of migrants as entailing a "risk of absconding"[110]. The criminal law undertones of the terminology of "risk of absconding" have been noted by authors[111] reflecting a framing of the migrant as risk and resulting potentially intro further criminalisation of migration through the (over)use of immigration detention by Member States. The CJEU has attempted to place limits to national discretion in defining grounds of detention by requiring a minimum of rule of law safeguards related to the quality and foreseeability of law[112] and requiring legislation to articulate clearly objective criteria underlying

[110] See Article 15(1)(a) of the Return Directive (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* L 348, 24.12.2008, 98-107); Article 8(3) of the Reception Conditions Directive (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) *OJ* L 180, 29.6.2013); and Article 28(2) of the Dublin Regulation (requiring a significant risk of absconding) (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 an application for international protection lodged in one of the Member States by a third-country national or a stateless person, *OJ* L 180, 29.6.2013, 31-59). The asylum measures have now been revised in the EU Migration Pact – see Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, 2024/1351, 22.5.2024; and Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection, *OJ* L, 2024/1346, 22.5.2024.

[111] Majcher notes that the concept of absconding embraces penal law logic – Izabella Majcher, «Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on Their Movement under EU Law», *Refugee Survey Quarterly* 40 (2021) 82-105, 97. Costello and Mouzourakis note that the term is usually invoked in the criminal law context when individuals against whom there is a reasonable suspicion of having committed a crime flee in order to evade prosecution. Cathryn Costello / Minos Mouzourakis, «EU Law and the Detainability of Asylum Seekers», *Refugee Studies Quarterly* 35 (2016) 47-73.

[112] Case C-528/15 *Al Chodor,* ECLI:EU:C:2017:213. The CJEU held that the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness (para. 40). It added that only a provision of general application could meet the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness (para. 43). Member States are required to establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant who is subject to a transfer procedure may abscond (para. 47).

the reasons for believing that an applicant may abscond[113]. However, the CJEU has in another ruling justified detention in order to prevent risk of absconding in the asylum process on the basis of the proper functioning of the Common European Asylum System[114] with detention allowing the applicant to be available to the national authorities so that they are able, to interview him and, consequently, to contribute to the prevention of possible secondary movements[115]. The right to liberty thus takes second place to the preventive aims of immigration detention, with the CJEU normalising detention by elevating it to a constituent element of the effective functioning of the Common European Asylum System[116].

4.2. The Quest for the Rule of Law in Immigration Detention

The practices of immigration detention within the territory of EU Member States has been increasingly accompanied by detention at the border. It has been documented that the implementation of border procedures by EU Member States have led widely to immigration detention[117]. It has been noted in particular that secondary EU law, by not clearly defining the relationship between border procedures and detention, leaves Member States too much scope for applying de facto detention practices[118]. This lack of clarity leads to considerable diversity as regards the legal treatment of detention between Member States. The result is that practices that are qualified as detention by one Member State may not be seen as such by

[113] Para. 47. For a case commentary see Niovi Vavoula, «The Detention of Asylum Seekers Pending Transfer under the Dublin III Regulation: *Al Chodor*», *Common Market Law Review* 56 (2019) 1041-1068.

[114] Case C-18/16. *K*. ECLI:EU:C:2017:680 The Court held that a measure based on the grounds set out in the first subparagraph of Article 8(3)(a) and (b) meets the objective of ensuring the proper functioning of the Common European Asylum System (para. 36).

[115] Para. 39.

[116] Izabella Majcher, «Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on Their Movement under EU Law», 96, argues that the Court's stance disregards the exceptional nature of detention of asylum-seekers under refugee law.

[117] *Border procedures in the Member States Legal assessment,* by G. Cornelisse and M. Reneman, at the request of the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament – Manuscript completed in November 2020, Key finding 11, in EPRS | European Parliamentary Research Service, *Asylum Procedures at the Border*. European Implementation Assessment, 2020, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf.

[118] EPRS | European Parliamentary Research Service, *Asylum Procedures at the Border*, above n. 117, 16-17.

another[119]. This diversity does not only demonstrate a lack of harmonisation, but also generates significant rule of law challenges. Member States mislabel detention practices and do not treat confinement of migrants as immigration detention, resulting in the non-applicability of EU law, including fundamental rights, standards in the detention of third country nationals.

The Court of Justice has attempted to address this rule of law deficit resulting from the reluctance of Member States to call detention by its name in the case of Commission v Hungary, involving immigration detention in transit zones[120]. The Court held that the detention of an applicant for international protection is an autonomous concept of EU law understood as any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter[121]. The use of autonomous concepts is not only an attempt by the Court to manage legal diversity[122], but can also be seen as an attempt to uphold the rule of law by bringing practices of detention within the scope of EU law. In another ruling involving border procedures, the Court has held that the concept of detention has the same meaning across EU immigration and asylum law[123], and articulated a number of safeguards underpinning the imposition of immigration detention in EU asylum law[124]. These safeguards include multiple proportionality checks[125] including establishing through an individual assessment that less coercive measures would not be effective[126]. National authorities cannot place an applicant for international protection in detention without having previously determined, on a case-by-case basis, whether such detention is proportionate to the aims which it pursues[127].

[119] Galina Cornelisse / Marcelle Reneman, «Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?», *European Law Journal* 26 (2020) 181-198.

[120] Case C-808/18, *Commission* v *Hungary (Reception of applicants for international protection)*, EU:C:2020:1029

[121] *Ibid*., para. 159 (by reference to Joined Cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, EU:C:2020: 367, para. 223).

[122] On the diversity management function of autonomous concepts in EU law, see Valsamis Mitsilegas, «Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice», *Common Market Law Review* 57/1 (2020) 45-78.

[123] Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ and SA, SA junior*, ECLI:EU:C:2020:367, para. 224.

[124] See in particular paras 256-265.

[125] See paras 258 and 264.

[126] Para. 258.

[127] *Ibid*.

The Court of Justice's rule of law parameters on immigration detention are important in assessing the move towards the normalisation of detention in the Pact – which as seen above extends the categories of third country nationals subject to border procedures and pre-screening measures while allowing the detention of third country nationals for these purposes[128]. Firstly, it is clear from the Court's case-law treating detention as a broad, autonomous concept, that EU law is applicable to national detention practices, including de facto detention, which may result from the implementation of the new asylum procedures and pre-screening measures[129] – including detention in transit zones and within the territory. Secondly, it is clear that the proportionality test developed by the CJEU requires an individualised, case-by-case assessment of the necessity of detention – a requirement which appears not to be met by the Pact proposals on generalised detention at the border. Thirdly, detention must be proportionate to the aims pursued by the legislation. While the CJEU has accepted that detention may be justified for the purposes of identifying asylum seekers, the proportionality test will not be met when the aims of the legislation are defined in an overtly broad manner – as is the case when legislation is justified under the general aim of preventing entry in the territory and secondary movements. Fourthly, from a legality perspective, detention can take place only if it is provided under an express ground set out in law[130]– as will be seen below, the interpretation of these grounds is narrow.

The CJEU has elaborated on rule of law safeguards regarding detention in more recent case-law. In a ruling involving claims of instrumentalisation[131], the Court held that EU law precludes legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency

[128] On the extension of the categories of third country nationals who will be subject to detention under the Commission Pact proposals, see also Maarten den Heijer, «The Pitfalls of Border procedures», *Common Market Law Review* 59 (2022) 641-672, 663.

[129] See also Marin and Cassarino who note that following the CJEU ruling it can be argued that the parameters clarified in that decision could also be applied to the case of migrants during the screening phase: Luisa Marin / Jean-Pierre Cassarino, «The pact on migration and asylum: turning the European territory into a non-territory?», *European Journal of Migration and Law* 24/1 (2022) 1-26, 11.

[130] C-241/21, ECLI:EU:C:2022:753: "Article 15(1) of 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, must be interpreted as not permitting a Member State to order the detention of an illegally staying third-country national solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised, without satisfying one of the specific grounds for detention provided for and clearly defined by the legislation implementing that provision in national law".

[131] C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*, ECLI:EU:C:2022:505.

or in the event of a declaration of an emergency due to a mass influx of aliens, an asylum seeker may be placed in detention for the sole reason that he or she is staying illegally on the territory of that Member State[132]. The Court held that the illegal nature of the presence of an applicant for international protection cannot, in itself, be regarded as demonstrating the existence of a sufficiently serious threat affecting a fundamental interest of society and thus it cannot be accepted that such an applicant can, for the sole reason that he or she is staying illegally in a Member State, constitute a threat to national security or public order in that Member State[133]. In a ruling involving the Return Directive[134], the Court stressed once again the requirement for detention to be subject to the principle of proportionality[135]. The Court reiterated its findings in *Al Chodor* regarding the need for safeguards to address the adverse impact of detention on the right to liberty[136] and the rule of law requirement for protection against state arbitrariness[137]. The Court held that Article 15(1) of the Return Directive does not permit a Member State to order the detention of an illegally staying third-country national solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised, without satisfying one of the specific grounds for detention provided for and clearly defined by the legislation implementing that provision in national law[138].

The Court of Justice's rule of law parameters on immigration detention are important in assessing the move towards the normalisation of detention in the EU Migration Pact[139]. Detention in the Pact underpins its broader preventive aims as expressed in the normalisation of the fiction of non-entry to the territory of member states and in the introduction of the contested political concept of the instrumentalisation of migration as a legal concept in EU law[140].

[132] Para. 94.

[133] Para. 90. The Court held further that it is possible for an applicant for international protection whose presence in a Member State is illegal to be regarded as posing such a threat on account of specific circumstances which demonstrate that he or she is dangerous, in addition to being illegally present (para. 91).

[134] Case C-241/21, *I. L. v Politsei- ja Piirivalveamet*, ECLI:EU:C:2022:753.

[135] Para. 40, 43.

[136] Para. 50.

[137] Para. 49.

[138] Para. 55.

[139] For a critical analysis of the Commission Pact proposals, see Maarten den Heijer, «The Pitfalls of Border procedures», 663.

[140] For a critical analysis of the instrumentalization of migration in EU law see Valsamis Mitsilegas, «The EU External Border as a Site of Preventive (In)justice»; Elspeth Guild / Valsamis Mitsilegas / Niovi Vavoula, *Lawless Borders. The Rule of Law Deficit in European Immigration Control,* Bristol: Bristol University Press, 2025.

The new Reception Conditions Directive[141] states that detention must not be punitive in nature[142] but then goes on to essentially normalise detention by allowing this in order to: determine the applicant's identity or nationality; determine the elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular where there is a risk of absconding; and ensure compliance with legal obligations imposed on the applicant through an individual decision on restriction of movement in cases where the applicant has not complied with such obligations and there continues to be a risk of absconding[143]. The generalisation of detention in the Pact risks confirming state practice of turning detention "from the exception to the rule"[144].

It is questionable whether these provisions, and the provisions on the length of detention in conjunction with the border procedures and crisis instruments, are compatible with the rule of law requirements set out by the CJEU. Firstly, it is clear from the Court's case-law treating detention as a broad, autonomous concept, that EU law is applicable to national detention practices, including de facto detention, which may result from the implementation of the new asylum procedures and pre-screening measures – including detention in transit zones and within the territory. Secondly, it is clear that the proportionality test developed by the CJEU requires an individualised, case-by-case assessment of the necessity of detention – a requirement which appears not to be met by the Pact provisions on generalised detention at the border. Thirdly, detention must be proportionate to the aims pursued by the legislation. While the CJEU has accepted that detention may be justified for the purposes of identifying asylum seekers, the proportionality test must apply on a case-by-case basis and will not be met when the aims of the legislation are defined in an overtly broad manner – as is the case when legislation is justified under the general aim of preventing entry in the territory and secondary movements.

Moreover, it is questionable whether the grounds of detention enumerated in the Pact are in line with the case-law of the European Court of Human Rights. In a recent ruling[145], the Strasbourg Court reiterated that

[141] Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection, *OJ* L, 2024/1346, 22.5.2024.

[142] Article 10(2).

[143] Article 10(4). See also the provisions on detention in Article 5 of the Return border procedure Directive.

[144] On the case of Italy, see Eleonora Celoria / Virginia Passalacqua, *Turning the Exception into the Rule. Assessing Italy's New Border Procedure – Verfassungsblog*, 27 October 2023, available at https://verfassungsblog.de/turning-the-exception-into-the-rule/

[145] Case of *M.B. v The Netherlands,* Application number 71008/16, 23 April 2024.

the detention of asylum seekers under Article 5(1)(f) of the Convention is permitted only to prevent unauthorised entry[146]. The Court noted that although Article 8(3) of the EU asylum reception conditions Directive in force at the time of the proceedings permitted, from an EU law standpoint, detention when national security or protection of public order so requires, this has no bearing on the fact that Article 5(1)(f) of the Convention only allows for immigration detention to prevent unauthorised entry or to effect deportation[147]. Detention which was justified under public order grounds while no removal proceedings were effectively ongoing was arbitrary[148]. This ruling poses questions on the legality, from an ECHR perspective, of a number of the grounds of detention under the Pact, including detention for the purposes of identification and detention on the basis of the assumption of an individual's dangerousness (or "risk of absconding"), if the link of the latter with the objective of preventing unauthorised entry is not clearly substantiated on a case-by-case basis. A lot will rest on the implementation of the Pact in Member States and on the litigation of such implementation in domestic and European courts.

4.3. The blurring of boundaries between immigration detention and imprisonment

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 a number of 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*[149], the Court rejected such a prospect. The Court noted that it is clear from the wording of Article 16(1) of the Return Directive that the latter 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[150]. This obligation is not coupled with any exception and constitutes a guarantee of

[146] Para. 64.

[147] Para. 72. The Court reiterated the requirement for a close connection between the ground justifying detention and the prevention of unauthorised entry in the recent case of *B.A. v Cyprus,* Application no. 24607/20, 2 July 2024.

[148] *Ibid*.

[149] Case C-474/13, *Thi Ly Pham*, judgment of 17 July 2014. ECLI:EU:C:2014:2096.

[150] Para. 17.

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 accommodation for the purpose of removal[151]. 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[152]. 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[153].

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[154]. The Court stated unequivocally that Article 16(1) of the Return 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[155]. 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 powerfully in his Opinion in *Bero and Bouzalmate,* a detention measure under the Return Directive is very clearly different, in essence, from a punitive measure, as its purpose is not to punish the migrant for a crime or offence he has committed, but to prepare for his removal from the Member State concerned. By referring to the Court's ruling in *El-Dridi,* AG Bot further continued to state that:

[151] Para. 19

[152] Para. 21.

[153] Para. 23.

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

[155] Para. 34.

> … 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[156].

Yet these clear safeguards against the criminalisation of migration via prison detention have not been upheld in more recent case-law of the CJEU. In *WM v Stadt Frankfurt am Main*[157], the CJEU was called to rule on the permissibility of prison detention for the purposes of removal in cases where the third country national is deemed by the state to pose a particular threat to national security, in particular "in view of his personality, his conduct, his radical Islamist views and his classification as 'a trafficker and recruiter for the Islamic State terrorist organisation' by the intelligence services and his activities for that organisation in Syria"[158]. The distinguishing factor of this case according to the referring court was that prison detention, separated from other prisoners, was justified not because of a lack of specialised detention centres in that Member State, but on the ground that that foreign national posed a serious threat to the life and limb of others or to national security[159].

In a marked U-turn from earlier case-law, the CJEU interpreted Article 16(1) of Directive 2008/115 as not precluding national legislation which allows an illegally staying third-country national to be detained in prison accommodation for the purpose of removal, separated from ordinary prisoners, on the ground that he poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned[160]. The Court noted the national legislation which provides that detention for the purpose of removal is to take place, in principle, in specialised detention facilities and, in exceptional cases, in prison accommodation if the foreign national poses

[156] Opinion of Advocate General Bot delivered on 30.4.2014, Joined Cases C-473/13 and C-514/13, *Bero and Bouzalmate,* paras 91-92. ECLI:EU:C:2014:295.

[157] C-18/19*,* judgment of 2 July 2020.

[158] Para. 14.

[159] Para. 19.

[160] Para. 48.

a serious threat to the life and limb of others or to significant internal security interests. In that case, foreign nationals detained for the purpose of removal are to be accommodated separately from ordinary prisoners[161], and added the safeguard that the detention of a third-country national in prison accommodation for the purpose of removal under the second sentence of Article 16(1) of Directive 2008/115 is therefore justified on the ground of a threat to public policy or public security only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting one of the fundamental interests of society or the internal or external security of the Member State concerned[162]. Yet this requirement of individualised assessment cannot mask the acceptance of a logic of a risk assessment by the state of a third country national who is not subject to a criminal conviction but yet is imprisoned on the ground of their "dangerousness." In this way, the severity of criminal punishment is introduced in what is essentially an administrative process. This approach is also contrary to the Court's approach in *El-Dridi*, where the Court limited the use of criminal law emphasising the effectiveness of the administrative return procedure.

5. Conclusion

This contribution argued that the use of criminal law for the purposes of immigration and border control is based on shaky normative foundations, is excessive and presents significant challenges to the rule of law. The European Union and its Member States have made a political choice to use criminal law for the purposes of managing migration, a process which can be dealt with by administrative law. A key element underpinning this choice has been the securitisation of migration, with migrants viewed as dangerous and/or undesirable by states of destination and transit. Criminalisation has thus been linked with a clear preventive agenda, the aim of which is to prevent migrants from reaching the physical/external border, territory and jurisdiction of states in the first place, and to continue keeping them outside the law or confined if they manage to reach the border after all. The contribution has demonstrated that securitised, preventive criminal law has led to overcriminalisation with profound implications for the rights of migrants and for the rule of law. At the same time, it has been argued that this preventive, securitised agenda in migration management has normalised immigration detention, which increasingly resembles, or takes the form of,

[161] Para. 40
[162] Para. 46.

imprisonment and serves further to criminalise migrants. The analysis has demonstrated that, while the criminal law of the border has been expanded and been normalised by governments, there has been considerable resistance to such criminalisation on the ground, slowly but steadily culminating in judicial decisions which place, to some extent, limits and parameters to such criminalisation. Legal contestation and judicial intervention are key, in a field where the legal profession is facing at the time of writing direct threats of violence and intimidation for upholding the rule of law in the field of migration[163].

Postscript: The ECJ ruling on *Kinsa*

The manuscript for the present contribution was submitted in August 2024. From the submission of the manuscript to the actual publication, a significant development has been the delivery of the much awaited Court's ruling in *Kinsa* on 3 June 2025[164]. The Court held, sitting in Grand Chamber, that Article 1(1)(a) of Directive 2002/90, read in the light of Articles 7 and 24 and Article 52(1) of the Charter, must be interpreted as meaning that, first, the conduct of a person who, in breach of the rules governing the movement of persons across borders, brings into the territory of a Member State minors who are third-country nationals and are accompanying him or her, and over whom he or she exercises actual care, does not fall within the scope of the general offence of facilitation of unauthorised entry, and, second, those articles preclude national legislation criminalising such conduct[165]. The Court based its reasoning not only on Articles 7 and 24 and Article 52(1) of the Charter, but also on Article 18 of the Charter on the right to asylum and on the requirement to interpret EU law in the light of international law, including both international refugee law and the Palermo Convention on transnational organised crime.

Kinsa will generate much discussion. For those who view the glass as half empty, the Court's ruling in *Kinsa* is a missed opportunity to examine the compatibility of the criminalisation of humanitarian assistance with fundamental rights. The narrow focus of the Court to the facts of the case perpetuates legal uncertainty regarding the position of those providing humanitarian assistance to migrants, including civil society organisations subject to a sustained establishment of a hostile environment, and means

[163] https://www.theguardian.com/uk-news/article/2024/aug/06/lawyers-urge-starmer-to-ensure-safety-of-advice-centres-over-far-right-threat

[164] C-460/23, *Kinsa,* ECLI:EU:C:2025:392

[165] Para. 73.

that the impact of the ruling on the current negotiations of a new Directive on facilitation may be more limited than hoped for. On the other hand, those who view the glass as half full, will hail *Kinsa* as a significant step forward: the Court relied expressly on an array of fundamental rights and Article 52(1) of the Charter to interpret EU criminal law on facilitation, leading to a degree of decriminalisation at EU and at national level. In addition to family life and the rights of children, the Court examined specifically the impact of criminalisation on the right to asylum, in a significant finding that irregular entry leading to the submission of an asylum application, and until the issuance of a first instance decision, is not to be treated as a criminal offence. This finding, along with the Court's express reliance on international law not only in terms of refugee law, but also in terms of the Palermo Convention[166], can open the door towards the decriminalisation of humanitarian assistance, if the latter is linked to enabling the exercise of the right to asylum.

[166] The Court's interpretation is supported by the Palermo Protocol against the Smuggling of Migrants, in the light of which that directive must be read – indeed, in accordance with Article 2 of that protocol, the purpose of the protocol is to criminalise the smuggling of migrants, while protecting the rights of the migrants themselves (para. 66).