Critically assessing human rights integration in AFSJ policies

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Executive summary

The aim of this report (FRAME deliverable D 11.2) is to critically assess the integration of human rights into certain EU justice and home affairs policies. The report scrutinises the EU's action in relation to border checks, asylum and immigration, and in connection to organised and serious crime, terrorism, human trafficking, as well as international crimes. The central goal is to identify gaps and incoherencies in how human rights are integrated into and protected in the said policies. Special consideration is given to the relationship between the internal and external dimensions of the investigated policies. The report builds upon FRAME deliverable D 11.1, in which the integration of fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice (AFSJ) was considered. While deliverable D 11.1 addresses the coherence of the structures and instruments of the AFSJ, the present report focuses on studying the content of the policies and their impact on the realisation of human rights. To some extent, however, this report also pinpoints structural matters that negatively or positively affect the realisation of human rights.

The report is mainly based on desk research on EU legislation and policy documents in the areas under scrutiny. In the analysis special attention is given to human rights problems identified in reports by international and EU human rights monitoring bodies and to criticism raised by human rights NGOs.

The report is composed of four chapters. Chapter I, the introductory chapter, outlines the scope and aim of the report and explains some of the central concepts used in the report. In Chapter II, the EU policies on immigration, border checks and asylum are analysed. Questions considered in this chapter include the EU visa regime, border checks and surveillance, the EU asylum *acquis,* protection in the contexts of return and readmission, and the social and economic rights of non-EU citizens staying in the Union. In Chapter III, attention is directed towards the EU collaboration regarding organised and serious crime. This chapter contains a general part on the fight against organised and serious crime, after which the EU approaches to human trafficking, counter-terrorism and international crimes are addressed in greater detail. This chapter also includes a case study on extraordinary rendition. On the basis of the analysis in the substantive chapters of the report, the concluding chapter (Chapter IV) identifies crosscutting issues affecting the realisation of human rights in the areas that the report analyses and proposes recommendations.

The analysis of the various justice and home affairs policies clearly shows that the AFSJ is an area of EU action in which special consideration to human rights must be given. It is argued that three crosscutting issues negatively affect the integration of human rights in the justice and home affairs policies considered in this report. These issues are: (a) a strong security focus or 'securisation'; (b) lack of coherence; and (c) lack of solidarity. As regards securitisation, a trend towards accepting increasingly punitive and coercive measures to counteract serious crime and irregular migration is identified, and concern is expressed for the human rights implications of this trend. In relation to coherence, the report points to the many different types of incoherence that are found to be present in the justice and home affairs policies. Particular concern is expressed concerning the lack of coherence between the EU's

human rights rhetoric and the actual integration and monitoring of human rights standards. The external action of the EU in the field of justice and home affairs is sometimes also plagued by differential standards as compared to the EU's internal action, and depending on whether or not the external partner is a key strategic ally. The lack of solidarity is identified as a factor that negatively affects the possibilities of the EU to overcome the human rights problems identified in the report. While the Union is aware of the many human rights issues within the field of justice and home affairs, it seems unable to adopt effective measure to overcome them.

Based on these findings, the report makes recommendations for a more human rights-based approach to the EU's justice and home affairs. Most importantly, the report asserts that Member State discretion and mutual trust should not override protection of human rights, and that political will and solidarity among the Member States are necessary if more profound changes in the justice and home affairs cooperation are to be achieved. It is further proposed that human rights monitoring should be enhanced in many areas of justice and home affairs. Likewise, the importance of human rights impact assessments before adopting new legislation and policies is emphasised. The report also stresses the value of academic research in this regard. EU policy choices in the realm of justice and home affairs should be based on solid facts and objective research rather than on unsubstantiated fear and prejudices.

List of abbreviations

AAs	Association Agreements
ACP	African, Caribbean, and Pacific Group of States
AFSJ	Area of Freedom, Security and Justice
AOP	Action Oriented Paper
ATC	EU Anti-Trafficking Coordinator
CAMM	Common Agenda for Migration and Mobility
CATS	Article 36 Committee
CEAS	Common European Asylum System
CEPOL	European Police College
CFSP	Common Foreign and Security Policy
CIA	Central Intelligence Agency
CISE	Common Information Sharing Environment
CJEU	Court of Justice of the European Union
COAFR	Working group on Africa
COHOM	Human Rights Working Group
COJUR	Working Group on Public International Law
COJUR-ICC	The ICC sub-area in the Council's Public International Law Working-Party
COPEN	Working Party on Cooperation in Criminal Matters
CORDROGUE	Working group on horizontal drugs issues
COSI	Standing Committee on Operational Cooperation on Internal Security
COTER	Commission for Territorial Cohesion Policy and EU Budget
CRC	UN Convention on the Rights of the Child
CRIM	Special Committee on Organised Crime, Corruption and Money Laundering
CRIMORG	Working group on organised crime
CSDP	Common Security and Defence Policy
CTC	Counter-Terrorism Coordinator
DG	Directorate-General
DROI	[Parliament's] Subcommittee on Human Rights
EASO	European Asylum Support Office
EAW	European Arrest Warrant
EC	European Community
ECFR	European Council on Foreign Relations
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECRIS	European Criminal Records Information System
ECSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area

EEAS	European External Action Service
EEC	European Economic Community
EIDHR	European Instrument for Democracy and Human Rights
EIO	European investigation order
EIS	Europol Information System
EJN	European Judicial Network
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
ENP	European Neighbourhood Policy
EPPO	European Public Prosecutor's Office
ERPUM	European Return Platform for Unaccompanied Minors
ESS	European Security Strategy
ETA	Euskadi Ta Askatasuna (Basque Country and Freedom)
EU	European Union
EULEX KOSOVO	European Union Rule of Law Mission in Kosovo
eu-LISA	European Agency for the Operational Management of Large-Scale IT Systems
EURODAC	European Dactyloscopy
Eurojust	The EU agency dealing with judicial co-operation in criminal matters
Europol	European Police Office
Eurostat	Statistical Office of the European Communities
Eurosur	European Border Surveillance System
EUSR	EU's Special Representatives
FAC	Foreign Affairs Council
FRAN	Frontex Risk Analysis Network
FREMP	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
GENVAL	Working Party on General Matters including Evaluation
GRETA	Group of Experts on Action against Trafficking in Human Beings (Council of Europe)
HLWG	High-Level Working Group on Asylum and Migration
HRW	Human Rights Watch
HVD	High value detainee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on the Economic, Social and Cultural Rights
IcSP	The Instrument Contributing to Stability and Peace
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organization
INTCEN	European Union Intelligence Analysis Centre

Interpol	International Criminal Police Organization
IOM	International Organization for Migration
IRA	Irish Republican Army
ISEC	EC programme on 'Prevention of and Fight against Crime'
ISS	Internal Security Strategy
JAIEX	JAI-RELEX Working Party [working party which task is to ensure that the EU's external relations in the area of justice and home affairs are appropriately coordinated]
JITs	Joint investigative teams
JHA	Justice and home affairs
JUSTCIV	Working Party on Civil Law Matters
LIBE	Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee)
LTV	limited territorial validity
MARSUR	Maritime Surveillance System
MIGR	Working group on migration
MLA	Mutual legal assistance
MP	Mobility Partnership
NGO	Non-governmental organisation
NPM	National Preventive Mechanisms
NSA	[United States] National Security Agency
OCG	Organised crime groups
OHCHR	Office of the United Nations High Commissioner for Human Rights
OCTA	Organised Crime Threat Assessment
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organization for Security and Co-operation in Europe
PCAs	Partnership and cooperation agreements
RAN	Radicalisation Awareness Network
SAR	Search and rescue
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SIS	Schengen Information System
SOCTA	EU Serious and Organised Crime Threat Assessment
SSCI	[United States] Senate Select Committee on Intelligence
TDCAs	Trade, Development and Cooperation Agreements
TDIP	Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
THB	Trafficking in human beings
TJ	Transitional justice
TREVI	Terrorism, Radicalism, Extremism, and International Violence Group
UN	United Nations

UNCAT	UN Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
US	United States
VAT	Value added tax
VIS	Visa Information System
WFP	United Nations World Food Programme
WHO	World Health Organization

I. Introduction

A. Background and research objective

The mechanisms for Union-internal cooperation in justice and home affairs (JHA) were created through the 1992 Maastricht Treaty establishing the European Union (EU). In that Treaty asylum policy, immigration policy, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation were identified as matters of common interest.[1] The JHA collaboration was further developed in the 1997 Amsterdam Treaty, which most notably brought along the creation of an Area of Freedom, Security and Justice (AFSJ). Today, the functioning of the AFSJ is regulated by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as amended by the 2007 Lisbon Treaty. Under Articles 2 and 6 TEU, all EU policies shall be based on respect for human rights, and the 'rights, freedoms and principles' set out in the Charter of Fundamental Rights of the European Union (Fundamental Rights Charter) of 2007.

The objective of this research report is to critically assess the integration of human rights into certain AFSJ policies, namely the EU policies on border checks, asylum and immigration and the fight against organised and serious crime (in particular, human trafficking, terrorism, and international crimes). These policies have been chosen for inquiry due to their special human rights sensitivity. A central goal is to identify gaps and problems of incoherence in the protection of human rights in the said policy areas.

B. Research context, focus and scope

The report builds upon earlier research conducted within the FRAME project, in particular the report 'Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice' (2014).[2] That report mapped AFSJ institutions and instruments, and identified certain areas of concern with regard to the integration and protection of human rights within the AFSJ. The most notable areas of concern were: unclear divisions of competencies; Member State discretion; a lack of accountability and monitoring; reliance on technocrat-driven decision-making (also referred to as technocratisation) and expert knowledge produced by EU agencies;[3] securitisation of 'freedom' and 'justice';[4] and disregard for

[1] Article K.1 Treaty on European Union, signed at Maastricht on 7 February 1992 [1992] OJ C 191/1 (hereinafter 'Maastricht Treaty' or 'Treaty of Maastricht').

[2] See further Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015.

[3] For a discussion on technocratisation and reliance on expert knowledge, see, e.g., Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 58, 5-7. See also Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015, 146-149.

[4] Securitisation is understood to denote a process through which 'an issue is defined as an existential threat and thereby lifted above the normal into the extraordinary', where 'extraordinary measures are required which go beyond the established rules and procedures'. See Jens Kremer, 'Exception, Protection and Securization: Security

the external implications of EU-internal action. All of these areas were identified as possible reasons for human rights concerns.

Against this background, the aim of the present report is to further elaborate on these and other phenomena that have an effect on the protection of human rights within the AFSJ, so that the focus is now turned towards more policy-specific issues.[5] In its analysis of the integration of human rights in the EU JHA policies, the report adopts both an EU-internal and an EU-external perspective. Questions of coherence, including the relationship between the internal and external dimensions of the various AFSJ policies and the congruence of the said policies with the human rights undertakings of the EU and its Member States are of special interest for the present study. The report identifies and discusses the consequences of such incoherencies, with particular focus placed on situations and contexts where a clear negative impact (be it real or potential) on human rights can be found. As the concept of *coherence* forms a central premise for the discussion, an overview on how this notion is understood in this report is provided in the section below.

C. On coherence, JHA and human rights[6]

1. Definition and rationale

The notion of 'coherence' is sometimes used interchangeably with the notion of 'consistency', and it remains open to debate whether, and in which ways, the two notions differ. Consistency was introduced to the treaty framework by the 1986 Single European Act, the preamble of which emphasises the responsibility incumbent upon Europe to aim to speak ever increasingly with one voice and to act with consistency and solidarity. The TEU refers to the need to ensure the consistency of EU policies and actions,[7] and at other similar instances the founding treaties also speak of coherence.[8] It seems that, of the two concepts, coherence has become an often recurring buzzword, highlighted in numerous recent policy documents. For example, the 2012 EU Action Plan on Human Rights and Democracy sets as one of its goals 'achieving greater policy coherence' and the 2010 European Council strategy 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' (Stockholm Programme) mentions the need to enhance coherence at several instances.[9]

Mindset in Law', in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 7, 19.

[5] Due to limitations of space, questions related to the specific protection concerns of persons with vulnerabilities within the realm of the AFSJ remain, with the exception to the victims of trafficking, largely beyond the scope of this report. Such issues will be addressed in more detail in a forthcoming FRAME report D 11.3 on 'Vulnerable groups and EU border checks, asylum and immigration policies'.

[6] NB. This section largely builds upon the discussion in the report Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015.

[7] Article 13 TEU. Also see Articles 16(6) and 18(4) TEU.

[8] Article 11 TEU, Article 349 TFEU.

[9] Also see e.g., EU Annual Report on Human Rights and Democracy in the World 2013, Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2012, and European Parliament Resolution of 13 December 2012 on the review of the EU's human rights strategy .

Interestingly, despite the emphasis being put on the need to ensure coherence and consistency, the concepts have not been defined in EU instruments.[10] The lack of an official definition of coherence/consistency has prompted academics to propose definitions. In such definitions, consistency is often seen to refer to the lack of contradictions, whereas coherence is connected to the creation of a united whole, which, besides being characterised by a lack of contradictions, includes a quest for positive connections or synergies.[11] Against such differentiation between the concepts, however, lies the fact that the concepts are not used in the same way in the different language versions of the founding treaties, nor in the different policy instruments.[12] With this in mind, while the present report mainly uses the concept of coherence, it does not conceptually differentiate between the notions of coherence and consistency.

The analysis in the report is based on an understanding that it is essential that EU policies are not in contradiction to one other and that relevant actors are cooperating to achieve settled goals. More specifically, for the purposes of this report, coherent policy-making can be understood as:

> policymaking that seeks to achieve common, identifiable goals that are devised and implemented in an environment of collaboration, coordination and cooperative planning among and within the EU Institutions, among the EU Institutions and Member States, as well as among EU Member States. This policymaking considers the internal (within EU borders) and external (with third countries or other partners) aspects of [...] policies, together with the vertical (policies handed to Member States by the EU) and horizontal relationships (policies among EU Institutions or among Member States).[13]

Incoherence in policymaking can be the result of: (1) poor design of structures leading to a lack of coordination in policy design or policy implementation; (2) competing visions or overlapping responsibilities; and (3) diverging or conflicting interests regarding policy goals.[14] Hence, different

[10] Indirectly it is, however, possible to construe meanings, as many instruments propose specific steps to ensure such policy-making. See Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 3. For example, in a 2006 Commission Communication on greater coherence, effectiveness and visibility for EU in the world, it is noted that: "Unsatisfactory co-ordination between different actors and policies means that the EU loses potential leverage internationally, both politically and economically." See European Commission, Commission Communication: to the European Council of June 2006 Europe in the World — Some Practical Proposals for Greater Coherence, Effectiveness and Visibility [2006] COM(2006) 278 final, 6.

[11] See further Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 14-15. It is also possible to make a distinction between *negative coherence* (absence of contradictions) and *positive coherence* (the principle of cooperation). Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008), 18.

[12] See further Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 13.

[13] Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 20.

[14] See Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 19 and the references made in the report.

shortcomings and contradictions in organisational structures, policy regimes and interests may lie behind problems of incoherence.[15] On a general level it can be argued that coherent action is generally based on good strategic planning, effective implementation, functional cooperation between relevant stake-holders and actors, and established mechanisms for accountability.[16] In terms of institutional coherence it should be noted that, while consistency (negative coherence) demands that the distribution of powers between different actors in a policy field is clearly settled and that there are established mechanisms for resolving possible conflicts of norms, coherence (positive coherence) requires more, for example, rules compelling various policy actors to cooperate.[17] Also, a clear allocation of competencies generally enhances coherence.

The AFSJ is an area where the need to ensure coherence has been stressed especially strongly.[18] As such, it is beyond dispute that coherence is an important value in the field of the AFSJ. Coherence in policy-making is generally expected to lead to increased efficiency and effectiveness, which makes it wise to strive for coherence.[19] It has also been held that coherence is important for the image, transparency and credibility of the EU in both the AFSJ and human rights fields.[20] It is, for example, problematic if the EU upholds double standards by not itself living up to the human rights standards it requires its partner states to maintain.[21] At the same time, differentiation may sometimes be a wise policy option. Divergent solutions may be necessary to address situations that are different from one another. A difficult question is how to differentiate undesirable incoherence from desirable differentiation.[22]

[15] Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, ii.

[16] European Commission, Commission Communication: to the European Council of June 2006 Europe in the World — Some Practical Proposals for Greater Coherence, Effectiveness and Visibility [2006] COM(2006) 278 final.

[17] Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008), 27.

[18] The 2010 Stockholm Programme serves as an illustrative example in this regard. The word 'coherence' is mentioned 36 times in the policy document and the word 'consistent/consistency' 13 times. See European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1. In relation to external coherence, the founding treaties explicitly establish that the Union shall ensure consistency between the different areas of its external action and between these and its other policies. See Article 21(3) TEU.

[19] Efficient and effective: the "first describing the sensible use of resources, the latter referring to the achievement of goals". Carola Vogel, 'The Migration-Development Nexus: Is the Migration Policy of the European Union Coherent with Its Development Policy? in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 273, 274-275 (referring to Ashoff and Carbone).

[20] Cf. Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 0.

[21] Cf. Sarah Wolff, 'The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at home what the European Union preaches abroad [2013] *The Hague Journal on the Rule of Law*.

[22] The risk of an 'obsession' to strive for coherence should be recognised. See e.g., Marangoni and Raube who ask whether coherence really is a virtue. Anne-Claire Marangoni and Kolja Raube, 'Virtue or Vice? The Coherence of the EU's External Policies' [2014] *Journal of European Integration*, 473-489.

2. Coherence and the JHA cooperation

a) Different types of incoherence

It is possible to differentiate between different types of incoherence in the EU's JHA cooperation. It is, for example, possible to identify a difference between *vertical incoherence* connected to the relationship between the EU and its Member States, and *horizontal incoherence* related to action in different policy fields.[23] Non-consistent action by different EU institutions, bodies and organs may result in a lack of *institutional coherence*.[24] Additionally, the Member States may act incoherently in the different policy fields, both internally and in relation to action by other Member States. One may also distinguish between *internal coherence* and *external coherence*, where the former refers to coherence in EU internal action and the latter to coherence between EU-internal and EU-external action. Further, it is also possible to look at the type of action giving rise to incoherence and to observe a difference between, for example, *legislative coherence* (coherence between different legal instruments) and *coherence in the implementation of legislation and policies*.

All these different types of incoherence are of interest for this research report, which analyses the implications such incoherencies may have on the furtherance of fundamental/human rights. A brief outline on some of the various coherence issues in terms of the JHA cooperation is given below.

b) Institutional, structural and policy coherence

As an area, the AFSJ is characterised by a variety of different policies, which are not easily grouped into one area. According to Monar, the diversity of the objectives pursued and instruments used within the divergent policy fields render it 'impossible to apply a "one-size-fit-all" mode of governance'.[25] This characteristic of the AFSJ entails a special risk for internal incoherence within the AFSJ, as well as a risk for horizontal incoherence between different policy fields.

This being said, the JHA policies also share common features. One such feature is that most of them touch upon questions that lie at the very heart of state sovereignty.[26] Border control and criminal law are examples of questions where states have traditionally felt a need to retain control. Historically, the sensitive nature of JHA cooperation was reflected in the pillar divide, where the third intergovernmental

[23] See further e.g., Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 18, and Paul Quinn, 'The Lisbon Treaty – Answering the Call for Greater Coherence in EU External Relations?' in Dieter Mahncke and Sieglinde Gstöhl (eds), *European Union Diplomacy: Coherence, Unity and Effectiveness* (Peter Lang AG 2012) 45, 47 (referring to Nuttall).

[24] See e.g., Anne-Claire Marangoni and Kolja Raube, 'Virtue or Vice? The Coherence of the EU's External Policies' [2014] *Journal of European Integration*, 475.

[25] Jörg Monar, 'Experimentalist Governance in Justice and Home Affairs' in Charles F. Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2010), 240.

[26] E.g., Jörg Monar, 'The Institutional Framework of the AFSJ: Specific Challenges and Dynamics of Change' in Jörg Monar (ed.), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice* (Peter Lang 2010), 23.

pillar addressed JHA cooperation.[27] Today the pillar structure is dissolved, but the sensitivity of the JHA cooperation is otherwise reflected in the integration and cooperation structures. As will be analysed in more detail below, the possibility granted in the Lisbon Treaty for country-specific exceptions as regards the JHA cooperation and for so-called enhanced cooperation between some Member States entails a clear risk of incoherence. [28]

Structurally, the high number of actors (both institutional and sub-institutional entities) involved in the JHA cooperation brings an increased risk of institutional incoherence. For example, within the European Commission, JHA matters are currently addressed within two different DGs: (1) DG Migration and Home Affairs; and (2) DG Justice. Of these, the former deals with immigration, asylum, border control, organised crime, human trafficking, terrorism, police cooperation, and internal security issues, and the latter with fundamental rights, criminal justice and data protection matters. Within the Council, numerous Council constellations and preparatory bodies take part in the AFSJ policy-making.[29] Within the European Parliament, the LIBE (Civil liberties, justice and home affairs) Committee is the central JHA actor, but also, for example, the DROI (human rights) can act in this field. Furthermore, a special feature of the AFSJ cooperation is the central role played by the so-called agencies.[30] The extensive agency involvement reflects the fact that much of the JHA cooperation is not legislative, but rather executive or operational.[31]

A further characteristic of the JHA cooperation is the inbuilt tension between justice and security, which is a recurrent source of human rights concerns and incoherence.[32] It has been observed in this regard that the 'rather technically sounding term "justice and home affairs" should not make one forget that the EU is dealing here with issues relating to the most invasive forms of state action, such as deprivation

[27] As a working method, intergovernmentalism namely entail that Member States retained full control over the development of the cooperation. See further e.g., Sionaidh Douglas-Scott, 'The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?' [2009] *Cambridge Yearbook of European Legal Studies*, 57-58.

[28] See further e.g., Section III.A.4.d.2.

[29] The Council has, for example, the following preparatory bodies: the Asylum Working Party, the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS), the High-Level Working Group on Asylum and Migration (HLWG), the Standing Committee on Operational Cooperation on Internal Security (COSI), the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), the Visa Working Party, the Working Party for Schengen Matters, the Working Party on Civil Law Matters (JUSTCIV), the Working Party on Cooperation in Criminal Matters (COPEN), and the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP).

[30] Frontex, the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (EU-LISA), the European Asylum Support Office (EASO), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Police College (CEPOL), the European Police Office (Europol), the European Public Prosecutor's Office (EPPO) (not yet established), the European Union Agency for Fundamental Rights (FRA) and the European Union's Judicial Cooperation Unit (Eurojust).

[31] See further, e.g., Sionaidh Douglas-Scott, 'The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?' [2009] *Cambridge Yearbook of European Legal Studies*, 59-60, and Jörg Monar, 'Experimentalist Governance in Justice and Home Affairs' in Charles F. Sabel and Joathan Zeitlin (eds), *Experimentalist Governance in the European Union* (Oxford University Press 2010), 239-240.

[32] See further Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015.

of liberty, refusal of entry at borders, expulsion and uncovering of personal data.'[33] While fundamental/human rights certainly form a part of the JHA cooperation, and while the values of security and justice do not necessarily always collide, the JHA cooperation's focus on security may entail clashes with other policies with a more pronounced human rights focus. Such clashes have especially been identified between the external JHA action and the Union's external human rights policy.

c) The internal and external dimension of the AFSJ

Article 3(2) of the TEU establishes that: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.' Hence, the starting-point in the Union's JHA policies is the creation of an *EU-internal* area of freedom, security and justice.[34] This EU internal cooperation most notably involves cooperation between Member States and measures adopted by the Union with regard to its Member States. This being said, most AFSJ policies have an inherent international or external dimension. Organised crime and terrorism, for example, often involve actors from many different countries, and often also countries outside of the Union. Similarly, immigration implies, by definition, the crossing of borders. Generally, it can be said that cooperation between the EU and third countries is a condition *sine qua non* for effective action within the AFSJ.

Taking this into consideration, it is not surprising that the 1999 European Council in Tampere insisted on the importance of strong external action in the field of JHA.[35] Subsequently, the need to develop the external dimension of the JHA has been emphasised in numerous strategic instruments, for example, the 2010 Stockholm Programme[36] and the 2014 strategic guidelines for the development of the AFSJ (2014 Strategic Guidelines).[37] Of these, the latter set forth that: 'The answer to many of the challenges in the area of freedom, security and justice lies in relations with third countries, which calls for improving the link between the EU's internal and external policies.'[38] The external dimension of the AFSJ has also been the objective of a special strategy adopted in 2005 (2005 External Dimension Strategy).[39]

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[33] Jörg Monar, 'The Area of Freedom, Security and Justice' in A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing/Verlag CH Beck 2010), 553.

[34] Monar has similarly held that AFSJ is 'primarily an internal political project'. Jörg Monar, 'The External Dimension of the EU´s Area of Freedom, Security and Justice: Progress, Potential and Limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 7 (also see 11).

[35] European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, para. 59 ('The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.').

[36] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.

[37] European Council: European Council 26/27 June 2014 Conclusions.

[38] European Council: European Council 26/27 June 2014 Conclusions.

[39] European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final.

While the external dimension of the AFSJ is important it is, however, not 'an external policy in its own right'; rather, its role is instrumental, to support the internal elements of the AFSJ.[40] This has led Wolff and Mounier to argue that the external dimension of JHA sits uneasily between two more established EU policies, namely foreign affairs and internal security.[41] Or to put it differently, the external dimension of the AFSJ has partially transformed the Union's external action and forced the Union to act beyond its classic areas of international cooperation, that is, trade and development cooperation, and foreign security and defence policy.[42] This has been done, on the one hand, by mainstreaming JHA issues into established cooperation frameworks such as the European Neighbourhood Policy (ENP)[43] and, on the other hand, by creating new types of foreign policy instruments, such as agreements concluded by the JHA agencies. As will be discussed in greater detail below, the relationship between the Union's general external action and the external dimension of JHA policies is, however, not without tensions.

While the external dimension of JHA policies has existed for some time, it has evolved significantly in recent years. New policy areas have been included in the AFSJ and new JHA-objectives have been added to established policies (*sectoral changes*).[44] All the JHA policy areas investigated in this report, for example, have an external dimension of their own.[45] Also, the geographical scope of the policies has been expanded to new states and regions (*horizontal changes*) and some countries have been identified as especially significant cooperation partners.[46]

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[40] Jörg Monar, 'The External Dimension of the EU´s Area of Freedom, Security and Justice: Progress, Potential and Limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 13. 'The EU Treaties do not provide for an express general competence of the EU to act on external AFSJ matters, let alone an AFSJ external dimension as such. The only explicit references made to external action are to be found in Article 78(2)(g) TFEU, with regard to partnership and cooperation with third-countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection, and Article 79(3) TFEU, with regard to the conclusion of readmission agreements with third-countries.' *Ibid.,* 21-22. Also see Article 216(1) TFEU.

[41] Sarah Wolff and Grégory Mounier, 'The External Dimension of JHA: A New Dimension of EU Diplomacy' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 250.

[42] Ramses A. Wessel, Luisa Marin and Claudio Matera, 'The External Dimension of the EU's Area of Freedom, Security and Justice' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 272, 272.

[43] Sarah Wolff and Grégory Mounier, 'The External Dimension of JHA: A New Dimension of EU Diplomacy' in Sarah Wolff, Flora Goudappel and Jaap de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (TMC Asser Press 2011) 241, 244.

[44] Florian Trauner and Helena Carrapiço, 'The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification' [2012] *European Foreign Affairs Review* 1, 4-7.

[45] E.g., the 2005 strategy identifies terrorism, organised criminality (including trafficking in persons), illegal immigration, and State failure in third countries as the principal challenges. European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final, 3-4.

[46] In relation to geographic prioritisation, the 2005 External Dimension Strategy sets forth that: 'priorities must be set, within the enlargement, development and external relations policies and reflecting the EU's special relations with third countries or regions. To this end, comprehensive policies encompassing all aspects of justice, freedom and security will be developed with priority countries, such as candidate or neighbourhood countries, while with other countries cooperation will focus on specific issues.' See European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final, 6. In the 2010 Stockholm Programme, the geographical focus of the external action was extended to more remote countries and regions, such as India and Afghanistan. See European Council: The Stockholm Programme - An Open

Due to regional and country-specific differences, the EU has held that *differentiation* is necessary in the external action as 'there can be no "one size fits all" strategy.'[47] While this differentiation is understandable from the point of view of effectiveness, it may, as will be noted in the subsequent sections of this report, create problems of incoherence.

The external dimension of the AFSJ has also changed over time due to the involvement of new EU institutions and bodies (*vertical changes*).[48] Many JHA agencies, such as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), are, for example, nowadays closely involved in the external dimension of JHA policies. The fact that the EU JHA agencies conclude agreements may entail specific problems in terms of human rights and institutional coherence, but also as regards internal-external coherence.[49]

d) Coherence and human rights

A central goal in this report is to consider how human rights have been integrated into the EU policies under scrutiny. What exactly is understood by integration here is, however, not self-evident. In recent years it has become more common to measure human rights implementation, and questions related to human rights indicators are also of relevance within the FRAME research project.[50] The goal of this report is, however, not to develop or discuss human rights indicators for human rights integration within the AFSJ. Rather, the report focuses on identifying and analysing central incoherencies between the policies and the human rights undertakings of the EU and its Member States.

In relation to such coherence, the distinction sometimes drawn between internal *fundamental* rights and external *human* rights norms should be addressed. The main source for EU internal fundamental rights is the Fundamental Rights Charter. Human rights norms, on the other hand, are a concept of

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and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 35-37. In the 2014 Strategic Guidelines, the focus has been put on transposing, effectively implementing and consolidating the legal instruments and policy measures in place, and no new geographic priorities are identified. See European Council: European Council 26/27 June 2014 Conclusions.

[47] European Commission, Commission Communication: A Strategy on the External Dimension of the Area of Freedom, Security and Justice [2005] COM(2005) 491 final, 7.

[48] On the sectoral, horizontal and vertical changes, see further Florian Trauner and Helena Carrapiço, 'The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification' [2012] *European Foreign Affairs Review* 1, 4-7.

[49] Guild *et al.* note that special attempts have been made to ensure coherent action in relation to EASO and Frontex*:* "There have been attempts to ensure the 'policy coherency' and 'compatibility' between the external relations adventures of EASO and Frontex with EU internal and external policies. Similar attempts to avoid 'contradictions' have not occurred in the case of Europol." Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 100.

[50] See further Klaus Starl, Veronika Apostolovski, Isabella Meier, Markus Möstl, Maddalena Vivona and Alexandra Kulmer, in collaboration with Hans-Otto Sano and Erik André Andersen, Baseline *Study on Human Rights Indicators in the Context of the European Union* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/12-Deliverable-13.1.pdf> accessed 13 May 2015.

international law and something that the EU primarily promotes in its external relations. In JHA matters, the European Convention on Human Rights (ECHR) and the Convention Relating to the Status of Refugees (Refugee Convention or 1951 Refugee Convention) are examples of the central regional/international human rights instruments. The distinction between fundamental rights and human rights is, however, not as watertight as it may sometimes appear. In terms of content, the Fundamental Rights Charter is similar to the substance of the ECHR and the European Social Charter.[51] In addition, the ECHR has a special position in EU law through Article 6(c) TEU, which provides that the rights as guaranteed by the ECHR shall constitute general principles of the Union's law.[52] It should also be noted that Article 6 TEU provides for the EU's accession to the ECHR and that the EU is a signatory to the United Nations (UN) Convention on the Rights of People with Disabilities.[53] This brings human rights more clearly within the EU internal arena. By contrast, the applicability of the Fundamental Rights Charter is not governed by the territory of the EU but by the exercise of jurisdiction, which means that in certain situations where EU and Member States operate beyond the territory of the EU the Fundamental Rights Charter can also apply extraterritorially.[54]

This being said, the distinction between 'internal' fundamental rights and 'external' human rights has both institutional and instrumental implications in terms of coherence. Within the Council, for example, issues are considered by two different preparatory bodies depending on whether they are concerned with external human rights (the Working Group on Human Rights, COHOM) or internal fundamental rights (the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons,

[51] The relationship between the Fundamental Rights Charter and the ECHR is addressed in the Charter that provides that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention [...], the meaning and scope of those rights shall be the same as those laid down by the [...] Convention. This provision shall not prevent Union law providing more extensive protection.' See Article 52(3) Fundamental Rights Charter.

[52] Article 6 TEU establishes a 'tripartite interwoven system for the protection of fundamental rights in the EU.' See Hermann-Josef Blanke, 'The Protection of Fundamental Rights in Europe' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012) 159, 163. Article 6 establishes that: (1) the Fundamental Rights Charter shall have the same legal value as the Treaties; (2) that the Union shall accede to the ECHR; and (3) that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States 'shall constitute general principles of the Union's law'. Furthermore, secondary legislation contains instruments with human rights content. E.g., Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

[53] The accession procedure, however, recently experienced a setback when the Court of Justice of the European Union (CJEU) ruled that the draft accession agreement was incompatible with EU law. See Opinion pursuant to Article 218(11) TFEU − Draft international agreement − Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties, Opinion 2/13, 18 December 2014. Also see e.g., Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' [2014] *EU Law Analysis* [blog], 18 December 2014.

[54] See further e.g., Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office, report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 48, and Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (ed.), The EU Charter of Fundamental Rights (Hart Publishing 2014) 1657.

FREMP).[55] As regards instruments, the implementation of fundamental rights is advanced by a special Strategy for the Effective Implementation of the Charter,[56] whereas the external human rights work is guided by documents such as the Strategic Framework on Human Rights and Democracy and the connected Action Plan.[57] However, some instruments (such as the Stockholm Programme) address both types of rights.

An important and recurrent question in relation to human rights coherence in EU policies is whether the EU monitors and abides by the same standards at home that it requires third states to maintain in its external relations.[58] This is relevant both in relation to third states in general and in relation to prospective new Member States of the Union. Regarding the latter, it has been pointed out that whereas the human rights record of applicant countries is scrutinised in detail, there is a certain laxity towards Member State violations. The example of Hungary, where violations of minority rights and suppression of media freedoms have been reported after EU accession, is often mentioned in this context.[59] The EU as an institution is aware of this. For example, in a resolution adopted by the European Parliament in 2014 it is emphasised that 'the effectiveness of EU action rests on its exemplariness and consistency between internal practice and external action.'[60] To develop internal human rights practices, many instruments have recently been adopted. An especially important instrument in this regard is the new framework to safeguard the rule of law within the EU.[61]

[55] See further e.g., FRA, 'Council of the EU discusses coherence of internal-external fundamental rights' policies' [press release], 7 October 2014, <http://fra.europa.eu/en/event/2014/council-eu-discusses-coherence-internal-external-fundamental-rights-policies> accessed 1 September 2015. Within this research project, it has been pointed out that FRA through its activities has increased human rights coherence by furthering good horizontal cooperation between different institutions and bodies. See further Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 72.

[56] Commission Communication: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union [2010] COM(2010) 573 final.

[57] Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 71: 'The divide in internal and external fundamental and human rights policy cannot be more pronounced than it is within the strategy documents of EU human rights policy. The documents reveal a divided union in which policies develop separate and apart from each other. This was also evident in interviews with EEAS and D-G Justice officials. The EEAS officials interviewed by the lead author of this report referenced the Strategic Framework and also admitted no familiarity with the Stockholm Programme.')

[58] Cf. Sarah Wolff, 'The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at home what the European Union preaches abroad [2013] *The Hague Journal on the Rule of Law*.

[59] Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 82.

[60] European Parliament resolution of 17 April 2014 on EU foreign policy in a world of cultural and religious differences, para. 26. Also see Eva Maria Lassen (editor), Monika Mayrhofer, Peter Vedel Kessing, Hans-Otto Sano, Daniel García San José, Rikke Frank Jørgensen, *Report on factors which enable or hinder the protection of human rights* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/03-Deliverable-2.1.pdf> accessed 13 May 2015, 13.

[61] See further e.g., European Commission, 'European Commission presents a framework to safeguard the rule of law in the European Union' [press release], 11 March 2014, <http://europa.eu/rapid/press-release_IP-14-237_en.htm> accessed 11 September 2015.

As regards policy coherence more generally, the external dimension of the AFSJ faces a double consistency challenge – one between the different AFSJ fields, and one between the external dimension and other EU external policies.[62] While the first of these has not so far led to major coherence issues,[63] the ideological tension between the EU's external JHA action and the EU's general foreign policy is a matter of fact. A central question in relation to the external action in the AFSJ has been how to reconcile the security mindset often present in the discourse on the external JHA cooperation with the normative aspirations of EU foreign policy in general.[64]

Article 21 TEU establishes that all EU action 'on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.' Furthermore, for example, the EU Action Plan on Human Rights and Democracy (2012) (Human Rights Action Plan) provides that: 'The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into [...] the external dimensions of [...] the area of freedom, security and justice, including counter-terrorism policy.'[65]

As will be analysed in greater detail below, certain elements of the external JHA action have, however, been found to be problematic from a human rights perspective. This entails a specific source of incoherence between the external JHA activity and the Union's human rights action. While the primary goal of the EU's general foreign policy is to create good neighbourly relations and to promote human rights, the external JHA cooperation is guided by an 'interest in keeping problems out and the external border closed.'[66] The participation of different ministers (often ministers for foreign affairs or for the interior) in the different Council constellations and formations adds to the difficulty in ensuring coherence between the internal and the external due to the 'tendency of ministries and ministers to protect their respective turfs'.[67]

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[62] Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, Potential and Limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 45.

[63] 'As regards consistency between external action in the different AFSJ fields, the fact that the external dimension is still under the control of a single Council formation (the JHA Council) and that the aforementioned JAIEX group covers all external AFSJ matters has so far ensured adequate coordination across the different fields of external AFSJ action. Yet there could be a risk of a growing "drifting apart" of the external home affairs and external justice fields as a result of the aforementioned new separation of these fields within the Commission and the tendency also in the Council working structures for home affairs and justice issues to be dealt with by different meetings or even parts of meetings at different times.' Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, Potential and Limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 45.

[64] Florian Trauner, 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 19.

[65] Council of the European Union: EU Strategic Framework and Action Plan on Human Rights and Democracy [2012] 11855/12, 25 June 2012.

[66] Florian Trauner, 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 21.

[67] Jörg Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, Potential and Limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 46.

D. Methodology and structure

The report primarily builds upon reports by international and EU human rights monitoring institutions and agencies as well as NGO reports. It is in such reports that fundamental/human rights issues are often first identified; this is an important consideration given the topical and fast-developing character of many of the issues discussed in this report. Attention is also given to academic research in the field, primarily to highlight and analyse institutional, legislative, structural and crosscutting issues underlying the challenges in human rights integration in the AFSJ policies.

The report is structured around two main themes: policies on immigration, border checks and asylum (Chapter II); and EU cooperation in relation to organised and serious crime (Chapter III). Chapter II explores questions related to entry to the Union, international protection, and the protection of the social and economic rights of non-EU citizens staying within the Union. Chapter III, again, analyses human rights integration in terms of organised and serious crime, human trafficking, the fight against terrorism, and international crimes. Each substantive section of the report contains discussions on the internal and external dimensions of the policies, as well as parts in which coherence issues and fundamental/human rights concerns are pinpointed and discussed. The findings of the substantive sections of the report are summarised in Chapter IV, which discusses crosscutting issues arising from the analyses and proposes policy recommendations for increased coherence and for further integration of human rights into the AFSJ.

II. Policies on immigration, border checks and asylum

A. Introduction

Following the refugee flows from the Syrian war and the dramatic increase of irregular migrants arriving in often perilous conditions by sea, the EU's approach to asylum and migration and to managing migration flows is currently facing stern criticism in the media and by non-governmental organisations.[68] As Peers points out, the issue of immigration and asylum from non-EU countries, together with the issue of free movement of EU citizens, has recently become 'one of the most contested issues in EU law'.[69] The bone of contention has essentially been to what extent foreigners in need should be allowed to stay in the Union and/or be allowed in. In this regard, there is a significant lack of coherence between internal policies focusing on protection and external policies striving to keep those in need of protection outside of the Union area.[70] Issues of immigration and asylum are often perceived as 'inherently political'[71] and as matters of security. At the same time, human rights law and international refugee law put legal limits on how border controls and immigration issues should be addressed. Tensions exist both between immigration control and human rights and between national and EU powers.[72]

The current chapter will identify and critically assess some of these tensions and issues of coherence by studying how respect for fundamental rights is integrated into the external and internal aspects of EU policies on border checks, asylum and immigration. Due to the breadth of the topic it is, however, not within the limits of this report to provide a detailed account of the development and content of the legislation and implementation of such policies.[73] Rather, attention will primarily be given to identifying possible lacunae in the integration of human rights within the policies.

[68] E.g., 'The European Union and its member states must hang their heads in shame following reports this morning that as many as 300 migrants are believed to have died in the high seas off the Italian island of Lampedusa […] "With people continuing to flee war and persecution, EU member states must stop burying their heads in the sand whilst hundreds keep dying at sea."' See, Amnesty International, 'EU "burying heads in the sand" as hundreds more migrants die at sea off Italy' (Press Release 11 February 2015), <http://www.amnesty.eu/en/news/press-releases/eu/asylum-and-migration/eu-burying-heads-in-the-sand-as-hundreds-more-migrants-die-at-sea-off-italy-0852/#.VTYRayhq76k> accessed 20 April 2015. Quote within quote by John Dalhuisen, Europe and Central Asia Programme Director at Amnesty International.

[69] Steve Peers, 'Don't Rock the Boat: EU Leaders Do as Little as Possible to Address the Migrant Crisis', *EU Law Analysis* [blog], 23 April 2015.

[70] Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015, 95-96.

[71] Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006).

[72] Steve Peers, 'Don't Rock the Boat: EU Leaders Do as Little as Possible to Address the Migrant Crisis', *EU Law Analysis* [blog], 23 April 2015.

[73] For such accounts, see e.g., Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009), Steve Peers, Elspeth Guild, Jonathan Tomkin, Diego Acosta Arcarazo, Kees Groenendijk and Violeta Moreno-Lax (eds) *EU Immigration and Asylum Law (Text and Commentary)* (2nd edn, Martinus Nijhoff 2012), and FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 35.

Attention will first be given to the rationale for and general policy development within the internal and external policy fields on border checks, asylum and immigration, after which the EU rules and policies covering asylum and immigration matters, as well as cooperation in migration management with third states, will briefly be presented. Against this background, the chapter outlines and critically discusses the main coherence and human rights issues within the policy field, suggesting recommendations for the further integration of human rights and fundamental rights into the structures and policies on border checks, asylum and immigration.

The main contours of the existing institutional structures and instruments within the EU policy area on border checks, asylum and immigration have been described in FRAME deliverable 11.1.[74] The present report will therefore only briefly touch upon the institutional structures and primary law provisions in this regard. Instead, the focus in this chapter is on outlining and discussing in greater detail some aspects of the EU policies and secondary law in the area of border controls, asylum and migration.

The relevant EU law is introduced by outlining the relevant regulations and directives as well as the provisions of the EU Fundamental Rights Charter. To situate the provisions within the larger regulatory framework of European and international law, EU law will be discussed in the context of the European and international human rights law pertinent to asylum and immigration. References to the European human rights system will principally relate to the ECHR and to the case law developed by the European Court of Human Rights (ECtHR). Attention will also be paid to relevant European Court of Justice (ECJ) case law. Due to limited space, within international law attention is largely limited to the 1951 Refugee Convention. Some attention is also paid to the International Covenant on the Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), as well the UN Convention on the Rights of the Child (CRC).

1. Decades of European migration and asylum policies

a) Phase 1: Emerging cooperation and lacking competences (1957-1990)

Free movement of citizens of the Member States has been one of the driving goals of European integration since the establishment of the European Economic Community (EEC) in 1957. Stagnating economic growth, increasing unemployment rates, diversification of immigration, and increasing focus on religious and ethnic distinctions of immigrants embedded in global political developments all contributed to stricter immigration controls and asylum legislation in many Western European countries during the first phase of European integration.[75] The cooperation in migration and asylum matters in the early days of European integration consisted of informal (from 1975 onwards regular) meetings of the ministers of the interior, covering issues of terrorism, radicalisation and immigration.[76]

[74] Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015, 84-98 and 18-66.
[75] Pieter Boeles, Maarten Den Heijer, Gerrie Lodder, Kees Wouters, *European Migration Law* (Intersentia 2014) 27.
[76] Maria O'Neill, The Evolving EU Counterterrorism Framework (Routledge 2012), and Ben Bowling, James Sheptycki, *Global Policing* (Sage 2012) 43.

The emblematic feature of the first phase of cooperation in border and immigration questions was the focus on economic and political integration through the creation of the single market and the ancillary nature of the cooperation regarding external borders. At the same time, by the late 1980s there was a proclaimed goal of strengthening the external borders of the EU's territory to restrict the free flow of asylum seekers and irregular migrants, as well as to harmonise the policies for migration management within the Union area. The enhanced economic cooperation and integration between European Community (EC) Member States through the creation of the single market[77] was followed by the gradual abolishment of internal border controls.[78] This abolishment was realised in 1985 by the Schengen Agreement,[79] resulting in a new logic of security thinking.[80] The policy documents prepared during the first phase of integration laid the groundwork for subsequent policies and legislative acts in the field.[81]

As regards human rights integration, human rights were either absent or addressed only in the most general terms in the policy documents adopted during this time period.[82] The Convention Implementing the Schengen Agreement did not integrate human rights obligations with respect to the execution of the Schengen regime. Rather, Member States were permitted to derogate from their obligations on border controls on humanitarian grounds.[83] The emphasis was laid on the external borders, and new fields and ways of cooperation were identified.[84]

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[77] Single European Act 1988, 25 ILM 503.

[78] Solemn declaration on European Union 1983, Bulletin of the European Communities 6/1983, 24-29.

[79] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [1985] OJ L 239, 13-18, art 1 (hereinafter '1985 Schengen Agreement').

[80] 1985 Schengen Agreement. Also see Didier Bigo, 'Internal and External Aspects of Security' [2006] 15(4) *European Security*, 405, 397.

[81] Confidential Report from K.4 Committee to Permanent Representatives Committee, 2 November 1993, 9568/93, CK4 2. The Report was drawn up for the accession of Sweden, Austria and Finland on the understanding of the TREVI *acquis*, incorporated into the *acquis communautaire* by the Treaty of Maastricht. See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 136-201.

[82] Declaration of the Belgian Presidency: Meeting of Justice and Interior Ministers of the European Community, Brussels, 28 April 1987, para B: 'The Ministers reminded the meeting of the vocation of the Member States to receive persecuted individuals and they stressed their wish to fully respect the Geneva Convention.' Declaration of Ministers of the Trevi Group Reference, Paris, 15 December 1989, para 4: '[W]e solemnly renew our commitment towards individual and collective freedoms, human and civil rights and the rule of law, and we declare that our action can only be developed within a context of respect for these basic principles of our democracies.' The Convention Implementing the Schengen Agreement 1990 setting forth merely 'humanitarian grounds' (art 5) or 'humanitarian reasons' (art 36), but remains silent on specific human rights concerns.

[83] Convention Implementing the Schengen Agreement of 14 June 1985 [1990] OJ L 239, 19-62, art 5(2): 'An alien who does not fulfill all the above conditions must be refused entry into the territories of the Contracting Parties unless a Contracting Party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations. In such cases authorisation to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly.' Art 25(1): 'Where a Contracting Party considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry, it shall first consult the Contracting Party issuing the alert and shall take account of its interests; the residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reason of international commitments.'

[84] Declaration of the Belgian Presidency: Meeting of Justice and Interior Ministers of the European Community, Brussels, 28 April 1987, para I.b.1: 'The Member States will ensure, if they consider it appropriate, in some third

b) Phase 2: The institutionalisation of migration and asylum cooperation (1990-1999)

In the 1990s, the EU significantly increased its role in managing asylum and immigration. The precursor of the Dublin Regulation, the Dublin Convention determining the State responsible for examining applications for asylum, was signed in 1990 and entered into force in 1997.[85] With the agreement on the Treaty of Maastricht, the Commission emphasised the need to 'make migration an integral element of [the] Community['s] external policy'.[86] Under Article K.1 of the Treaty, migration and asylum were legally defined as areas of 'common interest' of the EU.[87] The ensuing civil wars in Former Yugoslavia and the increase in total numbers of asylum seekers arriving in EU Member States resulted in the continuing political exigency of asylum and migration matters on the European level.[88] Subsequently, the 1997 Treaty of Amsterdam mandated the introduction of a Common Immigration and Asylum Policy. A protocol attached to the Treaty of Amsterdam incorporated the Schengen Agreement into the EU *acquis*.

Further steps were taken with regard to the external dimension of migration and asylum cooperation. In Edinburgh in 1992 the European Council reaffirmed the need to arrange contacts and cooperation with third countries in the field of migration.[89] The Commission and the Council suggested extending the array of measures in cooperation with third countries, including measures towards social and economic development in the countries of origin, as well as integration of trade liberalisation into migration policies in order to reduce 'migratory pressures'.[90] The Council stated that coordination in the fields of foreign policy, economic cooperation and immigration and asylum policy can 'contribute substantially to addressing the question of migratory movements'.[91]

Although the Treaty of Amsterdam remained essentially silent on cooperation with third states, the action plan on the implementation of the Treaty set forth the adoption of an array of measures, including the 'assessment of countries of origin in order to develop a country specific approach' and information campaigns on irregular migration in transit countries and countries of origin.[92] The High

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countries, at the time of embarkation, a control of travellers' documents.' The 'Palma Document' sets forth that actions at external frontiers should include 'Measures which are essential: Solution to problems raised by Member States' agreements with third countries.' Coordinators' Group on the Free Movement of Persons, 'Free Movement of Persons. A Report to the European Council by the Coordinators' Group', Madrid, June 1989, annex I, para I.A.4 (The Palma Document); Declaration of Ministers of the Trevi Group Reference, Paris, 15 December 1989, para 10 (development of networks of liaison officers to third states). See also European Parliament, 'Resolution on the Right to asylum', A2-227/86, 12 March 1987.

[85] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, OJ C 254, 19 August 1997.

[86] European Commission, Communication on Immigration, SEC(91) 1855 final, 21 October 1991, 2.

[87] Art K1 Treaty of Maastricht [1992] OJ 2002/C 325/5.

[88] European Commission, 'Communication on Migration and Asylum Policies', COM(94) 23 final, 23 February 1994, para I.5.

[89] Edinburgh European Council Conclusions, December 1992, SN 456/92, annex, paras I.3. et IV.12.

[90] Edinburgh European Council Conclusions, December 1992, SN 456/92, annex 5 part A, paras X and 3-5.

[91] Edinburgh European Council Conclusions, December 1992, SN 456/92, annex 5 part A, para IX.

[92] Action Plan of the Commission and the Council on How Best to Implement the Treaty of Amsterdam [1998] OJ C 19/01, para 22, 36 (a) and (c).

Level Working Group (HLWG) on asylum and migration established at the Council further developed the external dimension along two lines. First, a general approach across the pillars suggested the combination of foreign policy, development and economic assistance with migration and asylum in order to tackle migration in the countries of origin. Second, based on these three categories, a country specific approach on the basis of country action plans was envisaged.[93]

References to human rights and to human rights obligations deriving from specific treaties, such as the ECHR and the 1951 Refugee Convention, were increasingly included in key policy documents and in the legislative framework.[94] Although the first proposals on concrete cooperation with third states were made in policy documents, a specific and systematic inclusion of human rights safeguards or commitments with regard to the 'external dimension' of asylum and migration did not take place.[95] Compliance with human rights law was often viewed as a matter of domestic concern (related to, for example, forced returns) and it was not systematically addressed in the cooperation with third states.

c) Phase 3: The deepening and 'maturation' of cooperation in border controls and immigration (1999)

The entry into force of the Treaty of Amsterdam entailed a communitarisation of migration and asylum cooperation, and as such, the treaty marked the most significant single institutional turning point in European cooperation in this area. Since 1999, cooperation has also been affected by multiannual JHA policy programmes adopted by the European Council, each identifying strategic goals and necessary steps to be taken. Although the establishment of the AFSJ was envisaged in the Treaty of Amsterdam,[96] it is the ensuing policy programmes that have provided substance and content to the legal concepts.

The first of these policy programmes, the Tampere Programme (1999-2003), integrated migration and asylum into other EU policies and activities, including external relations.[97] Although the programme to a great extent repeated the substance of previous policy documents, its importance lies in the establishment of a permanent discursive framework on the external dimension. Hence, it provided a forum for future, more extensive measures to be adopted, and contributed to the 'normalisation' of the external dimension of the migration and asylum policies. General and broadly worded migration clauses were systematically integrated into EU-third country agreements with the aim to ensure cooperation on migration issues.[98] Furthermore, a so-called negative conditionality approach was adopted, providing for the reduction of EU relations with third states on the grounds of 'unjustified lack of cooperation in the

[93] JHA Council, 'Final Report of the High Level Working Group on Asylum and Migration', October 1999, 11298/99 (Press 288-G), paras 4 et 9-10.
[94] E.g., Art K.2 Treaty of Maastricht [1992] OJ C 325/5.
[95] JHA Council, 'Final Report of the High Level Working Group on Asylum and Migration', October 1999, 11298/99 (Press 288-G), paras 11 et 59.
[96] Treaty of Amsterdam [1997] OJ C 340, art K.1.
[97] European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999 para 59.
[98] Seville Council Conclusions, June 2002, 13462/02, para 33: 'The European Council urges that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.'

joint management of migration flows'.[99]

The subsequent Hague Programme (2004-2009) marked, as will be discussed below, the completion, in 2006, of the first phase of the Common European Asylum Policy (CEAS). During the Hague era the previous *ad hoc* centres on border control were replaced by the border management agency Frontex, which was established in 2004 with a view to coordinating and assisting Member States in the surveillance and control of the EU's external borders.[100] The 2007 Treaty of Lisbon granted further powers to the EU to gradually introduce an integrated management system for the external borders and to adopt provisions concerning passports, identity cards and residence permits. In 2008, the French Presidency proposed a new 'European Pact on Immigration', which aimed at the introduction of a Common Asylum Policy by 2012.

The Hague Programme also included further measures on international cooperation with third countries. Whereas the Tampere Council Conclusions dedicated two paragraphs to the external dimension of migration and asylum, considerably more attention was given to the external dimension five years later, with the Hague Programme dedicating eleven paragraphs to the cooperation with third states of origin and transit. Assistance to third countries with a view to improving their capacities in migration and refugee management and border controls were identified as crucial measures, amongst others, and potential externalisation of asylum procedures was included in the programme.[101]

The Stockholm Programme (2009-2014), defined 'a Europe of responsibility, solidarity and partnership in migration and asylum matters' as one of its core tenets.[102] Based on this, the programme set out well managed, dynamic and comprehensive migration policy as an aim. The programme further emphasised the priority to establish long-term cooperation with third countries within the framework of Mobility Partnerships.[103] In addition, the Global Approach to Migration and Mobility adopted under the Stockholm era in 2011 as the successor to the Global Approach to Migration represents the 'overarching framework of the EU External Migration Policy'.[104] It identifies as strategic goals, and as non-negotiable preconditions in relations with third countries, 'well-functioning border controls, lower levels of irregular migration and an effective return policy', adding that the 'legitimacy of any [EU] policy

[99] Seville Council Conclusions, June 2002, 13462/02, para 36. Also, the debates were highly controversial due to the proposal of the Spanish presidency to make development assistance dependent on cooperation in migration and asylum matters.

[100] Council Regulation (EC) No 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1, as amended by Council Regulation (EU) No 1168/2011, OJ L 304/1, 25 October 2011.

[101] European Council: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, [2004] OJ C 53/01, paras 1.3 et 1.6.1.-1.6.4. Also see European Council and European Commission, 'Action Plan Implementing the Hague Program' [2005] OJ C 198/01.

[102] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.

[103] European Council, The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C 115/01, para 6.1.1.

[104] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 5.

framework relies on it'.[105]

In 2013, the European Border Surveillance System (Eurosur) for the Union's southern borders was created. Eurosur is an information-exchange framework designed to support the Union in its external border management. On the one hand, the establishment of Eurosur has to be seen as part of broader developments of technologisation and securitisation of the external borders of EU Member States in order to detect and prevent irregular migration.[106] On the other, Eurosur also envisages cooperation with third countries through specific modes of cooperation. For instance, Article 17(3) of the Eurosur Regulation provides for the communication and exchange of information with third country authorities.[107] There has been a general increase in surveillance and information sharing systems and initiatives at the European level.[108] Indeed, the Commission has repeatedly pointed out that the establishment of Eurosur 'forms part of a broader policy aimed at reinforcing the management of external borders.'[109] At least three of those, the Maritime Surveillance System (MARSUR),[110] the Common Information Sharing Environment (CISE)[111] and Eurosur[112] include, either implicitly or explicitly, border control in their objectives.[113] With regard to issues of migration, however, Eurosur is the most relevant in terms of its mandate.

d) The European Agenda on Migration

The humanitarian outcry following the increasing loss of life in the Mediterranean prompted the Commission to present a new approach to migration, the European Agenda on Migration, on 15 May

[105] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 5.

[106] The institutional involvement of the European Defence Agency and its MARSUR surveillance system probably illustrates this best. See Sergio Carrera and Leonhard den Hertog, Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean [2015] *CEPS Paper in Liberty and Security in Europe*, No 79.

[107] Art 17(3), Council Regulation (EU) No 1052/2013 of the European Parliament and the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) [2013] OJ L 295/11 (hereinafter 'Eurosur Regulation').

[108] European Commission: Communication from the Commission to the European Parliament and the Council, Better situational awareness by enhanced cooperation across maritime surveillance authorities: next steps within the Common Information Sharing Environment for the EU maritime domain, COM(2014) 451 final, 8 July 2014, 4.

[109] European Commission, Proposal for a Regulation of the European Parliament and the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union, COM(2013) 197 final, 1.

[110] European Defence Agency, 'European maritime surveillance system reaches operational status' <https://www.eda.europa.eu/info-hub/news/2014/10/27/european-maritime-surveillance-network-reaches-operational-status> accessed 14 April 2015.

[111] European Commission: Communication from the Commission to the European Parliament and the Council, Better situational awareness by enhanced cooperation across maritime surveillance authorities: next steps within the Common Information Sharing Environment for the EU maritime domain, COM(2014) 451 final, 8 July 2014.

[112] Eurosur Regulation.

[113] Sergio Carrera and Leonhard den Hertog, Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean [2015] *CEPS Paper in Liberty and Security in Europe*.

2015.[114] The agenda was preceded by several proposals and policies in 2014 and 2015, including a Ten Point plan launched in April 2015 to address the 'refugee crisis'.[115] The new migration strategy is divided into three parts: immediate action; an agenda for irregular migration, border management, asylum and legal migration; and long-term objectives. The immediate action accounts for the immediate duty to protect those in need, such as saving lives at sea through increasing support to the Frontex joint operations Triton and Poseidon and tripling their assets. Further, the Agenda sets out to propose a temporary distribution mechanism to take immediate pressure away from the countries of first entrance by providing for relocation of asylum seekers and an EU-wide resettlement scheme to support UNHCR supported placements for 20,000 displaced persons in need of protection.

Besides the steps proposed for immediate action, the European Agenda on Migration acknowledges structural shortcomings in the EU approach to migration management and proposes a more solid EU approach in terms of a 'strong common asylum policy' as well as a 'new European policy on legal migration'. To that end, the Agenda puts forth 'four pillars to manage migration better'. The first of these pillars aims to increasingly integrate development cooperation assistance into migration and thereby reduce the incentives and root causes of irregular migration. This most notably involves measures to address poverty, insecurity, inequality and unemployment in countries from which many migrants originate. Cooperation with third countries will also be enhanced with the view to boosting the fight against smugglers and traffickers, as well as to facilitate the return of irregular migrants.

The second pillar in the newly tabled EU agenda on migration seeks to strengthen the EU's border management, notably by beefing up the role and capacity of Frontex and by offering support to countries in North Africa in order to strengthen their capacity to prevent deaths of migrants at sea. The third pillar, which deals with Europe's common asylum policy, mainly focuses on calling for a more stringent and coherent application of the existing EU law on asylum, the Common European Asylum System, and increased uniformity of asylum decisions through enhanced practical cooperation.

Finally, the fourth pillar of the EU Agenda on Migration supports a legal migration policy as a response to 'long-term economic and demographic challenges'. While Member States retain their exclusive competence to decide on the volumes of admissions of working-age third country nationals, EU programmes such as Horizon 2020 and Erasmus+ aim at attracting talented individuals to the EU. The Commission also seeks to boost the application of the Blue Card Directive – an EU-wide scheme for immigration of highly qualified third-country nationals – to enhance its role in attracting talent to Europe. The Commission also refers to its earlier proposal for modernising the EU visa policy providing for more flexible visa tools, 'aiming to maximise the positive economic impact' through attracting tourists and other visitors, whilst at the same time minimising the risks of irregular migration and security.

[114] European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final.

[115] European Commission, 'Joint Foreign and Home Affairs Council: Ten point action plan on migration' (press release, 20 April 2015) <http://europa.eu/rapid/press-release_IP-15-4813_fi.htm> accessed 15 September 2015.

In terms of long-term goals, the Agenda refers to the completion of the Common European Asylum System, including a single asylum decision process, a shared management of the European border as a common responsibility of the EU, and the creation of an 'EU-wide pool' of qualified migrants accessible to employers and authorities.

The Commission proposals set out in the Agenda on Migration, together with the subsequent developments related to them, will be discussed in greater detail in the subsequent sections of the present Chapter.

2. Legislation and policies

a) The internal dimension

The goal of the EU's policy on border controls is to abolish the EU's internal border controls and to create a common external border at which various controls take place. To that end, Article 67(2) TFEU establishes that the Union *shall* ensure the absence of internal border controls for persons. The chief legislative instrument for the harmonised administration of the external border checks on persons, entry requirements and length of stays in the 'Schengen Area' is the Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).[116] This regulation provides for the free movement of persons crossing the internal borders of the Schengen area and determines rules governing border controls on persons crossing the external borders of the EU. The conditions and procedures for issuing short-term visas are laid out in the Schengen Visa Code (Visa Code).[117]

In relation to asylum, the founding treaties of the Union establish that the Union *shall* frame a common policy on asylum, based on solidarity between Member States, which is fair towards third-country nationals. Furthermore, the TFEU stipulates that the Union *shall* develop a common policy on asylum, subsidiary protection and temporary protection, with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. Since 1999 the EU has been working on the creation of a Common European Asylum System (CEAS) and, as will be discussed in more detail below, several legislative measures harmonising common minimum standards for asylum have been put in place.

The secondary legislation in the area includes: the recently revised directives on asylum procedures, reception conditions and qualifications;[118] the revised EURODAC regulation;[119] and the revised Dublin

[116] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105.

[117] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.

[118] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, 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) [2013] OJ L180/96, and Directive 2011/95/EU of the European Parliament and of

Regulation.[120] Such secondary legislation aims, *inter alia*, to: further harmonise standards of protection, grounds for granting international protection, and Member States' asylum legislation; ensure respect for the fundamental rights of asylum seekers; increase solidarity and sense of responsibility among EU Member States; and ensure the protection of asylum seekers during the process of establishing the State responsible for examining the application.

b) The external dimension

Due to the global nature of migration, EU migration and asylum policies include a variety of measures that have an external dimension. The establishment and implementation of an effective EU migration policy thus envisages and enshrines various modes of cooperation with third countries, ranging from specific technical and operational cooperation and assistance to the conclusion of general agreements and treaties including specific clauses related to migration.[121] In recent years the external dimension of the European Union's policy on migration and asylum has become an increasingly central element of the EU's external policies. The European Council's 2014 Strategic Guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice call for further integration of migration policies as an essential segment of the Union's external and development policies through intensifying cooperation with third countries.[122]

Cooperation with third states within EU asylum and immigration policies generally takes two different forms: (i) the conclusion of treaties or agreements with third states; and (ii) operative measures set forth in secondary legislative instruments, which implicitly entail an external dimension. According to Article 216(1) TFEU, the EU has the competence to conclude international treaties or agreements with third countries or international organisations where the treaties either explicitly provide for – or where such competence is necessary for – the realisation of one of the objectives referred to in the treaties.[123]

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the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

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

[120] 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 [2013] OJ L180/31. The 2003 Dublin regulation was preceded by the 1990 Dublin Convention.

[121] For instance, the Cotonou Agreement between the EU and the ACP countries includes an article on migration *inter alia* encompassing mutual readmission confirmations. See Partnership Agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, [2000] OJ L 317, Art 13.

[122] European Council: European Council 26/27 June 2014 Conclusions.

[123] Article 216(1) TFEU.

Article 79(3) TFEU explicitly concedes to the EU the concurrent competence to conclude readmission agreements with third countries.[124] In order to realise the objectives laid down in Title V TFEU the EU may also establish European agencies, such as Frontex, tasked with the execution of EU law.[125] Under Article 78(2) measures for the adoption of a common European asylum system shall be adopted, including partnerships and cooperation with third countries.[126]

Since the EU, however, has no exclusive competence under Title V TFEU, international agreements and treaties are often mixed treaties or agreements concluded between the EU, its Member States, and third countries. The explicit inclusion of an EU competence permits EU institutions to cooperate in the field of asylum and migration, even if there is no explicit external competence within the purview of legal harmonisation.[127] Hence, in addition to legally binding agreements or treaties, cooperation with third states (or international organisations) may also operate on the basis of informal collaboration arrangements.[128] Such cooperation may occur through the financial and operative support of third states in the field of migration management. These modes of cooperation are often informal and non-legal arrangements concluded on the general competence of Article 78(2)(g) TFEU, hence remaining outside the scope of Article 216(1) TFEU.[129] For instance, working arrangements between Frontex and third country authorities on operative measures, mobility partnerships and financial and technical support for border control are informal and non-legal instruments, while readmission agreements are concluded in the form of legally binding instruments. With regard to their substance, these agreements are multilayered, hence including distinct fields of cooperation with different legal bases, objectives, competences and actors. Again, policy documents are particularly relevant in examining the scope and ratio of cooperation with third countries. Policy documents thus represent the 'overarching framework' against which the (internal) legitimacy of any other proposal or instrument is measured.[130]

On a general level, the conclusion of agreements with third countries entails obligations on the part of the partner country to take serious and concrete measures in combating irregular migration, including, *inter alia*, information campaigns to discourage irregular migration, enhanced border controls supported by operational cooperation with Member States and Frontex, and an exchange of information with EU Member States' authorities in order to improve border controls.[131] This reflects the strong emphasis on

[124] Article 79(3) TFEU.
[125] Volker Röben, 'Artikel 67 AEUV' in Grabitz, Hilf, Nettesheim (eds), *Das Recht der Europäischen Union* (54th edn, Beck 2014) para 12.
[126] Article 78(2)(g) TFEU.
[127] Article 3(2) TFEU. Similarly Thym, 'Artikel 78 AEUV' in Grabitz, Hilf, Nettesheim (eds), *Das Recht der Europäischen Union* (54th edn, Beck 2014) para 45.
[128] The cooperation between Frontex and third country authorities or international organizations, such as UNHCR or IOM, occurs on the basis of legally non-binding working arrangements. For a comprehensive list of working arrangements concluded by Frontex, see <http://frontex.europa.eu/partners/third-countries/> and <http://frontex.europa.eu/partners/international-organisations/> accessed 28 April 2015.
[129] Article 78 TFEU.
[130] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 5.
[131] European Commission, Commission Communication: On circular migration and mobility partnerships between the European Union and third countries [2007] COM(2007) 248 final, 4.

EU-imposed conditionality.[132] The clear objective to prevent irregular migration and, at the same time, the absence of the offer of possibilities for regular migration to the EU, often renders agreements between the EU and third countries, in particular mobility partnerships, highly unpopular with both the government and the population of third countries.[133] As noted, the cooperation with third states includes both operative collaboration and cooperation on the basis of formal agreements. The coordination of border surveillance activities and exchange of information conducted within the Eurosur framework are examples of the former, whereas the various readmission agreements illustrate the latter.

The recently adopted European Agenda on Migration reiterates, as noted, that cooperation with third countries is 'of critical importance',[134] thus pointing out the centrality of the external dimension in EU migration management. The external dimension of the EU's migration policy is set forth in the EU's Global Approach to Migration and Mobility (GAMM), which serves as the 'overarching framework of EU external migration policy'.[135] Its precursor, the Global Approach to Migration (GAM), was initially announced in 2005 as a comprehensive framework to tackle irregular migration and human trafficking on the one hand and to advance cooperation with third countries in order to manage migration on the other. Thereby the GAM aimed at formulating a wider approach to migration stretching beyond JHA to the fields of development, social affairs and employment and external relations. In 2011, the GAM was supplemented by an element on 'mobility' and thereby renewed and relabelled as the Global Approach to Migration and Mobility (GAMM).[136]

Through the GAMM the EU seeks to establish and enhance relations to third countries, in particular the sending and transit states of migration, with a view to facilitate policy objectives in these fields through, for example, cooperation in and coordination of admissions policies, border controls and measures against irregular migration. With a view to managing migration in an effective manner, the GAMM is based on dialogues and partnerships with non-EU countries of origin, transit and destination. More concretely, the GAMM builds on mutual interests and may result in MPs or Common Agendas for Migration and Mobility (CAMMs), of which the latter (and looser) form of cooperation is often used in

[132] This is particular obvious in the Mobility Partnerships concluded between the EU and third states, which represent a main pillar of the EU's migration management approach. See European Commission, 'Déclaration Conjointe pour le Partenariat de Mobilité entre la Tunisie, l'Union Européenne et ses états membres participants' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration/specific-tools/docs/final_joint_declaration_tn-eu_fr.pdf> accessed 28 April 2015.

[133] Natasja Reslov and Marteen Vink, 'Three-Level Games in EU External Migration Policy: Negotiating Mobility Partnerships in West Africa' [2014] *Journal of Common Market Studies*, 8-9.

[134] European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 8. Similarly, the European Council 2014 Strategic Guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice call for further integration of migration policies as an essential segment of the Union's external and development policies through intensifying cooperation with third countries.

[135] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 4.

[136] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final.

relations with non-neighbouring states. The effective management of migration in the GAMM is based on dialogues and partnerships with third countries of origin and transit and highlights the mutual beneficiary character of migration. In this regard, the GAMM envisages general Migration and Mobility Dialogues and Cooperation Frameworks. It is based on the underlying logic of a 'more-for-more' approach: the more third countries cooperate on migration issues, the more concessions the EU is ready to make, for instance in the form of visa facilitation or mobility agreements.[137]

Thematically the GAMM is structured along four key pillars: (i) legal migration and mobility; (ii) irregular migration and trafficking in human beings; (iii) international protection and asylum policy; and (iv) enhancing the development impact on migration and mobility (see table). Across the four thematic pillars, the GAMM intends to take up root causes for migration by linking migration management with development cooperation. At the same time, it shifts focus to a security lens by thematically linking classical security issues, such as human trafficking, with development cooperation and international protection.

B. Regulating the entry into the Union

1. Introduction

The chief legislative instrument for the harmonised administration of the external border checks on persons, entry requirements[138] and lengths of stay in the Schengen Area is the Schengen Borders Code.[139] This regulation provides for free movement of persons crossing the internal borders of the Schengen area and determines rules governing border control of persons crossing the external borders of the EU.

Subsequent to the upheaval caused by the Arab Spring, the numbers of irregular crossings to the European Union through the Mediterranean started to increase in 2011, with thousands of Tunisian refugees arriving at Italy's borders, in particular to the island of Lampedusa.[140] Since 2013, the EU has again witnessed a dramatic increase in the influx of refugees and migrants fleeing poverty, violent conflict or political turmoil in the Middle East and in Africa.[141] A total of 3.4 million people immigrated to

[137] Marie Martin, 'Statewatch Analysis: The Global Approach to Migration and Mobility: the state of play' [2012].
[138] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81 as amended by Regulation (EC) No 2414/2001 [2001] OJ L 327, Regulation (EC) No 851/2005 [2005] OJ L 141, and Regulation (EC) No 1932/2006 [2006] OJ L 405.
[139] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105.
[140] UNHCR, The Sea Route to Europe: The Mediterranean passage in the age of refugees (1 July 2015) <http://www.unhcr.org/5592bd059.html> accessed 13 October 2015, 5.
[141] Eurostat, 'Asylum statistics' <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 13 October 2015.

one of the EU Member States during 2013.[142] Statistics indicate that, following a gradual increase in asylum applications through 2012, the number of applications started to grow rapidly over the course of 2013.[143] With the wars in Syria and Iraq, as well as conflict and unstable conditions in countries like Afghanistan and Eritrea as significant push-factors, the numbers continued to rise in the first half of 2014.[144] All in all, in 2014 the 28 EU Member States registered roughly 570,800 applications for international protection, which represents an increase of 44 per cent as compared to 2013,[145] and is the highest number of asylum applications within the EU since 1992.[146]

Many of these migrants and asylum seekers arrive in Europe from Northern Africa through the Mediterranean in often-perilous conditions having boarded unsafe boats sent out to sea by smugglers' rings. In 2014, a record of 280,000 irregular border crossings was detected at the southern sea border of the EU, largely driven by the on-going conflicts in Syria, Libya, and human rights violations in Eritrea.[147] Over 170,000 migrants arrived in Italy in 2014, amounting to the biggest influx of refugees to any one country in the history of the EU.[148] With the continued influx of migrants through the Mediterranean in the first half of 2015 (137,000 migrants and refugees crossed the sea during the first half of 2015) the number of crossings to the EU is expected to remain high in 2015.[149]

The growing number of migrants in particular from Northern Africa, has led to an increase in the number of fatalities at sea. According to UNHCR, an estimate of 3,500 migrants perished in 2014 while attempting to cross the European border through the Mediterranean,[150] and the figures indicate that the toll of migrant deaths remains high for 2015 with close to 3,000 deaths in the period of January through September 2015.[151] 'Europe, according to a 2014 report from the International Organization for Migration, is currently the most dangerous destination for irregular migration in the world, and the Mediterranean Sea the world's most dangerous border crossing.'[152] Often refugees are also vulnerable

[142] Eurostat, 'Migration and migrant population statistics' <http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migration_flows> accessed 15 September 2015.

[143] Eurostat, 'Asylum statistics' <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 13 October 2015.

[144] UNHCR, '2015 UNHCR regional operations profile – Europe', <http://www.unhcr.org/pages/4a02d9346.html> accessed 15 September 2015.

[145] UNHCR, Asylum Trends 2014: Levels and trends in Industrialized countries <http://www.unhcr.org/551128679.html> , accessed 13 October 2015, 2.

[146] Eurostat, 'Asylum statistics' <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 13 October 2015.

[147] Frontex, *Annual Risk Analysis 2015* (Frontex 2015) 17.

[148] Frontex, 'Central Mediterranean route' <http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/ > accessed 13 October 2015.

[149] UNHCR, The Sea Route to Europe: The Mediterranean passage in the age of refugees (1 July 2015) <http://www.unhcr.org/5592bd059.html> accessed 13 October 2015, 2.

[150] UNHCR, Asylum Trends 2014: Levels and trends in Industrialized countries <http://www.unhcr.org/551128679.html> , accessed 13 October 2015, 5.

[151] IOM, Missing Migrants Project, 'Migrant Fatalities Worldwide' <http://missingmigrants.iom.int/en/latest-global-figures> accessed 13 October 2015.

[152] *Fatal Journeys – Tracking Lives Lost during Migration*, Tara Brian and Frank Laczko (eds) (International Organization for Migration 2014).

to exploitation and abuse as they are, in the absence of viable legal avenues of migration, dependent on the smugglers' organisations to enter the European Union.

With this background in mind, grave concern has been expressed on the forcible returns, the so-called 'pushbacks' on the high sea, of migrants to their point of departure by EU Member States, depriving the refugees of due asylum process and often putting their lives at risk. The UNHCR has called upon EU Member States and the EU to adopt more protective border management measures to ensure full compliance with the principle of *non-refoulement*. Search and rescue operations should, according to the organisation, be stepped up to prevent loss of life in line with the basic tenet of international human rights law.[153]

The influx of irregular immigrants and the measures to address it give rise to a number of human rights questions, namely: who may enter the Union; are the border controls conducted in a way that respects human rights and international refugee law; what are the procedural rights of the irregularly arriving migrants; and finally, what are the alternatives for irregular migration? Each of these questions will be discussed below.

2. EU visa regime

In the interest of ensuring internal security and the smooth operation of the border-free Schengen area, EU Member States have set up a common visa policy.[154] The third countries whose nationals are required to hold a visa when crossing the external EU border and those that are exempt from that requirement are listed in Council Regulation 539/2001 as successively amended.[155] The common visa policy is applicable to short-term visas issued either for transit or for a period of up to three months in total;[156] the issuing of long-term visas remains within the national jurisdiction of Member States.

[153] See, e.g., UNHCR, 'UNHCR calls for more robust search-and-rescue operation on Mediterranean' (News Stories, 12 February 2015) <http://www.unhcr.org/54dc8dc59.html > accessed 13 October 2015.

[154] Commission, 'Visa policy' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm> accessed 14 May 2015.

[155] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81 as amended by Regulation (EC) No 2414/2001 [2001] OJ L 327; Regulation (EC) No 851/2005 [2005] OJ L 141, and Regulation (EC) No 1932/2006 [2006] OJ L 405. For an overview and development of the regulations, see Astrid Epiney and Andrea Egbuna-Joss, 'Entry of third-country nationals' in Kay Hailbronner (ed), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (Beck/Hart 2010) 29. Whereas the division into two groups entails 'a distinction of certain groups of persons from others independent of the individuals' characteristics', Epiney and Egbuna-Joss find the categorization of third countries into two exhaustive groups to be compatible with EU primary law given the large margin of discretion the EU legislator enjoys in terms of Union's external relations. The authors recommend, however, that clearer explanations for the division and the assessment underlying it to justify why the risk of illegal immigration from some third countries is deemed to be higher than from others. See *ibid.,* 62.

[156] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1, Article 1(1).

The conditions and procedures for issuing short-term visas are laid out in the Schengen Visa Code (Visa Code).[157] A visa may be refused on several accounts, including non-admissibility, refusal, annulment and revocation.[158] Notably, however, the CJEU held in its 2013 ruling in the *Koushaki* case that Member States have an *obligation* to issue a Schengen visa to an applicant if the entry conditions of the Visa Code are satisfied and unless none of the refusal grounds for refusing the visa pursuant to the Visa Code is applicable.[159] A right of appeal in case of refusal is set forth in Article 34(7) of the Visa Code.

In the requirements to obtain a visa, a strong emphasis is laid on the evidence concerning the applicant's *bona fide* (that is, that he or she does not present a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for), and capability to sufficiently support themselves.[160] By definition, this often means that 'the more liberal face of Europe is reserved for EU citizens and the more bureaucratic face for third country nationals.'[161]

3. Border checks and surveillance

a) Interception v principle of non-refoulement

The response by the EU and its Member States to the on-going refugee crisis is being repeatedly called into question with regard to the respect for the human rights of asylum seekers arriving irregularly at the borders of Europe. Particular concern is expressed with regard to the practice of pushbacks by border authorities.[162] Pushbacks fall under the concept of interception which, as defined by the UNHCR, encompass 'all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination'.[163]

[157] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.
[158] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1, Articles 19, 32, 33 and 34.
[159] Case C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* [2013] CJEU.
[160] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 407, and Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1, Article 21.
[161] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 397.
[162] See, e.g., Amnesty International, 'GREECE: Stop putting lives at risk. No more push-backs!' <http://www.sos-europe-amnesty.eu/greece-stop-putting-lives-at-risk-no-more-push-backs-actions/?preview=n4t5uxhd2fo6mq> (accessed 15 September 2015).
[163] UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme,18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, 10. Available at <http://www.unhcr.org/4963237411.pdf> accessed 15 September 2015.

While states have a 'legitimate interest in controlling irregular migration'[164] they are, at the same time, obliged under Article 33(1) of the 1951 Refugee Convention to abide by the principle of *non-refoulement*, that is, not to 'expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[165] The principle is, as will be discussed in greater depth in Section C.1, also integrated in Article 78 TFEU and Article 18 of the Fundamental Rights Charter. As Guild and Moreno-Lax assert, the EU approach to the principle of *non-refoulement* seems, however, to be based on an understanding that the principle only applies to persons who 1) have arrived within the borders of the state where they seek protection; or 2) are not returnable to a safe country as defined by the EU or its Member States.[166] While the issue of safe countries will be discussed further in Chapter D.2.1, an overview of the human rights challenges with regard to interception beyond the borders of the EU will be given below.

Several human rights problems are attached to interception practices. Interceptions often run the risk of placing irregularly arriving migrants 'in orbit', in situations where a transit country fails to provide for an effective protection regime and where the first country where asylum was claimed refuses to readmit the migrants.[167] Interception situations do typically not enable the migrants to put forth their claim for international protection, hence failing the criteria of individual assessment of international protection needs and contradicting human rights law.[168] Where adequate means for identifying protection needs are not in place, such immigration control measures can, therefore, seriously undermine the access of persons at risk of persecution to safety and asylum.[169] Insufficient screening is not solely a problem for

[164] UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme,18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, 17. Available at <http://www.unhcr.org/4963237411.pdf> accessed 15 September 2015.

[165] 1951 Refugee Convention, Article 1(A)(2). For a discussion on the definition of refugees, see, David J. Whittaker, Asylum Seekers and Refugees in the Contemporary World (Routledge 2006) 1-12.

[166] Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR', CEPS Paper in Liberty and Security in Europe No. 59 / September 2013, 7. Available at <http://www.ceps.eu/system/files/LSE%20No%2059%20International%20Refugee%20Law.pdf> accessed 13 June 2015.

[167] UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, 19. Available at <http://www.unhcr.org/4963237411.pdf> accessed 15 September 2015.

[168] See, e.g., ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012.

[169] UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme,18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, 18. Available at <http://www.unhcr.org/4963237411.pdf> accessed 15 September 2015. See, also, Spijkerboer, who argues that, where migrants are not asked 'whether they want to invoke the protection of Article 3 [ECHR] and are returned to the country of embarkation, that is clearly a violation of Article 3.' See, Thomas Spijkerboer, 'Stretching the Limits. European Maritime Border Control Policies and International Law' in M. Maes, M-C Foblets, Ph de Bruycker, D. Vanheule and J. Wouters (eds), *External Dimensions of EU Migration and Asylum Law and Policy* (Bruylant 2011) 389, 411. Neither are the inception operations likely to be efficient as a measure to curtail irregular migration as, in the absence of a comprehensive approach to addressing the root causes of migration and to providing legal avenues to enter the EU, the irregular migration and refugee smuggling risks simply to divert to other entry routes. See, UNHCR, Interception of Asylum-

interception operations, as national authorities, including immigration officials, as well as airline officials, are reportedly 'frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection.'[170] It is also to be noted that even where airline officials and officials of other carriers are aware of such a distinction, the carriers are often likely to be unwilling to risk liability under the EU Carrier Sanctions Directive for transporting insufficiently documented passengers, which often is the situation with asylum seekers.[171]

Interception measures constitute a form of *extraterritorial* migration control executed, under the coordination of Frontex, through joint EU surveillance of the external borders. With increasing cooperation with third states in border management States seem, as Moreno-Lax notes, to believe that possible human rights violations accrued through such operations are allocated solely to the third state in whose territorial waters the operation is carried out.[172] They undertake, in other words, extraterritorial operations with limited acknowledgment of the extraterritorial applicability of corresponding duties arising upon them under international and European human rights law.[173] This is problematic given that interception practices are seen to pose a serious threat to the protection of human rights of irregularly arriving migrants.

Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, 33. Available at <http://www.unhcr.org/4963237411.pdf> accessed 15 September 2015.

[170] UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, 17. Available at <http://www.unhcr.org/4963237411.pdf> accessed 15 September 2015. A FRA study on EU land borders reports that a considerable percentage of border guards interviewed at the land border crossing points said that they would not start an asylum procedure even if the traveller said their lives or freedom would be at risk if they were returned to the country they had left. FRA calls for enhanced measures to enhance recognizing of asylum-seekers. See, FRA, *Fundamental rights at land borders: findings from selected European Union border crossing points (FRA* 2014) 42-43 and 45. Available at < http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-land-border-checks_en.pdf> accessed 15 September 2015. Similar concerns are expressed in regard of screening to identify members of vulnerable groups, such as unaccompanied children. See, e.g., Amnesty International, 'Greece: Humanitarian Crisis Mounts as Refugee Support System Pushed to Breaking Point' (25 June 2015) <https://www.amnesty.org/en/press-releases/2015/06/greece-humanitarian-crisis-mounts-as-refugee-support-system-pushed-to-breaking-point-5/> accessed 15 September 2015.

[171] Council Directive 2001/51/EC of 10 July 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement [2001] OJ L187. For a discussion, see, Sylvie de Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia 2004) 112-116.

[172] Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' [2011] *International Journal of Refugee Law* 174, 200. For cooperation on border management, see also FRA, *Fundamental rights at Europe's southern sea borders* (FRA 2013) 11. Available at <http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> (accessed 15 September 2015).

[173] Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR', CEPS Paper in Liberty and Security in Europe No. 59 / September 2013, 10. Available at <http://www.ceps.eu/system/files/LSE%20No%2059%20International%20Refugee%20Law.pdf> accessed 13 June 2015.

Based on its prior jurisprudence, the ECtHR has recognised, specifically in the context of border surveillance and migration control operations, that the ECHR applies where state exercises control over an area or an individual, where it has 'full and exclusive control over a prison or a ship', or where state action has, or produces, effects outside the territory of a State Party.[174] The judgment of the Court in *Hirsi Jamaa and others v. Italy* indicates that where a state exercises a high level of *de jure* authority abroad, a lower level of *de facto* or physical control is required for state's jurisdiction to arise.[175] Hence, operating through joint patrols extraterritorially does not liberate the EU Member States of their human rights obligations or responsibility for human rights violations as a result of such operations.[176] Nor can a state refer to the pressures created through the increasing influx of migrants and asylum seekers to evade its obligations under Article 3 ECHR.[177] In *Hirsi Jamaa* judgment, the Court held explicitly that, despite such pressures, the 'protection against the treatment prohibited by Article 3 imposes on states the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment.'[178] Whether such a 'real risk' exists is, according to the Court 'for the national authorities […] to find out about'.[179] Notably, in determining whether such a risk exists, the finding of a threat of degrading and inhuman treatment does not have to be individualised and may be based on the 'general situation in a particular country' based on reliable information from 'international bodies and non-governmental organisations', for example, 'independent international human rights protection associations'.[180]

It is consequently critical that interception measures are executed with full respect to the states' obligations under international human rights and refugee law.[181] The UN Special Rapporteur on the human rights of migrants, François Crépeau has stated in a similar vein, that '[t]erritorial sovereignty is about controlling the border, knowing who comes in and who leaves. It has never been about sealing the border to migration'.[182]

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[174] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, paras 71-75. For a discussion on the extraterritorial applicability of human rights law and the principle of *non-refoulement*, see, Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' [2009] *International Journal of Refugee Law* (2009) 256.

[175] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, para 81. For a discussion, see, Violeta Moreno-Lax, ''*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control? (2012) 12(3) Human Rights Law Review 574.

[176] FRA, *Fundamental rights at Europe's southern sea borders* (FRA 2013) 11. Available at <http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> accessed 15 September 2015.

[177] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, para 122.

[178] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, para 123. See, also, *Soering v. United Kingdom* (1989) 11 EHRR 439, Judgment of 7 July 1989, paras 90–1.

[179] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, para 133.

[180] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, paras 118 and 123.

[181] UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, Executive Committee of the High Commissioner's programme,18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000, 19. Available at <http://www.unhcr.org/4963237411.pdf> accessed 15 September 2015.

[182] UN, 'Europe's response to migrant crisis is not working, warns UN rights expert' <http://www.un.org/apps/news/story.asp?NewsID=51713#.VfgTgihq76n> accessed 15 September 2015.

b) Right to life and rescue

Human rights concerns also arise in regard to other elements of border control and surveillance. Notably, while the EU and its Member States have undertaken to respect human rights, including the right to life, under various human rights instruments including Article 2 of the ECHR, the IOM reports that the death toll of migrants crossing the Mediterranean by mid September amounted to over 2,800 for the year 2015.[183] The failure of the EU to address the humanitarian crisis in the Mediterranean through sufficient rescue operations has been the subject of stark criticism by the civil society.[184] Also, reported cases indicate that rescue operations sometimes arrived to rescue migrants drifting at sea with considerable delay.[185] This can be seen to be in contradiction with the 1982 UN Convention on the Law of the Sea (UNCLOS) (to which both the EU and all its Member States are party), which obliges the coastal Member States to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea',[186] and with the 1979 International Convention on Maritime Search and Rescue, under which States Parties are to 'ensure that assistance [is] provided to any person in distress at sea [...] regardless of the nationality or status of such a person or the circumstances in which that person is found'.[187] Within the territorial waters of the coastal EU Member States, this is also in contravention with the duty undertaken by the Member States to ensure the right to life of individuals within their jurisdiction. It is, therefore, welcome that the new Commission Agenda on Migration foresees to step up the EU rescue efforts and to allocate further resources to rescue operations.[188] Such efforts should, according to Human Rights Watch, 'be sustained over the long-term'.[189]

As it is essential that such rescue systems are functional,[190] it is regrettable that human rights considerations are not given a central role in the coordination of rescue operations with third state authorities through Eurosur and Frontex. When the Eurosur Regulation was adopted the tragic events off the Italian island Lampedusa on 3 October 2013 were still fresh in mind. Hence, the Commission and the European Parliament have repeatedly emphasised that Eurosur is also about 'reduc[ing] the loss of

[183] IOM, (Missing Migrants Project, 15 September 2015) <http://missingmigrants.iom.int/> accessed 15 September 2015.

[184] See, e.g., Amnesty International European Institutions Office, 'EU "burying heads in the sand" as hundreds more migrants die at sea off Italy' (Press Release 11 February 2015). Available at <http://www.amnesty.eu/en/news/press-releases/eu/asylum-and-migration/eu-burying-heads-in-the-sand-as-hundreds-more-migrants-die-at-sea-off-italy-0852/#.VTYRayhq76k> accessed 20 April 2015.

[185] FRA, *Fundamental rights at Europe's southern sea borders* (FRA 2013) 10. Available at <http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> accessed 15 September 2015.

[186] Art 98(2) United Nations Convention on the Law of the Sea 1982, UNTS Vol. 1833.

[187] Chapter 2.1.10 International Convention on maritime search and rescue 1979, 1405 UNTS 97.

[188] European Commission, A European Agenda on Migration (Communciation)COM(2015) 240 final, 3.

[189] Human Rights Watch, 'EU: Five Steps to Tackle Refugee Crisis
How to Save Lives and Protect People' (4 September 2015) <https://www.hrw.org/news/2015/09/04/eu-five-steps-tackle-refugee-crisis> accessed 15 September 2015.

[190] FRA, *Fundamental rights at Europe's southern sea borders* (FRA 2013) 10. Available at <http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> accessed 15 September 2015.

lives at sea'.[191] Frontex or an EU Member State may transmit information to the respective third country authorities based on humanitarian arguments, for example, saving the lives of persons in distress at sea. Compared to the Italian initiated search and rescue operation Mare Nostrum, which resulted in the saving of up to 10,000 persons in distress at sea per week, only minor efforts have been taken with regard to SAR measures on the European level.[192] The replacement of the Mare Nostrum operation, with monthly costs of 9.5 million euro,[193] by the joint operation Triton, with an estimated monthly budget of between 1.5 and 2.9 million euro,[194] is illustrative of this discrepancy.

The absence of concrete search and rescue rules in the Eurosur Regulation has been partly remedied by the adoption of the Regulation Establishing Rules for the Surveillance of the External Sea Borders.[195] This Regulation, adopted in 2014, sets forth provisions on, *inter alia*, disembarkation, the obligation to respect *non-refoulement* and the obligation to render assistance to persons found in distress.[196] The establishment of Eurosur is based on Article 77(2)(d) TFEU, which sets forth the establishment of integrated border management and Article 77(1) TFEU, under which the EU is to develop a policy with a view to ensuring the effective monitoring of its external borders. These provisions do not include any reference to humanitarian concerns. In this regard, the Commission has aptly remarked that the 'purpose of border surveillance is to prevent unauthorized border crossings' and that Frontex 'neither becomes a search and rescue body nor does it take up the functions of a rescue coordination centre.'[197] Ongoing cooperation with third country authorities, such as those of Tunisia and Libya, indicates that the focus lies on strengthening the border control and surveillance capabilities of those countries in order to prevent attempts at irregular migration to the EU.

[191] European Commission, 'establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union' (Proposal for a Regulation) COM(2013) 197 final, 1. The European Parliament placed a strong emphasis on the protection and saving of migrants as one task of Eurosur and insisted on corresponding provisions. Cf, Report on the proposal for a regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), (COM(2011)0873 – C7-0506/2011 – 2011/0427(COD), 24 June 2013.

[192] BBC News, 'Libya migrants: UN urges more effort to save lives' (15 April 2015) <http://www.bbc.com/news/world-africa-32314263> accessed 28 April 2015.

[193] The Economist, 'Tidal Wave' (5 July 2014) <http://www.economist.com/news/europe/21606301-more-horrific-deaths-mediterranean-tidal-wave> accessed 14 April 2015.

[194] European Commission, 'European Commission stands with Italy on coping with migratory pressure on Lampedusa' (Press Release), 19 February 2015, <http://europa.eu/rapid/press-release_IP-15-4453_en.htm> accessed 14 April 2015.

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

[196] Art 4, art 9 and Art 10 Council Regulation No 656/2014.

[197] European Commission, 'establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union' (Proposal for a Regulation) COM(2013) 197 final, 5. But see rather unconvincing statements to the contrary in the aftermath of the Lampedusa tragedy by former JHA Commissioner Malmström: European Commission, 'Commissioner Malmström's intervention on Lampedusa during the Home Affairs Council press conference' (MEMO), 8 October 2013.

Thus, the inclusion of humanitarian concerns remains suspected of serving as an apology for continuing and stepping up the broad set of measures aimed at preventing migrants, including refugees, from reaching the territories of EU Member States, which results in a dilution of legal responsibility. A state may be held responsible for the violation of rights enshrined in the ECHR if it exercises authority or control over a person[198] or territory;[199] however, demonstrating that such control exists or has existed as a result of EU support to third country authorities to strengthen their capabilities on border control is often difficult, which means that the EU would generally be able to evade responsibility for human rights violations in the border control activities of the countries that receive such support.[200] Given this, and the fact that the EU may through such support hamper the access to asylum procedures in EU Member States, it can be said that a structural incoherency exists between the EU's commitments with regard to the right to asylum on the one hand and the operational cooperation with third countries envisaged in the Eurosur Regulation on the other.

c) Procedural rights and access to remedies

Article 47 of the Fundamental Rights Charter provides for the fundamental right to an effective remedy to 'everyone whose rights and freedoms guaranteed by the law of the Union are violated'. To be effective, a remedy must be based on sufficient and accessible information and meaningful access to a mechanism to lodge a complaint to challenge a decision or treatment. Such a right may be relevant in border control situations in the context of, *inter alia*, conduct of border control agents; refusal of entry, rejection at the airport of an asylum claim, and placement in a holding facility.[201]

Recent reports on EU border controls indicate, however, that many officers at EU borders provide insufficient information in relation to the checks conducted; on the process of border controls and the rights connected to it, as well as on complaints procedures.[202] Interpretation is, likewise, reported to be

[198] *Issa and others v. Turkey* App no 31821/96 (ECHR, 16 November 2004) para 71, *Pad and Others v. Turkey* App no 60167/00 (ECHR, 28 June 2007) para 53; *Isaak and others v. Turkey* App no 44587/98 (ECHR, 28 September 2006) para 119.

[199] *Bankovic and Others against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (GC) App no 52207/99 (ECHR, 12 December 2001); *Medvedyev and Others v. France* (GC) App no 3394/03 (ECHR, 29 March 2010) para 64.

[200] On the extraterritorial human rights of the EU in general, see, Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' [2014] *European Journal of International Law* 25, 1071-1091.

[201] European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union* (FRA 2014) 8. Available at <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf> accessed 13 April 2015.

[202] European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union* (FRA 2014) 8, 86 and 97. Available at <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf> accessed 13 April 2015. See, also FRA, *Fundamental rights at land borders: findings from selected European Union border crossing points (FRA* 2014) 42-43 and 45. Available at <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-land-border-checks_en.pdf> accessed 15 September 2015.

provided in an insufficient manner,[203] a fact which risks to fundamentally hamper access to an effective remedy. Information on appeals procedures may also be inaccessible, or difficult to understand, due to the technical and legal language used.[204]

In this regard, it is noted that the ECtHR has expressly stated that the lack of access to information is a 'major obstacle in accessing asylum procedures',[205] and has underlined the importance of the right to obtain sufficient information to enable a person to gain access to the 'relevant procedures and to substantiate their complaints' for anyone 'subject to removal measure, the consequences of which are potentially irreversible'.[206] With regard to interceptions, it is to be noted that such procedural guarantees shall, following the ECtHR judgment in *Hirsi Jamaa*, apply equally on the high seas: 'the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.'[207] As a consequence, the practice by some coastal EU Member States of intercepting migrants on the high seas is in clear conflict with the ECHR, where due attention is not given, in line with the Convention and the Court's interpretation thereof, to individual assessments of the migrant's situation, linguistic support, information on the procedures, and possibility for suspension or removal.[208]

d) Frontex and Eurosur: issues of accountability and legitimacy

During the last decade, a number of EU regulatory agencies have been established to operationalise the JHA cooperation.[209] In European immigration control, Frontex, for example, plays a central role. Given the grave potential for human rights violations accruing directly from the actions of such agencies,[210] and in light of reported malpractices discussed above, questions are increasingly being posed about the

[203] European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union* (FRA 2014) 8. Available at <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf> accessed 13 April 2015.

[204] European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union* (FRA 2014) 8. Available at <http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf> accessed 13 April 2015.

[205] *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR 21 January 2011), para 304.

[206] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, para 204.

[207] ECtHR, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, 23 February 2012, para 178. See, also, *Medvedyev and Others v France,* Application no. 3394/03*,* 29 March 2010, para 81.

[208] For a similar conclusion, see, Violeta Moreno-Lax, ''*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control? (2012) 12(3) Human Rights Law Review 574.

[209] Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 337.

[210] Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 338. See similarly Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

democratic legitimacy and legal accountability of agencies such as Frontex. In fact, as FRAME deliverable 11.1. asserts, Frontex has, '[o]ut of all AFSJ agencies', become 'the one that has faced the most extensive fundamental rights criticism'.[211] In what follows, Frontex operations will be assessed from the perspective of their legal basis, democratic legitimacy and human rights accountability.

Unclear legal contours of operations

The exact contours of the agency's mandate remain obscure, as its founding regulation does not specify its tasks in terms of the concepts of facilitation or coordination of activities.[212] Frontex Regulation remains silent, also, regarding the geographical scope of border controls, and merely mentions that joint operations and pilot projects are conducted at the external borders of Member States.[213] The Schengen Borders Code, as the key legal instrument in this regard, defines external borders quite vaguely as the 'Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders'.[214] International law of the sea limits the territory of states to 12 nautical miles and permits immigration control in a zone extending to 24 nautical miles.[215] In the absence of any permissive norm authorising border control operations beyond the territory of EU Member States and the limits set forth by international law, that is, beyond the 24 nautical miles zone, the legal basis for the territorial scope of Frontex coordinated joint operations is, at best, at the 'brink of legality'.[216] While the legal framework for Eurosur remains silent, or at best ambiguous, as to the geographical scope of Eurosur operations, the Regulation Establishing Rules for the Surveillance of the External Sea Borders clearly envisages operations in third country territories and in cooperation with third country authorities.[217] Such flexibility in terms of the geographic applicability of the legal provisions and of the measures they regulate is questionable in terms of legal certainty.[218]

[211] Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015, 45-46.

[212] Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 343.

[213] Council Regulation (EC) No 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1, as amended by Council Regulation (EU) No 1168/2011, OJ L 304/1, 25 October 2011, art 3.

[214] Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105/1, 15 March 2006, art 2(2).

[215] United Nations Convention on the Law of the Sea 1982, UNTS Vol. 1833, art 3 and art 33.

[216] Statewatch, 'The reinforcement of Frontex and the intensification of cooperation with third countries' March 2012 <http://www.statewatch.org/news/2012/mar/01frontex.htm> accessed 11 September 2015.

[217] Council Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, art 7 and art 10 (Council Regulation No 656/2014)

[218] The GAMM clearly sets forth that it is, as a general approach and method, not geographically restricted. See European. See, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 7. Also note that Article 78(2)(g) TFEU foresees that the

Also, neither the Eurosur Regulation nor the Frontex Regulation contain clear rules regulating a transfer of information by Frontex to third country authorities and, in particular, no legal safeguards as to when to abstain from such transfer of information.[219] Article 20 Eurosur Regulation, which explicitly grants Member States the prerogative to exchange information with third countries on the basis of bilateral or multilateral agreements,[220] and the overall purpose of Eurosur, which is to strengthen and harmonise exchange of information between EU Member States and Frontex,[221] both support the view that Frontex does not have the competence to exchange such information with third country authorities. Cooperation with third states in terms of transferring information is addressed only briefly in the Eurosur Regulation. Hence, it remains unclear whether and under which circumstances Frontex may transmit information to third country authorities. Concern has also been expressed regarding the way such information databases, which were originally meant to be used for asylum and migration management, have come to be used as forms of law enforcement.[222] The lack of clarity is further illustrated by, for example, the current EU Border Assistance Mission in Libya, the goal of which is, broadly speaking, to transfer knowledge or information to the Libyan authorities in order to strengthen and secure Libyan borders.[223] The absence of any clear rules and any human rights safeguards (and established practice) in the cooperation agreements and cooperation with Libyan authorities suggests that these provisions were kept deliberately vast in order to enable informal cooperation with third countries. The vagueness of the provisions may have serious implications for the situation of individuals who find themselves in distress at sea and attempt to seek asylum in an EU Member State.

The importance given to the exchange of information with third states can be seen as a part of a larger trend within the JHA agencies, including Frontex, to 'increase their margin of manoeuvre and autonomy from EU Member States, national law enforcement authorities and even European institutions'.[224] While typically portrayed as a merely technical facilitator or coordinator of border management activities, the

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European asylum system shall include partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

[219] The Frontex regulation merely contains a provision prohibiting the transmission of personal data to third countries during pilot projects, joint operations and rapid interventions, but not any rules on information exchange outside these modes of cooperation. See Council Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L 304/1, Art 11c (6) (Frontex Regulation).

[220] Art 20(1) Eurosur Regulation.

[221] Cf. Recital 1 Eurosur Regulation.

[222] Jorrit J. Rijpma, 'Institutions and Agencies: Government and Governance after Lisbon', in: Diego Acosta Arcarazo and Cian C. Murphy (eds) *EU Security and Justice Law after Lisbon and Stockholm* (Hart Publishing 2014) 54, 68-69.

[223] EU External Action Service, 'EU Integrated Border Assistance Mission in Libya' (Press Release, January 2015) <http://eeas.europa.eu/csdp/missions-and-operations/eubam-libya/pdf/factsheet_eubam_libya_en.pdf> accessed 14 April 2015.

[224] Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 108.

actual operational activities of Frontex go far beyond technical facilitation and coordination.[225] As it has the power to, for example, initiate and carry out joint operations, to purchase equipment and to deploy border guards seconded by Member States,[226] the role of Frontex is seen to have grown from 'providing technical and operational assistance', into 'performing a more leading role' in the operations.[227] This *de facto* expansion of its mandate has been facilitated by the fact that the limits of its operations and tasks are not clearly defined in its founding Regulation, which due to its indeterminate nature enables such extensions of its competences 'on an ad hoc basis.'[228] In its focus on security and the production and use of intelligence, the enhanced role of Frontex is also an example of the increasing securitisation of the EU's asylum and immigration policies.[229]

Democratic legitimacy and accountability for human rights

Despite its increasing role in the activities, Frontex itself, as well as the general EU narrative,[230] claims that it merely exercises the role of a coordinator or facilitator of the policies and that legal responsibility for any violations should therefore fall with the Member States operating in joint operations.[231] Such a 'depoliticisation' of its role and activities highlights the independence of the Agency, and gives rise to questions concerning the political, democratic and legal scrutiny of its activities.[232] These developments

[225] Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 108, and Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 342.

[226] Art 3, 3b, 7 Frontex Regulation

[227] Roberta Mungianu, 'Frontex: Towards a Common Policy on External Border Control' [2013] 15 *European Journal of Migration and Law* 359, 384.

[228] Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 108.

[229] Valsamis Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 39, 49.

[230] The general EU narrative refers here to frequent claims that the main responsibility in this area remains with the Member States. For a discussion, see Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 341-342.

[231] Yves Pascouau and Pascal Schumacher, 'Frontex and the respect of fundamental rights: from better protection to full responsibility', *European Policy Centre, Policy Brief*, 3 June 2014, http://www.epc.eu/documents/uploads/pub_4512_frontext_and_the_respect_of_fundamental_rights.pdf, 1, accessed 15 September 2015, 1.

[232] Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 229, e.g. 236; Valsamis Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 39, 61; and Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 108.

may be attributed to a more fundamental and broader trend in EU policies: the increasing role of expert bodies in the operationalisation of EU policies. With regard to agencies, this phenomenon is often labelled 'agencification'.[233] Efficient border management through Frontex comes along with border experts, high degrees of flexibility, outsourcing, increasing 'technologisation', and a shift from political decisions to the implementation of apolitical expert decisions, as well as a shift from legal instruments to technical arrangements and political memoranda of understanding as instruments for cooperation.

The lack of democratic legitimacy and accountability of Frontex is not limited to specific instruments, but derives from its institutional and legal structure. The non-legal nature of the working arrangements by Frontex – concluded under the threshold of international agreements based on Article 218 TFEU – excludes them from judicial review by the CJEU.[234] Also, although the European Parliament has to be informed on the envisaged conclusion of working arrangements 'as soon as possible',[235] no parliamentary consent is required. A prior, legally non-binding, opinion has to be received by the Commission, but this merely underlines the growing 'executive dominance' in sensitive fields in European democracy.[236] The result is curtailed democratic oversight and severely limited judicial review, which is particularly obvious in Frontex's role in daily operations. For instance, the management of the Eurosur surveillance network by Frontex shows that there are no clear rules with regard to cooperation with third country authorities and that no rules exist setting forth accountability towards the European Parliament.

The increasing role played by the Agency, coupled with its imprecise mandate and the unclear division of competences between the Agency and the Member States in the management of external borders, may also prove problematic in terms of human rights accountability.[237] The enhanced scope and role of Frontex has not been accompanied with a clear recognition of its legal responsibility in terms of human rights violations that may occur in the operations it coordinates.[238] Although Frontex has adopted a Fundamental Rights Strategy and has recently appointed a Fundamental Rights Officer, the former does not constitute a legally binding document and the latter merely has a monitoring and reporting

[233] The increasing role of expert bodies illustrates the shift towards new forms of governance. For a general overview see: Paul Craig and Grainne de Burca, EU Law: Text, Cases and Materials (5th ed, Oxford 2011) 158-180; for a global analysis on the rise of expert bodies: David Kennedy, Challenging Expert Rule: The Politics of Global Governance,[2005] Sydney Journal of International Law 27, 5-28.

[234] Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding Technical Relationships' [2012] 28 *Merkourios - Utrecht Journal of International and European Law*, 28.

[235] Council Regulation (EC) No 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1, as amended by Council Regulation (EU) No 1168/2011, 25.10.2011, OJ L 304/1, art 14(8).

[236] Deirdre Curtin, 'Challenging Executive Dominance in European Democracy' [2014] 77(1) *The Modern Law Review*, 1.

[237] Bjarte Vandvik, 'Extraterritorial Border Controls and Responsibility to Protect: A View from ECRE' [2008] *Amsterdam Law Forum*, 34.

[238] Yves Pascouau and Pascal Schumacher, 'Frontex and the respect of fundamental rights: from better protection to full responsibility', *European Policy Centre, Policy Brief*, 3 June 2014, http://www.epc.eu/documents/uploads/pub_4512_frontext_and_the_respect_of_fundamental_rights.pdf, 1, accessed 15 September 2015.

mandate, lacking the power to issue binding opinions.[239] Furthermore, the multi-actor structure of the EU's border management makes it complicated for an individual affected by the operations to claim remedies in case of an alleged violation of human rights, as he or she would need to demonstrate the chain of causality between the violation and the Frontex activity, as opposed to Member State activity.[240] That may be difficult to prove, given the 'interwoven web of actions by several players' in this area.[241] As a result, Frontex operations may evade legal responsibility.[242] The reported lack of transparency in the Frontex operations, and the lack of information on access to remedies, is prone to complicate access to remedies and accountability.[243] In the context of extraterritorial border controls, the situation is further compounded by the physical remoteness of avenues for legal remedies.[244]

There should, hence, be a clearer division made between responsibilities of the Member States and Frontex 'in line with the Agency's expanded role', and 'ensuring that Frontex has full legal responsibility for acts committed during the operations that it coordinates, wherever they take place'.[245] Such a clear division, however, does not exist, which hampers individuals' access to judicial remedies, thereby increasing the vulnerability of individuals on the move.[246] As border management concerns the

[239] Frontex, Frontex Fundamental Rights Strategy <http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf> accessed 9 October 2015; Frontex, Management Board Designates new Fundamental Rights Officer, <http://frontex.europa.eu/news/management-board-designates-fundamental-rights-officer-8IK8lm> accessed 9 October 2015.

[240] See, generally, Valsamis Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) 39, 62.

[241] For a discussion see Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 352-353.

[242] Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 354.

[243] For lack of transparency, see http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf, 44-45. See, also, Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 110.

[244] Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 110.

[245] Migreurop, A study conducted by Migreurop (www.migreurop.org) on the European External Borders Agency in view of the revision of its mandate, <http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>, accessed 15 September 2015, 46.

[246] Elspeth Guild, Sergio Carrera, Leonhard den Hertog, and Joanna Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 110.

fundamental rights of people on the move, clear and efficient possibilities to file a complaint should be put in place to ensure access to judicial remedies.[247]

The goal to increase the external dimension of migration policies can be seen to result in a dual logic: human rights remain key within the borders of EU Members States, guaranteed by judicial oversight, while in the external dimension, where the judicial stretch is missing, the operational logics of cooperation and efficiency shift human rights considerations into the background. Cooperation with several third country authorities provides an example to this effect. As both the Frontex Regulation and the EU Action Plan on Human Rights (2015-2019) set forth, cooperation with third country authorities require that the latter policies meet EU standards.[248] Working arrangements, however, have been signed by the Frontex Executive Director with 17 different third country authorities, including the Nigerian Immigration Service, the State Border Committee of Belarus and the Russian Border Guard Service.[249] Whether these cooperating authorities meet EU standards in their codes of conduct and legal mandates, particularly with regard to human rights, is not clear. From the perspective of protecting the right to seek asylum, it is also questionable that third countries are encouraged to undertake substantial efforts to prevent irregular migration to the EU by means of improving border controls by cooperating with the EU border control agency Frontex or by carrying out information campaigns to discourage migration to the EU.[250]

4. A system that encourages illegal immigration? Enhancing legal channels to enter the EU

a) Legal and illegal avenues to the Union

Following the unfolding and acceleration of the Mediterranean refugee crisis in 2014 and 2015, the EU is facing increasing criticism for failing to facilitate the arrival of asylum seekers and persons in need of protection.[251] While more and more people are fleeing persecution as a result of conflicts in countries like Syria, Iraq and Afghanistan, Europe has stepped up its efforts to combat irregular entry at its sea and land borders, tightening visa requirements and, under Directive 2001/51/EC,[252] placing sanctions on the carrying of passengers without valid travel documentation to enter the territory of the EU.[253] As

[247] Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy? [2013] *European Journal of Migration and Law* 337, 339.

[248] Council Regulation (EC) No 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L 349/1, as amended by Council Regulation (EU) No 1168/2011, OJ L 304/1, 25 October 2011, art 14(1).

[249] For a complete list of working arrangements, see Frontex website <http://FRONTEX.europa.eu/partners/third-countries/> accessed 8 September 2015.

[250] See for instance the Mobility Partnership concluded with Georgia in 2009, Council of the European Union, 16396/09 ADD 1, 20 November 2009.

[251] See, e.g, Human Rights Watch, 'EU's Approach to Migrants: Humanitarian Rhetoric, Inhumane Treatment' <https://www.hrw.org/news/2015/04/15/eus-approach-migrants-humanitarian-rhetoric-inhumane-treatment> accessed 13 October 2015.

[252] Council Directive 2001/51/EC of 10 July 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement [2001] OJ L187.

[253] See, ECRE, 'Access to Europe', <http://www.ecre.org/topics/areas-of-work/access-to-europe.html> accessed 15 September 2015. See also Guild *et al.,* according to whom 'The first problem is that refugees' dangerous journeys

potential asylum seekers often do not meet the criteria for obtaining a regular visa, they may have no option other than crossing the border in an irregular manner,[254] a phenomenon which, as described above, often means taking life-threatening risks in the hands of human smugglers.[255]

Repeated calls have, therefore, been made for urgent action by the EU to deal with the situation of the thousands of people putting their lives at risk in crossing the European sea border to reach protection on European soil.[256] A recent statement by the UNHCR reminds the European leaders of the fact that it is not 'only a migration phenomenon' Europe is currently dealing with, but a refugee crisis, where the 'vast majority of those arriving in Greece come from conflict zones like Syria, Iraq or Afghanistan and are simply running for their lives'.[257] Penalising entry and the facilitation of entry to the EU can, therefore, not be a sustainable approach to tackling the influx of migrants and asylum-seekers.

The carrier sanctions instituted at the EU level, introducing sanctions on carriers for facilitating entry to the EU of third-country nationals travelling without the necessary travel documents to enter the EU,[258] have been found to work to the detriment of those persons seeking protection in the absence of viable alternatives for entry.[259] Whereas cheaper and much safer forms of transport exist, the carrier sanctions render such alternatives beyond the reach of persons needing international protection, as businesses refuse to take them on board in fear of sanctions. The system shifts an element of responsibility for migration control to private actors who, lacking authority to do so and in the absence of proper training, fail to carry out proper refugee status determination, instead refusing to carry any passenger without

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to the EU are a result of EU visa policies and carrier sanctions. While nationals from refugee-producing countries require visas to reach the EU (Visa Regulation 539/2001), visa-issuing criteria include proof of willingness and ability to return to the country of origin or provenance (Art. 21 Visa Code).' See Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, 4.

[254] FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 35. See also Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, 4.

[255] ECRE, 'Access to Europe', <http://www.ecre.org/topics/areas-of-work/access-to-europe.html> accessed 15 September 2015.

[256] See e.g., Amnesty International, 'UN finds Mediterranean 'deadliest' sea route for migrants', 10 December 2014 <http://www.amnesty.eu/en/news/press-releases/eu/asylum-and-migration/un-finds-mediterranean-deadliest-sea-route-for-migrants-0827/#.VffYBMn4I0J> accessed 15 September 2015, UNHCR, 'UNHCR calls for urgent action as hundreds feared lost in Mediterranean boat sinking', 20 April 2015 <http://www.unhcr.org/5534dd539.html> accessed 15 September 2015, and Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, 5.

[257] UNHCR, 'Statement by UN High Commissioner for Refugees, António Guterres on refugee crisis in Europe', 4 September 2015 [press release] <http://www.unhcr.org/55e9459f6.html> accessed 15 September 2015.

[258] Council Directive 2001/51/EC of 10 July 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement [2001] OJ L187.

[259] See, e.g., Claire Rodier, 'Analysis of the external dimension of the EU's asylum and immigration policies' – summary and recommendations for the European Parliament [2006] report to the European Parliament's Subcommittee on Human Rights, 11, ECRE, 'Access to Europe', <http://www.ecre.org/topics/areas-of-work/access-to-europe.html> accessed 15 September 2015, and Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] *CEPS Papers in Liberty and Security in Europe*, No. 83, 6.

the necessary documents to enter the EU.[260] Such privatisation is problematic, not least with a view to the fact that non-state actors cannot be held legally accountable for any malpractice under public international law.[261]

Within the EU, high priority is also given to fighting migrant smuggling 'to prevent the exploitation of migrants by criminal networks and reduce incentives to irregular migration'.[262] While the legislation to this end[263] has been applicable for more than ten years, its effect, as Guild *et al.* note, if anything, has been counterproductive: 'criminalising the irregular movement of people across the Mediterranean seems only to have increased both the risk and costs involved for refugees'.[264] Such a punitive approach to facilitation of entry for persons in need of protection fails to take full account of states' obligations under international refugee law not to penalise refugees for entering into the territory irregularly.[265] The military operations foreseen to address smuggling also risk exposing the migrants and asylum seekers to serious risks.[266] Instead of addressing smuggling with military operations, Guild *et al.* suggest that the interests and rights of persons needing protection would be better served by the removal of carrier sanctions.[267] This could also contribute to the elimination of the smuggling rings by eliminating the need for clandestine forms of transport.[268] In a similar vein, UNHCR asserts that international cooperation is necessary to address smuggling of refugees, but for any such measure to be effective it needs to be

[260] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] *CEPS Papers in Liberty and Security in Europe*, No. 83, 6.

[261] ECRE, 'Carrier sanctions, <http://www.ecre.org/topics/areas-of-work/access-to-europe/7-carrier-sanctions.html> accessed 15 September 2015.

[262] European Commission, Communication from the Commission to the European Parliament and the Council, Action Plan Against Migrant Smuggling (2015 – 2020), COM(2015)285 final, 27 May 2015; and European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 3-4. See, also, Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1.

[263] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17.

[264] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, 5. See, also, Human Rights Watch, 'Migrant smuggling: What are the EU options?' (*EU Observer*, 12 May 2015) <https://www.hrw.org/news/2015/05/12/migrant-smuggling-what-are-eu-options> accessed 13 October 2015.

[265] FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them* [2014], 15-16. Also see Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 5 , 10, and Violeta Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' [2008] 10(3) *European Journal of Migration and Law* 315.

[266] Human Rights Watch, ' EU: Don't Endanger Lives at Sea or Deny Protection: Anti-smuggling Operation Bound by Human Rights Law' (*EU Observer* 21 May 2015) <https://www.hrw.org/news/2015/05/21/eu-dont-endanger-lives-sea-or-deny-protection> accessed 13 October 2015. See, also, Council Decision of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2006] OJ L 122/31, 19 May 2015.

[267] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] *CEPS Papers in Liberty and Security in Europe*, No. 83, 7.

[268] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] *CEPS Papers in Liberty and Security in Europe*, No. 83, 7.

coupled with 'opening up more opportunities for people to come legally to Europe and find safety upon arrival'.[269]

Suggestions to this end have been put forth by the UNHCR and other actors, including the introduction of reliable and safe *legal avenues* to enter the Union in conformity with the Fundamental Rights Charter and international human rights and refugee law provisions.[270] Such an approach is believed both to 'reduce the demand for the services of smugglers, and thereby enhance trust between asylum seekers, refugees and the authorities in EU member states' and to 'lead to more effectively planned and orderly arrivals on the territory of the member states', thus lessening the pressure on frontline Member States.[271] Such propositions usually refer to a set of refugee-related schemes such as humanitarian visas, temporary protection and protected entry procedures, and to enhancement of regular mobility schemes available for, among others, family reunification and for students and migrant workers.[272] An overview of the suggested schemes will be given in the sections below.

b) Humanitarian visas

Humanitarian visas belong to the group of protected entry procedures that allows non-nationals to 'approach the potential host state outside its territory with a claim for […] international protection' and 'to be granted an entry permit in case of a positive response to that claim'.[273] Such visas are intended to provide persons in need of protection with safe access to the territory through screening of protection needs at the diplomatic representation of the potential host state. The humanitarian visa presents a hybrid form of protected entry procedures in that, where a humanitarian visa is issued, applications for international protection are subsequently lodged and processed within the territory of the destination state, not in the diplomatic representations abroad.[274]

While EU law does not provide for a separate humanitarian visa procedure,[275] the Visa Code stipulates rules for short-term visas with 'limited territorial validity' (LTV),[276] valid within the territory of one or more, but not all, Schengen States, most commonly the territory of the issuing state.[277] As per Article

[269] UNHCR, 'Statement by UN High Commissioner for Refugees, António Guterres on refugee crisis in Europe', 4 September 2015 [press release] <http://www.unhcr.org/55e9459f6.html> accessed 15 September 2015.
[270] See, e.g., Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, 5. For an overview and assessment of protected avenues to access Europe, see Laura Facchi (ed), *Exploring Avenues for Protected Entry in Europe* (Italian Council for Refugees 2012) <http://www.ecre.org/component/downloads/downloads/468.html> accessed 14 May 2015.
[271] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, 5.
[272] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], 5.
[273] Gregor Noll and Jessica Fagerlund*, Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests. A Preliminary Study* (Danish Centre for Human Rights 2002) 14.
[274] *Ibid.*
[275] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 10.
[276] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1, Article 25.
[277] For an overview on humanitarian visas as an avenue for save access to EU's asylum procedures, see Outi Lepola, 'Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for

25(1) of the Visa Code, an LTV 'shall' be issued regardless of whether the regular entry conditions of the Visa Code are met 'when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations.'[278] From a human rights perspective, it is however notable that in the current wording of the Visa Code it remains unclear whether the appeals procedure in case of refusal to issue a visa provided by Article 32(3) of the Visa Code applies to LTVs, or only to short-term visas.[279] Also, the obligation in Article 25(1) of the Visa Code is qualified with a reference to Member State discretion: 'when the Member State concerned considers it necessary'. Therefore, it remains debatable, as Peers notes, whether the non-discretionary reading of the Visa Code in the *Koushaki* ruling discussed above can be read to apply not only to short-term visas but also to LTVs, that is, visas for persons in need of long-term international protection.[280]

Reading the Code in tandem with the EU Fundamental Rights Charter, Peers holds, however, that at least in cases where there exists an alleged need for international protection such a potential need shall be assessed by Member States and a visa shall be issued where a need for protection is found to exist, regardless of where such an application is made.[281] It is also to be noted that the Visa Code provides, in Article 19(4) for an exception to the general admission criteria: 'By way of derogation, an application that does not meet the requirements set out in paragraph 1 may be considered admissible on humanitarian grounds or for reasons of national interest.'[282] Thus if, as Jensen argues, a Member State 'recognises the humanitarian situation to be sufficiently serious as to warrant a derogation from admissibility requirements, then it seems logical that the humanitarian situation would be sufficiently serious for the Member State to "consider it necessary" to issue an LTV visa.'[283]

Should the Member States wish to adopt a humanitarian reading of the Visa Code there seems to exist no legal impediment to this as per the existing Code,[284] even though the wording of the Code leaves much to be desired in terms of clarity. Nevertheless, such a reading has not been institutionalised at the EU level (and is only used in a scattered manner in the national praxis),[285] and calls have been made for a

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safe access to asylum procedures', DETECTER Project, deliverable 14.3, <http://www.detecter.bham.ac.uk/pdfs/D14_3_Humanitarian_Visas.doc> accessed 15 September 2015.

[278] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1, Article 25(1).

[279] See, e.g., Ulla Iben Jensen, 'Humanitarian Visas Option or Obligation?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 50.

[280] Steve Peers, 'Migrant deaths in the Mediterranean: What can the EU do?' *EU Law Analysis* [blog], 20 April 2015.

[281] Steve Peers, 'Migrant deaths in the Mediterranean: What can the EU do?' *EU Law Analysis* [blog], 20 April 2015.

[282] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1, Article 19(4).

[283] Ulla Iben Jensen, 'Humanitarian Visas Option or Obligation?' [2014] *CEPS Paper in Liberty and Security in Europe*, no 68.

[284] Steve Peers, 'Migrant deaths in the Mediterranean: What can the EU do?' *EU Law Analysis* [blog], 20 April 2015. Peers argues elsewhere that: '[i]f this interpretation is correct, the current and proposed visa codes already include implicit rules covering those applying for international protection. However, it would be preferable to include express rules to this effect.' Steve Peers, 'External processing of applications for international protection in the EU' *EU Law Analysis* [blog] 24 April 2015.

[285] For an account of the national praxis, see Ulla Iben Jensen, 'Humanitarian Visas Option or Obligation?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 41-50.

more outspoken and clearer nexus between the exceptions clause and Article 25(1) providing for a LTV on humanitarian grounds.[286]

Given that humanitarian visas could provide a viable alternative to irregular migration by introducing a safe and legal entry channel to third country nationals to complement other forms of protected entry, such a development would be welcome.[287] A promising practice in this regard is provided by the French policy of receiving asylum applications abroad with a possibility to issue visas based on need for protection. Between 2012 and 2015 close to 1,400 visas were issued to Syrians through this procedure, with a majority of these persons being granted a long-term visa which entitles them to work during the asylum process.[288]

Repeated calls for the introduction of a common EU policy on humanitarian visas have been made since the Tampere Conclusions in 1999.[289] A major revision of the EU visa scheme was suggested in the Stockholm Programme, in which the European Council called for a study on the 'possibility of establishing a common European issuing mechanism for short term visas', notably including an appraisal of 'to what degree an assessment of individual risk could supplement the presumption of risk associated with the applicant's nationality'.[290] Such an initiative is, however, yet to materialise, regret for which has been expressed, for example, in a Parliament resolution of 24 February 2014 calling for further harmonisation of visa procedures, 'including truly common rules on the issuing of visas'.[291]

While multiple schemes for humanitarian visas are in use in EU Member States,[292] the political climate in Member States has not been favourable to the introduction of a EU-wide common scheme for humanitarian visas.[293] Therefore, in its Resolution of April 2014 on the mid-term review of the Stockholm Programme, the European Parliament urged the Member States 'to make use of the current provisions of the Visa Code and the Schengen Borders Code allowing the issuing of humanitarian

[286] See e.g., Ulla Iben Jensen, 'Humanitarian Visas Option or Obligation?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 25-26. For an account of the national praxis, see *ibid.*, 41-50.

[287] For a call on provision of humanitarian visas, see, e.g., Human Rights Watch, 'EU: Provide Protection for Syrian Refugees Allow Access to EU Territory, Step Up Assistance in Region' <http://www.hrw.org/news/2012/12/23/eu-provide-protection-syrian-refugees> accessed 14 May 2105.

[288] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 10.

[289] See, e.g., Presidency Conclusions of the Tampere European Council 15-16 October 1999, Conclusion 3; European Commission: Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen, COM(2009) 262 final, 10 June 2009, paras. 4.2.3.1, 4.2.3.3 and 5.2.3, and European Commission, Communication on the work of the Task Force Mediterranean [2013] COM(2013) 869 final, 13.

[290] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 27.

[291] See, e.g., European Parliament resolution of 27 February 2014 on the future of EU visa policy 2014/2586(RSP).

[292] For an overview, see Ulla Iben Jensen, 'Humanitarian Visas Option or Obligation?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 41-50.

[293] See, e.g., Tanja Milevska, 'EU countries downplay 'humanitarian visas' for migrants' (EurActiv, 9 December 2013) <http://www.euractiv.com/east-mediterranean/little-enthusiasm-eu-migrant-pro-news-532176> accessed 14 Mary 2015.

visas'.[294] The on-going revision process of the Visa Code currently discussed by the Council and the Parliament could present an opening for addressing the lack of a clear and coordinated approach to humanitarian visas.[295]

A set of amendments to overhaul the Visa Code tabled by the Commission in 2014 (referred to as Proposed Regulation for a Union Code on Visas) does not, however, provide for an improvement to the provision regarding LTVs: 'A visa with limited territorial validity shall be issued exceptionally […] when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations'.[296] It is unfortunate that the wording of the proposed paragraph still leaves it ambiguous as to whether the discretionary qualification 'considers it necessary' applies to interpreting whether an international obligation requires the state in question to issue a LTV. A preferred option, suggested by Peers, would be to clearly separate the reference to states' discretion from the reference to international obligations: an LTV visa 'shall be issued…when *it is necessary in order to ensure the international protection of the person concerned in accordance with Directive 2011/95 [the Qualification Directive], or when* the Member State concerned considers it necessary […]'.[297] Acknowledging the fact that the discussions on the proposed amendments are still in their early stages, Peers suggests, with a view to promptly addressing the on-going humanitarian refugee crisis, splitting the proposal for the new visa code into two and a 'fast-track' approach to be taken to adopt the amendment to the LTV provisions.[298] In a similar vein, to ensure increased consistency of the provisions relating to a humanitarian visa, 'international obligations' should be added alongside 'humanitarian grounds' and 'reasons of national interest' as one of the criteria for waiving admissibility requirements in Article 19(4) (Article 17(4) in the Proposed Regulation for a Union Code on Visas) of the Visa Code.[299] In the current version of the proposed regulation, such an addition has not been made.[300]

In terms of issuing of visa applications, increased usage of consular representation between Member States and the introduction of so-called Schengen Visa Centres is recommended with a view to ensuring an improved outreach of visa processing and to take into account the fact that persons in need of international protection may have difficulties accessing a consular representation.[301] It should also be

[294] European Parliament Resolution of 2 April 2014 on the mid-term review of the Stockholm Programme 2013/2024(INI), 83.

[295] European Commission: Proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) [2014] COM(2014) 164 final. FRA has held that '[t]he pending revision of the Visa Code is an opportunity to review the appropriateness of developing a more coordinated approach to visas issued on humanitarian grounds.' See FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 10.

[296] European Commission: Proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) [2014] COM(2014) 164 final, Article 22(1).

[297] Steve Peers, 'External processing of applications for international protection in the EU' *EU Law Analysis* [blog] 24 April 2015 (emphasis in the original).

[298] Steve Peers, 'Migrant deaths in the Mediterranean: What can the EU do?' *EU Law Analysis* [blog], 20 April 2015.

[299] Ulla Iben Jensen, 'Humanitarian Visas Option or Obligation?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 51-52.

[300] See European Commission: Proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) [2014] COM(2014) 164 final, Article 17(4).

[301] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 10.

taken into account, as Lepola aptly points out, that mere contact with a foreign embassy or consulate may endanger the safety of a person in need of international protection in the state he or she is residing in, or perhaps even to a greater degree, in his or her country of origin. Subsequently, for the humanitarian visa to become a meaningful tool for protection, procedures and processes for issuing visas need to be sensitive to the specific conditions of the context and situation in which the visa application is made. Flexibility, expertise and consultations with other agencies dealing with asylum, such as regional UNHCR offices, are mentioned as vital in this regard.[302] Further, a recent report on humanitarian visas suggests that an independent formal procedure should be put in place in the Visa Code to demand that Member States carry out mandatory assessments of whether a derogation based on humanitarian grounds or due to international obligations from admissibility criteria or from Schengen visa requirements is justified.[303]

Finally, it could be further considered whether the issuance of Schengen visas on humanitarian grounds applicable throughout the Schengen area would better serve the purpose of international protection than the LTVs, which provide access to a limited number of Schengen States.[304] This, or any further harmonisation or clarification of the secondary legislation relating to the humanitarian visa is, however, not included among the immediate action priorities or the more medium or long-term approaches to manage migration proposed by the Commission in the new EU immigration agenda published in May 2015. The closest to this effect the document gets is stating that '[a] clear and well implemented framework for legal pathways to entrance in the EU (both through an efficient asylum and visa system) will reduce push factors towards irregular stay and entry, contributing to enhance security of European borders as well as safety of migratory flows.'[305]

[302] Outi Lepola, 'Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures', DETECTER Project, deliverable 14.3, <http://www.detecter.bham.ac.uk/pdfs/D14_3_Humanitarian_Visas.doc> accessed 15 September 2015, 24.

[303] Ulla Iben Jensen, 'Humanitarian Visas Option or Obligation?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 51. In this regard, it is notable that the revision of Article 38(3) of the proposed regulation, coupled with the suggested deletion of Article 17(5) demanding Member States to enable lodging of applications directly at consulates, opens up the possibility for Member States to cooperate with external service providers in assessing some aspects of the admissibility of visa applications. As the possibility applies both to short-term visas and to LVTs, it is vital that precautions are taken to the effect that the outsourcing of assessment does not refuse applications which do not meet the admissibility criteria for short-term visas but could qualify for the waiver from the admissibility requirements based on humanitarian grounds. See *ibid.*, 38-39.

[304] Laura Facchi (ed), *Exploring Avenues for Protected Entry in Europe* (Italian Council for Refugees 2012) 75, <http://www.ecre.org/component/downloads/downloads/468.html> accessed 14 May 2015, and Outi Lepola, 'Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures', DETECTER Project, deliverable 14.3, <http://www.detecter.bham.ac.uk/pdfs/D14_3_Humanitarian_Visas.doc> accessed 15 September 2015, 23.

[305] European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 6.

c) Family reunification

The May 2015 Commission Agenda on Migration calls upon Member States to use legal avenues available to persons in need of protection 'to the full', including family reunification clauses.[306] Family reunification is seen both as an integral precondition for effective integration of refugees,[307] and as a potential legal avenue for persons in need of protection to enter the EU.[308] The position of the family as the fundamental group unit of any society is also a basic tenet of international human rights law,[309] and has been recognised in the final act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons adopting the 1951 Refugee Convention. In the final act, the Conference recommended that states take measures to protect the refugee's family and to maintain the refugee's family unity.[310] As many of the refugees arriving into the EU irregularly are likely to have family members within the EU, functioning family reunification schemes are essential in tackling the ongoing refugee crisis.[311]

In EU legislation, family reunification is covered by the Family Reunification Directive.[312] Although it is an instrument that is applicable to migrants in general, the Directive includes specific provisions for refugees in its Chapter V. Under Article 4 of the Directive, Member States are to authorise the entry and residence of family members of third country nationals residing lawfully within the Member States.

Reports indicate, however, that long procedures and high threshold criteria for family reunification are an important hurdle for lawful family reunification in the EU, forming a further incentive for irregular entry.[313] The UNHCR identifies nine areas of concern in this regard: 'restrictions in scope and time; limited family definition; difficulty in tracing relatives; insufficient information about the procedure; difficulties accessing embassies to lodge an application; difficulties documenting family links and dependency; problems securing travel documents and visas from remote or insecure areas; financing

[306] European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 5.
[307] UNHCR, *A New Beginning - Refugee Integration in Europe* [2013], 127, FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 13, and ECRE, 'ECRE Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification' [2003] <http://www.ecre.org/component/downloads/downloads/199.html> accessed 15 September 2015, 3.
[308] See, e.g., FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 5.
[309] See, e.g., CRC Articles 9-10, and ICESCR, Article 10(1). For a discussion on refugees' right to family reunification under ECtHR case law, see Mark Rohan, 'Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence' [2014] 15(1) *Chicago Journal of International Law*, Article 15.
[310] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *travaux préparatoires*, 25 July 1951, <http://www.unhcr.org/40a8a7394.html> accessed 15 September 2015.
[311] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 11.
[312] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12. For an overview of the different aspects of the Directive, see Sergio Carrera, *In Search of the Perfect Citizen? – The Intersection Between Integration and Nationality in the EU* (Martinus Nijhoff Publishers 2009), 153-171.
[313] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 95-103, and UNHCR, *Refugee Family Reunification – UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)* [2012].

travel and meeting integration requirements'.[314] Concern has been expressed on the variety and complexity of rules relating to family reunification across Member States, leading the UNHCR to recommend a simplification of the family reunification process.[315] Furthermore, the European Council on Refugees and Exiles (ECRE) points to the possibility of extending the periods for processing of family reunification applications under Article 5(4) of the Directive and urges Member States to process such applications with least possible delay.[316]

From the perspective of equal protection, it is noted that persons who have been granted subsidiary protection status under the EU Qualifications Directive are under Article 3(2)(c) exempt from the provisions of the Family Reunification Directive. As seen below in the discussion concerning subsidiary protection, this may indicate that persons in similar situations are treated unequally in terms of their right to family unity.[317]

d) Resettlement

According to the UNHCR, resettlement signifies 'the transfer of refugees from an asylum country to another State that has agreed to admit them and ultimately grant them permanent settlement', providing the refugee with 'legal and physical protection, including access to civil, political, economic, social and cultural rights similar to those enjoyed by nationals'.[318] Resettlement is seen as the 'only durable solution that involves the relocation of refugees from an asylum country to a third country',[319] and has a proven historic record since the time between the First and Second World Wars.[320] The UNHCR is responsible for identifying the persons to be resettled according to the criteria set out in its Resettlement Handbook,[321] normally prioritising those refugees with increased protection risks in countries of first asylum.

In the EU, a proposal for a Joint Resettlement Programme was put forth by the Commission in 2009 with a view to

[314] UNHCR, *Refugee Family Reunification – UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)* [2012], 4-5.
[315] UNHCR, *A New Beginning - Refugee Integration in Europe* [2013], 127-128.
[316] ECRE, 'ECRE Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification' [2003] <http://www.ecre.org/component/downloads/downloads/199.html> accessed 15 September 2015, 8.
[317] See e.g., ECRE, 'ECRE Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification' [2003] <http://www.ecre.org/component/downloads/downloads/199.html> accessed 15 September 2015, 3.
[318] UNHCR, 'A New Beginning in a Third Country' <http://www.unhcr.org/pages/4a16b1676.html> accessed 15 September 2015.
[319] UNHCR, 'A New Beginning in a Third Country' <http://www.unhcr.org/pages/4a16b1676.html> accessed 15 September 2015. For an overview of resettlement, see UNHCR, *UNHCR Resettlement Handbook* [2011].
[320] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 7.
[321] UNHCR, *UNHCR Resettlement Handbook* [2011].

> (1) increase the humanitarian impact of the EU by ensuring that it gives greater and better targeted support to the international protection of refugees through resettlement, (2) to enhance the strategic use of resettlement by ensuring that it is properly integrated into the Union's external and humanitarian policies generally, and (3) to better streamline the EU's resettlement efforts so as to ensure that the benefits are delivered in the most cost-effective manner.[322]

As a corollary, a Joint Resettlement Programme[323] for the EU was established in 2009in order to step up the Member States' activity in the realm of resettlement in close coordination with the GAMM 'through the identification of common priorities not only on humanitarian grounds, but also on the basis of broader migration policy considerations'.[324]

The number of refugees resettled in the EU remains, however, relatively low compared to other industrialised countries, and many EU Member States lack a resettlement programme.[325] The Syrian refugee crisis serves, as FRA suggests on the basis of data of the UNHCR, as an example of the low interest in resettlement by EU Member States: by February 2015, EU Member States had undertaken to resettle 38,000 Syrian refugees of the 130,000 places available for Syrian refugees according to a pledge made at a UNHCR Conference in December 2014[326]

As a response to a target of 20,000 annual resettlement places to be provided by the EU by the year 2020,[327] the European Agenda on Migration proposes an EU-wide resettlement scheme to support UNHCR supported placements for 20,000 displaced persons in need of protection.[328] The proposal is negligible when viewed in the global context, considering that 60 million people were forcibly displaced in 2014,[329] and that the UNHCR has called upon European and other countries to 'make some fundamental changes to allow for larger resettlement and humanitarian admission quotas'.[330] However,

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[322] European Commission: Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme, COM(2009) 456 final, 2 September 2009, 6-7.

[323] Decision No 281/2012/EU of the European Parliament and of the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', OJ L 92/1, 30 March 2012.

[324] Elsbeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 21.

[325] Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 18, and European Commission, 'External aspects' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index_en.htm> accessed 15 September 2015.

[326] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 7.

[327] Statement of UNHCR Deputy Director, Progress Report on Resettlement, Meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme, Geneva, 26-28 2012.

[328] European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 4-5. See also European Commission: Commission Recommendation of 8.6.2015 on a European resettlement scheme, C(2015) 3560 final, 8 June 2015.

[329] UNHCR, 'Worldwide Displacement hits all time high as war and persecution continue' (18 June 2015) <http://www.unhcr.org/558193896.html> accessed 8 September 2015.

[330] UNHCR, 'Statement by UN High Commissioner for Refugees, António Guterres on refugee crisis in Europe', 4 September 2015 [press release] <http://www.unhcr.org/55e9459f6.html> accessed 15 September 2015.

political will to do so does not appear to exist in all EU Member States, while others have made important contributions in this regard.[331]

e) Labour migration

The EU and its Member States may under the EU migration policy offer specific avenues, so-called MPs, for legal migration from the partner countries in the form of national employment quotas for citizens of the cooperating country or in the form of favourable entry conditions.[332] The need for high skilled labour forces in EU Member States, combined with demographic developments, are the key drivers for a more structured and institutionalised opening of European labour markets. Therefore, in 2007 circular migration and Mobility Partnerships have been introduced as the most innovative and sophisticated tools of the GAMM aimed at offering legal opportunities of entry for citizens of cooperating third countries.[333] Circular migration denotes frequent temporary migration between two countries, including persons such as students, researchers, and seasonal workers. Mobility Partnerships are tailor-made declarations negotiated by the Commission with a third state on cooperation in migration matters. So far, Mobility Partnerships have been concluded between the EU and Armenia, Azerbaijan, Cape Verde, Georgia, Jordan, Morocco and Tunisia. The Common Agenda on Migration and Mobility (CAMM), a framework for an advanced level of cooperation between the EU and third states which are not yet ready to enter into a full set of commitments and obligations,[334] was concluded with Nigeria in 2015.[335]

Mobility Partnerships as tools for opening venues for legal migration, eventually resulting in visa facilitation agreements, have raised expectations in third countries. Still, the overall outcome with regard to mobility is difficult to assess. Mobility partnerships are political declarations negotiated between the Commission and the third state, with Member States being able to 'opt-in'. This has resulted in a certain imbalance considering that third countries commit themselves, for instance, to readmission agreements with the whole Union whereas, for example in the case of Cape Verde, only few Member States chose to opt in and open their labour markets on a project based level.[336] Additionally, the leverage for the EU in the negotiations with third countries creates further imbalances and shifts the main focus of Mobility Partnerships onto security issues such as the fight against irregular

[331] Steve Peers, 'Commission strategy on EU immigration policy', *EU Law Analysis* [blog], 11 May 2015.
[332] Steffen Angenendt, 'EU Mobility Partnerships: the "Most Innovative and Sophisticated Tool" of European Migration Policy?' [2014] Policy Brief, *Migration Strategy Group on Global Competitiveness (MSG)*, 6
[333] European Commission, Commission Communication: On circular migration and mobility partnerships between the European Union and third countries [2007] COM(2007) 248 final.
[334] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final.
[335] European External Action Service, EU and Nigeria Sign "Common Agenda on Migration and Mobility" Agreement (20/03/2015), Press Release, <http://www.eeas.europa.eu/delegations/nigeria/press_corner/all_news/news/2015/20150323_en.htm> accessed 9 October 2015.
[336] Rabat Process, 'Euro-African Dialogue on Migration and Development, Mobility Partnerships and Common Agendas on Migration and Mobility in the Rabat Process Region, <http://www.processusderabat.net/web/index.php/support-projects-activities/infographic-mobility-partnerships-and-common-agendas-on-migration-and-mobility-in-the-rabat-process-region> accessed 8 September 2015.

migration and human trafficking. Third countries are encouraged to undertake substantial efforts to prevent irregular migration to the EU by means of improving border controls by cooperating with the EU border control agency Frontex or by carrying out information campaigns to discourage migration to the EU.[337] Also, although the first pillar of the GAMM envisages enhancing possibilities of legal migration and mobility, these migration and mobility schemes are preconditioned on demands of the European labour market and the status of high skilled workers, students or researchers.[338] These policies reflect the need of the Union to be competitive in the 'global competition about talent' and to attract highly skilled workers in order to meet labour market needs by easing access to the labour market for specific categories of people.

The impact of these measures has, however, been rather marginal. In particular, the Blue Card Directive (2009/50/EC) has failed to attract the immigrants needed by European economies. A report by the Commission on the implementation of the Directive of May 2014[339] shows that in 2013 only around 15,000 Blue Cards were issued, and the EU Commission itself remains very sceptical of the potential of the current Blue Card scheme to increase highly skilled migration. The Commission expresses concern at the flaws in the transposition, and the lack of coherence in relation to the Blue Card Directive in the Member States.[340] However, there is also a structural incoherence in the EU's attempts to enhance legal migration as a means to reduce irregular migration, as the new Agenda on Migration reiterates. Legal ways of entry should, *inter alia*, be increased through resettlement. Resettlement, however, is limited to a limited number of refugees annually (20,000) and the Blue Card Directive aims at the most affluent parts of society, those who are to be employed in highly skilled jobs, researchers and students.[341] Although one of the priorities of the newly adopted Agenda on Migration is the elaboration of a new legal migration policy, including a review of the Blue Card regime, there seems to be little political will and support to significantly enhance possibilities of legal migration[342]

[337] See for instance the Council of the European Union, Mobility Partnership concluded with Georgia in 2009, 16396/09 ADD 1, 20 November2009.

[338] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility [2011] COM(2011) 743 final, 12-15.

[339] European Commission, Report on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ("EU Blue Card") (Communication), COM(2014) 287 final.

[340] European Commission, Expert Group on Economic Migration, Reviewing the Blue Card Directive, Discussion Paper No. 2, Ref. Ares(2015)1173184, 1, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=19267&no=2> accessed 9 October 2015.

[341] In this regard, the EU Bluecard Directive should be revised in order to attract high skilled labour force, see European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 15.

[342] European Commission, Commission Communication: A European Agenda on Migration [2015] COM(2015) 240 final, 14-17.

C. Deciding who can stay and who has to go: asylum, international protection and the return of irregular migrants

1. Introduction

Upon their arrival within the EU third-country nationals can be categorised under the framework of regular migration (including free movement of EU citizens and members of their family and holders of a valid EU visa pursuant to Regulation No. 539/2001) or irregular migration (including persons seeking international protection or subsidiary protection). Given the limited scope of this study, and with a view to the current challenges the EU faces in terms of addressing irregular immigration, the focus in this Section will be on outlining and problematising the main characteristics of the EU framework for protection of persons in need of international protection from a human rights perspective.[343] Attention will first be paid to asylum qualifications and procedures as set out under the EU asylum *acquis*, moving subsequently to discussing the Dublin system as a framework for responsibility sharing and solidarity. Finally, the provisions for protecting asylum seekers in the event of return and readmission will be analysed.

Granting asylum for persons in need of international protection is an international obligation set forth under the 1951 Refugee Convention.[344] The Convention defines a refugee as any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.[345] Article 33(1) the Convention sets forth an obligation to abide by the principle of *non-refoulement*. Further, the Convention specifies the rights and obligations related to the treatment of refugees, including the judicial status, welfare of, and administrative proceedings in relation to, refugees. Notably, States Parties to the Convention should, under Conclusions no. 8 (XXVIII) of 12 October 1977 of the Executive Committee of the UNHCR, grant a 'reasonable time' to appeal, either through judicial or administrative channels, for a formal reconsideration where the applicant is not recognised.[346]

The prohibition of *refoulement* is also set out in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT) where there are substantial grounds for believing that an asylum seeker would be in danger of being subjected to torture and, as will be seen below, has also been read by the ECtHR to fall under the article of the ECHR prohibiting torture, inhuman or degrading treatment or punishment.[347] In a similar vein, the ICCPR contains provisions

[343] For an overview and discussion on regular migration, see, e.g. Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009), Part II.
[344] 1951 Refugee Convention, Article 33(1).
[345] 1951 Refugee Convention, Article 1(A)(2). For a discussion on the definition of refugees, see David J. Whittaker, *Asylum Seekers and Refugees in the Contemporary World* (Routledge 2006) 1-12.
[346] Conclusions no. 8 (XXVIII) of 12 October 1977 of the Executive Committee of the UNHCR.
[347] UNCAT, Article 3(1). For a discussion on asylum and the ECHR, see Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe 2010), Francesca Ippolito, 'The Contribution of the European Courts to the Common European Asylum System and its Ongoing Recast Process' [2013] 20 MJ 2,

relevant to the protection of refugees, most notably Article 7(a) prohibiting torture or cruel, inhuman or degrading treatment or punishment, which the Human Rights Committee has interpreted to imply a prohibition on states to 'expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.'[348]

2. EU asylum *acquis*

In terms of EU legislation, Articles 67(2) and 78(1) TFEU require the Union, in accordance with the 1951 Refugee Convention and other relevant treaties, to frame a common policy on asylum. Such a policy is to be based on solidarity between Member States with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement.* Similarly, the EU Fundamental Rights Charter sets forth that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Refugee Convention, and prohibits return to a country with a substantial risk of the death penalty, torture, inhuman or degrading treatment or punishment.[349]

In line with this, since 1999 the EU has been working towards a Common European Asylum System (CEAS). An important milestone in this regard was achieved with the adoption in 2005 of the Asylum Procedures Directive, which marked the completion of the first phase of the creation of the CEAS.[350] Subsequent to arduous negotiations,[351] a recast 'asylum package' was adopted in 2013, following the adoption of the Qualification Directive in 2011. The UNHCR characterised the adoption of the new asylum package as 'an important step forward towards the establishment of a Common European

261; and Francesca Ippolito and Samantha Velluti, 'The Relationship between the CJEU and the ECtHR: The Case of Asylum' [2014] 6 *Journal of Constitutional Law* 509.

[348] CCPR General Comment no. 20, Article 7 (1992) 9.

[349] EU Fundamental Rights Charter, Articles 18-19. For the international law framework of EU asylum law, see, e.g., Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006), Kay Hailbronner (ed), *EU Immigration and Asylum Law: Commentary* (C.H. Beck and Hart 2010) 10-18, and Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009), 253-314.

[349] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 315. For an overview of the developments towards harmonised EU asylum policies since mid-1980s, see Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 316-318. For an account on the systemic aspects of the first stage of the CEAS, see Hemme Battjes, 'The Common European Asylum System: The First Stage' in Jean-Yves Carlier and Philippe De Bruycker (eds), *Immigration and Asylum Law of the EU: Current Debates* (Bruylant, 2005) 27. See also Steve Peers, 'From Balck Market to Constitution. The Development of the Institutional Framework for EC Immigration and Asylum Law' in Steve Peers and Nicola Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Brill 2006) 19.

[350] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 315. For an overview of the developments towards harmonised EU asylum policies since mid-1980s, see Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 316-318. For an account on the systemic aspects of the first stage of the CEAS, see Hemme Battjes, 'The Common European Asylum System: The First Stage' in Jean-Yves Carlier and Philippe De Bruycker (eds) *Immigration and Asylum Law of the EU: Current Debates* (Bruylant, 2005) 27. See also Steve Peers, 'From Black Market to Constitution. The Development of the Institutional Framework for EC Immigration and Asylum Law' in Steve Peers and Nicola Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Brill 2006) 19.

[351] Steve Peers, 'Statewatch Analysis: The Revised Directive on Refugee and Subsidiary Protection Status' [2011].

Asylum System'.[352] At the same time, as will be discussed below, considerable areas of contrast remain in place between some of the provisions and the international human rights norms applicable to asylum seekers.[353]

The CEAS is currently composed of the recently revised directives on asylum procedures,[354] reception conditions,[355] and qualifications;[356] the Directive on Temporary Protection;[357] the revised EURODAC Regulation;[358] and the revised Dublin Regulations.[359] Such secondary legislation aims, *inter alia*, at further harmonising standards of protection, grounds for granting international protection and Member States' asylum legislation; ensuring respect for the fundamental rights of asylum seekers; increasing solidarity and clarifying responsibility among EU States; and ensuring the protection of asylum seekers during the process of establishing the state responsible for examining the application.

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[352] See UNHCR, 'UNHCR's statement on the EU asylum legislative package June 2013' [2013], <http://www.unhcr.org/51b7348c9.pdf> accessed 10 June 2015. See also Henri Labayle and Philippe De Bruycker, 'Towards the Negotiation and Adoption of the Stockholm Programme's Successor for the Period 2015-2019' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 18.

[353] For a discussion, see, Federica Toscano, *The Second Phase of the Common European Asylum System: A Step Forward in the Protection of Asylum Seekers?,* IES Working Paper 7/2013 (IES 2013). See, also, Peers, who argues: 'Taken as a whole, the amended proposals will not require Member States to raise their standards very much, in particular to the extent that raising those standards would cost money. If these Directives are adopted as proposed, the second phase of the Common European Asylum System would therefore look a lot like the first phase. There would be largely cosmetic changes to the current inadequate standards. To borrow President Obama's phrase, this would be like "putting lipstick on a pig".' Steve Peers, 'Statewatch Analysis: Revised EU asylum proposals: "Lipstick on a pig"', <http://www.statewatch.org/analyses/no-132-asylum.pdf> accessed 12 June 2015.

[354] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

[355] 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) [2013] OJ L180/96.

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

[357] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

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

[359] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1, and 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 [2013] OJ L180/31. The 2003 Dublin regulation was preceded by the 1990 Dublin Convention.

The CEAS, in its current Phase Two, signals a change in the objective of all the recast instruments. The aim is to develop a common system rather than a set of minimum standards. This development is reflected in the wording of Article 78 TFEU when compared with the wording of the former Article 63 EC.[360] Such a further step is called for, *inter alia*, in the 1999 Tampere conclusions of the European Council and in the Stockholm Programme, which envisage rules for a common asylum procedure and a system providing for a uniform status valid throughout the EU for those who have been granted international protection.[361] Such an ambition was also brought forward as one of the long-term goals in the recent Commission Agenda on Migration of May 2015:

> The EU Treat[y] looks forward to a uniform asylum status valid throughout the Union. The Commission will launch a broad debate on the next steps in the development of Common European Asylum System, including issues like a common Asylum Code and the mutual recognition of asylum decisions. A longer term reflection towards establishing a single asylum decision process will also be part of the debate, aiming to guarantee equal treatment of asylum seekers throughout Europe.[362]

The projected debate on a common Asylum Code sustaining mutually recognised asylum decisions is welcomed by the UNHCR, according to which 'mutual recognition should be the ultimate goal of a Common European Asylum System'.[363]

a) Asylum qualifications

The common grounds to international protection in the EU are clarified in the Qualification Directive,[364] which is seen to form the 'centre piece' of the CEAS.[365] The directive was revised in 2011 to further harmonise the provisions of the previous Directive 2004/83/EC,[366] which were criticised for allowing

[360] Peers et al, EU Immigration and Asylum Law, Vol. 3, 2015, 11-12 and 498.

[361] European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, para. 15, and European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 32. See, similarly, Council of the European Union, European Pact on Immigration and Asylum, 24 September 2008, 13440/08, 11-12.

[362] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM(2015) 240 final, 13 May 2015 (hereinafter '2015 European Agenda on Migration'), 17.

[363] UNHCR, 'UNHCR Position on the European Commission's Migration Agenda' <http://www.unhcr.org/55537b166.html> accessed 10 June 2015. See also e.g., UNHCR, 'Towards a Common Asylum Procedure and Uniform Status, Valid throughout the European Union, for Persons Granted Asylum' (November 2001), <http://www.unhcr.org/436624742.pdf > accessed 10 June 2015.

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

[365] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 336. On the impact of the Qualification Directive, see, e.g., Hélène Lambert, 'The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law' [2006] 55 *International and Comparative Law Quarterly* 161, and Gregor Noll, 'Evidentiary Assessment and the EU Qualification Directive' [2005] *UNHCR Evaluation and Policy Analysis Unit, New Issues in Refugee Research, Working Paper*, No. 117.

[366] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and

significant differences in national asylum legislation and practices between Member States.[367] The directive is applicable to all EU Member States, with the exception of Denmark, Ireland and the United Kingdom, but Ireland and the United Kingdom will remain bound by the directive of 2004.[368]

The recast directive sets forth standards for the qualification of third country nationals or stateless persons as 'refugees' and specifies a set of rights to be provided to them, including access to education, social welfare, employment, integration facilities, healthcare and accommodation.[369] It also sets forth protection against *refoulement* and offers specific protection measures for children and persons with vulnerabilities.[370] In addition, the Qualification Directive provides a complementary category of refugee protection through the inclusion of subsidiary protection.[371] A person eligible for subsidiary protection is a third-country national who does not qualify as a refugee but who, if returned to his or her country of origin, or to his or her country of former habitual residence, would face a real risk of suffering serious harm, defined in Article 15 of the Directive as the death penalty or execution, torture or inhuman or degrading treatment or punishment, or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[372]

The Directive is predominantly seen as an important step towards uniform EU level asylum admissibility criteria[373] and to provide 'relatively high standards of protection'.[374] All in all, it is considered to be

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the content of the protection granted [2004] OJ L304/12. For an overview of positive and negative impacts of the 2004 Directive, see e.g., ECRE/ELENA, *The Impact of the EU Qualification Directive on International Protection* [2008].

[367] European Commission, 'Who qualifies for international protection' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/refugee-status/index_en.htm> accessed 12 June 2015. On the disparities on asylum policies between Member States, see e.g., UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive* [2007], and ECRE/ELENA, *The Impact of the EU Qualification Directive on International Protection* [2008].

[368] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, recital 50-51.

[369] For a judicial analysis of the Recast Directive, see EASO, *Article 15(c) Qualification Directive (2011/95/EU): A judicial analysis* [2015].

[370] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, Art 1.

[371] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, Articles 15-19. Boeles *et al.* view the introduction of subsidiary protection as 'a major political achievement'. Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 347.

[372] Such additional protection was called for e.g., by ECRE. See ECRE, 'Position on Complementary Protection' (September 2000), <http://www.ecre.org/component/downloads/downloads/135.html> accessed 12 June 2015. On the dispersed practice across Member States concerning complementary and subsidiary protection, see ECRE, *Complementary/Subsidiary Forms of Protection in EU Member States: An Overview* [2004], <http://www.ecre.org/component/downloads/downloads/134.html> accessed 12 June 2015.

[373] ECRE, 'ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13

'generally respectful to' or – even surpass – the international standards under the Refugee Convention.[375] The fact that the directive is predominantly based on existing international legal obligations incumbent on states may, at least partly, explain the agreement by Member States on the relatively high degree of harmonisation in this area, as may the fact that evidentiary issues in individual cases are likely to decrease the transparency of its implementation.[376]

While the recast directive is generally seen as a welcome step forward in harmonising the qualification criteria and the content of protection provided,[377] criticism has been voiced with regard to, inter alia, the provisions relating to the subsidiary protection status; the determination of 'serious harm'; exclusion of EU citizens from the scope of the Directive; the usage of revocation; the definition of 'family' and 'particular social group'; and the definition of 'actors of protection'.[378] Concern is, in particular, expressed at the fact that the directive allows states to apply, in comparison to persons qualified for refugee protection, a less favourable standard of protection to persons qualified for subsidiary protection in terms of the duration of residence permits, the right to family reunification, and the right to social assistance and integration facilities.[379] With a view to the principle of non-discrimination in the EU Fundamental Rights Charter,[380] ECRE urges the EU to provide all rights afforded to refugees also to persons under subsidiary protection as 'both categories of protected persons have similar needs and

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December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)', <http://www.ecre.org/component/downloads/downloads/805.html> accessed 13 June 2015 (hereinafter 'ECRE Information Note on the Directive 2011/95/EU').

[374] Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59.

[375] Jens Vedstedt-Hansen, 'Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedure' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012) 255, 262, and Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 337. See, similarly, Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence' [2012] 4 *Goettingen Journal of International Law* 217, 232.

[376] Jens Vedstedt-Hansen, 'Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedure' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012) 255, 263.

[377] ECRE, 'Qualification Directive', <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html> accessed 12 June 2015.

[378] See further UNHCR, 'UNHCR Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (COM(2009)551, 21 October 2009)' (hereinafter 'UNHCR comments on proposal qualification directive'), and ECRE Information Note on the Directive 2011/95/EU.

[379] Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence' [2012] 4 *Goettingen Journal of International Law* 217, 235. See, similarly, ECRE, *Mind the Gap: An NGO Perspective on Challenges to Accessing the Common European Asylum System: Annual Report 2013/2014* [2014] 37-38; and ECRE Information Note on the Directive 2011/95/EU. As Peers notes, 'those persons with subsidiary protection who cannot find employment will still not have the right to equal treatment in social assistance, and neither refugees nor persons with subsidiary protection will have the right to equal treatment in housing, so the daily life of those persons with subsidiary protection who are less fortunate might not improve much'. Steve Peers, 'Statewatch Analysis: The Revised Directive on Refugee and Subsidiary Protection Status' [2011].

[380] ECRE Information Note on the Directive 2011/95/EU.

circumstances'.[381]

Regarding the qualification for subsidiary protection, it is noted with concern that some of the central concepts pertaining to the definition of serious harm, such as 'civilian', 'armed conflict' and 'individual threat' in Article 15(c) result in very different interpretations by Member States and are often interpreted restrictively.[382] This remains true despite the fact that the CJEU in its judgment in *Elgafaji* specifically held that the reference to 'individual threat' does not impose a higher threshold of proof of serious harm.[383] With regard to the definition of internal armed conflict in establishing serious harm, it should be noted that the CJEU has taken a further step, stating that a lower standard of proof is applicable on applicants for subsidiary protection under EU law than the one prescribed in the 1951 Refugee Convention. UNHCR has, therefore, called upon Member States to interpret the terms of Article 15(c) 'in a broader and less restrictive fashion than currently observed in some Member States, to ensure it does not become an empty shell'.[384]

Further, while the restriction of protection to third-country nationals may appear logical in the context of harmonising EU asylum procedures, and given that the CEAS competence is limited to third-country nationals under the TFEU, some unease is expressed as regards this limitation. While the CEAS does not prevent EU Member States from granting asylum to a national of another EU Member State, Boeles *et al.* argue that 'the Protocol on asylum for nationals of Member States does raise a threshold for EU citizens to obtain asylum in another Member State', which may lead to a contradiction with the Refugee Convention which provides no equal geographical restriction.[385] For this reason, ECRE recommends, 'that Member States, in applying this definition, extend it to "any person" in order to properly reflect the definition under Article 1 A(2) of the 1951 Refugee Convention'. For the purpose of consistency, ECRE asserts that 'this should also apply to the definition of persons eligible for subsidiary protection.'[386]

While the family definition in Article 2(j) was extended in the Recast Directive, its scope is still not fully in line with European human rights law. It is regrettable that the revised directive continues to exclude siblings from the family definition and fails to recognise unmarried partners as family members unless 'the law or practice of the Member State concerned treats unmarried couples in a way comparable to

[381] ECRE, 'Qualification Directive' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html> accessed 12 June 2015. Such harmonisation has been called for by the UNHCR. See, UNHCR, 'UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need Inter- national Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)', 28 January 2005 <http://www.unhcr.org//docid/4200d8354.html> accessed 13 October 2015.

[382] See, UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* [2011], 99.

[383] Case C-465/07, *Elgafaji v Staatssecretaris van Justitie* [2009] CJEU.

[384] UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* [2011], 107.

[385] See Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 320.

[386] ECRE Information Note on the Directive 2011/95/EU, 4.

married couples under its law relating to third-country nationals'.[387] This, as a report by ECRE notes, is likely to put same-sex couples in a disadvantaged position as same-sex marriages are still not acknowledged in a number of Member States.[388] The restrictive family definition also seems to run counter to the ECtHR's reading of family life under Article 8 ECHR, which recognises the definition of a family to be 'essentially a question of fact depending upon the reality in practice of close personal ties'.[389]

In its comments on the Recast Directive the UNHCR regrets the inclusion of non-state actors within the definition of actors of protection under Article 7. Non-state actors should, according to the UNHCR view, not be counted as actors of protection as they often lack capacity to provide consistent and long-term protection.[390] UNHCR recommends, furthermore, that is should be expressly specified in Article 7(2) of the Directive that 'reasonable steps' to prevent persecution alone are not sufficient: the steps must be such that they can actually ensure 'effective and durable' protection against the harm.[391]

Another source of criticism is the gap between legislation and polices on the one hand and their implementation on the other. It is noted that the 'use of words like '*inter alia*', 'may' or 'in particular' leaves room for discretion to the Member States'.[392] The discretion becomes visible, for example, in the differences between Member States with regard to the status granted to asylum applicants and in the overall acceptance rates of asylum applications[393] originating from the same country. As noted by FRA, 'the chances an applicant for international protection has for obtaining such protection depend greatly on the Member State in which he or she applies',[394] a fact which puts asylum seekers in an unequal

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

[388] ECRE Information Note on the Directive 2011/95/EU.

[389] *Al-Nashif v Bulgaria* App no 50963/99 (ECHR, 20 June 2002).

[390] UNHCR comments on proposal qualification directive, 5. See, similarly, ECRE Information Note on the Directive 2011/95/EU. See, also, FRAME D7.2. The report will be available at <http://www.fp7-frame.eu/reports/> accessed 12 September 2015.

[391] UNHCR comments on proposal qualification directive, 5. See, similarly, ECRE Information Note on the Directive 2011/95/EU, 6-7.

[392] Dirk Vanheule, 'The Multifaceted Role of Law in the Development of European Asylum and Migration Policy', in Christina Gortázar, María-Carolina Parra, Barbara Segaert and Christiane Timmerman (eds), *European Migration and Asylum Policies: Coherence or Contradiction?* (Bruylant 2012) 89, 92-93.

[393] See, e.g., ECRE, *Mind the Gap: An NGO Perspective on Challenges to Accessing the Common European Asylum System: Annual Report 2013/2014* [2014], 37-38. See, also, Peers who pointing to the evidence in the case of *MSS v Belgium and Greece* notes that 'the success rate for persons applying for asylum in Greece is 0.15% at first-instance (adding together the refugee and subsidiary protection claims), whereas the success rate in five of the six Member States with more claims is 36.2% - para 126 of the MSS judgment. In other words, asylum-seekers applying in those other Member States are more than 200 times more likely to be successful at first instance than those accepted in Greece.' Steve Peers, 'Statewatch Analysis: The Revised Directive on Refugee and Subsidiary Protection Status' [2011]. See, also, FRA, *Fundamental Rights in the Future of the European Union's Justice and Home Affairs* [2013], 19- 20.

[394] FRA, *Fundamental Rights in the Future of the European Union's Justice and Home Affairs* [2013], 19-20. See also Peers who states: 'There are still wide differences in recognition rates of refugees between Member States, despite a common legal acquis: the low recognition rate of Eritreans in France as compared to other Member

position as regards one another and puts their right to asylum at risk due to the arbitrariness of the acceptance system. The uneven recognition rates have been held by the Commission to be at variance with 'the principle of providing equal access to protection across the EU'.[395]

Concern is likewise expressed regarding the large discretion left for Member States to implement Article 32(2) of the directive in providing accommodation 'allowing for national practice of dispersal of beneficiaries of international protection'.[396] Such a wording may not only risk contradicting the liberty of movement and freedom to choose one's place of residence as set forth in Article 26 of the 1951 Refugee Convention and Article 12 of the ICCPR, but may also be unfavourable in terms of integration policies, including access to employment and training.[397]

Further, the influx of refugees to the EU area has been met with discriminatory policies by Member States that through their selectivity are in clear contradiction with both international human rights law and the EU Fundamental Rights Charter.[398] Selective refugee policies have been publicly voiced particularly in Eastern European countries, where a clear movement in favour of turning down non-Christian asylum seekers is gaining ground.[399] Such an intra-European divide, as EU President Donald Tusk warns, threatens to further complicate any effort to find solutions to the intensifying refugee crisis.[400] Political will is needed to counter-challenge the movements that propagate religious and cultural intolerance by using the current refugee surge to accentuate fears against immigration and cultural diversity.[401]

b) Asylum procedures

Another central instrument of the CEAS is the Recast Asylum Procedures Directive,[402] which was adopted in June 2013 as the last legislative measure in the post-Amsterdam asylum package.[403] The

States may have contributed to the 'Calais crisis', for instance.' Steve Peers, 'The Refugee Crisis: What should the EU do next?', *EU Law Analysis* [blog], 8 September 2015.

[395] European Commission, Policy Plan on Asylum: An Integrated Approach to Protection across the EU, COM (2008) 360 final, 17 June 2008, 3.

[396] ECRE Information Note on the Directive 2011/95/EU, 16.

[397] ECRE Information Note on the Directive 2011/95/EU, 16.

[398] For a discussion, see Steve Peers, 'The Refugee Crisis: What should the EU do next?', *EU Law Analysis* [blog], 8 September 2015: 'Several Member States also have stated that they do not wish to take Islamic refugees. This is again a clear breach of international and EU law: the Geneva Convention specifically states that it applies without discrimination on ground of religion, while the EU Charter of Rights bans discrimination on grounds of religion when applying EU law (and the asylum process in all its aspects amounts to applying EU law).'

[399] Ishaan Tharoor, 'Slovakia will take in 200 Syrian refugees, but they have to be Christian' *The Washington Post* (19 August 2015), Ian Traynor, 'Migration crisis: Hungary PM says Europe in grip of madness' *The Guardian* (Brussels, 3 September 2015), Al Jazeera, 'Viktor Orban's comments come as refugees are forced off train headed towards Austria and taken to refugee camp' (4 September 2015), Kimmo Henriksson, 'Soini ja Orpo riitautuneet pakolaisista' *YLE* (24 August 2015), and Kenneth Roth (HRW), 'The Refugee Crisis That Isn't' *Huffington Post* (3 September 2015).

[400] Al Jazeera, 'Hungarian PM: We don't want more Muslims' (4 September 2015).

[401] Kenneth Roth (HRW), 'The Refugee Crisis That Isn't' *Huffington Post* (3 September 2015).

[402] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

[403] For an analysis of proposals for the Recast Directive, see e.g., Steve Peers, 'Statewatch Analysis: The Revised

Directive sets out common standards and guarantees for a fair and efficient asylum procedure.[404] The Recast Directive binds all Member States except for Denmark, Ireland and the United Kingdom, of which Ireland and the United Kingdom will remain bound by the 2005 Directive.[405]

The Recast Directive was adopted to replace the 2005 Procedures Directive,[406] which was criticised for being too vague and for allowing a high degree of discretion to Member States to apply their own rules on asylum procedures.[407] While the new Directive is seen, in many respects,[408] as a 'considerable improvement compared to the 2005 Asylum Procedures Directive',[409] it is still weighed down by the 'considerable flexibility' left for Member States in interpreting the provisions.[410] The in many places discretionary and non-specific language of the Directive is feared to weaken the protection provided to asylum seekers and their access to fair and systematic assessment of their asylum applications,[411] as well as to undermine the goal of establishing truly common and uniform standards for asylum procedures throughout the Union.[412] The legal complexity of the Directive, in concert with the flexibility of some of

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Asylum Procedures Directive: Keeping Standards Low' [2012].

[404] For an overview of the Procedures Directive, see FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 96-105.

[405] ECRE, 'Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)' <http://www.ecre.org/component/content/article/41-protection-in-europe/925> accessed 14 May 2015 (hereinafter 'ECRE Information Note on Directive 2013/32/EU').

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

[407] See UNHCR, 'UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final (UNHCR)', <http://www.refworld.org/pdfid/4f3281762.pdf> accessed 23 June 2015. For a critical analysis of the 2005 Directive, see Cathryn Costello, 'The European Asylum Procedures Directive in Legal Context' [2006] *UNHCR, New Issues in Refugee Research, Research Paper,* No. 134. For an analysis of the proposal for the 2005 Directive, see e.g., Steve Peers, 'Statewatch Analysis: EU Law on Asylum Procedures: An Assault on Human Rights?' [2003].

[408] 'The recast Asylum Procedures Directive represents, in many aspects, an important improvement in the procedural guarantees for asylum seekers as laid down in EU law and as discussed throughout this information note. In particular with respect to access to the asylum procedure, the guarantees surrounding the personal interview and the right to an effective remedy, progress is significant.' See ECRE Information Note on Directive 2013/32/EU.

[409] ECRE Information Note on Directive 2013/32/EU. Similarly, UNHCR: 'The Amended Proposal represents a major positive step forward towards establishing common procedures for the granting or withdrawing of international protection as required by Article 78 (2) (d) of the TFEU.' See, UNHCR, UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final (UNHCR), 4. This is also the view of the Commission: 'The new Asylum Procedures Directive is much more precise. It creates a coherent system, which ensures that asylum decisions are made more efficiently and more fairly and that all Member States examine applications with a common high quality standard.' European Commission, 'Asylum procedures' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/common-procedures/index_en.htm> accessed 14 May 2015.

[410] ECRE Information Note on Directive 2013/32/EU.

[411] ECRE Information Note on Directive 2013/32/EU, 36.

[412] See, UNHCR, UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final (UNHCR) 3 and 6.

the provisions, is seen to risk undermining the accurate implementation of the Directive and may lead to undue delays.[413]

Various aspects of the Directive give rise to concern from a human rights perspective and in terms of ensuring fair and efficient asylum procedures. Such issues include, most notably, the provisions on *accelerated procedures* and *safe third countries* which are seen to give inadequate consideration to UNHCR recommendations and to leave wide discretion to states.[414]

Article 31(8) of the Recast Procedures Directive allows an asylum examination procedure to be accelerated or conducted at the border or in transit zones.[415] Many of the provisions in the Directive leave room for wide interpretations, which are sometimes open to value judgments, allowing asylum decisions to be guided by circumstances not directly relevant for the assessment of need for international protection.[416] Such considerations allowing swift assessment of applications without proper consideration of protection needs and rejections at the border may lead to *refoulement*, risking rendering void the whole rationale of the Procedures Directive and an applicant's right to seek asylum.[417] This is especially true considering that processing asylum applications at the border has been evidenced to give rise to a variety of questions regarding the availability and quality of procedural safeguards provided to the applicants.[418]

Considering the shortage of legal avenues for persons in need of protection to enter the EU, and the fact that asylum seekers would in many cases arrive without valid documentation – or may have been misguided by the persons smuggling them to dispose of such documents –[419] it is also regretted that Article 31(8)(c) and (d) allows states to accelerate the procedures in case an applicant is late in submitting an application for international protection or is deemed to have mislead the authorities through presenting in bad faith false documents or by destructing documents relevant for clarifying his

[413] Elspeth Guild *et al*., 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 20. See also ECRE Information Note on Directive 2013/32/EU.

[414] See, Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 2 and 14; and UNHCR, 'UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final (UNHCR)', 4. See, also, ECRE Information Note on Directive 2013/32/EU, 36; and Elspeth Guild *et al*., 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 20.

[415] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, Article 31(8).

[416] ECRE Information Note on Directive 2013/32/EU, 37. For such provisions, see, e.g., Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, Article 31(8) (d), (g), (h) and (j).

[417] Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 15. See, similarly, ECRE Information Note on Directive 2013/32/EU, 39.

[418] ECRE Information Note on Directive 2013/32/EU, 48.

[419] ECRE, Information Note on Directive 2013/32/EU, 37.

or her identity.[420] Resorting to an accelerated procedure in such cases may be at variance with Article 31 of the 1951 Refugee Convention, which prohibits penalisation of illegal immigration.[421]

The same may hold true for the requirement in Article 31(8)(h) of the Recast Directive allowing accelerated procedures to be undertaken in cases where an applicant fails to apply for international protection 'as soon as possible'. It should be noted that the ECtHR held in *Jabari v Turkey* that the 'automatic and mechanical application' of a short time limit for submitting an asylum application, in this case the five-day registration requirement under the national asylum law in Turkey, must be considered a breach of Article 3 of the ECHR.[422] Due to the various human rights concerns related to the use of the accelerated procedures,[423] it is vital that the option for accelerated procedures is not used other than in case of 'manifestly unfounded or clearly abusive claims', [424] or in cases where the applicant's situation is such that he or she would benefit of a speedy processing of his or her application.[425] Otherwise, where the 'speed of the proceedings undermines the effectiveness of the prohibition of *refoulement* and/or the right to asylum', the accelerated procedure may run counter to the principle of effectiveness inherent in the EU's system.[426]

Further, it is likely that accelerated procedures risk undermining applicants' effective recourse to remedies. Where time limits make the exercise of the right as guaranteed by EU law to an effective remedy, or other procedural rights as guaranteed by the Asylum Procedures Directive, 'impossible or excessively difficult', this is at variance with EU law, as Reneman asserts based on an analysis of EU legislation and CJEU and ECtHR case law.[427] Notably, the ECtHR has found a breach of Article 3 of the ECHR in the case of *IM v France* as a consequence of the applicant's remedies having been limited through recourse to accelerated procedures.[428] A further source of concern relates to, *inter alia*, the

[420] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, Article 31(8) (c) and (d).
[421] For a discussion, see Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 15-16.
[422] *Jabari v Turkey* App no 40035/98 (ECHR, 11 July 2000), 40.
[423] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice – Key Findings and Recommendations* [2010], 53-58. See, similarly, UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice – Detailed Research on Key Asylum Procedures Directive Provisions* [2010], 221-269.
[424] UNHCR, 'UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final (UNHCR)', 27.
[425] 'Accelerated procedures should generally not be applied, except to speed up the granting of protection to those in particular need of it.' ECRE, 'Asylum Procedures' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/37-asylum-procedures.html> accessed 14 May 2015.
[426] Marcelle Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy' [2014] 25(4) *International Journal of Refugee Law* 717.
[427] Marcelle Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy' [2014] 25(4) *International Journal of Refugee Law* 717.
[428] *IM v France* App no 9152/09 (ECHR, 2 May 2012). See also *AC v Spain* App no 6528/11 (ECHR, 22 April 2014).

discretion left for states to decide on time limits for appeals.[429] In this context it should be noted that, while Article 47 of the EU Fundamental Rights Charter provides for the right of effective remedy to everyone, and Article 39 of the Asylum Procedures Directive sets forth that asylum seekers shall have the right to request a review of their asylum decision before a court or tribunal, a study commissioned by FRA indicates that, in reality, several obstacles, including language and communication barriers, 'make it difficult for asylum applicants to access effective remedies.'[430]

Acceleration may also apply to applicants from allegedly safe countries, 'leading, in practice, to semi-automatic detention and a deterioration of procedural safeguards'.[431] This, combined with the fact that states are, under Article 37 of the Recast Directive, allowed a considerable degree of discretion in the labelling of third countries as 'safe',[432] risks to undermine the underlying rationale of the Directive by replacing individual assessment of international protection need by a summary evaluation of the state of human rights in the country of origin of the applicant. In addition, this procedure places the primary burden of proof on the applicant.[433] The designation of certain countries as safe risks precluding whole groups from international protection, and contradicts the proper reading of international refugee law on decisions on international protection to be guided by an understanding of individual and contextual circumstances.[434] It is, therefore, noted with concern that the May 2015 Commission Agenda on Migration proposes strengthening the safe country of origins provisions in the Asylum Procedures Directive,[435] and that the proposal was discussed further by EU leaders on 9 September 2015. A counter-proposal is to develop a list of 'unsafe' countries, nationals of which would be presumed to be in need of international protection with asylum applications to be processed through streamlined procedures.[436] In this context attention should be paid to the UNHCR's concept of 'prima facie' refugees, which provides for 'group determination of refugee status' for each member of the population in situations with large displaced populations and under circumstances that give reason to assume that 'most members of the population could be considered individually as refugees'.[437]

[429] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, Article 46(4).
[430] FRA, *Access to effective remedies: The asylum-seeker perspective* [2010].
[431] Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 16 (referring to information drawn from UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, 2010).
[432] Elspeth Guild and Violeta Moreno-Lax, 'Current Challenges Regarding the International Refugee Law, with Focus on EU Policies and EU Co-operation with UNHCR' [2013] *CEPS Paper in Liberty and Security in Europe*, No. 59, 16.
[433] ECRE Information Note on Directive 2013/32/EU, 40.
[434] http://ec.europa.eu/dgs/home-affairs/what-is-new/publicconsultation/2007/pdf/contributions/ngo/european_council_on_refugees_exiles_ecre_en.pdf, 10, and Amnesty International, 'EU: Asylum seekers relocation deal only a small step towards fixing a broken system' <http://www.amnesty.nl/nieuwsportaal/pers/eu-asylum-seekers-relocation-deal-only-small-step-towards-fixing-broken-system> accessed 12 September 2015.
[435] 2015 European Agenda on Migration, 13. See 9 September 2015, Juncker proposal.
[436] HRW, 'EU: Five Steps to Tackle Refugee Crisis' (4 September 2015), <http://www.hrw.org/news/2015/09/04/eu-five-steps-tackle-refugee-crisis> accessed 12 September 2015.
[437] UNHCR, UNHCR Resettlement Handbook: Division of International Protection (revised edn, UNHCR 2011) 77-78.

c) Measures of solidarity and share of responsibility

Under EU law, the criteria and mechanisms for identifying the Member State responsible for the examination of an application for international protection are laid out in the Dublin III Regulation (Dublin Regulation).[438] The aim of the Dublin system is to ensure effective access to an asylum procedure and higher standards of protection through efficient identification of the state responsible for processing the asylum claim, at the same time deterring multiple asylum claims.[439] The Dublin system consists, apart from the Dublin Regulation, of the EURODAC Regulation establishing an EU asylum fingerprint database,[440] and of the Regulation (EU) No. 118/2014 which amends Regulation (EU) No. 1560/2003 laying down detailed rules for the application of the recast Dublin Regulation.[441]

In light of the recommendations of the Hague Programme,[442] the proposal for the Dublin III Regulation was cast in 2008 to replace the Dublin II Regulation adopted in 2003, with the aim of 'making the necessary improvements, in the light of experience, to the effectiveness of the Dublin system and the protection granted to applicants under that system'.[443] The recast Regulation seeks to contribute to increased efficiency through, *inter alia*, the introduction of early warning, preparedness and crisis management mechanisms with the aim of responding to particular pressures and to structural malfunctions in the national asylum systems; enhanced protection of applicants via, for example,

[438] 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 [2013] OJ L180/31.

[439] ECRE, 'What is the Dublin System?' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html> accessed 12 September 2015, and ECRE, 'ECRE Comments on 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 (recast)' <http://www.ecre.org/component/downloads/downloads/995.html> accessed 12 September 2015 (hereinafter 'ECRE Comments on Regulation (EU) No 604/2013').

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

[441] Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2014 L 39/1.

[442] European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, 3 March 2005, 7-9.

[443] 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 [2013] OJ L180/31. For the quote, see, Recital 9. The 2003 Dublin regulation was preceded by the 1990 Dublin Convention. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities - Dublin Convention, OJ 254/1, 19 August 1997.

personal interviews and further protection guarantees to minors; increased legal clarity in terms of, *inter alia*, the introduction of exhaustive deadlines for procedures between Member States (Articles 21-22, 25 and 29); as well as an obligation to guarantee the right of appeal against transfer decisions.[444] Since its entry into force, the Recast Regulation applies to all Member States, as well as Norway, Iceland, Liechtenstein and Switzerland.[445]

Under the Dublin III Regulation, the determination of responsibility for processing an asylum application to a single state is governed, in a hierarchical order, by the criteria of family links, possession of visa or residence permit in a certain EU Member State, and the question of whether the applicant has entered the EU area in an irregular or regular manner.[446] Where no responsible Member State can be designated on the basis of the criteria listed in the Regulation, the first Member State in which the application was lodged shall, under Article 3(2), be responsible for examining it. Where another state than the one within whose jurisdiction the asylum application is lodged is responsible for processing the asylum application, the Regulation sets forth the procedures and conditions for transfer.[447] Under the so-called sovereignty clause set forth under Article 17(1) of the Dublin Regulation, a Member State may, however, decide to process an application for international protection, despite the fact that it is not the responsible state. Where a transfer would expose the applicant to risk of ill-treatment prohibited under Article 4 of the Fundamental Rights Charter due to systemic flaws in the asylum procedure and in the reception conditions in the state designated as responsible, states are, in addition, obliged under Article 3(2) of the Regulation, to examine other Regulation criteria to assess whether another Member State can be designated as responsible under such criteria. Where such another responsible state cannot be identified within a reasonable time, the determining state becomes the responsible state.[448]

Despite often being referred to as the cornerstone of the CEAS,[449] the Dublin system has over recent years come under harsh criticism for working to the detriment of asylum seekers.[450] Case law indicates that the system is dysfunctional and has given rise to multiple violations of human rights and international refugee law. In particular, the principle of mutual trust and recognition has proven

[444] European Commission, 'Country responsible for asylum application (Dublin)', <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm accessed 12 September 2015. On interviews and hearing the asylum applicants, see, e.g., Nienke Doornbos, 'On Being Heard in Asylum Cases: Evidentiary Assessment through Asylum Interviews' in Gregor Noll (ed), *Proof, Evidentiary Assessment and credibility in Asylum Procedures* (Martinus Nijhoff 2005) 103.

[445] ECRE Comments on Regulation (EU) No 604/2013, 2.

[446] Dublin, Chapter III. See also European Commission, 'Country responsible for asylum application (Dublin)', <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm accessed 12 September 2015.

[447] See, e.g., Articles 27-32.

[448] Article 3(2). See also Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] CJEU.

[449] Elspeth Guild *et al*., 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 8.

[450] See, e.g., ECRE, 'What is the Dublin System?' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html> accessed 12 September 2015, and Steve Peers, '*Tarakhel v Switzerland*: Another nail in the coffin of the Dublin system?', *EU Law Analysis* [blog], 5 November 2014.

problematic in the context of transfers of asylum seekers to other EU Member States,[451] and it is increasingly acknowledged that the Dublin system 'cannot work on the basis of a conclusive presumption that asylum seekers' fundamental rights in each Member State will be observed.'[452] Notably, in *M.S.S. v Belgium and Greece*, the ECtHR found a violation on the part of Belgium of Articles 3 and 13 of the ECHR for transferring an asylum seeker to Greece even though it must have been aware of deficiencies in the asylum procedures in that country, as well as detention and living conditions there, and for failing to provide an effective remedy against the decision made under the Dublin system.[453] The CJEU affirmed, correspondingly, in the combined case *NS and ME* that Member States have an obligation to refrain from transferring asylum seekers to Member States where they would face inhuman or degrading treatment in contradiction with Article 4 of the Fundamental Rights Charter.[454]

What gives rise to concern, however, is that the CJEU's interpretation of the Dublin rules in the *Abdullahi* case[455] reads 'systemic deficiencies' as the only ground for challenging the applicability of the Dublin rules for transfer.[456] In light of the ECtHR's *Tarakhel* judgment,[457] it is argued, in line with Peers et al., that the CJEU should take back its restrictive reading and clearly state that 'asylum-seekers can challenge a transfer under the Dublin rules due to any significant and relevant human rights breaches in another Member State (not just systematic breaches leading to violation of Article 4 of the Charter), or because of any breaches of the procedural and substantive rules in the Regulation'.[458] Alternatively, a human rights friendly interpretation of the 'systemic deficiencies', which includes cases where only

[451] For a discussion on the principle of mutual trust and the AFSJ, especially migration policy, see e.g., Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] available at <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015, and Bossuyt 12-14.

[452] ECRE, 'What is the Dublin System?' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html> accessed 12 September 2015.

[453] *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR 21 January 2011). See also *Sharifi and Others v Italy and Greece* App no 16643/09 (ECHR 21 October 2014), and *Tarakhel v Switzerland* App no 29217/12 (ECHR 4 November 2014).

[454] Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] CJEU ECR I-13905. For an account of the jurisprudence, see Katharina Häusler and Karin Lukas, 'EU migration and asylum law – basic principles, possible human rights gaps, contradictions, tensions, and interactions' in Monika Mayrhofer *et al*., *Report on the Global Human Rights Protection Governance System* [2015], 49-53, <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-4.2-Submitted-28-July-2015.pdf> accessed October 12, 2015.

[455] Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] CJEU. In *Abdullahi*, para. 60, the CJEU held that 'in such a situation, in which the Member State agrees to take charge of the applicant for asylum, and given the factors mentioned [in paragraphs 52 and 53 above i.e. the CEAS, mutual confidence and the objective of measures to speed up the handling of claims], the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art. 4 of the Charter'.

[456] Steve Peers, '*Tarakhel v Switzerland*: Another nail in the coffin of the Dublin system?', *EU Law Analysis* [blog], 5 November 2014.

[457] *Tarakhel v Switzerland* App no 29217/12 (ECHR 4 November 2014).

[458] *EU Immigration and Asylum Law (Text and Commentary)*, Steve Peers, Elspeth Guild, Diego Acosta, Kees Groenendijk and Violeta Moreno Lax (eds) (2nd rev edn, Brill 2012), 382. See, also, 372-373.

some aspect of the system is malfunctioning, should be adopted.[459] Caution is, in addition, voiced by the by civil society organisations to use the non-application of the early warning mechanism, introduced in the Recast Dublin Regulation,[460] as an indication of lack of risks to an applicant's fundamental rights in the designated responsible state.[461]

Human rights NGOs have expressed concern over the fact that, although under the Dublin Regulation detention is not be applied for the sole reason that a person is applying for international protection,[462] high numbers of both adult and child asylum seekers are being detained in Europe for long periods and occasionally in conditions that do not meet international human rights standards.[463] Equally, it is held that the definition of the family in the Dublin regulation should clearly reflect ECtHR case law that reads the family concept to extend beyond marriage and blood relations.[464] In this regard, it is notable that while the current Dublin system provides for a possibility for appeal and effective remedy over the return of an asylum seeker to another Member State,[465] but not over decisions *not* to return him or her. This may be problematic in terms of, for example, respect for family life and family unity. Rectifying this is important, considering that Article 47 of the EU Fundamental Rights Charter guarantees the right to an effective remedy to everyone.

With these concerns in mind, it is welcomed that the Dublin system is due to be evaluated in 2016, with possible 'revision of the legal parameters' so as to better respond to the current nature and scale of the influx of refugees to the EU.[466] This revision has been called for by ECRE, among others, who advocate the abolition of the current Dublin system and the development of 'a more humane and equitable system that considers the connections between individual asylum seekers and particular Member States'.[467]

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[459] For a discussion, see, Steve Peers, '*Tarakhel v Switzerland*: Another nail in the coffin of the Dublin system?', *EU Law Analysis* [blog], 5 November 2014.

[460] 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 [2013] OJ L180/31, art 33.

[461] ECRE Comments on Regulation (EU) No 604/2013, 36.

[462] 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 [2013] OJ L180/31, recital 20 and art 28(1).

[463] Amnesty International, 'In detention in Europe' <http://www.sos-europe-amnesty.eu/in-detention-in-europe-facts-and-figures/> accessed 12 September 2015.

[464] See, e.g., *X, Y AND Z v. The United Kingdom* App no 21830/93 (ECHR 22 April 1997), paras 33-37. See, also, ECRE Comments on Regulation (EU) No 604/2013, 10.

[465] 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 [2013] OJ L180/31, art 27(3).

[466] 2015 European Agenda on Migration, 13.

[467] ECRE, 'What is the Dublin System?' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html> accessed 12 September 2015.

Relocation

Such a revision will be necessary also due to the fact that the Dublin system fails to fulfil the role of a *solidarity* measure among Member States.[468] With five countries accounting for 80% of all first-time asylum applicants in the EU-28 in the first quarter of 2015,[469] it is apparent that the Dublin system 'is not working as it should'.[470] More needs to be done, the Commission concedes, to 'relieve the pressure on the frontline Member States' and to 'achieve a fairer distribution of asylum seekers in Europe'.[471] Similar calls for a more equitable redistribution of refugees and asylum-seekers across the EU have been made by, among others, the UN Special Rapporteur on the human rights of migrants.[472] In a similar vein, the UNHCR states:

> Europe cannot go on responding to this crisis with a piecemeal or incremental approach. No country can do it alone, and no country can refuse to do its part. It is no surprise that, when a system is unbalanced and dysfunctional, everything gets blocked when the pressure mounts. This is a defining moment for the European Union, and it now has no other choice but to mobilize full force around this crisis. The only way to solve this problem is for the Union and all member states to implement a common strategy, based on responsibility, solidarity and trust.[473]

Or, as stated by Amnesty International:

> The humanitarian crisis in the Aegean is not merely a Greek tragedy but the product of a failing European migration system. It is incumbent on EU leaders […] to acknowledge that the intolerable strains on frontline states such as Greece and Italy are the product of Europe's failed migration policies. Effective solutions to meet the global refugee crisis and share the responsibility more equitably across the EU must be urgently applied.[474]

A plan for burden-sharing, or relocation, was put forth by the Commission in its May 2015 Agenda on Migration, and subsequently in a proposal for a Council decision,[475] suggesting a legally binding system of quotas to distribute 40,000 newly arrived persons in clear need of international protection over two years as a first step in tackling the refugee crisis.[476] The suggested relocation programme, triggering the

[468] Elspeth Guild *et al*., 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 8.

[469] Eurostat, 'Asylum quarterly report' (16 June 2015) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report#Main_destination_countries> accessed 12 September 2015.

[470] 2015 European Agenda on Migration, 13.

[471] 2015 European Agenda on Migration, 13. For a discussion on the dispersal of asylum seekers and refugees within States, see Vaughan Robinson, Roger Andersson and Sako Musterd, *Spreading the 'Burden'?: A Review of Policies to Disperse Asylum Seekers and Refugees* (Policy Press 2003).

[472] UN News Centre, 'Europe's response to migrant crisis is not working, warns UN rights expert' (25 August 2015) <http://www.un.org/apps/news/story.asp?NewsID=51713#.Ve3lRChq76k> accessed 12 September 2015.

[473] UNHCR, 'UNHCR chief issues key guidelines for dealing with Europe's refugee crisis' (4 September 2015) <http://www.unhcr.org/55e9793b6.html> accessed 12 September 2015.

[474] Amnesty International, 'Greece: Humanitarian crisis mounts as refugee support system pushed to breaking point' [press release] 25 June 2015 <https://www.amnesty.org/en/press-releases/2015/06/greece-humanitarian-crisis-mounts-as-refugee-support-system-pushed-to-breaking-point-5/> accessed 12 September 2015.

[475] Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM(2015) 286 final, 27 May 2015.

[476] 2015 European Agenda on Migration.

emergency response system foreseen under Article 78(3) TFEU, would derogate from the usual Dublin rules in that a quota of asylum seekers that normally would be the responsibility of a few frontline Member States would be distributed among EU Member States according to a specific distribution key calculated on the basis of each Member State's 'objective, quantifiable and verifiable criteria that reflect the capacity of the Member States to absorb and integrate refugees'.[477] The original proposal for a binding distribution key was, however, rejected in June 2015.[478]

In July 2015, the JHA Council agreed on a draft decision instituting a temporary and exceptional relocation system from Italy and Greece to other Member States of persons in clear need of international protection and adopted a resolution to this end.[479] The decision was formally adopted in September 2015,[480] and on 22 September a further decision was reached to relocate 120,000 persons in clear need of international protection.[481]

While welcoming decisions on relocation policies as a concrete step in supporting frontline states in addressing the refugee influx,[482] it is only a more profound review of the Dublin rules that is seen to

[477] 2015 European Agenda on Migration, Annex: 'European schemes for relocation and resettlement', <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_annex_en.pdf> accessed 12 September 2015.

[478] European Council meeting (25 and 26 June 2015), Conclusions. For a commentary on the abandoning of the quota system, see Yves Pascouau, 'Solidarity and asylum seekers: member states agreed to disagree' (29 June 2015) <http://www.epc.eu/pub_details.php?cat_id=4&pub_id=5737> accessed 12 September 2015. See also Presidency, 'Commission Recommendation of 8.6.2015 on a European resettlement scheme, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece: Main outstanding issues', <http://www.statewatch.org/news/2015/jul/eu-council-recomendation-provisional-asylum-resettlement-10524-15.pdf> accessed 12 September 2015.

[479] Resolution of the Representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40 000 persons in clear need of international protection. In September 2015, German and other EU leaders urged the EU Member States to bind themselves to obligatory quotas of refugees and asylum seekers in the face of the refugee influx to frontline states such as Greece, Italy and Hungary. See, Kim Willsher and Stephanie Kirchgaessner, 'Germany and France demand binding refugee quotas for EU members' *The Guardian* (3 September 2015), Henry Foy, Andrew Byrne and Richard Milne, 'Eastern Europe moderates its opposition to refugee quotas' *Financial Times* (3 September 2015), Nikolaj Nielsen and Eszter Zalan, 'New EU proposal to relocate 160,000 asylum seekers' *EU Observer* (3 September 2015), and Daniele Weber, '160,000 refugees to be redistributed among EU countries' *Euranet Plus News Agency* (4 September 2015). On 9 September, Jean-Claude Juncker, the President of the European Commission, presented a plan to relocate 160,000 refugees, calling upon Member States to accept binding quotas to that end. See, Matthew Weaver, 'Refugee crisis: Juncker unveils EU quota plan – as it happened' *The Guardian* (9 September 2015, live blog).

[480] Council Decision of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146, 15 September 2015. See, also, JHA Council, 20 July 2015, <http://www.consilium.europa.eu/en/meetings/jha/2015/07/20/> accessed 12 September 2015.

[481] Council Decision of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80, 24 September 2015.

[482] ECRE, 'Commissions Relocation Plan, First Step to Show Concrete Solidarity but Fundamental Questions Remain' (29 May 2015) <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1072-commissions-relocation-planfirst-step-to-show-concrete-solidarity-but-fundamental-questions-remain.html> accessed 12 September 2015. See, similarly, Steve Peers, 'The new EU Migration Agenda takes shape: analysis of the first new measures', *EU Law Analysis* [blog], 28 May 2015.

provide an opening for a long-time solution to the refugee question within the EU.[483] This is also the view taken in a recently released CEPS policy brief, urging all Member States to 'acknowledge that the Dublin system does not work and a new approach is urgently required'.[484] In that regard, it is noteworthy that, in addition to an emergency relocation mechanism, Juncker proposed in his 9 September 2015 speech to the Parliament a permanent mechanism of relocation in order to modify the Dublin system to the effect that the burden of frontline states for processing asylum applications will be more effectively shared with all Member States.[485] Such an idea of burden-sharing is, Peers notes, inherent in international refugee law, and recognised in Article 80 TFEU on solidarity among Member States.[486]

Different solutions have been tabled to this end by different actors. The distribution key proposed by the Commission in its Agenda on Migration is seen as a plausible way to ensure a fair distribution of refugees among Member States, provided the other elements of the CEAS, such as reception conditions and procedures, are functional.[487] It is further suggested to deepen the AFSJ integration through joint processing of asylum claims by an EU entity.[488] Such centralised processing of asylum claims would, according to FRA, 'make it less relevant in which Member State an application is lodged', as well as clarify the disembarkation rules for migrants rescued or intercepted at high seas, hence cutting undue delays.[489] Peers suggests, in a similar vein, 'transforming the European Asylum Support Office into a body able to make decisions on asylum applications in 'overflow' cases […] and/or creating a common European asylum appeal court.'[490]

There is, as an ECRE report notes, a gap in the current EU legislation in that the EU asylum *acquis* does not provide for sufficient guarantees of the principle of *non-refoulement* for refugees making use of their right to travel within the EU for a period longer than three months.[491] This gap was explicitly pointed to in the case of *M.G. v. Bulgaria,* in which the ECtHR recognised prior refugee status in another

[483] Steve Peers, 'The new EU Migration Agenda takes shape: analysis of the first new measures', *EU Law Analysis* [blog], 28 May 2015.

[484] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332.

[485] Reuters, 'Factbox: Juncker's new proposals on migration crisis' (9 September 2015) <http://www.reuters.com/article/2015/09/09/us-europe-migrants-eu-proposals-factbox-idUSKCN0R919X20150909> accessed 12 September 2015.

[486] Steve Peers, 'The Refugee Crisis: What should the EU do next?', *EU Law Analysis* [blog], 8 September 2015. For a discussion on the different stages of burden-sharing in the history of the CEAS, see Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 263.

[487] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332.

[488] FRA, *Fundamental Rights in the Future of the European Union's Justice and Home Affairs* [2013], 20. See similarly Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, suggesting the instituting of an 'EU Migration, Asylum and Protection Agency (EMAPA) with powers to make centralized, EU-wide decisions on asylum applications', as one alternative solution.

[489] FRA, *Fundamental Rights in the Future of the European Union's Justice and Home Affairs* [2013], 20.

[490] Steve Peers, 'The Refugee Crisis: What should the EU do next?', *EU Law Analysis* [blog], 8 September 2015.

[491] ECRE, *Mind the Gap: An NGO Perspective on Challenges to Accessing the Common European Asylum System: Annual Report 2013/2014* [2014], 35.

EU Member State as an important indication of sufficient elements of risk for persecution.[492] The omission is mainly attributed to lacking political will on the part of the Member States, in particular the Northern ones, to commit themselves to receiving a potentially increasing number of refugees as a result of mutual recognition of asylum decisions and the transfer of protection status between Member States.[493]

Proposals in this regard have also been made for mutual recognition of asylum decisions between EU Member States,[494] either through an obligation to be incurred on Member States to recognise the decision to grant international protection by another Member State, or, echoing the Long-term Residence Directive criteria, the right to move freely within the EU area after two years of legal and uninterrupted residence in the granting Member State.[495] Such mutual recognition of positive asylum decisions and the transfer of protection status between EU Member States would be important in enhancing the protection of persons that have been granted international protection from *refoulement* when moving from one Member State to another.

Any revision of the Dublin system should be based on voluntary mechanisms, excluding coercion of asylum seekers, with full respect of their agency and fundamental rights.[496] The current proposals for a relocation mechanism face criticism in this regard: the mechanisms fail to give a right to the asylum seekers to be heard during the process of relocation, and provide for a limited right of appeal, risking their right to effective remedy.[497] 'What about the asylum seekers themselves?', Peers asks:

> There is no requirement that they consent to their relocation or have the power to request it. The proposed Decision only requires Italy and Greece to inform and notify the asylum-seekers about the relocation, and the Commission suggests that they could only appeal against the decision if there are major human rights problems in the country to which they would be relocated. So neither the relocation itself, nor the choice of Member State that a person will be relocated to, is voluntary. This is problematic, since forcing asylum-seekers to a country that they don't want to be in is one of the key problems facing the Dublin system already.[498]

[492] *M.G. v Bulgaria* App no 59297/12 (ECHR, 25 March 2014).
[493] ECRE, *Mind the Gap: An NGO Perspective on Challenges to Accessing the Common European Asylum System: Annual Report 2013/2014* [2014], 35.
[494] FRA, *Fundamental Rights in the Future of the European Union's Justice and Home Affairs* [2013], 20.
[495] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] *CEPS Papers in Liberty and Security in Europe*, No. 83, e.g. iii.
[496] For a discussion, see, e.g., Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332. See similarly Elspeth Guild *et al*., 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), e.g. i. See also Peers who argues that 'it would be best to take account of their preference in any relocation system as far as possible, so as to reduce 'secondary movements''. See, Steve Peers, 'The Refugee Crisis: What should the EU do next?', *EU Law Analysis* [blog], 8 September 2015.
[497] ECRE, 'Commissions Relocation Plan, First Step to Show Concrete Solidarity but Fundamental Questions Remain' (29 May 2015) <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1072-commissions-relocation-planfirst-step-to-show-concrete-solidarity-but-fundamental-questions-remain.html> accessed 12 September 2015. See similarly Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332.
[498] Steve Peers, 'The new EU Migration Agenda takes shape: analysis of the first new measures', *EU Law Analysis* [blog], 28 May 2015.

Considering the uneven practices and reported malpractices in terms of the protection of human rights of asylum seekers in the Member States, as well the prospects for successful integration and family reunification, this is a significant consideration which should be addressed in the coming revision of the Dublin system. A 'reasonable range of options' should be available for the asylum seekers to have a say as regards their country of asylum.[499]

It is also noted that the proposed scheme for relocation is largely based on 'numerical indicators' as benchmarks for the selection of relocated asylum seekers, which may risk disguising specific protection needs of particular groups of individuals based on past recognition rates, or may fail to take account of changing realities in the countries of origin of asylum seekers.[500]

Temporary protection

Consideration could also be given to enhanced usage of the Temporary Protection Directive, which has remained dormant since its adoption in 2001.[501] The directive addresses emergency situations where large numbers of displaced persons from a given country or a geographic area with endemic levels of conflict or violence enter the Union in search for protection.[502] Designed and adopted as a reaction to the mass influx of displaced persons consequent to the conflicts in the Western Balkans in the 1990s, the directive provides for minimum standards on immediate and temporary protection through the removal of visa requirements,[503] in particular in cases where the ordinary system for asylum processing is at risk of collapsing subsequent to a massive flood of asylum applications.[504] Recourse to the procedure may also be a way out from a situation where regular refugee status determination would not be a viable alternative 'because of the time and evidence required to do a full and fair evaluation of protection needs'.[505]

[499] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] *CEPS Papers in Liberty and Security in Europe*, No. 83, 36.

[500] Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'The 2015 Refugee Crisis in the European Union' [2015] *CEPS Policy Brief*, No. 332, and Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' [2015] *CEPS Papers in Liberty and Security in Europe*, No. 83.

[501] For a call for enhanced use of the Temporary Protection Directive, see e.g., FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 10. For an overview of the Temporary Protection Directive, see Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 355-358.

[502] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

[503] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, Article 8.

[504] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 355.

[505] ECRE, 'Temporary protection' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/81-temporary-protection.html> accessed 14 May 2015.

Temporary protection based on solidarity and the idea of burden sharing among EU Member States remains an *exceptional* measure, only activated where a Council decision by a qualified majority has been reached on the existence of a mass influx of displaced persons.[506] This escape clause mechanism, as noted by Vedstedt-Hansen, may be one of the reasons why the Member States agreed to the adoption of the Directive,[507] but as Guild points out it is also one of its weak points, as its protective intent may be hampered by political disinterest.[508]

The directive provides for what has been regarded as 'a reasonable standard of rights' to be ensured for the subjects of temporary projection.[509] The procedure does not preclude possibility for access to asylum determination procedure.[510] On the contrary, Article 3(1) of the Directive explicitly states that temporary protection 'shall not prejudge recognition of refugee status under the Geneva Convention.'[511] The same holds true for obtaining visa, which the Member States are, as per Article 8(3) of the Directive, to facilitate to the maximum. In this regard, drawing on a parallel to the relatively commonly used EU

[506] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, Articles 2(d), 5(1) and 5(3).

[507] Jens Vedstedt-Hansen, 'Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedure' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012) 255, 264.

[508] Elspeth Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' [2004] 29 *European Law Review* 198, 211.

[509] ECRE, 'ECRE Information Note on the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof' (1 September 2001) <http://www.ecre.org/component/downloads/downloads/118.html> accessed 10 June 2015 (hereinafter 'ECRE Information Note on the Council Directive 2001/55/EC'). Vedstedt-Hansen considers also the Directive to provide for 'relatively high protection standards'. See Jens Vedstedt-Hansen, 'Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedure' in Elspeth Guild and Paul Minderhoud (eds) *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012) 255, 262.

[510] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art 3(1), 8(3) and 17(1). See Cynthia Orchard and Dawn Chatty, 'High Time for Europe to Offer Temporary Protection to Refugees from Syria?', Oxford Human Rights Hub (27 October 2014) <http://ohrh.law.ox.ac.uk/high-time-for-europe-to-offer-temporary-protection-to-refugees-from-syria/> accessed 14 May 2015. The directive was welcomed by the UNHCR as 'a major step towards a harmonised treatment of refugees and other persons arriving in a mass influx and in need of international protection'. In particular the fact that the temporary protection scheme is not designed as an alternative but as 'a practical device aimed at meeting urgent protection needs during a mass influx situation until the individuals concerned have their asylum requests determined on a case-by-case basis'. See UNHCR, 'UNHCR welcomes EU agreement on temporary protection' (Briefing notes, 1 June 2001) <http://www.unhcr.org/nes/NEWS/3b17a0b24.html> accessed 14 May 2015.

[511] See, however, Guild, who notes that the temporary protection period of two years, at the maximum, may delay the recognition of the refugee status and hence access to the rights of a refugee that are wider than those afforded to persons under temporary protection. Elspeth Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' [2004] 29 *European Law Review* 198, 213-214.

visa facilitation scheme,[512] FRA proposes expanding the categories of persons to whom visas are issued on a simplified basis – including, usually, groups such as public officials, diplomats and students – to categories of persons on humanitarian grounds, including, *inter alia*, human rights defenders.[513]

At the same time, it is noted that the Temporary Protection Directive fails to make a reference to the freedom of movement, and only provides for emergency health care, which ECRE, among others, views as insufficient.[514] Concern is also expressed vis-à-vis the fact that no appeals procedure is provided for in case of denial of temporary protection, nor is there a general procedure defined for issuing temporary protection.[515]

While the temporary protection procedure has never been triggered, its use has, on some occasions, been contemplated. Recourse to the Temporary Protection Directive has been mentioned as an alternative measure to address the migration flows from Northern Africa by the Commission, for example, in 2011:

> The Commission would […] be ready to consider proposing the use of the mechanism foreseen under the 2001 Temporary Protection Directive (2001/55/EC), if the conditions foreseen in the directive are met. Consideration could only be given to taking this step if it is clear that the persons concerned are likely to be in need of international protection, if they cannot be safely returned to their countries-of-origin, and if the numbers of persons arriving who are in need of protection are sufficiently great. Resort to this mechanism would allow for the immediate protection and reception in the territory of EU Member States for persons concerned, as well as offering a 'breathing space' for the national asylum systems of the Member States most directly affected.[516]

Calls have been voiced by civil society organisations for urgent operationalisation of the Temporary Protection Directive, urging Italy and the other most heavily burdened states to request a Council decision on a mass influx:

> […] if not now, then when will the EU trigger the "temporary protection" mechanism? […] Won't the European Council after several thousands deaths, now take this occasion to implement a Treaty provision and ask for the implementation of an already existing EU legislation? Unfortunately this looks like a rhetorical question.[517]

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[512] The EU has concluded visa facilitation agreements with twelve third states to agree on simplified procedures for issuing visas. See European Commission, 'Visa policy' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm> accessed 14 May 2015.

[513] FRA, *Legal entry channels to the EU for persons in need of international protection: a toolbox* [2015], FRA focus 02/2015, 10-11.

[514] ECRE Information Note on the Council Directive 2001/55/EC, 3.

[515] ECRE, 'Temporary protection' <http://www.ecre.org/topics/areas-of-work/protection-in-europe/81-temporary-protection.html> accessed 14 May 2015.

[516] European Commission, 'The European Commission's response to the migratory flows from North Africa' [press release] (8 April 2011) <http://europa.eu/rapid/press-release_MEMO-11-226_en.htm?locale=en> accessed 14 May 2015. See also European Parliament resolution of 9 October 2013 on EU and Member State measures to tackle the flow of refugees as a result of the conflict in Syria.

[517] Emilio De Capitani, 'Mediterranean Humanitarian Crisis: if not now, then when will the EU trigger the "temporary protection" mechanism?', *European Area of Freedom Security & Justice, FREE Group* [blog], 20 April 2015 <http://free-group.eu/2015/04/20/mediterranean-humanitarian-crisis-if-not-now-when-the-eu-will-trigger-the-temporary-protection-mechanism/> accessed 14 May 2015. For a similar call see, e.g., HRW, 'EU: Provide

The temporary protection procedure does not, as noted by Boeles *et al.*, create a 'true system of solidarity' since states are left with discretion to decide on the number of displaced persons they are able and/or willing to admit.[518] The political climate in many Member States has not facilitated such European camaraderie. Notably, the May 2015 Commission agenda on migration makes no reference to temporary protection.

3. Protection in context of return and readmission

a) Return

Where an application for international protection is rejected, the asylum seeker is returned to his or her country of origin or habitual residence. Between 400,000 and 500,000 third country nationals are ordered to leave the EU annually.[519] Among returned third country nationals are persons who no longer have a legal basis to remain in, or have consented or induced to leave, the territory of the host state, as well as those who, against their will, are forced to return subject to sanctions or use of force.

Under EU law such returns are governed by the so-called Returns Directive, which establishes common rules for the return and removal of irregular migrants.[520] The Directive binds all EU Member States, except the United Kingdom and Ireland which have opted out, and the four countries associated to the Schengen *acquis*, Switzerland, Norway, Iceland and Liechtenstein. A proposal for the Directive, called for in the Hague Programme,[521] was tabled in 2005 with a view to providing for 'clear, transparent and fair common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, which take into full account the human rights and fundamental freedoms of the persons concerned'.[522] The Directive was agreed upon in 2008 and entered into force at the end of 2010.

The Returns Directive sets out common standards and procedures for returning 'illegally staying' third-country nationals 'in accordance with fundamental rights as general principles of Community law as well

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Protection for Syrian Refugees Allow Access to EU Territory, Step Up Assistance in Region' <http://www.hrw.org/news/2012/12/23/eu-provide-protection-syrian-refugees> accessed 14 May 2015, and Cynthia Orchard and Dawn Chatty, 'High Time for Europe to Offer Temporary Protection to Refugees from Syria?', Oxford Human Rights Hub (27 October 2014) <http://ohrh.law.ox.ac.uk/high-time-for-europe-to-offer-temporary-protection-to-refugees-from-syria/> accessed 14 May 2015.

[518] Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia 2009) 357.

[519] European Commission, 'Return & readmission' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm> accessed 12 September 2015.

[520] 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 L348/98.

[521] European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, 3 March 2005, 6.

[522] European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals, COM (2005) 391 final, 1 September 2005, 2.

as international law, including refugee protection and human rights obligations'.[523] It contains rights and obligations relating to the fair and transparent procedure for decisions on the return; voluntary departure; access to basic health care and education for children; limitations on the use of coercive measures and detention; as well as an entry ban for migrants returned by an EU State.[524]

Whereas the basic tenet of the Directive, that it is legitimate for a state to return rejected asylum seekers, is not disputed,[525] it is held that the Directive, and the current state of the EU asylum law in general, fails to provide for the necessary safeguards to guarantee that returns are conducted 'in safety and dignity'.[526] Essentially, despite the prohibition of *refoulement* included in the Directive,[527] the UNHCR, among others, has expressed concern over the fact that in the absence of unequivocal procedural safeguards, *refoulement* may take place in practice.[528]

With a view to the position of irregularly arriving migrants it is, in particular, noteworthy that Article 2(2)(a) of the Directive gives discretion to Member States to except from the scope of protection of the Directive third-country nationals who 'are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State'. Hence, under Article 2(2)(a) only 'very minimal safeguards' may be applicable to, for example, blanket rejections failing to assess the substance of the applications that could, inter alia, be the case for the accelerated 'safe third country' procedures or interceptions at sea.[529]

Further criticism has been directed at the use, under Article 15(1) and (6) of the Directive, of administrative pre-removal detention for up to six – and in some cases up to 18 – months, of third-country nationals subject to return procedures, including families and unaccompanied children, 'in order to prepare the return and/or carry out the removal process'. UNHCR has specifically commented upon the second ground for extending the period of detention up to 18 months due to 'delays in obtaining the

[523] 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 L348/98, Article 1.

[524] European Commission, 'Return & readmission' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm> accessed 12 September 2015.

[525] ECRE, 'ECRE Information Note on the 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', http://www.ecre.org/component/downloads/downloads/158.html, 4 accessed 12 September 2015 (hereinafter 'ECRE Information Note on the Directive 2008/115/EC').

[526] UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008], and ECRE Information Note on the Directive 2008/115/EC, 4.

[527] 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 L348/98, Art 4(4)(b).

[528] UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008].

[529] UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008].

necessary documentation from third countries', which effectively penalizes the individual asylum-seeker for the lack of cooperation by a state.[530] FRA has urged Member States to insert safeguards in national legislation to the effect that the possibility for extended detention of up to 18 months is only used in 'extremely exceptional cases' and to ensure that detention is ordered 'only for as long as it is strictly necessary to ensure successful removal', taking full account of the individual circumstances of each asylum seeker and barring systemic recourse to the maximum period of detention.[531] The Commission report on EU Return Policy indicates that, while under Article 16(1) such detention shall take place in prisons only where special detention facilities are not available, half of the Member States accommodate detained third-country nationals in prisons, and several Member States fail to abide by the obligation to keep the detained third-country nationals separate from the ordinary prisoners.[532]

While the Returns Directive sets out that the 'special needs' of vulnerable persons are 'to be taken into account',[533] the specific safeguards to that end are insufficient.[534] It is, for example, possible under Article 10(2) of the Directive for a Member State to return an unaccompanied minor provided 'adequate reception facilities' exist. According to a Commission study, seven Member States reported having returned unaccompanied minors to reception centres or social services in their country of origin.[535] Likewise, seventeen Member States detained unaccompanied minors and nineteen Member States detained families with minors,[536] despite the fact that both the Returns Directive Article 17(1) and Article 37(b) of the CRC only allow recourse to detention of children as a last resort.

Further, the entry ban set forth in Article 11 of the Directive to accompany a return decision is seen to run counter the right to seek international protection as described above. It is unfortunate that, despite calls by the UNHCR,[537] the entry ban can be ordered for up to five years, or even longer in some cases. Likewise, the fact that the Returns Directive allows Member States discretion not to provide translation

[530] UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008].
[531] FRA, *Detention of third-country nationals in return procedures* [2010], 9.
[532] European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 18. For comment, see Steve Peers, 'The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants?', *EU Law Analysis* [blog], 28 March 2014. See, also, Katharina Häusler and Karin Lukas, 'EU migration and asylum law – basic principles, possible human rights gaps, contradictions, tensions, and interactions' in Monika Mayrhofer et al., Report on the Global Human Rights Protection Governance System [2015], 58-62, <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-4.2-Submitted-28-July-2015.pdf> accessed October 12, 2015.
[533] 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 L348/98, Art 14(1)(d).
[534] UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008].
[535] European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 20.
[536] European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 19.
[537] UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008].

or information on elements of return decisions for migrants that have arrived to the country illegally[538] risks putting asylum seekers' right to remedy in jeopardy.[539]

It is also noteworthy that in only nine Member States did an appeal have an automatically suspensive effect on returns procedures.[540] Notably, in the case of *Khlaifia and Others v. Italy*, the ECtHR held that the applicants had not benefited from an effective remedy as, in a case of a collective expulsion, for a remedy to be effective it would need to have suspensive effect, that is, to have suspended the *refoulement* of the applicants to Tunisia. The Court found further that the applicants' detention had been unlawful as they had not been informed of the reasons for their detention and had not had an opportunity to challenge it through appeal.[541]

All in all, the Directive can be seen to be premised on 'a strong presumption in favour of expulsion' and punitive consequences faced by irregularly staying migrants.[542] In view of this, and taking into account the acknowledged flaws in the asylum system and its interpretation discussed above, the credibility and rationale of the returns system in terms of protecting the rights of persons in need of international protection can be questioned.[543] While Member States are allowed to institute or uphold more advanced standards of protection,[544] it is noted with concern that a recent Commission report on the application of the Directive indicates that in some Member States some standards, for example, those related to detention, have been lowered, arguably to match the Directive's level of protection.[545]

[538] 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 L348/98, Art 12(3).

[539] Commission study on the Returns Directive indicates that 'in practice a number of factors come into play that can compromise the right to a real legal remedy', including insufficiently communicated information and ineffective provision of legal aid. See European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 23.

[540] European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final, 23.

[541] *Khlaifia and Others v Italy* App no 16483/12 (ECHR 1 September 2015).

[542] Anneliese Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive' [2009] 11(1) European Journal of Migration and Law 1, Conclusion.

[543] For a discussion, see, e.g., ECRE Information Note on the Directive 2008/115/EC, 4, and UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008].

[544] 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 L348/98, Art 4(3).

[545] European Commission, Commission Communication: On EU Return policy [2014] COM(2014) 199 final. See also European Commission, Memo, 'Frequently Asked Questions: the EU Return Policy', 28 March 2014, <http://europa.eu/rapid/press-release_MEMO-14-243_en.htm> accessed 30 May 2014. For an analysis of the report findings, see Steve Peers, 'The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants?', *EU Law Analysis* [blog], 28 March 2014. For an expression of concern, see UNHCR, 'UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals' [2008].

b) Readmission

Alongside operational cooperation with third states aiming to prevent the arrival of irregular migrants, another major concern from the external perspective of the EU refugee policy is the return of irregularly staying persons from EU Member States' territory. In 2013, approximately 166,500 persons were subject to forced return to third countries.[546] The largest number of persons ordered to leave an EU Member State in the period 2012-2013 comprised citizens of countries with which the EU has concluded a readmission agreement: Morocco, Pakistan, Albania and Russia.[547]

To ensure cooperation with third countries for the purpose to enforce return decisions, the EU has concluded 16 readmission agreements with third countries.[548] The return of third country nationals was identified as a priority early on in the EU's asylum and migration policy. As early as the entry into force of the Treaty of Amsterdam, the EC was granted competence to sign readmission agreements with third countries.[549] The Tampere Council Conclusions further endorsed the view that the EC should conclude readmission agreements with third countries,[550] and the implementation of the Seville Council envisaged standard readmission clauses in all external relations agreements.[551] Generally, the reasoning behind the conclusion of readmission agreements is to enforce the return of irregularly staying persons. Under international law, states are obliged to readmit their citizens if they *want* to return.[552] Readmission agreements, by contrast, concern the readmission of individuals against their will due, *inter alia*, to their lack of or non-eligibility for a valid visa or a residence permit. In practice, it is relatively common that a third country either contests that a person lacking any documents is its citizen or is reluctant to issue travel documents to the person for different reasons.[553]

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[546] Eurostat, 'File: Persons issued with an order to leave the EU-28 compared to persons recorded as having been returned to a non-EU country, 2008-2013 V1.png' (15 December 2014), <http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Persons_issued_with_an_order_to_leave_the_EU-28_compared_to_persons_recorded_as_having_been_returned_to_a_non-EU_country,_2008%E2%80%9313_V1.png&oldid=212311> accessed 28 April 2015

[547] Eurostat, 'File: Main citizenship of persons ordered to leave an EU-28 member state, 2012-2013 V1.png' <http://ec.europa.eu/eurostat/statistics-explained/images/b/b0/Main_citizenships_of_persons_found_to_be_illegally_present_in_the_EU-28%2C_2012%E2%80%9313_V1_2.png> accessed 28 April 2015.

[548] As of 15 April 2015. For a complete list of the EU readmission agreements see EUR LEX, 'Readmission Agreements' <http://eur-lex.europa.eu/search.html?qid=1429255279314&text=readmission%20agreement&scope=EU_SUMMARY&type=quick&lang=en&page=1> accessed 28 April 2015.

[549] Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford 2011) 587.

[550] European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, second part.

[551] General Affairs Council, Intensified Cooperation on the Management of Migration Flows with Third Countries, Council Conclusions, 13894/02, 18 November 2002, para 7.

[552] Under the norm under customary international law prohibiting states to arbitrarily deny entry to their territory to their citizens the individual is the rights bearer and the obligation is only the corollary of that right. Readmission clauses entail no right whatsoever for the individual, but the obligation to readmit is on the third state. See Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, OUP 2008) 858-59, James Crawford, *Brownlies' Principles of International Law* (8th edn, OUP 2012) 510, also see ICCPR, art 12(4)

[553] Brigitte Kukovetz documents such practices in Austria, see. Brigitte Kukovetz, Catch-22 des irregulären Aufenthalts, Handlungspraxen zwischen Abschiebung und Niederlassung [Catch-22 of irregular stay: Social practices between deportation and residency], unpublished PhD Dissertation at the Institute of Socioglogy at the

There are two different forms of readmission: (i) separate readmission agreements; and (ii) readmission clauses in cooperation or/and association agreements or MPs. As noted above, the EU concludes readmission agreements on the basis of Article 216(1) TFEU in conjunction with Article 79(3) TFEU. Initially, the EU intended to conclude readmission agreements without offering anything in return.[554] The high unpopularity of this intention with third country governments and populations, however, required the EU to adapt its approach and to offer adequate compensatory measures as an incentive.[555] The envisaged compensatory measures include visa facilitation agreements, financial assistance in managing migration flows, and deeper and broader economic cooperation. The specific form of the compensatory measure depends on the negotiation with each specific country and the relative bargaining power of the EU with regard to the respective country. The recent conclusion of the readmission agreement between Turkey and the EU, for instance, has been concluded against strong pressures from the Turkish civil society for the conclusion of a visa facilitation agreement,[556] whereas the MP with Senegal, integrating readmission clauses, failed due to a lack of internal political support in the ministry responsible in Senegal and a lack of leverage possibilities on the side of the EU.[557] Instead of concluding 28 readmission agreements with a single third country, EU Member States have a keen interest in the conclusion of a single EU wide readmission agreement.

As noted above, approximately 166,500 persons were forcefully returned to third countries in 2013. According Eurostat's data, roughly 98,000 non-EU citizens were returned to their countries of origin.[558] The difference in absolute numbers and terminology suggests that about 68,500 non-EU citizens were subject to forced return to countries other than their countries of origin. Readmission agreements explicitly entail the return not merely of citizens of the readmitting country, but also of third country nationals and stateless persons, provided that these persons hold a valid visa or residence permit issued by the third country and/or entered the EU irregularly and directly from the concerned third country.[559]

University of Graz, available online <http://search.obvsg.at/primo_library/libweb/action/display.do?tabs=detailsTab&ct=display&fn=search&doc=UGR_aleph_acc002787398&indx=1&recIds=UGR_aleph_acc002787398&recIdxs=0&elementId=0&renderMode=poppedOut&displayMode=full&frbrVersion=&dscnt=0&frbg=&scp.scps=scope%3A%28UGR_sfx%29%2Cscope%3A%28UGR_aleph_acc%29%2Cscope%3A%28UGR_aleph_ubg01%29%2Cscope%3A%28UGR_metalib_kb%29&tab=default_tab&dstmp=1444403433089&srt=rank&mode=Basic&&dum=true&tb=t&vl(freeText0)=kukovetz&vid=UGR> accessed 9 October 2015

[554] European Commission, Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements, 23 February 2011, COM(2011)76, 6.

[555] Natasja Reslov and Maarten Vink, 'Three-Level Games in EU External Migration Policy: Negotiating Mobility Partnerships in West Africa' [2014] *Journal of Common Market Studies*, 7

[556] Kemal Kerisci, 'Will the Readmission Agreement Bring the EU and Turkey Together or Pull Them Apart?' [2014] *CEPS Commentary*, 2-3.

[557] Meng-Hsuan Chou and Marie V. Gibert, 'The EU-Senegal Mobility Partnership: From Launch to Suspension and Negotiation Failure' [2012] 8(4) *Journal of Contemporary European Research*.

[558] Eurostat, 'Statistics on Enforcement of Immigration Legislation' <http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation#About_98.C2.A0000_non-EU_citizens_were_effectively_returned_to_their_country_of_origin_in_2013> accessed 28 April 2015.

[559] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation [2014] OJ L 267/1, art 2 and 3 (hereinafter 'EU-Turkey Readmission Agreement'), Agreement between the European Community and Ukraine on the readmission of persons [2007] OJ L 332/48, art 2 and 3

With regard to the above-mentioned figures and due to a lack of more concrete data, this at least, underscores the importance of readmission agreements with third countries as a legal instrument to affect the return of stateless persons or third country nationals with citizenship different from the readmitting state. Readmission agreements subsume third country nationals and stateless persons under the same heading, and thus smudge two entirely different legal categories. Readmission agreements enshrine the ratio of keeping up efforts to return non-EU citizens to their country of origin.[560] Whereas non-EU citizens returned to the readmitting state may be subsequently returned to their country of origin, stateless persons lack a country of origin. They cannot be returned anywhere. It is merely shifting responsibility to the readmitting state without properly taking into account the specific situation of the stateless person, for instance, whether the latter may realistically gain citizenship of the readmitting country.

The GAMM sets forth that 'special attention should be paid to protecting and empowering vulnerable migrants, such as […] stateless persons',[561] and the EU Strategic Framework and Action Plan on Human Rights includes the raising of statelessness as dimension of its human rights approach in all EU external policies.[562] The ILC Draft Articles on the Expulsion of Aliens, adopted in 2007, set forth the obligation to duly consider the special protection of vulnerable persons, including pregnant women, children and older persons.[563] In its comments to the draft articles, the EU delegation highlighted its agreement with the standards of the ILC Draft Articles on vulnerable persons and even suggested the inclusion of a reference to health considerations.[564] Also, the Action Plan implementing the Stockholm Programme mentions that the Union's policies and actions in preventing and reducing irregular migration should give special attention to the most vulnerable.[565] The provision that the application form for readmission should include information on special needs of persons suggests, on the one hand, that the purpose of readmission agreements is to guarantee effective return,[566] and on the other hand, that stateless persons are merely treated under the general category non-EU citizens. Generally, no specific legal

(hereinafter 'EU-Ukraine Readmission Agreement'), and Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation [2007] OJ L 334/149, art 2 and 3 (hereinafter 'EU-Moldova Readmission Agreement').

[560] Art 7 EU-Turkey Readmission Agreement.

[561] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility, COM(2011)743 final, 18 November 2011, 6.

[562] Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12, 25 June 2012, 14(d).

[563] ILC, Report of the International Law Commission, 59th session, 2007, UN Doc A/62/10, art 14(1), Draft Article on the Expulsion of Aliens.

[564] EU Delegation to the United Nations New York, 'EU Statement - United Nations 6th Committee: Report of International Law Commission Expulsion of Aliens', 1 November 2012, <http://eu-un.europa.eu/articles/en/article_12789_en.htm> accessed 14 April 2015.

[565] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, 20 April 2010, 7.

[566] Art 8(2) EU-Turkey Readmission Agreement.

safeguards or rules exist which take into account the necessity to apply higher protection standards with regard to vulnerable groups.

Although the Returns Directive obliges EU Member States to take into consideration the best interests of the child[567] and to ensure the implementation of the directive without discrimination,[568] these provisions often do not translate into readmission practice. According to Human Rights Watch, approximately 51,000 Roma have been returned to Kosovo between 1999 and 2007.[569] Although no EU readmission agreement with Kosovo yet exists, readmission agreements are in force with most EU Member States[570] and a general legal framework on readmission is in place in Kosovo as part of the requirements of the EU visa liberalisation roadmap.[571] After their return to Kosovo, many of the returnees are reported to have suffered severe discrimination. Roma children, for example, face difficulties in accessing education.[572] Roma reportedly face systematic and broad discriminatory measures with regard to access to employment, health care and social welfare.[573] They also often lack personal documents and face difficulties to obtain ID-documents which are necessary to enrol children in school, register for social services, or to change civil status. The lack of personal documentation may even result in *de facto* statelessness, as it prevents access to documentation confirming citizenship.[574]

The fact that readmission agreements fail to enshrine particular provisions that pay due regard to vulnerable persons and groups such as minorities or stateless persons, and the way readmission policies are enforced by EU Member States, raises serious doubts with regard to the EU's commitment to enshrine discrimination in the external dimension of its migration and asylum policies. The apparently objective and neutral provisions on the scope *ratione personae* of readmission agreements, together with the lack of any further differentiation, translates into indirect discrimination suffered by vulnerable persons.[575] Hence, a structural incoherency exists between the EU's readmission policy and its

[567] 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 L348/98, art 5.

[568] 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 L348/98, recital 12.

[569] HRW, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo* [2010], 7.

[570] For a complete list of readmission agreements between Kosovo and EU member states, see Ministry of Foreign Affairs of Kosovo, 'International Agreements' <http://www.mfa-ks.net/?page=2,72> accessed 28 April 2015.

[571] European Commission, Second Report on Progress by Kosovo in Fulfilling the Requirements of the Visa Liberalisation Roadmap, COM(2014) 488 final, 24 July 2014, 1-2.

[572] HRW, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo* [2010], 55-60, and Harvard School of Public Health, 'Post-War Kosovo and Its Policies towards the Roma, Ashkali and Egyptian Communities' [2014] *Briefing Paper*, 13-16.

[573] HRW, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo* [2010], 63-71.

[574] HRW, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo* [2010], 40-46.

[575] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art 2(2)(b) ('Racial Equality Directive').

commitments to ensure protection from discrimination in the external aspects of its migration and asylum policies.

D. Social and economic rights of non-EU citizens staying in the Union

Millions of non-EU and non-EEA citizens reside in the European Union. They live there under a wide variety of conditions, from sought after Blue Card holders to irregular migrants, but all have economic and social rights under international human rights instruments. In the European context, these rights are more directly enforceable under the EU Fundamental Rights Charter, under the ECHR and under various EU directives. Vindicating these rights, however, labours under a double burden: the difficulties of vindicating migrants' rights – given the migration policies of the EU and the competences ascribed to individual Member States – and the perceived or alleged 'secondary' character of economic and social rights (as opposed to civil and political rights) in the EU, Council of Europe and international systems.

Legally and morally, however, all human beings have an extensive set of economic, social and cultural rights, including rights to non-discrimination, under the ICESCR, the CRC, the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination.[576] Although no EU Member State has ratified the International Convention on the Protection of All Migrant Workers and Members of Their Families (Migrant Workers' Convention), it entered into force in 2003.[577] Workers also have rights under the various conventions of the International Labour Organization (ILO), many of which have been ratified by EU Member States.[578] That said, the effective enjoyment of their economic and social rights for non-EU nationals in the EU is much more dependent on their entitlements under the law of the EU and of the Council of Europe. In this section, accordingly, we will examine the rights afforded to non-EU citizens by ECHR law and jurisprudence and, especially, by the EU Fundamental Rights Charter, EU legislation and EU jurisprudence and contrast them with the reality of non-enjoyment of economic and social rights, as a result of divided competencies and policy incoherence.

[576] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

[577] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, (adopted 18 December 1990, entered into force 1 July 2003), UN doc A/RES/45/158.

[578] E.g., ILO Social Security (Minimum Standards) Convention (adopted 28 June 1952, entered into force 27 April 1955) ILO no 102.

1. Policy development

a) Tampere Programme

The Tampere Programme explicitly declares that 'fair treatment of third country nationals who reside legally on the territory of its Member States' includes 'granting them rights and obligations comparable to those of EU citizens' including 'non-discrimination in economic, social and cultural life'.[579] This includes approximating the 'legal status' of holders of long term permits to that of EU nationals, including 'e.g. the right to reside, receive education, and work as an employee or self-employed person'.[580] This restriction of such rights to legal residents and with a focus on their integration clearly excludes a number of non-EU citizens resident in the EU, such as asylum seekers (who are not considered, in some case, to be 'resident') and irregular migrants.

b) Hague Programme

After the Tampere Programme expired, the subsequent Hague Programme represented a very different approach to the economic and social rights of migrants, and to migration generally. In this document, the focus is on illegal migration as a problem to be addressed and the development of the Common European Asylum System. Although it reaffirms not just the protection but 'active promotion' of fundamental rights,[581] the only references to the economic and social rights of migrants are to the establishment of the European Refugee Fund and an exhortation to states to 'maintain adequate asylum systems and reception facilities'.[582] To some extent, it denies the EU's competence in the area of non-asylum seekers: 'The European Council emphasizes that the determination of volumes of admission of labour migrants is a competence of the Member States.'[583] Nevertheless, it urges states to curtail the informal economy as a pull factor for illegal migration. This would necessarily threaten the ability of irregular migrants resident in the EU to meet their social and economic needs. The provision of greater legal avenues of migration to reduce irregular migration, however, is not envisaged in the programme.

Other than these pronouncements, all other actions in the document concern the external dimension, including partnership agreements with third countries, return policies for irregular migrants and strengthening borders. It is striking that it is the external dimension of the AFSJ concerning migration –

[579] European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, para 18.
[580] European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, para 21.
[581] European Council: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/1, 3 March 2005, para 2.2.
[582] European Council: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/1, 3 March 2005, para 1.3.
[583] European Council: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/1, 3 March 2005, para 1.4.

discussed elsewhere in this report[584] – that is most developed in the form of border controls, greater cooperation with third countries and EU directives on employer sanctions and returns.[585]

c) Stockholm Programme

The Stockholm Programme was the multi-annual plan that followed the Lisbon Treaty. Perhaps the most striking reference in the summary is the following: 'All opportunities offered by the Lisbon Treaty to strengthen the European area of freedom, security and justice for the benefit of EU citizens should be used by the European institutions.'[586] When it discusses promoting fundamental rights, however, it is somewhat more inclusive: 'European citizens and others must be able to exercise their specific rights to the full within the European Union, even, where relevant, outside the Union.'[587] Other than these references, the rights of non-EU citizens – and socio-economic rights in particular – are strikingly absent from the document with one exception: the rights of the child, with a specific reference to 'unaccompanied minors'.[588]

There is, however, an extensive focus on implementing the GAMM, with its emphasis on development of third countries to reduce migration pressures and the threat of 'brain drain',[589] meeting labour market needs through legal migration and integrating legal migrants. Irregular migration continues to be identified as a threat, and strikingly, one of the relatively few policies directed at the social and economic rights of non-EU migrants – the 'portability of social security rights' – is presented as an encouragement to 'circular migration' (i.e. the frequent and eventual return of labour migrants to their countries of origin) which is seen as an encouragement of legal migration.[590]

2. Legislation

Although the competences of Member States to determine the conditions of admission and to regulate access to the labour market place limits on the access of non-EU citizens to work, health care, education, housing and social assistance, there has been an evolution in favour of requiring Member States to vindicate the socio-economic rights of migrants of whatever status. The best protected, nevertheless,

[584] See, also, Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] available at <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015.

[585] See Sergio Carrera and Elspeth Guild, 'Undocumented Migrants and the Stockholm Programme: Ensuring Access to Rights?' in Sergio Carrera and Massimo Merlino (eds), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme* (Centre for European Policy Studies 2010), 4-5.

[586] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 1.

[587] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 1.1.

[588] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 2.3.2.

[589] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, para 6.1.2.

[590] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility, COM(2011)743 final, 18 November 2011, 24.

continue to be legal migrants. The most significant developments have taken place through the case law of the ECtHR and CJEU, although the European Committee on Social Rights (ECSR) has also played a role. In the CJEU, in particular, the growing importance of the EU Fundamental Rights Charter has been cemented by the Lisbon Treaty, which made it a fundamental law of the EU.[591]

In our discussion of these rights, below, we will begin with those who enjoy the least protection and proceeding to those who enjoy the most protection. Key directives relevant to migrants' economic and social rights include, depending on the relevant group, the Employer Sanctions and Facilitation Directives, Recast Reception Directive and the Single Permit Directive.

a) Irregular migrants

The EU Fundamental Rights Charter declares a number of rights that apply to all individuals resident in the EU, including irregular migrants. These include articles 1 (human dignity), 14 (education), 31 (fair and just working conditions), 35 (health care), and 47 (right to an effective remedy and fair trial).[592] Although there is little case law in these areas, irregular migrants are legally entitled to 'emergency health care' in all EU Member States (and only to emergency health care in 19 states) and to primary and secondary education in all states.[593] Belgium, France, Italy, Netherlands, Portugal and Spain provide primary and secondary care to irregular migrants.[594] Indeed, the centrality of the rights of the child mean that children in an irregular situation are often better protected than adults in the EU.[595] The European Committee for Social Rights has found, in *FIDH v France*, that France's removal of the exemption from health care fees for impoverished migrant children violated Article 17 of the European Social Charter on the right of children to protection, because children are entitled to special protection.[596] EU citizen children have rights under Article 20 of the TFEU, and this was the basis for all parents of EU citizen children, including irregular ones, being granted the right to live and work in the EU while those children are below the age of majority.[597]

Some of these rights are also protected under the ECHR. Although it is primarily concerned with civil and political rights, the ECHR also provides the right to education in Protocol 1, Article 2 and the right to an effective remedy, including in immigration cases, under Article 13 and Article 1 of Protocol 7.[598] Article 8

[591] For a more developed account of some aspects of this jurisprudence, see Katharina Häusler and Karin Lukas, 'EU migration and asylum law – basic principles, possible human rights gaps, contradictions, tensions, and interactions' in Monika Mayrhofer et al., Report on the Global Human Rights Protection Governance System [2015], 46-60, <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-4.2-Submitted-28-July-2015.pdf> accessed October 12, 2015.
[592] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011].
[593] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 74.
[594] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 78.
[595] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 78.
[596] *International Federation of Human Rights Leagues (FIDH) v France* Compl no 14/2003 (ECSR 8 September 2004). See also CRIN, 'ECSR (FRANCE)' <http://www.crin.org/en/library/legal-database/fidh-v-france> accessed 13 September 2015, and FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 204.
[597] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] CJEU.
[598] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 23.

of the ECHR (the right to family life) has been found – in the *Berrehab* case[599] – to protect an individual migrant from expulsion and the *Boultif* case[600] to require states to find a 'fair balance' between protecting public order and the right to family life.[601]

Although most economic rights depend on a migrant being in a Member State legally, the Employer Sanctions Directive (2009/52/EC, Denmark, Ireland and the United Kingdom have opted out) does provide some protections to irregular migrants in the countries to which it applies. Irregular migrants must receive any outstanding pay, be able to access support from civil society organisations and unions and may, in some cases, receive residence permits for cooperating with the authorities.[602] These entitlements are not primarily justified by the rights of irregular migrants, but as a deterrent to irregular migration by discouraging employers from hiring them.

Finally, the EU Member States have some responsibilities to unremoved and unremovable irregular migrants. Article 14 (1) of the Return Directive gives four considerations that apply to irregular migrants who are awaiting removal or who cannot be removed, whether for practical reasons or for legal or humanitarian reasons: '(a) family unity with family members present in their territory is maintained; (b) emergency health care and essential treatment of illness are provided; (c) minors are granted access to the basic education system subject to the length of their stay; (d) special needs of vulnerable persons are taken into account.'[603] Because the delays involved can be quite lengthy, these conditions can represent an important entitlement for unremoved irregular migrants. This is particularly true of 'unremovable' migrants.

b) Asylum seekers

While asylum seekers have all the rights under the EU Fundamental Rights Charter and ECHR that irregular migrants do, they also have rights in cases where they are under the special responsibility of the state. Asylum seekers that have entered the EU are specifically protected through the Recast Reception Directive,[604] which was adopted in 2013 to replace its predecessor, the Reception Conditions

[599] *Berrehab v. the Netherlands* App no 10730/84 (ECHR, 21 June 1988).
[600] *Boultif v. Switzerland* App no 54273/00 (ECHR, 2 August 2001).
[601] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 23.
[602] FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 195.
[603] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, cited in FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 29.
[604] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96 (hereinafter Recast Reception Directive or RRD). Ireland, Denmark and the United Kingdom opted out of the Reception Directive and are not bound by the Recast Reception Directive. Under Article 3, the Directive is applicable to 'all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants'.

Directive of 2003.[605] The Reception Directive lays down minimum standards for the reception of applicants for international protection in Member States for the period while they are waiting for a decision to be taken on their applications, including a dignified standard of living, limited freedom of movement, protection for vulnerable groups, as well as restricted rights to work, health care and to education for children.

Thus, although the ECtHR has, in its judgment in *Pančenko v Latvia*, explicitly denied that the ECHR guarantees socio-economic rights,[606] it did find, in the case of *M.S.S. v Greece and Belgium*, that Belgium violated the rights of M.S.S. (an Afghan asylum seeker) under Article 3 of the ECHR (prohibiting inhuman and degrading treatment) when, under the Dublin Regulation, it returned him to Greece, the country where he first sought protection. The court found that Belgium should have been aware of the conditions M.S.S. would face if returned to Greece, namely the extreme poverty that he found himself in, living in a public park and dependent on gifts of food, violating Greece's responsibilities under Article 3. In both cases, Belgium and Greece were found in violation not because Article 3 entitles everyone to a minimum standard of living, but because of international obligations they had taken on (as mentioned in the Reception Directive) and because of positive law, namely Greece's transposition of the Reception Directive itself. This judgment overturned a previous judgment*, K.R.S. v United Kingdom*, in which the transfer of an asylum seeker to Greece under the Dublin Regulation did not constitute a violation of Article 3.[607] The *M.S.S.* case is potentially a significant development, not just for the socio-economic rights of asylum seekers, but for the inclusion of socio-economic rights in the jurisprudence of the ECtHR more generally.

M.S.S. only succeeded, however, because of the socio-economic rights present in international human rights instruments and in the Recast Reception Directive, not because social and economic rights are directly protected by the ECHR.[608] Recital 9 of the Recast Reception Directive declares that 'In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity' in accordance with the EU Fundamental Rights Charter, CRC and ECHR.[609] Recital 10 says that 'With respect to the treatment of people falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.'[610] Although the Directive does not directly refer to the 'Solidarity Rights' of the EU

[605] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

[606] *Pančenko v Latvia* App no 40772/98 (ECHR, 28 October 1999). Also see *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR 21 January 2011).

[607] *K.R.S. v United Kingdom* (2009) EHRR SE8.

[608] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96.

[609] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96, cited in Liam Thornton, 'Law, Dignity and Socio-Economic Rights: the Case of Asylum Seekers in Europe', draft working paper, <https://www.academia.edu/5732035/Law_Dignity_and_Socio-Economic_Rights_The_Case_of_Asylum_Seekers_in_Europe> accessed 14 August 2015.

[610] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L. 180/96, cited in Liam Thornton, 'Law, Dignity and Socio-Economic Rights: the Case of Asylum Seekers in Europe', draft working paper.

Fundamental Rights Charter (which include rights to 'fair and just working conditions', 'social security and social assistance' and 'health care'), Recitals 11, 16 and 21 require in all cases that standards of reception 'ensure them a dignified standard of living and comparable living conditions.'[611] Article 20(5) also states that in all cases of withdrawal or reduction in reception conditions, Member States 'shall under all circumstances […] ensure a dignified standard of living.'[612] Specific provisions have been made for the right to be provided with shelter (Article 18), education for children under eighteen (Article 18), protection of particularly vulnerable asylum seekers (Articles 21-25), including those suffering from mental illness, and the right to work after nine months, although states can still favour EU nationals and legal residents (Article 15).[613] Thus, at least on paper, asylum seekers have relatively robust entitlements to socio-economic rights.[614]

c) Legal residents

Legally resident individuals in the EU are resident under a wide variety of terms. As a result of the historic focus on legal migrants in EU fundamental rights law and in the AFSJ, all legally resident workers have, under the EU Fundamental Rights Charter, the right to engage in work (Article 15), collective bargaining (Article 28), to join or form trade unions (Article 12), to free placement services (Article 29), against unjustified dismissal (Article 30), to fair and just working conditions, to paid annual leave and to health and safety conditions at work (Article 31).[615] Access to the labour market is, ultimately, regulated by the law of the Member States and conditions vary considerably. For example, it can be a condition of legal migration to a Member State that a person not have recourse to public funds.[616] The Single Permit Directive, however, enshrines the right to equal treatment to nationals of the Member State regarding the employment rights of the EU Fundamental Rights Charter in its Article 12 including 'educational and vocational training'.[617]

As a sign of how Member States can attach different conditions depending on nationality, the Racial Equality Directive (2000/43/EC) prohibits discrimination on the basis of ethnicity, but not nationality or

[611] Cited in UNHCR, 'UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers', (COM no 320, 2011) <http://www.unhcr.org/513da1cc9.pdf> accessed 14 August 2015.
[612] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96.
[613] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] OJ L 180/96. On mental illnesses, see UNHCR, 'UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers', (COM no 320, 2011) <http://www.unhcr.org/513da1cc9.pdf> accessed 14 August 2015, 16.
[614] I am grateful, in this section, for the assistance of Liam Thornton, who was good enough to share with me a working paper from his forthcoming monograph, *The Socio-Economic Rights of Asylum Seekers in International and European Law* (Routledge 2015 forthcoming).
[615] FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 185-186.
[616] See, e.g., *Bah v the United Kingdom* App no 56328/07 (ECHR, 27 September 2011).
[617] Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1.

legal status.[618] The most privileged legal workers are Blue Card holders, who, after two years of legal residence, have access to 'highly qualified employment' in the Member State on the same basis as nationals of the Member State, and largely unrestricted freedom of movement to take up work in another Member State.[619] Finally, the non-EU family members of EEA citizens have the right to seek employment and self-employment throughout the EU, and the 'right to treatment equal to a Member State's own nationals.'[620]

Workers from certain countries with bilateral agreements with the EU also have enhanced entitlements. The most favoured are Turkish citizens. After the Ankara Agreement of 1963 and its Additional Protocol of 1970, which envisioned Turkey's eventual accession to the EU, Turkish citizens and their dependents have rights equivalent to nationals of the Member States in the areas of the payment of health care benefits, death and invalidity benefits and family payments and, as part of their freedom of movement, aggregation of eligibility for these payments and portability of these supports when moving between Member States and between the EU and Turkey.[621] This has been upheld by a variety of cases of the CJEU.[622] Similarly, the Euro-Mediterranean Agreements with Israel, Morocco, Algeria and Tunisia, give migrant workers from those countries and the family members the right to social security including the aggregation of eligibility on the same basis as EU nationals, through a non-discrimination clause.[623] Social security includes 'sickness and maternity benefits, invalidity, old-age and survivor's benefits, industrial accident and occupational disease benefits, death, unemployment and family benefits.'[624] The EU has concluded agreements with over one hundred states, and most of these contain non-discrimination clauses in terms of working conditions, although they can differ widely in terms of non-discrimination with regards to social security.[625]

[618] Cited in FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 182-183.

[619] FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 188.

[620] FRA and Council of Europe, *Handbook on European Law Relating to Asylum, Borders and Immigration* [2014], 186.

[621] Agreement establishing an Association between the European Economic Community and Turkey ('Ankara Agreement') signed at Ankara on 12 September 1953, OJ C 113, 24 December 1973, 1. Additional Protocol and Financial Protocol signed at Brussels on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force, OJ L 293, 29 December 1972, 3. See also Paul Minderhoud, 'The Significance of Decision 3/80 of the EEC-Turkey Association Council' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 32.

[622] Case C-102/98 and C-211/98 *Kocak and Örs* [2000] ECR I-1287.

[623] See Anja Wiesbrock, 'Social Security Rights of Third Country Nationals under the Euro-Mediterranean Agreements' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 47-48.

[624] Anja Wiesbrock, 'Social Security Rights of Third Country Nationals under the Euro-Mediterranean Agreements' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 48.

[625] Anja Wiesbrock, 'Social Security Rights of Third Country Nationals under the Euro-Mediterranean Agreements' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 48.

3. Obstacles for the enjoyment of economic and social rights by non-EU nationals and incoherencies in EU policies

As the case of *M.S.S. v Belgium and Greece* suggests, the reality of non-EU nationals' enjoyment of their economic and social rights is very different from their formal entitlements, even given the limited rights they have in this area under EU and Council of Europe law. Again, in what follows, we will explore the problems the different groups of non-EU nationals experience in terms of their enjoyment of their economic and social rights with an especial focus on how they are prevented from enjoying even these limited rights. In general, Member States have exercised their competencies and discretion to minimise their obligations to non-EU citizens and have not adequately funded their programmes in this area, most obviously in the case of asylum seekers. Although migration has been a shared competence of the EU since 1999, the competences of the Member States have been emphasised over those of the Union in some of the contributory documents to the Stockholm Programme, like the European Pact on Immigration and Asylum.[626] One consequence has been a lack of a positive policy response to the social and economic rights of non-EU residents of the EU at EU level. As a result of this emphasis on Member State policies and competence, non-EU migrants have frequently needed to take cases against individual Member States to the courts, usually the CJEU, but also, in extreme cases, to the ECtHR. There has been a general trend towards greater vindication of migrants' fundamental rights in the CJEU and even, as with M.S.S. in the ECtHR.

The focus of EU policy, however, as embodied in the AFSJ, has been to focus on bringing legal migrants' entitlements closer to those of nationals of the Member States, as a way both to encourage integration and, perhaps paradoxically, to encourage 'circular migration' as a means of combating irregular migration and claims for international protection, both of which are constructed as threats to the EU. The adoption of the discourse of 'illegality' and the construction of migration as a threat have come in for particular criticism. According to the most severe critics, the lack of respect for and measures to ensure the enjoyment of social and economic rights for irregular migrants and asylum seekers in particular, 'increasingly undermines the legitimacy of the entire AFSJ project as well as Europe's commitments to fundamental rights protection for all its residents'.[627]

a) Irregular migrants

According to the CLANDESTINO project of the FRA, there were estimated to be 1.9 to 3.8 million irregular migrants in the EU in 2008.[628] Their lives are characterised by a high level of mobility, which

[626] Council of the European Union, European Pact on Immigration and Asylum [2008] 13440/08, not published. Cited in Sergio Carrera and Elspeth Guild, 'Undocumented Migrants and the Stockholm Programme: Ensuring Access to Rights?' in Sergio Carrera and Massimo Merlino (eds), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme* (Centre for European Policy Studies 2010), 3.

[627] Sergio Carrera and Elspeth Guild, 'Undocumented Migrants and the Stockholm Programme: Ensuring Access to Rights?' in Sergio Carrera and Massimo Merlino (eds), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme* (Centre for European Policy Studies 2010), 2.

[628] Clandestino project 'Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe', European Commission, DG Research (2011) <http://clandestino.eliamep.gr> and <http://irregular-

complicates their access to secure housing, education and health care.[629] They are particularly vulnerable to exploitation in the labour market. Their greatest obstacles to availing of the rights they have are not knowing about their rights, Member State policies that discourage them from availing of such services, for example, by requiring service providers to report on individuals' irregular status, EU directives aimed at preventing solidarity being shown to irregular migrants and a lack of access to effective remedies when those rights are denied.

Health care may serve as an example. Health care services and entitlements are complex and studies have shown that both irregular migrants and health care providers are confused or uninformed about the right to health care of migrants in a particular Member State. This leads to confusion about whether and how much to charge for health care, refusal of services, even to pregnant women, and poor health outcomes for irregular migrants.[630] The majority of irregular migrants do not receive sufficient benefit from health care services.[631] Many of these obstacles arise from the policies of Member States. In the case of health care, some states (Sweden and Austria) require payments for even emergency health care, others (for example Germany) require health care services to report irregular migrants who present to the Foreigners Office.[632] On the other hand, the provision of health care is often devolved to local or regional authorities within the Member State, and many of these have developed formal or informal ways of providing migrant health care, in a number of cases in breach of the law, for example, laws requiring providers to report irregular migrants, or against national and EU policies.[633] Further services are often provided in conjunction with or exclusively by, NGOs.[634] There is a clear potential for incoherence as a result of the variable and uncoordinated approaches of different providers and different localities and regions. For example, 'migrant friendly' health care providers often become 'overloaded' and may face sanctions from government. Health outcomes for migrants can be worsened by the presence of reporting conditions, for example, insufficient or inaccurate medical history, because of the use of other individuals' health insurance identification.[635]

Further obstacles are placed in migrants' way by EU directives. For example, the Facilitation Directive[636] requires each Member State to 'adopt appropriate sanctions' on any person who facilitates the transit

migration.hwwi.net> accessed 12 August 2015. Cited in FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 15.

[629] Ryszard Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Council of Europe Publishing 2005).

[630] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 82.

[631] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 82.

[632] See Platform for International Cooperation on Undocumented Migrants, *Access to Health Care for Undocumented Migrants in Europe* (PICUM 2007), 8.

[633] Sergio Carrera and Joanna Parkin, 'Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union' [2011] report to the Committee of the Regions, 19-20.

[634] Sergio Carrera and Joanna Parkin, 'Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union' [2011] report to the Committee of the Regions, 19-20. Also see Platform for International Cooperation on Undocumented Migrants, *Access to Health Care for Undocumented Migrants in Europe* (PICUM 2007), 8-9.

[635] Platform for International Cooperation on Undocumented Migrants, *Access to Health Care for Undocumented Migrants in Europe* (PICUM 2007), 9.

[636] Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, OJ L 328. Ireland has opted out of this directive.

of irregular migrants to or within the EU or 'for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the state concerned on the residence of aliens' (Article 1). Although, Member States may decide not to impose sanctions in cases of humanitarian aid, for migrants in transit, all states governed by the directive punish facilitation of stay, thirteen punish facilitation of stay even without a financial motive and eight states punish even non-profit, humanitarian aid.[637] This emphasis on border control embodies a fundamental incoherence of EU policy in this area. It addresses irregular migration across borders, whereas most irregular migrants fall into irregular status having previously been legally entitled to work and live in the EU.[638]

b) Asylum seekers

While calls were made for a more rights-based approach in the Recast Conditions Directive as regards, for example, clearer standards for the social benefits accorded to the applicants and the level of discretion left for Member States in deciding on the level of protection to be provided,[639] the revised directive still leaves room for varying interpretations concerning the minimum level of protection for the applicants,[640] and allows Member States to detain applicants for international protection, as well as to hamper their access and right to employment, to social benefits and to remedies.[641]

Access to economic and social rights for asylum seekers varies tremendously across the EU. In the Member States who have opted out of the original Reception Directive, arrangements are arguably more varied: Denmark provides conditions for asylum seekers superior to those required by the Directive, including the right to work after 6 months by separate legislation, whereas Ireland does not permit asylum seekers to work and maintains many in 'direct provision' for years, where their meals and accommodation are directly provided.[642]

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[637] The Social Platform, 'Criminalising Solidarity: the State of Play and Case Studies' [2015], <http://www.socialplatform.org/wp-content/uploads/2015/03/Criminalising-Solidarity-state-of-play-and-case-studies.pdf> accessed 14 August 2015.

[638] Clandestino project 'Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe', European Commission, DG Research (2011), 10 <http://clandestino.eliamep.gr> and <http://irregular-migration.hwwi.net> accessed 12 August 2015.

[639] UNHCR. For an overview of the drafting and the more human rights-based formulations and provisions, see Liam Thornton, 'EU Asylum Policy: Reception Conditions for Asylum Seekers' in Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014], 105 <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, and Steve Peers, 'Statewatch Analysis: The EU Directive on Reception Conditions: A weak compromise' [2012].

[640] ECRE, *Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU* [2015].

[641] Steve Peers, 'Statewatch Analysis: The EU Directive on Reception Conditions: A weak compromise' [2012].

[642] Irish Refugee Council, 'Asylum seekers in Ireland will not benefit from measures negotiated under Irish Presidency' <http://www.irishrefugeecouncil.ie/news/asylum-seekers-in-ireland-will-not-benefit-from-measures-negotiated-under-irish-presidency/1851> accessed 4 September 2015.

The resulting diverging practices among Member States have given rise to various concerns relating to the material reception conditions for asylum seekers in many countries.[643] Many of these concerns are very grave indeed. In one example, the 'UNHCR has characterized the situation in Greece, also as regards reception conditions, as a humanitarian crisis.'[644] Systemic deficiencies in the reception conditions for asylum seekers have been found, for example, in *M.S.S.*, and the joint cases *N.S.* and *M.E.,* to the extent the ECtHR found the situation to result in inhuman and degrading treatment in variance with Article 3 of the ECHR.[645] Further, in the recent case of *Saciri*, CJEU found (noting that the 'saturation of the reception networks' is not a justification for any derogation of the standards) that, where a state opts to make use of its margin of discretion to grant the material reception conditions in the form of financial allowances, such allowances must 'be sufficient to meet the basic needs of asylum seekers, including a dignified standard of living, and must be adequate for their health'.[646] Civil society organisations have, therefore, underlined the states' duty to adhere to their human rights obligations, and to their undertakings under the EU Charter for Fundamental Rights, when implementing the Directive.[647]

Although the Recast Reception Directive has many welcome aspects, like the reduction in the period before asylum seekers can access the labour market to six months, the real obstacle to realising asylum seekers' rights is the absence of information, programmes and funding for reception in most EU countries. Studies have shown that a number of countries do not provide adequate information about the entitlements of asylum seekers to them, or in a language they speak.[648] Also, even if access to the labour market is granted, states have restricted access to certain sectors or placed limits on the time that can be worked. Two thirds of the states governed by the Directive require asylum seekers to get a

[643] Ref. to UNHCR statistics. For a discussion on the Reception Directive and human rights concerns, see Liam Thornton, 'EU Asylum Policy: Reception Conditions for Asylum Seekers' in Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014], 105 <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015. See also Liam Thornton, 'Law, Dignity & Socio-Economic Rights: The Case of Asylum Seekers in Europe', [2014] *FRAME Working Paper* <http://www.fp7-frame.eu/wp-content/materiale/w-papers/Law-Dignity-Socio-Economic-Rights-The-Case-of-Asylum-Seekers-in-Europe.pdf> accessed 13 September 2015.

[644] UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Greece', November 2010, 8 <http://www.refworld.org/pdfid/4cd8f2ec2.pdf> accessed 4 September 2015.

[645] *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR 21 January 2011), and Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] CJEU.

[646] Case C-79/13 *Saciri and Others* [2014] CJEU, paras 48-50.

[647] ECRE, *Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU* [2015].

[648] Odysseus Academic Network, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum-Seekers in the EU Member States' [2006], 38-39 <http://www.unhcr.org/refworld/docid/484009fc2.html> accessed 12 August 2015.

work permit, which can act as an obstacle.[649] The Recast Directive does demand 'effective access' while conceding this competence to the Member States.[650]

By far the largest problem is that insufficient resources are allocated to providing minimal material reception conditions for asylum seekers. At least nine EU Member States do not provide sufficient resources to meet the requirements of the directive[651] and there is evidence that others may also provide insufficient funding.[652] This translates in supports given to individual asylum seekers being 'too low to cover subsistence' (in Cyprus, France, Estonia, Austria, Portugal and Slovenia)[653] or for too short a time: Italy only provides asylum seekers who fail to secure one of the very limited places in the official reception centres with supports for their first forty five days.[654] As the *M.S.S.* case regarding reception conditions in Greece and the Italian policy indicates, the logic of the Dublin Convention, which requires that asylum seekers be returned to their first country of arrival in the EU, is responsible for some of these shortfalls, because of the undue demands it places on the reception systems of the countries on the Southern and South-eastern borders of Europe, all of which are suffering from the economic crisis to various degrees. From an EU perspective, this is incoherence on a massive scale, caused, at least in part, by a lack of cooperation between the Member States.

d) Legal residents

With the exception of workers who are governed by a bilateral association agreement with their home country that confers a higher form of entitlement, most legal migrants to the Member States of the EU are initially ineligible for most forms of social assistance as a condition of their admission.[655] This is permitted under the directives governing legally resident third country nationals. Availing of social assistance is normally grounds for the withdrawal or non-renewal of the residence permit of the worker and their dependents and would certainly jeopardise any chance of gaining a long-term residence

[649] Odysseus Academic Network, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum-Seekers in the EU Member States' [2006], 6 <http://www.unhcr.org/refworld/docid/484009fc2.html> accessed 12 August 2015.

[650] UNHCR, 'UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers', 14 (COM no 320, 2011) <http://www.unhcr.org/513da1cc9.pdf> accessed 14 August 2015.

[651] Odysseus Academic Network, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum-Seekers in the EU Member States' [2006], 6 <http://www.unhcr.org/refworld/docid/484009fc2.html> accessed 12 August 2015.

[652] Romania's entire budget for asylum seekers in 2012 was 546,000 euro. Although this was not the lowest—Estonia's budget, e.g., for its one reception centre was 232,162 euro — Romania faces larger numbers of application for asylum. See Madeline Garlick, 'Asylum Seekers and People in Need of International Protection' in Sergio Carrera and Massimo Merlino (eds), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme* (Centre for European Policy Studies 2010), 68.

[653] Odysseus Academic Network, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum-Seekers in the EU Member States' [2006], 6 <http://www.unhcr.org/refworld/docid/484009fc2.html> accessed 12 August 2015.

[654] Madeline Garlick, 'Asylum Seekers and People in Need of International Protection' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 68.

[655] Kees Groenendijk, 'Social Assistance and Security for Lawfully Resident Third-Country Nationals' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 23-24.

permit.[656] In the case of Blue Card holders unemployment for three consecutive months or two periods of unemployment of any duration allows a state to withdraw the Blue Card.[657] On the other hand, the Long Term Residents Directive[658] does grant third country nationals who have acquired this status equal treatment with regard to social assistance, although this may be restricted to 'core benefits': 'minimum income support, assistance in case of illness, pregnancy parental assistance and long-term care.'[659]

As Groenendijk observes, the emphasis on legal migration in the AFSJ takes a particular form, seeing migrants as a temporary and potentially burdensome phenomenon.[660] There is a conceptual incoherence here with the idea of human rights: migrants are seen less as bearers of rights than as factors in production, an instrument to meet labour market needs. Hence the explicit favouring of 'circular migration' in the GAMM. On the other hand, a human rights based model, that at the same time recognises migrant workers as objects of solidarity and potential future citizens, would engage more actively with their integration through the extension of the solidarity rights of the EU Fundamental Rights Charter.

4. Overcoming the obstacles to the enjoyment of economic and social rights by third country nationals

Fundamental rights in EU law are the equivalent of human rights in international law. The new role for the EU Fundamental Rights Charter after the Lisbon Treaty means that the only way to improve coherence in the AFSJ regarding the economic and social rights of non-EU nationals resident in the EU is to adopt a human rights-based approach to migration at EU level, and to use the growing EU competence in the area of migration and willingness of the CJEU to find in favour of migrants to take a more active stance against the rights-restricting policies of the Member States.

To achieve this, however, the EU needs to change its discourse surrounding migration. As recommended by the UN Special Rapporteur on the human rights of migrants, it should avoid referring to migrants as 'illegal' and using the language of criminality and insecurity in its official documents and in the activities of its agencies.[661] To honour the international commitments of its Member States, the EU should,

[656] Kees Groenendijk, 'Social Assistance and Security for Lawfully Resident Third-Country Nationals' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 27.
[657] Kees Groenendijk, 'Social Assistance and Security for Lawfully Resident Third-Country Nationals', in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 27-28.
[658] Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents OJ L 16/44.
[659] In 2011, only Greece had restricted entitlements to core benefits. Kees Groenendijk, 'Social Assistance and Security for Lawfully Resident Third-Country Nationals' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 25.
[660] Kees Groenendijk, 'Social Assistance and Security for Lawfully Resident Third-Country Nationals' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 30.
[661] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union

instead, recognise that migrants have human rights that need to be addressed by positive policy programmes. It should encourage Member States to ratify the Migrant Workers' Convention and develop a directive that will give equal rights to 'equal pay for equal work, decent working conditions and collective organisation' to all migrant workers.[662] It will need, in many cases, to make funds available for these programmes to work and to be implemented by the Member States. It will need to give new roles to promote access to justice for migrants, as called for under the EU Fundamental Rights Charter, perhaps by enhancing the role of the European Ombudsperson, who currently can intervene to allow migrants to vindicate their rights.[663] The mandate of the FRA should be expanded to allow evaluation of all aspects of migrants' rights and greater monitoring of fundamental rights issues and the rule of law across the EU.[664]

a) Irregular migrants

The EU should make sure that migrants' rights are respected throughout the process of removal and that unremovable migrants are not left in a 'legal limbo'. A certificate of postponement of removal must be given to unremovable migrants, as described in the Returns Directive.[665] The EU should encourage states to develop paths to regularisation for migrants that cannot be returned within three months.[666] Services that provide education, health care and access to justice must be separated from immigration enforcement.[667] This requires the removal of reporting requirements and a ban on sharing migrants' information with immigration enforcement.[668] The Facilitation Directive must be changed so that states can no longer sanction humanitarian assistance.[669] There should be greater EU monitoring of the implementation of the Employer Sanctions and Returns directives.[670]

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and its impact on the human rights of migrants', UN doc A/HRC/29/36, 8 May 2015, 21. Also see Sergio Carrera and Massimo Merlino, 'Undocumented Immigrants and Rights in the EU -Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?' [2009] *CEPS 'Liberty and Security in Europe' publication series*, 34.

[662] Sergio Carrera and Massimo Merlino, 'Undocumented Immigrants and Rights in the EU -Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?' [2009] *CEPS 'Liberty and Security in Europe' publication series*, 35.

[663] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', UN doc A/HRC/29/36, 8 May 2015, 22.

[664] Sergio Carrera and Massimo Merlino, 'Undocumented Immigrants and Rights in the EU -Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?' [2009] *CEPS 'Liberty and Security in Europe' publication series*, 34.

[665] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 11.

[666] Sergio Carrera and Massimo Merlino, 'Undocumented Immigrants and Rights in the EU -Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?' [2009] *CEPS 'Liberty and Security in Europe' publication series*, 34.

[667] Platform for International Cooperation on Undocumented Migrants, 'Access to Health Care for Undocumented Migrants in Europe', (PICUM 2007), 107.

[668] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 11-12.

[669] FRA, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* [2011], 11-12.

[670] Sergio Carrera and Massimo Merlino, 'Undocumented Immigrants and Rights in the EU -Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?' [2009] *CEPS 'Liberty and Security in Europe' publication series*, 34.

b) Asylum seekers

The Dublin System is failing and needs to be replaced with arrangements that respect the fundamental rights of migrants. The evidence of this failure is obvious in a variety of cases, for example, the CJEU judgment in *N.S. v. Secretary of State for the Home Department M.E. et al v. Refugee applications Commissioner et al*.[671] This judgment finds, on the basis of the ECHR and, more important, the EU Fundamental Rights Charter that Member States should not transfer asylum seekers to the original state of entry

> where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[672]

A system that respects fundamental rights involves both quick decisions on the claims of seekers of international protection and the material supports for decent reception conditions in all EU Member States. The Common European Asylum System and the European Refugee Fund are already in place to form the basis of this system.[673] Greater monitoring and more extensive research are required: there is a remarkable lack of comparative research into reception conditions and funding for reception programmes in the various Member States.[674] Without such research, the monitoring of the implementation of the Recast Reception Directive is impossible.

c) Legal migrants

The biggest change that would improve the lot of legal migrants – and that would address the case of irregular migrants and the crisis in the asylum system – is the development of more legal paths to entry into the EU.[675] Currently, the discretion of Member States to decide on what migrants their labour markets need is dominating the EU's shared competence in the area of migration and the fundamental standing of the EU Fundamental Rights Charter. This has a direct effect on the access to social and economic rights by most legal migrants, with the exception of those migrants whose entitlements are enhanced by bilateral agreements. A common EU approach to access to social security for non-EU nationals is needed. In particular, information about rights to social security should be accessible and

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[671] Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] I-13905 CJEU.

[672] Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] I-13905 CJEU, para. 94.

[673] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', UN doc A/HRC/29/36, 8 May 2015, 21.

[674] Madeline Garlick, 'Asylum Seekers and People in Need of International Protection' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 70.

[675] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants', UN doc A/HRC/29/36, 8 May 2015, 21.

clear.[676] Again, there is a remarkable lack of comparative research on the social security entitlements of legal migrants in the different Member States.[677] Without such research, a coordinated approach and effective EU monitoring of the social security rights of legal migrants is impossible. Ultimately, the instrumental approach to legal migration, as embodied in the AFSJ and the GAMM, needs to be replaced with a discourse of the fundamental rights as human rights.

E. Concluding remarks

The preceding sections have given an overview on some of the main human rights concerns and incoherencies in the EU's asylum and immigration policies. The analysis indicates that, while some steps have been taken towards a more humanitarian and human rights-based approach to addressing the refugee crisis, several shortcomings and incoherencies in the structures, interpretation and implementation of the EU policies on asylum and immigration call for urgent improvement in terms of the protection of human rights. Ensuring accessible and legal avenues for persons in need of international protection must be a clear priority in this regard. This requires adopting a revised approach to addressing the influx of refugees. Instead of penalising entry and placing sanctions on the facilitation of entry, the right to seek asylum and the principle of *non-refoulement* need to be clearly recognised, both at the level of the European and national political rhetoric and in terms of the design and implementation of EU and national policies with regard to asylum seekers. For these to be realised in a meaningful way the legislation (and its implementation) on asylum qualifications, asylum procedures, reception conditions and criteria for return need to be more coherent and respect the obligations the EU and EU Member States have undertaken under European and international human rights law. To this end, greater solidarity between the EU Member States must be found to share the reception of asylum seekers and the processing of their applications for international protection. In these and other measures, the right of asylum seekers to be heard and to appeal must be respected. In ensuring sustainable integration of migrants, asylum seekers and refugees, access to social protections and the labour market are considered as key.

The increasing efforts by the EU and its Member States to enhance the external dimension of migration control, and the strong role given to security concerns therein, have had severe structural impacts on guaranteeing the human rights of migrants and asylum seekers. The result is the production of a peculiar dual logic: within the territorial space of EU Member States human rights remain key, guaranteed by judicial oversight, whilst at the same time, in the external dimension the specific modes of cooperation, the flexibility of the legal instruments, as well as unclear legal responsibilities and mandates, shift human rights considerations to the background. Logics of necessity and efficiency are underpinned by a security focus and an unrealistic belief that borders *can* actually be fully controlled. The incoherence

[676] Elspeth Guild, Sergio Carrera and Katharina Eisele, 'Social Benefits and Migration: A Contested Relationship in the EU' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 141-142.

[677] Elspeth Guild, Sergio Carrera and Katharina Eisele, 'Social Benefits and Migration: A Contested Relationship in the EU' in Elspeth Guild, Sergio Carrera and Katharina Eisele (eds), *Social Benefits and Migration* (Centre for European Policy Studies 2013), 137-139.

between the internal and external dimension is structurally enshrined in EU legislation and policies. This is visible in, for example, the fact that Frontex cooperation agreements with third countries remain outside the judicial purview of the CJEU. The multi-actor structure of border management cooperation with third countries also makes it difficult for an individual to hold EU Member States or Frontex accountable for human rights violations. Finally, the increase of readmission agreements with third countries, as well as deportation practices which fail to duly ensure the principle of non-discrimination are other examples of the missing human rights focus in the external dimension of the EU's migration and asylum policies that have been analysed in the foregoing sections. Human rights are heralded internally, while the human rights of those outside the territory, but nevertheless directly affected by concrete measures taken within the field of migration controls, are severely compromised in order to ensure the effective control of the EU's external borders.

III. EU cooperation in relation to organised and serious crime

A. The fight against organised and serious crime

1. Introduction

a) Organised crime as a social problem

Historically, structured criminal activity of some sort has probably always existed.[678] In 2013, it was estimated that around 3,600 international organised crime groups (OCGs) were active in the EU. Primarily, these groups engaged in drug trafficking and fraud, but also in crimes against persons (including facilitation of illegal immigration and trafficking in human beings), organised property crime, economic crimes (including fraud and money laundering), cybercrime, environmental crime, and trafficking in weapons.[679] Around 70 percent of the OCGs had memberships comprising multiple nationalities.[680] Also, entirely non-European OCGs operate in Europe. An increase in Asian OCGs involved in match fixing, human smuggling, and drug trafficking have, for example, been noted.[681] This being said, successful criminal activity generally requires thorough knowledge of the local society and market. As such, the migration of OCGs remains a rare phenomenon.[682]

Organised crime is often viewed as a serious threat to safety and prosperity in Europe.[683] While the exact societal impact of such crime is difficult to measure, it is clear that organised crime harms individuals, societies, states, and the Union itself in many ways. The occurrence of organised crime typically has different types of negative economic consequences.[684] Also, harm inflicted on human beings commonly occurs as a result of organised criminal activity, especially in connection with certain types of organised crime, such as human trafficking.[685] Furthermore, the crimes may have particular

[678] Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 159 (referring to Lunde – Organised Crime, 2006).
[679] EU Serious and Organised Crime Threat Assessment [2013] (hereinafter '2013 SOCTA'), 19-31 and 33.
[680] 2013 SOCTA, 34.
[681] Dina Siegel-Rozenblit, 'Asian organized crime in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 4.
[682] James Sheptycki, Hager Ben Jaffel and Didier Bigo, 'International Organised Crime in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 14-15.
[683] Rob Wainwright, Director of Europol, in 2013 SOCTA, 5.
[684] For an assessment of different types of economic costs, see e.g., Michael Levi, Martin Innes, Peter Reuter and Rajeev V. Gundur, 'The Economic, Financial & Social Impacts of Organised Crime in the EU' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 9-10. It is important to make a difference between the economic consequences of the crimes themselves and the costs of the measures to address them. Also, the response costs of organised crime are considerable. See further Michael Levi, Martin Innes, Peter Reuter and Rajeev V. Gundur, 'The Economic, Financial & Social Impacts of Organised Crime in the EU' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 10.
[685] It is important to note, however, that some popular perceptions about organised crime do not find basis in scientific data. Such a popular perception is, for instance, that drug-trafficking generally would involve the use of violence. Michael Levi, Martin Innes, Peter Reuter and Rajeev V. Gundur, 'The Economic, Financial & Social Impacts

costs as side effects. For example, in addition to the economic harm that it gives rise to, corruption in relation to construction contracts can result in serious risks or harm to human beings where construction regulations are circumvented.[686] Certain forms of organised crime (especially corruption) also disrupt legal systems and as such harm the rule of law and democracy. The different types of harm connected to organised crime explain why fighting organised crime is given high priority in many societies.

b) Legal reactions to organised crime

The first steps towards European cooperation in the fight against cross-border crime date back to the 1970s when the so-called TREVI Group was created. The TREVI collaboration took place outside the framework of the European Community (EC) and was intergovernmental in nature. The group first focused on terrorism, but it later widened its focus to organised crime in general.[687] In the 1970 and 1980s various suggestions to formalise police cooperation within the Community were also put forward.[688]

Subsequent to three major developments, the pressure to enhance the role of the EC in the fight against organised crime grew significantly in the late 1980s.[689] First, the end of the Cold War meant a significant change in the political makeup of Europe and new types of security threats were identified. As noted by Fichera: 'The "non-military" threats of organised crime and terrorism were perceived by decision-makers as essential in forging a new identity within an integrationist and post-ideological approach that would later involve the former communist countries.'[690] Second, the 1986 Single European Act initiated the creation of the internal market, which saw the free movement of goods, capital, services and people. In the borderless Union, illegal goods, capital, services and people started to move more

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of Organised Crime in the EU' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 9-10 and 22.

[686] Michael Levi, Martin Innes, Peter Reuter and Rajeev V. Gundur, 'The Economic, Financial & Social Impacts of Organised Crime in the EU' [2013] report to European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 8.

[687] See further e.g., Malcolm Anderson *et al., Policing the European Union* (Clarendon Press 1995) 53-56, and Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 161.

[688] 'In the 1970s and 1980s, there were frequent calls from within and outside the Trevi group to formalise police cooperation within the Community. The first concrete reference to a European police force is usually attributed to Helmut Kohl. In 1991, at the European Summit in Luxembourg, the German chancellor called for a European police agency to be set up along the lines of the American FBI. The proposal generated a discussion among Community members about how best to tackle crime and guarantee security, sowing the seeds of Europe-wide police cooperation.' Europol, 'History' <https://www.europol.europa.eu/content/page/history-149> accessed 9 September 2015.

[689] On these initiatives, see further e.g., Cyrille Fijnaut and Letizia Paoli, 'The Initiatives of the European Union and the Council of Europe' in Cyrille Fijnaut and Letizia Paoli (eds), *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* (Springer 2004) 625 ff.

[690] Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 162. Also see e.g., Karen E. Smith, *European Union Foreign Policy in a Changing World* (3rd edn, Wiley 2014), 178.

freely.[691] Third, the trend towards globalisation and the development of new communication technologies in the late 1980s gave rise to new forms of opportunities for crime, especially as regards different forms of trafficking (such as people, drugs and weapons).[692] These developments in technology have also created completely new forms of crime, such as cybercrime.[693]

The first significant step towards EU criminal law took place outside of the Community framework in 1990 when some Member States concluded the convention implementing the 1985 Schengen Agreement.[694] The goal of the Schengen Agreement was primarily to abolish border checks between the Contracting States, but the convention also included provisions on cross-border police co-operation and cooperation in criminal justice matters. For example, Article 70 provided that the contracting parties should set up a permanent working party to examine common problems relating to the combatting of crime involving narcotic drugs.[695] The convention also gave impetus to the creation of the Schengen Information System (SIS), a large-scale information system for external border control, whose tasks have since been extended to support police and judicial cooperation by including alerts on persons or objects related to criminal offences.[696] The Schengen *acquis* was made part of the EU framework through the 1997 Treaty of Amsterdam.[697]

The second important step was taken a few years later, in 1992, when the Treaty of Maastricht was adopted. That Treaty created the EU, which besides the old community pillar had two others: Pillar II on Common Foreign and Security Policy (CFSP) and Pillar III on JHA. The Maastricht Treaty hence entailed an institutionalisation of various *ad hoc* groups which previously had been responsible for the JHA cooperation.[698] In Article K.1 of the Treaty, judicial cooperation in criminal matters and police cooperation for the purposes of preventing and combating terrorism were defined as 'matters of common interest', as were unlawful drug trafficking and other serious forms of international crime. The Treaty of Maastricht did, however, not give the Union competence to adopt measures harmonising

[691] Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 162.
[692] Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 163.
[693] See further e.g., Europol, *The Internet Organised Crime Threat Assessment* (iOCTA) [2014].
[694] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/19, 22 September 2000.
[695] The convention also contained explicit criminalisation obligation, see Article 27 ('The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.') and 71 ('The Contracting Parties undertake [...] to adopt [...] all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.')
[696] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239/19, 22 September 2000, Title IV.
[697] Treaty of Amsterdam, Protocol B, OJ C 340/93, 10 November 1997.
[698] See further Helena Carrapiço, 'The Evolution of the European Union's Understanding of Organized Crime ad Its Embedment in EU Discourse' in Felia Allum *et al.* (eds), *Defining and Defying Organized Crime: Discourse, Perceptions and Reality* (Routledge 2010), 46.

substantive criminal law, and during the Maastricht era the Union therefore merely adopted so-called joint actions, which only required Member States to present proposals to their national parliaments.[699] In 1998, a joint action was adopted on making it a criminal offence to be part of a criminal organisation.[700] The Treaty of Maastricht also envisaged the adoption of the 1995 Europol Convention, which formally established the Union's law enforcement agency.[701]

An explicit legal basis for adopting substantive criminal law measures was introduced by the 1997 Treaty of Amsterdam, which in Article 29 TEU provided that approximation, where necessary, of rules on criminal matters could be used to provide citizens with a high level of safety. The same provision also emphasised the need to prevent and combat 'crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud'. The Treaty of Amsterdam furthermore introduced framework decisions as an instrument for aligning national criminal laws.[702] In the aftermath of the Treaty of Amsterdam a series of framework decisions which call for the criminalisation of crimes often committed by OCGs were issued.[703]

Symeonidou-Kastanidou has noted that while the EU first focused on the codification of the participation in a criminal organisation in the joint action, the Treaty of Amsterdam and the framework decisions it introduced entailed a shift in focus towards the harmonisation of the law regarding certain crimes.[704] This focus on 'different classes of "criminal facts"'[705] has continued ever since. It should, however, be noted that in 2008 a more general framework decision was adopted regarding organised crime, namely the Council Framework Decision 2008/841JHA on the Fight against Organised Crime (2008 Framework Decision on Organised Crime). This framework decision, which repealed the Joint Action of 1998, is still the main instrument within EU law that aims at the harmonisation of the Member States' national criminal law as regards organised crime in general. As will be considered further below,

[699] The joints actions hence did not contain explicit obligations to *de facto* amend domestic law. Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 755-756.

[700] Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (1) (98/733/JHA), OJ L 351/1, 29 December 1998. Also European Council, Vienna, 11-12 December 1998, Presidency Conclusions, para. 83.

[701] Convention based on Article K.3 of the Treaty on European Union on the establishment of a European Police Office (Europol Convention), OJ C 316, 27 November 1995. The creation of Europol was foreseen in the Maastricht Treaty, Article K 1(9). Treaty on European Union, signed at Maastricht on 7 February 1992 ('Maastricht Treaty') [1992] OJ C 191/1.

[702] Cf. Peers has pointed out that during the Amsterdam era (1999-2009) the EU only used framework decisions to harmonise substantive criminal law (rather than e.g., conventions). As an exception he mentions a decision on synthetic drugs. Steve Peers, *EU Justice and Home Affairs Law*, (3rd edn, Oxford University Press 2011), 757.

[703] See further Elisabeth Symeonidou-Kastanidou, 'Towards a New Definition of Organised Crime in the European Union' [2007] *European Journal of Crime, Criminal Law and Criminal Justice* 83, 87-88.

[704] Elisabeth Symeonidou-Kastanidou, 'Towards a New Definition of Organised Crime in the European Union' [2007] *European Journal of Crime, Criminal Law and Criminal Justice* 83, 87-88.

[705] Francesco Strazzari and Alessandro Russo, 'US Mainland, EU Archipelago? Convergence and Divergence on Transnational Organized Crime' [2014] 23 *European Security* 529, 531.

it has, however, often been viewed as an instrument with little added value since most EU Member States already had domestic legislation fulfilling its central requirements when it was adopted.[706]

Since the early 1990s, the fight against organised crime has become a key priority within the Union, and in addition to the associated legal and institutional changes there have been numerous policy documents in which the need to tackle organised crime effectively has been emphasised. The first instrument of significance in this regard was the plan of action to combat organised crime adopted by the European Council in June 1997.[707] After this, the need to fight organised crime has, *inter alia*, been emphasised in the 1998 Vienna Action Plan,[708] the 2000 Millennium Strategy,[709] and in the Tampere and Hague Programmes.[710] In the 2010 Stockholm Programme the creation of a 'Europe that protects' was set as a central goal and it was put forward that:

> An internal security strategy should be developed in order to further improve security in the Union and thus protect the lives and safety of citizens of the Union and to tackle organised crime, terrorism and other threats. The strategy should be aimed at strengthening cooperation in law enforcement, border management, civil protection, disaster management as well as judicial cooperation in criminal matters in order to make Europe more secure.[711]

An Internal Security Strategy (ISS) was adopted in 2010, emphasising the need to prevent and fight terrorism, serious and organised crime, cyber-crime, cross-border crime, violence, natural and man-made disasters, and other security threats such as road traffic accidents.[712] More recently, the Union's

[706] Francesco Calderoni, *Organized Crime Legislation in the European Union: Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight against Organized Crime* (Springer 2010), 170.

[707] Action Plan to Combat Organized Crime, OJ C 251/1, 15 August 1997. 'The Action Plan [...] was far from being flawless. Firstly, it foresaw no clear parliamentary or judicial control of the measures therein. [...] Secondly, no position was taken on whether or no cooperation in the fight against organised crime should be accompanied by appropriate harmonisation of substantive and procedural law. Thirdly, the Action Plan showed little concern for sufficient procedural guarantees. On the contrary, law-enforcement priorities were highly emphasised without paying too much attention to the need to protect citizens against potential abuse [...]. Finally, and quite remarkably, no rules on evidence gathering were established, despite their importance in both pre-trial and trial activities.' Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 164.

[708] Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, OJ C 19/2, 23 January 1999.

[709] The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium, OJ C 124/1, 3 May 2000.

[710] European Council: Presidency Conclusions, Tampere European Council, 15-16 October 1999, and European Council: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/1, 3 March 2005.

[711] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 5.

[712] European Council, Internal Security Strategy for the European Union: Towards a European Security Model, 5842/2/2010. It has been observed that the ISS strategy intersects and overlaps with other EU strategies, such as Union's counter-terrorism strategy, and JHA external dimension strategy. Maria O'Neill and Aaron Winter, 'New Challenges for the EU Internal Security Strategy: An Introduction and Overview' in Maria O'Neill, Ken Swinton and Aaron Winter (eds), *New Challenges for the EU Internal Security Strategy, Newcastle upon Tune* (Cambridge Scholars Publishing 2013), 1-2.

determination to effectively tackle organised crime has been expressed in the 2014 European Council strategic guidelines for legislative and operational planning within the AFSJ[713] and in the 2014 Strategic Agenda for the Union in Times of Change adopted by the same institution.[714] Furthermore, the ISS (2010-2014) has recently been replaced by a new European Agenda on Security (2015-2020).[715] Other EU institutions have also engaged in the fight against organised crime, such as the European Parliament, which has adopted resolutions in this regard.[716] Numerous crime-specific strategies and action plans have also been agreed upon,[717] an example of which is the recently adopted new anti-money laundering package.[718]

In relation to the legal developments that have taken place within the Union, it should be noted that similar and parallel developments also have taken place within domestic legal systems and in the context of other international organisations. Besides the EU, the UN, the Council of Europe, the G8 and the OECD are the intergovernmental organisations that most notably have worked on organised crime. As regards the UN, the most important international instrument on organised crime is the 2000 UN Convention against Transnational Organized Crime, also known as the Palermo Convention, which entered into force in 2003. The convention is supplemented by three protocols to which State Parties can adhere: one on human trafficking,[719] one on smuggling of migrants,[720] and one on illicit manufacturing and trafficking in firearms.[721] Prior to the adoption of the Palermo Convention the international community had, however, already adopted numerous conventions on particular forms of serious transnational crime, most notably drug trafficking and terrorism.[722] Within the Council of

[713] European Council: European Council 26/27 June 2014 Conclusions, para. 10

[714] European Council: European Council 26/27 June 2014 Conclusions.

[715] Communication from the Commission: The European Agenda on Security, COM(2015) 185 final, 28 April 2015.

[716] E.g., European Parliament resolution of 11 June 2013 on organised crime, corruption, and money laundering: recommendations on action and initiatives to be take.

[717] E.g., the 2010 European Pact to combat international drug trafficking, the 2011 European pact against synthetic drugs, the 2013 Cybersecurity Strategy of the European Union, the EU Drugs Strategy for the period 2013-2020, and the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016.

[718] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73, 5 June 2015,and Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 [2015] OJ L 141/1, 5 June 2015. See also Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM(2013) 45 final.

[719] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime [2000].

[720] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime [2000].

[721] Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime [2001].

[722] Most notably, the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), the 1971 Convention on Psychotropic Substances, the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, the 1979 International Convention against the Taking of

Europe, the focus has been more on the procedural elements of fighting organised crime. An important instrument in this regard is the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Organised crime has also been the object of many international soft law instruments such as resolutions and recommendations. Important examples of such instruments are the recommendations adopted by the Experts Group on Transnational Organised Crime (Lyon Group) in 1996, as revised in 2002 (the G8 Recommendations on Transnational Crime).[723] The Council of Europe has also given significant recommendations such as Rec(2005)9 on the protection of witnesses and collaboration of justice and Rec(2005)10 on special investigations techniques in relation to serious crimes including acts of terrorism.

c) The concepts of 'organised crime' and 'serious crime'

The goal of this section is to introduce and generally assess the EU measures in the field of organised and serious crime. This prompts the question of what exactly is meant by organised, respectively serious crime. Despite numerous European and international instruments in the field, the question of how the two concepts should be defined remains debated.

The legal definition of organised crime differs from country to country, and no universally accepted definition of the phenomenon exists. In the Palermo Convention, the concept of an 'organised criminal group' has been defined as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences [...] in order to obtain, directly or indirectly, a financial or other material benefit'.[724] Similarly, the 2008 Framework Decision on Organised Crime defines a 'criminal organisation' as 'a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit'.[725] Both these definitions have been criticised for being overly broad.[726] In relation to the 2008 Framework Decision on Organised Crime definition, Paoli, for example, notes that the 'definition means that any group from the Sicilian Cosa Nostra to a burglars' clique, from Al Qaeda to a youth gang engaging in

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Hostages, the 1980 Convention on the Physical Protection of Nuclear Material, the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, the 1997 International Convention for the Suppression of Terrorist Bombings, and the 1999 International Convention for the Suppression of the Financing of Terrorism.

[723] See further Amandine Scherrer, 'Good Practices as International Norms? The Modalities of the Global Fight against Transnational Organised Crime and Terrorism [2009] *CEPS Special Report*, 3 and 6.

[724] Article 2(a). In Article 2(b) 'serious crime' is defined as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.'

[725] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, 11 November 2008, 42. Also see Kimmo Nuotio, 'Rikosoikeuden koherenssi ja fragmentaatio: esimerkkinä järjestäytyneen rikollisuuden määrittely' [2009] *Lakimies* 1154, 1162-1163.

[726] See e.g., Vincenzo Militello, 'Transnational Organized Crime and European Union: Aspects and Problems' in Heinrich Böll-Stiftung and Regine Schönenberg (eds), *Transnational Organized Crime: Analyses of a Global Challenge to Democracy* (Transcript Verlag 2013) 255, 262 (regarding the framework decision).

assaults, can be considered a form of organized crime.'[727] Despite its vagueness, the definition is, however, the one that is most commonly used within the Union, for example, in the EU Serious and Organised Crime Threat Assessment (SOCTA).[728]

As defined in the international instruments, an 'organised criminal group' is hence an elastic term which can encompass many different types of groups. In scholarly works and, for example, in the EU SOCTA, it is common to differentiate between different types of OCGs (for example, vertical mafia type of OCGs and horizontal network OCGs).[729] While it is beyond the scope of this report to discuss in detail the various types of OCGs, it is significant to note in this context that the multitude of different types of OCGs may entail that different types of policies, strategies and responses may be needed to tackle them effectively.[730]

In recent years, the EU has increasingly started to use the concept of 'serious crime' as a complement or as an alternative to the term 'organised crime'. It has been argued that this 'marks a shift of focus from the structure of criminal groups to the harm they inflict on individuals and societies.'[731] It has also been pointed out that as '[s]erious crime in Europe is [...] more disorganised than organised' (that is, the crimes are not generally committed by members of permanent organisations, but rather by groups of individuals who seize upcoming crime opportunities), the term 'serious crime' is often more accurate.[732] Also, the term 'serious crime' lacks an established definition. Its use, however, indicates that it is an even broader concept than organised crime.[733] For example, in the SOCTA it is held that: 'Serious crime

[727] Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 2-3.

[728] "In accordance with the definition provided by the Framework Decision, the following list of qualifying criteria was applied in the data collection process on organised crime groups for the SOCTA: - collaboration of more than two persons; - active for a prolonged or indefinite period of time; - suspected or convicted of committing serious criminal offences (intended as punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty - for organised crime); - with the objective of pursuing profit and or other material benefit; - operating/working on an international level in and/or outside the EU MS." SOCTA 2013, 42.

[729] E.g., Michael Levi, Martin Innes, Peter Reuter and Rajeev V. Gundur, 'The Economic, Financial & Social Impacts of Organised Crime in the EU' [2013] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 8, and SOCTA 2013, 33.

[730] Cf. SOCTA 2013, 33.

[731] Piotr Bąkowski, 'The EU Response to Organised Crime' (Library Briefing, Library of the European Parliament 2013).
<http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf> 4 September 2015.

[732] James Sheptycki, Hager Ben Jaffel and Didier Bigo, 'International Organised Crime in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 6 and 12.

[733] Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 3. "Judging by the list of crimes selected by Europol (2013: 39) in its 2013 SOCTA, the treaty list is not considered exclusive. SOCTA recommends that the counterfeiting of goods with an impact of public health and safety and a specific type of VAT fraud, the Missing Trader Intra Community fraud, are also recognized as key threats. The report also presents two other activities not included in the treaty list, environmental crime and energy fraud, as emerging threats." Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 4.

refers to criminal activity deemed worth reporting on, which does not meet the OCG definition set out in the 2008 Framework Decision. *De facto* it also concerns lone actors or individual actions.'[734]

OCGs are typically involved in certain types of crime such as trafficking in human beings, weapons, drugs and other illicit goods, and in counterfeiting and money laundering, which can be categorised as examples of both organised and serious crime.[735] There are, however, also other crimes that are serious and often committed by people acting in groups, such as terrorist offences and international crimes (most notably, genocide, crimes against humanity and war crimes). This prompts the question of what the relationship between organised crime and these other collective crimes is. Terrorism is sometimes regarded as a form of organised crime,[736] but more often it is viewed as a related but separate crime category.[737] Research in fact indicates that, for the time being, few OCGs are simultaneously involved in both types of crime.[738] This fact may, however, change,[739] and the connections between terrorism and organised crime are therefore something that needs to be further elaborated.[740] Genocide, crimes against humanity and war crimes are often committed during armed conflicts or other violent societal

[734] SOCTA 2013, 43.

[735] Also the relationship between organised crime and crimes that often are regarded as belonging to this crime category, such as human trafficking, can be unclear. Militello has, for example, pointed out that it is unclear why TFEU Article 83 (on substantive EU criminal law) enumerates both organised crime and many of its sub-forms. More specifically he notes that there is a 'worthless duplicate concerning many of the criminal activities named in the same article. In particular, the trafficking in human beings, drugs, and arms, but also money laundering and corruption, are all activities that share the characteristic that they are "normally" carried out in organized forms, especially when performed transnationally.' Vincenzo Militello, 'Transnational Organized Crime and European Union: Aspects and Problems' in Heinrich Böll-Stiftung and Regine Schönenberg (eds), *Transnational Organized Crime: Analyses of a Global Challenge to Democracy* (Transcript Verlag 2013) 255, 259 (referring to Sanchez Garcia de Paz).

[736] E.g., Article 29 TEU as amended by the Amsterdam Treaty, which included terrorism in the enumeration of other crimes generally connected with organized crime: 'crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.'

[737] 'Finckenauer (2005) lists and illustrates eight analytic defining variables of organized crime: lack of ideology, structure/organized hierarchy, continuity, violence/use of force or the threat of force, restricted membership, illegal enterprises, penetration of legitimate businesses and corruption. The first feature can help to illustrate the difference between organized crime and terrorism.' Francesca Longo, 'Discoursing Organized Crime: Towards a Two-Level Analysis' in Felia Allum *et al.* (eds), *Defining and Defying Organized Crime: Discourse, Perceptions and Reality* (Routledge 2010), 17.

[738] Cf. 'Some terrorist groups are known to resort to common crime to generate funds used to cover the costs associated with the planning and execution of attacks such as recruitment, procurement and travel. The merging of or sustained contact between OCGs and terrorist groups is currently only a very marginal phenomenon in the EU.' SOCTA 2013, 35.

[739] Cf. e.g., 'The linkages between OC and militant Islamist cells are a growing concern for E.U. member-states. [...] North African or Pakistani terrorist cells indigenous to the E.U. are increasingly engaged in criminal activity to fund terrorist operations while externally based terrorist cells, such as AQIM, pose a two-fold threat: targeting European citizens in its kidnap-for-ransom operations and using Europe for their drug trafficking operations.' West Sands Advisory (project leader Tamara Makarenko), 'Europe's Crime-Terror Nexus: Links between terrorist and organised crime groups in the European Union' [2012] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 11-12.

[740] See further e.g., West Sands Advisory (project leader Tamara Makarenko), 'Europe's Crime-Terror Nexus: Links between terrorist and organised crime groups in the European Union' [2012] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

contexts, which differentiates these crimes from most organised crimes that often take place in peacetime. It has also been claimed that the only true ideology of organised crime is to aim at 'profit through the creation and monopoly of illicit markets',[741] which is a factor that distinguishes it from terrorism and international crimes that often have a political or ideological dimension.

As was noted above, many of the crimes typically involving OCGs have been the object of special instruments and policies that complement the general EU approach to organised crime. In this section, it is not possible to discuss all the different forms of organised and/or serious crime in detail. The section therefore focuses on organised crime in general as an introduction to the more specific sections on human trafficking (which is generally considered as a type of organised crime) and terrorism and international crimes (which both belong to the category of serious crimes).

2. The internal dimension

a) Introduction

Today, the EU cooperation in criminal law and police matters is primarily regulated by the TEU[742] and TFEU[743] as amended by the Treaty of Lisbon. A central provision is Article 67(3) TFEU, which establishes that:

> The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

The cooperation in fighting organised and serious crime thus involves both *procedural* criminal law cooperation and cooperation between police and judicial authorities, as well as *substantive* criminal law cooperation. Measures against organised crime may, however, also include measures that are not policing or criminal law measures. For example, exchange of information regarding movement of goods may be of importance when fighting crimes such as trafficking in weapons and cigarette smuggling.[744] The cooperation has also involved adopting guidelines which aim to help Member States to prevent organised crime from infiltrating the public sector and economy.[745] Due to the limited scope of this report the focus below will be on the criminal law and police cooperation measures.

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[741] Liz Campbell, *Organised Crime and the Law – A Comparative Analysis* (Hart Publishing 2013), 15.

[742] Article 3(2): "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

[743] TFEU Articles 67-89.

[744] Communication from the Commission: The European Agenda on Security, COM(2015) 185 final, 28 April 2015, 6. See further also OLAF, 'Joint Customs Operations' <http://ec.europa.eu/anti_fraud/policy/joint-customs-operations/index_en.htm> accessed 4 September 2015.

[745] European Commission, 'Organised Crime & Human Trafficking' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/index_en.htm> accessed 4 September 2015.

b) The role of different EU institutions and agencies in the fight against organised crime

Before considering these different types of cooperation in greater depth, a short note on the institutional landscape will be made. The Treaty of Lisbon dissolved the Union's pillar structure, which for the criminal law cooperation entailed a significant overhaul, as the intergovernmental cooperation model was substituted with a supranational one. As noted by Paoli, the fight against serious and organised crime is today considered a *shared responsibility* of the EU and its Member States.[746] In general terms, it may be said that the roles that the EU institutions play in connection to organised and serious crime are the same as in relation to other EU policies.[747] The European Council primarily sets strategies, the Commission puts forth legislative initiatives and enforces EU law, the Council and the Parliament adopt secondary legislation, and the CJEU supervises the implementation of the legislation. Some of these institutions have special units that address organised crime. For example, within the Commission, it is DG Home that has a special Directorate for 'Security', which on its part has sections on both 'Organized Crime' and 'Terrorism and Crises Management'.[748] Within the European Parliament there has recently been a Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) which put forward a report which resulted in a Parliament resolution on organised crime in October 2013.[749]

A special feature in JHA governance, and especially in the fight against crime, is the central role played by the JHA agencies. Of the JHA agencies, it is Europol in particular that is involved in the fight against organised and serious crime. Its main task is to 'support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.'[750] Europol itself hence does not have autonomous investigative powers, but relies on the Member States' willingness to share information and intelligence and to cooperate.[751] Another central task of Europol in relation to organised crime is to collect, analyse and disseminate information and intelligence. The agency has, since 2006, regularly published an Organised Crime Threat Assessment (OCTA), now replaced with the SOCTA.[752] In 2010, a special policy

[746] Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 European Journal of Crime, Criminal Law and Criminal Justice 1, 2.
[747] See further Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] available at <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015.
[748] European Commission, 'Organigram' <http://ec.europa.eu/dgs/home-affairs/who-we-are/dg-home-affairs-chart/index_en.htm> accessed 4 September 2015.
[749] Special Committee on Organised Crime, 'Corruption and Money Laundering' <http://www.eppgroup.eu/CRIM> accessed 4 September 2015.
[750] Article 88(1) TFEU.
[751] Piotr Bąkowski, 'The EU Response to Organised Crime' (Library Briefing, Library of the European Parliament 2013) <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf> 4 September 2015.
[752] Piotr Bąkowski, 'The EU Response to Organised Crime' (Library Briefing, Library of the European Parliament 2013) <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf> 4 September 2015.

cycle was established in order to set the EU's priorities in the fight against organised and serious crime and to evaluate the results achieved.[753] Europol's SOCTA plays a central role in setting the policy priorities in the policy cycle. Based on the policy cycle, eight priorities for the fight against organised crime for the period 2011-2013 were endorsed by the Council in 2011.[754] In June 2013, new priorities were set for the years 2014-2017, which are:

1. To disrupt OCGs involved in facilitation of illegal immigration operating in the source countries, at the main entry points to the EU on the main routes and, where evidence based, on alternative channels.
2. To reduce [...] OCGs [...] abuse of legal channels for migration including the use of fraudulent documents as a means of facilitating illegal immigration.
3. To disrupt OCGs involved in intra-EU human trafficking and human trafficking from the most prevalent external source countries for the purposes of labour exploitation and sexual exploitation; including those groups using Legal Business Structures to facilitate or disguise their criminal activities.
4. To disrupt OCGs involved in the production and distribution of counterfeit goods violating health, safety and food regulations and those producing sub-standard goods.
5. To disrupt the capacity of OCGs and specialists involved in excise fraud and Missing Trader Intra Community MTIC fraud.
6. To reduce the production of synthetic drugs in the EU and to disrupt the OCGs involved in synthetic drugs trafficking.
7. To reduce cocaine and heroin trafficking to the EU and to disrupt the OCGs facilitating the distribution in the EU.
8. To combat cybercrimes committed by OCGs and generating large criminal profits such as on-line and payment card fraud, cybercrimes which cause serious harm to their victims such as online Child Sexual Exploitation, and cyber-attacks which affect critical infrastructure and information systems in the EU.
9. To reduce the risk of firearms to the citizen including combating illicit trafficking in firearms.
10. To combat organised property crime committed by Mobile Organised Crime Groups.[755]

The policy cycle has been seen as a move towards an intelligence-led policing model within the Union.[756] Nowadays, the management and assessment of risk plays a central role in the Union's crime policies.

[753] See further Europol, 'EU Policy Cycle (EMPACT)', <https://www.europol.europa.eu/content/eu-policy-cycle-empact> accessed 4 September 2015. EMPACT = European Multidisciplinary Platform against Criminal Threats. European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 21: 'The European Council therefore calls upon the Council and the Commission: [...] set its priorities in crime policy by identifying the types of crime against which it will deploy the tools it has developed, while continuing to use the Organised Crime Threat Assessment Report (OCTA) and its regional versions. Criminal phenomena to be tackled as a priority at European level should be selected.'

[754] This was referred to as the "Harmony Project". See further, JHA Council: Council conclusions on the creation and implementation of a EU policy cycle for organised and serious international crime, 8 and 9 November 2010.

[755] JHA Council: Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017, 6 and 7 June 2013.

[756] Artur Gruszczak, 'EU Intelligence-Led Policing: The Case of Counter-Terrorism Cooperation' in Maria O'Neill, Ken Swinton and Aaron Winter (eds), *New Challenges for the EU Internal Security Strategy, Newcastle upon Tune* (Cambridge Scholars Publishing 2013), 16. 'The extent to which the Multi-Annual Strategic Action Plans, which are being developed by the European Council of Justice and Home Affairs and COSI, will follow up on Europol's recommendations is still unclear. There is no doubt, however, that Europol has been entrusted with a major responsibility in identifying EU-wide crime control priorities in its SOCTAs.' Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice*, 4.

Europol also maintains the Europol Information System (EIS),[757] the function of which is to support Member States and Europol in their fight against organised and serious crime.[758] In December 2014, the major crime areas in the database were drug trafficking (29%), robbery (20%), illegal immigration (12%), fraud and swindling (6%), and trafficking in human beings (5%).[759] The database most notably contains data on persons who have been convicted of, or are suspected of having committed, a criminal offence in respect of which Europol is competent, and persons regarding whom there are factual indications or reasonable grounds to believe that they will commit such offences.[760]

Eurojust, on the other hand, is an EU agency which was established in 2002 and given further powers in 2009. Its task is to 'support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases'.[761] More concretely, Eurojust may ask the competent authorities: (1) to investigate or prosecute specific acts; (2) to coordinate with one another; (3) to accept that one country is better placed to prosecute than another; (4) to set up a Joint Investigation Team; and (5) to provide Eurojust with further information.[762] Eurojust has contact points in several non-EU States.[763]

Another EU agency working on organised crime is the European Police College (CEPOL), which is primarily dedicated to providing training and learning opportunities to police officers.[764] CEPOL has organised numerous seminars and workshops on organised and serious crime.[765]

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[757] Council Decision of 6 April 2009 establishing the European Police Office (Europol), OJ L 121/37, 15 May 2009, Article 11.

[758] Europol, 'Europol Information System (EIS)', <https://www.europol.europa.eu/content/page/europol-information-system-eis-1850> accessed 4 September 2015.

[759] Europol, 'Europol Information System (EIS)', <https://www.europol.europa.eu/content/page/europol-information-system-eis-1850> accessed 4 September 2015.

[760] Council Decision of 6 April 2009 establishing the European Police Office (Europol), OJ L 121/37, 15 May 2009, Article 12.

[761] Article 85(1) TFEU. Also see Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust. In the future, the Union probably also will have a European Public Prosecutor's Office (EPPO). It is intended that the EPPO focuses on crimes affecting the financial interests of the Union, but the TFEU also foresees that the powers of the EPPO, at a later stage, can be extended to serious crime having a cross-border dimension. If the EPPO *de facto* is created, this will have consequences on Eurojust's role in the JHA infrastructure. Article 86 TFEU. See further Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17 July 2013.

[762] Eurojust, 'Mission and Tasks', <http://www.eurojust.europa.eu/about/background/Pages/mission-tasks.aspx> accessed 4 September 2015. In relation to organised crime, see also e.g., Council of the European Union, 'A Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-Up, and the Role of Eurojust – Copenhagen , 11-13 March 2012 – Outcome Report', 14 June 2014, 11298/12.

[763] Eurojust, 'Mission and Tasks', <http://www.eurojust.europa.eu/about/background/Pages/mission-tasks.aspx> accessed 4 September 2015.

[764] CEPOL, 'About Us', <https://www.cepol.europa.eu/who-we-are/european-police-college/about-us> accessed 4 September 2015. Also see CEPOL, 'CEPOL in the fight against Organised Property Crime committed by Mobile Organised Crime Groups' <https://www.cepol.europa.eu/media/blog/20140711/cepol-fight-against-organised-property-crime-committed-mobile-organised-crime> accessed 4 September 2015.

[765] E.g., CEPOL, 'CEPOL Presidency Seminar 17/2014 – Illegal gambling and organised crime' <https://www.cepol.europa.eu/media/blog/20141215/cepol-presidency-seminar-172014-%E2%80%93-illegal-

c) Enhancing cooperation and mutual recognition between Member States

Article 82(1) TFEU establishes that: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to [...] facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.' The mandate in the field of criminal justice cooperation has given rise to many different types of measures and instruments that are of relevance in the fight against organised and serious crime. It important to note, however, that operational activities, such as investigating and prosecuting individuals suspected of these crimes, continue to be the responsibility of the Member States. The EU simply supports the Member States in these tasks, for example, by funding European projects or specialist networks.[766] A central role is also played by the JHA agencies, which often have the task to facilitate and support the cooperation and exchange of information between Member States.[767]

The first network to increase the cooperation between the JHA authorities in the Member States was created in 1998. The European Judicial Network (EJN) was established through Joint Action 98/428 JHA to support national judges and prosecutors carrying out cross-border investigations and prosecutions through the establishment of national contact points.[768] In the Stockholm Programme, the European Council also emphasised that 'contacts between senior officials of the Member States [...] are valuable and should be promoted by the Union in so far as possible' and that networks, such as the European Network of Councils for the Judiciary and the Network of the Presidents of the Supreme Judicial Courts of the European Union, should continue to receive support from the Union.[769] In the Stockholm Programme, the European Council also urged the Member States to share experiences and best practices.[770] Also, the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 MLA Convention) regulates different forms of law enforcement cooperation.[771] The MLA cooperation founded on 'requests' has, however, recently largely been replaced by European investigation orders (EIO) cooperation based on 'demands'.[772]

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gambling-and-organised-crime> accessed 4 September 2015, and 27/2015 Western Balkans organised crime links on 20-22 October 2015.

[766] European Commission, 'Organised Crime & Human Trafficking' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/index_en.htm> accessed 4 September 2015.

[767] European Commission, 'Organised Crime & Human Trafficking', <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/index_en.htm> accessed 4 September 2015.

[768] Now the functioning of the network is regulated in Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

[769] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 14.

[770] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 20.

[771] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197/1, 12 July 2000.

[772] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1 May 2014. Also see Catherine Heard and Daniel Mansell, 'The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases' [2011] 2(4*) New Journal of European Criminal Law* 353, 354.

A special form of law enforcement cooperation between the EU Member States is the possibility to create so-called joint investigative teams (JITs). The creation of such teams was foreseen for the first time in the 2000 MLA Convention,[773] but the slow ratification of the convention saw the EU adopt a Framework Decision on JITs in 2002.[774] Even though it has been held that JIT's play a 'fundamental role [...] in combating cross-border organised crime', Member States have not been eager to implement and use the cooperation possibilities created by the Framework Decision.[775] JITs may also include Europol and Eurojust representatives.[776]

A central element in the Member State cooperation is the exchange of information that takes place through the Union's large-scale databases, most notably EIS and SIS II.[777] The EU's police cooperation, however, also involves other forms of data exchange, such as the automated exchange of DNA, fingerprints and vehicle registration data (the Prüm cooperation),[778] and the Swedish Initiative on an effective and expeditious exchange of information and intelligence between EU States' law enforcement authorities.[779] Since April 2012, the European Criminal Records Information System (ECRIS) has been in operation to exchange information on offences such as participation in a criminal organisation, crimes within the jurisdiction of the International Criminal Court, terrorism, and trafficking in human beings.[780]

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[773] European Parliament, 'Judicial cooperation in criminal matters' <http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.12.6.html> accessed 4 September 2015 ('The Tampere European Council called for Joint Investigation Teams (JITs) to be set up to combat trafficking in drugs and human beings, as well as terrorism.')

[774] Council Framework Decision of 13 June 2002 on joint investigation teams, OJ L 162/1, 20 June 2002.

[775] European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), para. 27 (also see para. 25). Also see Communication from the Commission: The European Agenda on Security, COM(2015) 185 final, 28 April 2015, 9.

[776] European Parliament, 'Judicial cooperation in criminal matters' <http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.12.6.html> accessed 4 September 2015.

[777] Steve Peers, 'Bringing the Panopticon Home: the UK joins the Schengen Information System' [2015] *EU Law Analysis* [blog] 11 February 2015 ('The SIS II Decision provides for sharing 'alerts' on five main categories of persons or things: persons wanted for arrest for surrender or extradition purposes (mainly linked to the European Arrest Warrant); missing persons; persons sought to assist with a judicial procedure; persons and objects who should be subject to discreet checks or specific checks (ie police surveillance); and objects for seizure or use as evidence in criminal proceedings. There are also rules on the exchange of supplementary information between law enforcement authorities after a 'hit'. [...] On the other hand, the SIS does not, as is sometimes thought, provide for a basis for sharing criminal records or various other categories of criminal law data, although the EU has set up some other databases or information exchange systems dealing with such other types of data.')

[778] See further the 2005 Prüm Convention (the Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration), and the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210/1, 6 August 2008.

[779] Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386/89, 29 December 2006.

[780] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93/23, 7 April 2009, and

While structures for exchange of information exist, it has been asked whether such law enforcement databases could be more effectively used to combat organised crime. Lack of common data formats, language difficulties, and various national rules on data access and usage often hamper effective data exchange between Member States in practice.[781] The questions of data protection and human rights are essential in all these different forms of exchanges of information. In recognition of this, a special Council framework decision was adopted in 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.[782]

Finally, mutual recognition and mutual trust are presently two cornerstones in the European criminal justice cooperation. Based on Article 82 TFEU, the Union shall adopt measures to 'lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions' in criminal matters.[783] In this regard, the Union has legislated, for example, regarding European arrest warrants (EAWs),[784] EIOs, [785] orders regarding freezing and confiscation of proceeds of crime,[786] and decisions regarding the production of evidence.[787] All these instruments are of great relevance in the fight against organised and serious crime.

Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93/33, 7 April 2009.

[781] See further e.g., Constantin Stefanou, 'Databases as a Means of Combating Organised Crime within the EU' [2010] *Journal of Financial Crime* 100.

[782] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350/60, 30 December 2008. Also see Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final, 25 January 2012. Also see e.g., FRA, *Handbook on European Data Protection Law* [2014],143-163, and Mario Viola de Azevedo Cunha, 'Privacy, Security and the Council Framework Decision 2008/977/JHA' [2010] *Law/Technology*, 1-18.

[783] Also see Article 67(3) TFEU.

[784] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18 July 2002.

[785] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1 May 2014.

[786] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, 29 April 2014. Also see European Commission, 'Confiscation and freezing of assets' <http://ec.europa.eu/justice/criminal/recognition-decision/confiscation/index_en.htm> accessed 9 September 2015.

[787] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1 May 2014. Also see Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. OJ L 350/72, 30 December 2008. Emilio De Capitani and Steve Peers, 'The European Investigation Order: A new approach to mutual recognition in criminal matters', *EU Law Analysis* [blog] 23 May 2014 ('Unlike the European Evidence Warrant, which most Member States thought was useless and have not bothered to implement, the new Directive will cover almost all investigative measures such as interviewing witnesses, obtaining of information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications, and information on and monitoring of bank accounts.')

d) Minimum rules for criminal procedural law

While the EU has traditionally focused on measures relating to criminal law cooperation, the Union has in recent years also adopted some common minimum standards of procedural rights in criminal proceedings.[788] Indirectly, these common minimum standards are also related to the inter-Member State cooperation, as such standards must be in place if Member States are expected to mutually recognise the outcomes of criminal proceedings.[789] Most notably, the Union has adopted instruments addressing the rights of suspected and accused persons, and the position of victims of crime.

As regards the rights of suspects and accused persons, the EU has adopted directives on the right to information in criminal proceedings (2012),[790] on the right of access to a lawyer in criminal proceedings and in EAW proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (2013).[791] Furthermore, the Commission has put forward directive proposals[792] regarding the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings,[793] the procedural safeguards for children suspected or accused in criminal proceedings,[794] and legal aid for suspects or accused persons deprived of liberty and legal aid in EAW proceedings.[795]

In relation to the procedural status of victims of crime, the EU adopted a framework decision on the topic as early as in 2001.[796] In 2012 this framework decision was replaced by a Victims' Directive in

[788] It should be noted that also the Fundamental Rights Charter contains some procedural rights: Article 47 on the right to an effective remedy and a fair trial, Article 48 on presumption of innocence and right of defence, and Article 50 on the right not to be tried or punished twice for the same criminal offence. Charter of Fundamental Rights of the European Union [2010] OJ C83/389.

[789] European Commission, 'Rights of Suspects and Accused' <http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm> accessed 4 September 2015.

[790] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1, 1 June 2012.

[791] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294/1, 6 November 2013.

[792] On the current status of these proposals, see e.g., JHA Council, 'Justice and Home Affairs Council, Thursday 12 and Friday 13 March in Brussels', Press Release, 11 March 2015, 6-7.

[793] Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 final, 27 November 2013.

[794] Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, 27 November 2013. On this proposal, see further e.g., Amnesty International and Save the Children, 'Joint paper on the proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings' [2014], <http://www.amnesty.eu/content/assets/Reports/save_the_children_procedural_rights.pdf> accessed 2 May 2015.

[795] Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 final, 27 November 2013.

[796] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82/1, 22 March 2001.

which victims of terrorism, organised crime, and human trafficking are explicitly mentioned as categories of victims who often have specific protection needs.[797] Additionally, the EU has adopted a directive on European protection orders.[798]

Witness protection is often regarded as essential in cases concerning organised and serious crime and, for example, the European Parliament has emphasised 'the importance of providing appropriate protection for primary and secondary victims of organised crime, court witnesses, informers, whistleblowers and their families'.[799] The Union does not, however, appear to have any concrete plans to regulate witness protection.[800]

e) The adoption of substantive criminal law instruments

The EU has also adopted instruments establishing constituent elements and minimum rules for certain serious crimes. The legal basis for such substantive criminal law measures can be found in Article 83(1) TFEU, which stipulates that:

> The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.[801]

Of the ten 'particularly serious crimes' or 'Euro crimes'[802] that are explicitly mentioned in the provision, nine were already addressed through framework decisions before the entry into force of the Treaty of

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[797] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA , OJ L 315/57, 14 November 2012, para. 57 and article 22.

[798] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338/2, 21 December 2011.

[799] European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), para. 12.

[800] Piotr Bąkowski, 'The EU Response to Organised Crime' (Library Briefing, Library of the European Parliament 2013) <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf> 4 September 2015.

[801] Article 83(2) TFEU provides another legal base to adopt EU criminal law measures: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.'

[802] European Commission, 'Criminal Law Policy', <http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm> accessed 4 September 2015.

Lisbon.[803] Some of these framework decisions have now been replaced by directives.[804] As was mentioned above, the Council has also addressed the fight against organised crime in a framework decision in 2008. This framework decision has received much criticism, and the European Parliament has put forward that the Commission should submit a proposal for a directive 'which contains a more concrete definition of organised crime and better identifies the key features of the phenomenon' due to the 'extremely limited impact on the legislative systems of the Member States of Framework Decision 2008/841/JHA on organised crime.'[805]

f) Differential participation in the criminal justice cooperation

Prior to the entry into force of the Treaty of Lisbon there were no opt-outs in the criminal law cooperation, except in relation to certain procedural rules in the Schengen *acquis.* These exceptions applied to the United Kingdom and Ireland.[806] The Treaty of Lisbon brought the criminal law cooperation within the realm of the supranational cooperation. The price paid for this was the different types of rules allowing differentiated integration: opt-outs, emergency brakes and enhanced cooperation. The Member States which have been explicitly allowed special arrangements in the protocols to the Treaty of Lisbon are Denmark, Ireland and the United Kingdom.

Before the Treaty of Lisbon, the United Kingdom was a full participant in almost all EU criminal law and policing measures (the exception being related to certain Schengen *acquis* measures, that is, the rules on cross-border hot pursuit by police officers and the SIS).[807] In the Treaty of Lisbon, the UK was, however, given the right to reconsider its participation in the various policing and criminal law measures (block opt out possibility in Protocol 36). The UK first made a block opt out, but has now chosen to re-opt-in to many of the measures.[808] Both the United Kingdom and Ireland have the possibility to not participate in new policing and criminal law measures based on Protocol 21.

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[803] E.g., Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164/3, and Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L 330/21, and Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8. Also see Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 783-784. Illicit arms trafficking was the crime that was not regulated in a special framework decision.

[804] See e.g., Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1, and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1.

[805] European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), para. 7.

[806] Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 674.

[807] Steve Peers, 'The UK opts back in to the European Arrest Warrant − and other EU criminal law' [2014] *EU Law Analysis* [blog] 1 December 2014.

[808] "As for the other measures, the Commission Decision approves the UK's opt back in to almost all of the EU measures on mutual recognition in criminal matters (most notably the European Arrest Warrant), the creation of EU agencies (Europol, Eurojust) and exchange of information or databases, with a few exceptions: the Framework Decisions on mutual recognition of probation and parole decisions and the so-called 'Prum' Decisions on cross-border exchange of information on DNA, licence plate information and fingerprints. [...] On the latter issues, the transitional Decision [...] requires the UK to consider opting back in to the Prum Decisions by the end of 2015. If it

As regards Denmark, Denmark is bound by the Schengen *acquis* and EU measures on policing and criminal law adopted before the entry into force of the Treaty of Lisbon, but not by measures on policing and criminal law adopted after the entry into force of the treaty. Denmark is currently planning to organise a referendum on whether to continue the current complete opt-out for post-Lisbon JHA measures not linked to the Schengen *acquis* or whether to replace it with a more a selective one.[809] A proposal for a selective opt-in will be voted on in a referendum by 31 March 2016.[810] In relation to criminal law cooperation and policing the proposal suggests that Denmark would opt in to all measures concerning substantive criminal law and most measures concerning EU mutual recognition and agencies (for example, the EIOs, directives on trafficking in persons, sexual abuse of children, cyber-crime, market abuse, and counterfeiting the euro), but not to the directives on victims' and accused persons' rights and the rules on confiscation of criminal assets.[811]

Article 82(3) on police and judicial cooperation in criminal matters having a cross-border dimension and Article 83(3) on minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension also establish a so-called emergency brake and a connected possibility for enhanced cooperation:

> Where a member of the Council considers that a draft directive [...] would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation [...] shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The possibility of enhanced cooperation entails a further possibility that in the future there may be policing and criminal law measures that do not apply to all Member States of the Union.

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does not do so, the financial consequences Decision (also adopted last week) requires the UK to pay back the money it received from the EU budget to prepare for putting the Prum rules into force. The UK agreed informally to consider opt back in to the Framework Decision on mutual recognition of probation and parole measures later." Steve Peers, 'The UK opts back in to the European Arrest Warrant − and other EU criminal law' [2014] *EU Law Analysis* [blog] 1 December 2014. Also see Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele, 'The End of the Transitional Period for Police and Criminal Justice Measures adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 16-20.

[809] See e.g., Protocol (No 22) on the Position of Denmark [2010] OJ C83/299, and Steve Peers, 'Denmark and EU Justice and Home Affairs Law: Really Opting Back In?' [2014] *EU Law Analysis* [blog] 8 October 2014.

[810] Ministry of Foreign Affairs of Denmark, 'One step closer to a referendum on the JHA opt-out – modalities have now been decided' [press release] 17 March 2015, <http://um.dk/en/news/newsdisplaypage.aspx?newsid=85867e49-b075-4425-97d5-d6fcf73f4bf4> accessed 4 September 2015.

[811] See further e.g., Steve Peers, 'Denmark and EU Justice and Home Affairs Law: Details of the planned referendum' [2015] *EU Law Analysis* [blog] 17 March 2015, and Statsministeriet, 'Aftale om tilvalg af retsakter på området for retlige og indre anliggender' <http://stm.dk/_p_14120.html> accessed 9 September 2015.

3. The external dimension

It has long been recognised that EU internal measures alone are not sufficient to effectively tackle organised and serious crime within the Union. The need for strong external JHA action and regional cooperation against organised crime was stressed in the 1999 Tampere Programme.[812] In the 2000 EU priorities and objectives for external relations in the field of JHA, the fight against organised crime was characterised as a 'priority area for cooperation' in which many third countries need to be involved.[813] Similarly, in the 2003 European Security Strategy (ESS) organised crime was held to be one of the key security challenges for the Union.[814] More recently, the need to have a strong external dimension in the field was emphasised in the Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017.[815]

Provisions addressing organised crime have been included in many international agreements and instruments. For example, the Action Plans adopted within the ENP often contain provisions on organised and serious crime.[816] The EU also plans to increase the involvement of the neighbouring countries in operational activities in the field of organised crime.[817] In addition, prospective new Member States to the Union must demonstrate that measures have been taken to address organised crime.[818] The EU also supports the fight against organised crime by financing projects against organised crime in third countries.[819] The general international police and judicial cooperation in criminal matters is clearly also relevant in relation to organised and serious crime.[820] In this regard, one may mention by way of example the mutual legal assistance agreements with the United States (US) and Japan.[821]

[812] European Council, Presidency Conclusions, 15-16 October 1999 (Tampere), paras 59-62.

[813] European Union Priorities and Objectives for external relations in the field of Justice and Home Affairs, 6 June 2000, 7653/00.

[814] EEAS, 'European Security Strategy' <http://www.eeas.europa.eu/csdp/about-csdp/european-security-strategy/> accessed 4 September 2015.

[815] JHA Council, Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017, 6 and 7 June 2013: "STRESSING that the external dimension of internal security and cooperation with third countries and relevant International Organisations ought to be taken into account in implementing the Council priorities and the EU policy cycle, notably by improving operational law enforcement cooperation with such partners and by helping to strengthen the operational capacity of third countries' law enforcement authorities, [...] ENCOURAGES Member States to consider taking the following issues into account when drafting the MASPs and OAPs: - regional dimension issues relating for example to the Western Balkans and West Africa".

[816] EEAS, 'ENP Action Plans' <http://www.eeas.europa.eu/enp/documents/action-plans/index_en.htm> accessed 4 September 2015.

[817] Communication from the Commission: The European Agenda on Security, COM(2015) 185 final, 28 April 2015, 16 and 19.

[818] See further e.g., Commission Report on Albania's Progress in the Fight against Corruption and Organised Crime and in the Judicial Reform, COM(2014) 331 final, 4 June 2014.

[819] See further e.g., Berenschot/Imagos, *Thematic Evaluation of Rule of Law, Judicial Reform and Fight against Corruption and Organised Crime in the Western Balkans – Lot 3* [2012] 51-53.

[820] European Commission, 'Mutual Legal Assistance and Extradition', <http://ec.europa.eu/justice/criminal/judicial-cooperation/legal-assistance/index_en.htm> accessed 4 September 2015.

[821] Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on

Further, the EU has taken part in international cooperation with regard to fighting organised crime and is, for example, party to the Palermo Convention and to two of the Convention's protocols. The Union's competence to negotiate and adhere to conventions in this field has been improved by the Lisbon Treaty. In certain areas, such as arms trafficking, the shared competence of the Union and the Member States has, however, delayed EU participation.[822]

4. Assessment

a) Introduction: The strong focus on repression and security

As most measures adopted against organised and serious crime have been criminal law and police cooperation measures, it has been noted that 'the evolution of policies against organised crime have so far been marked by the prominence of the repressive side'.[823] By its nature, criminal law is a branch of law that often involves limitations to individual rights. Imprisonment, for instance, strongly affects the individual's right to liberty, and fines impact the economic interests of individuals. As such, recourse to criminal law generally needs to be specifically justified. In relation to organised and serious crime, the use of criminal law is often found to be warranted due to the harm such crime causes and/or due to its dangerousness. Often the aspiration is also to increase security in society.

In law, security has at least two central functions. First, it is an objective of law to protect individuals against harm, that is, to increase the security of individuals and other entities. Second, security is connected to the suspension of certain legal provisions and to allowing exceptions.[824] This tension between the two legal dimensions attached to the notion of security is amply evident in EU's fight against organised and serious crime. The balancing between collective security and individual rights

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mutual legal assistance between the European Union and the United States of America [2009] OJ L 291/40, 7 November 2009, and Council Decision of 7 October 2010 on the conclusion of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters [2010] OJ L 271/3, 15 October 2010.

[822] 'The Firearms Protocol (UNFP) [...] is categorised as a "mixed" agreement, covering both EU and Member State (MS) competence. The European Community had exclusive competence only on the basis of Articles 95 (internal market) and 133 EC Treaty (common commercial policy). [...] Even if provisions dealing with criminalisation and confiscation may now fall, with the Lisbon Treaty, under EU competence, the provisions of the Protocol as they affect the EU will not change (unless negotiations were to be opened with all parties to the UNFP). The European Community signed the UNFP on 16 January 2002, following Council authorisation adopted in October 2001. Whereas the Community concluded the Palermo Convention and two parallel Protocols in 2004 and 2006 respectively, conclusion of the Firearms Protocol was delayed. This was to allow time for the adoption of new legislation and amendments to existing Community law relating to the internal market in firearms.' Francesca Ferraro, 'Ratifying the UN Firearms Protocol' [2013] <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130508/LDM_BRI(2013)130508_REV1_EN.pdf> accessed 9 September 2015.

[823] Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 167.

[824] Jens Kremer, 'Exception, Protection and Securization: Security Mindset in Law', in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 7, 10.

(justice) is an inherent element in the fight against organised crime.[825] In relation to investigations, Peers notes, for example, that:

> The effective prevention and investigation of crime, particularly violent crime, is understandably a desire of the public in every society. But it is in this area there is the most acute tension between civil liberties and security objectives. Obviously, the greater the level of supervision and control of the public, the easier it is to prevent crime and to prosecute it more effectively.[826]

Security thinking affecting legal provisions and practices is not something that only marks investigations regarding organised crime. In fact, it has implications on all procedural stages up to the enforcement of sentences. Assessments of the security risk caused by a convicted person may, for example, affect the choice of the prison facility where a sentence is to be served (high-risk prisons).[827]

While legislation is presumably always adopted with special goals in mind, a strong instrumental use of criminal law is not unproblematic.[828] It is generally submitted that for legitimacy reasons the use of coercive powers in the form of criminal law demands more than simply instrumental arguments. It is beyond the scope of this report to discuss in detail how to legitimise the use of criminal law in general. That being said, it is important to consider how the danger posed by organised and serious crime has been framed in the EU context, as it affects the legitimacy of the measures taken. As the institutions and bodies involved in the fight against organised and serious crime have multiplied and their competences have expanded, the need to examine more carefully what legitimises action against organised and serious crime has grown.[829]

b) On difficulties in measuring the problem

The dangers of organised crime are often expressed in dramatic terms. An example of this can be found in the 1998 Pre-accession Pact on Organised Crime between the Member States of the European Union and the Applicant Countries of Central and Eastern Europe and Cyprus, where it is argued that 'organised crime constitutes a serious threat […] because it penetrates, contaminates and corrupts the structure of governments, legitimate commercial and financial business and society at all levels'.[830] The

[825] It should also be pointed out that individuals have a right to security. See further e.g., Article 6 in the Fundamental Rights Charter.
[826] Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 862.
[827] Kimmo Nuotio, 'Security and Criminal Law: A Difficult Relationship', in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 197, 206.
[828] See further Kimmo Nuotio, 'Security and Criminal Law: A Difficult Relationship', in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 197, 197.
[829] Massimo Fichera, 'Organised Crime: Developments and Challenges for an Enlarged European Union' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 159, 164-165.
[830] Pre-accession Pact on organised crime between the Member States of the European Union and the applicant countries of Central and Eastern Europe and Cyprus (Text approved by the JHA Council on 28 May 1998), OJ C 220/1, 15 July 1998.

recently adopted European Agenda on Security refers, for its part, to the 'huge human, social and economic costs' caused by serious and organised cross-border crime.[831]

It has been noted that the idea of organised crime as a threat to European society has so far gone unquestioned.[832] As the measures to combat organised crime are 'measures to defend democracy and the rule of law' they have often been automatically viewed as legitimate.[833] Indeed, the harmfulness and seriousness of the crime appears evident. At the same time, the harm caused by organised and serious crime is difficult to measure, and the risks and threats connected to it even more so. As noted by Nuotio:

> Clearly security is not a brute fact as it is not an object that can be directly observed. Security talk rather refers to a state of affairs, to a status, which is marked by the control or even absence of certain disturbing threats. These threats are also not natural in themselves, as they are not identifiable without schemes of approach. Determining whether there is a risk of [... an] attack is not just a matter of direct observations, but requires the bringing together of various analyses and making conclusions on the basis of those observations.[834]

The difficulty in assessing the harms and dangers to which organised and serious crime give rise is further complicated by the very vagueness of the concepts of organised and serious crime. One may therefore ask: What exactly is measured in statistics regarding organised and serious crime? Within the Union, it is especially Europol that has profiled itself as a centre of expertise regarding organised and serious crime,[835] and the EU policy cycle has been hailed as a change towards fact-based policing. At the same time, the methodology used by Europol has been criticised,[836] which has led to some changes. The SOCTA, for example, now focuses more on impact of organised crime, which has been found to be an innovative and positive development.[837] There are, however, still scholars who question the methodology used. For example, Paoli has put forward that:

> The 2013 SOCTA largely provides a list of banalities that are sometimes contradicted by the results of empirical research and even common sense. Furthermore, Europol's analysis makes no distinction between the harms caused by the activities and the harms and costs of the policy interventions

[831] Communication from the Commission: The European Agenda on Security, COM(2015) 185 final, 28 April 2015, 12.

[832] Francesco Strazzari and Alessandro Russo, 'US Mainland, EU Archipelago? Convergence and Divergence on Transnational Organized Crime' [2014] 23 *European Security* 529, 530. Also see Helena Carrapiço, 'Analysing the European Union's Responses to Organized Crime through Different Securization Lenses' [2014] *European Security* 601 ff.

[833] Elisabeth Symeonidou-Kastanidou, 'Towards a New Definition of Organised Crime in the European Union' [2007] *European Journal of Crime, Criminal Law and Criminal Justice* 83, 91-92.

[834] Kimmo Nuotio, 'Security and Criminal Law: A Difficult Relationship', in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 197, 198-199.

[835] Joanna Parkin, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] *CEPS Paper in Liberty and Security in Europe*, 7.

[836] See e.g., James Sheptycki, Hager Ben Jaffel and Didier Bigo, 'International Organised Crime in the European Union' [2011] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 20-24.

[837] Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 4 (referring to Dorn).

> carried out to tackle the activities themselves. [...] Contrary to Europol's assessment, a number of studies have shown that the violence directly associated with drug production and trafficking in Europe is much more limited than usually assumed. [...] The overall impression of the paragraph on the harms of drug trafficking is that Europol has had difficulties in identifying the harms associated with this criminal activity and did not want to admit that most of these harms are the result of policy choices. [...] Even more controversial is Europol's [...] assessment of the harms associated with human smuggling or, as Europol puts is, the facilitation of illegal immigration: [...] Here, Europol blatantly obscures the fact that most of the harms associated with human smuggling are not primarily the fault of the "bad" traffickers but are largely induced by the EU restrictive immigration policies, as clearly shown by numerous tragedies in the Mediterranean Sea and along the Bulgarian-Turkish border.[838]

The criticism directed at Europol's SOCTA is partly connected to the methodology used and the findings made. A more profound criticism questions whether it is suitable that Europol, as an enforcement agency, produces knowledge that legitimises its own existence. It has been noted that Europol as a law enforcement agency has the task to enforce laws and policies, not to question them.[839]

Even more fundamentally, the critique against the SOCTA relates to the function of JHA agencies and their role in knowledge production. It has been noted that agencies now play a critical role in providing the evidence base that supports EU policy-making whereby they, at the same time, affect the EU security agenda.[840] The cross-cutting features in the production and use of knowledge by JHA agencies are, as Parkin notes: (1) a lack of conceptual clarity around 'knowledge'; (2) a low interest for inputs by independent social science and humanities researchers; (3) a focus on intelligence; and (4) the use of knowledge as a source of legitimacy and authority for the agencies.[841] Of these features the third is especially interesting, as intelligence-led methodologies are generally connected to opacity and confidentiality. Information regarding the intelligence generated by the agencies, as well as their sources and methods to collect such intelligence, is often difficult to obtain.[842] This has especially been a problem with the EU SOCTA.[843]

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[838] Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 5-8.

[839] Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 8-9.

[840] Joanna Parkin, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] *CEPS Paper in Liberty and Security in Europe*, 1.

[841] Joanna Parkin, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] *CEPS Paper in Liberty and Security in Europe*, 31-38.

[842] Joanna Parkin, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] *CEPS Paper in Liberty and Security in Europe*, 35.

[843] Joanna Parkin, 'EU Home Affairs Agencies and the Construction of EU Internal Security' [2012] *CEPS Paper in Liberty and Security in Europe*, 36 ('This culture of secrecy can act to prevent scrutiny and accountability of decisions and actions taken. In the case of the intelligence products produced by agencies such as Frontex and Europol, it serves to shield them from thorough review of their robustness and reliability. This is particularly the case when strict confidentiality rules apply not only to the information contained in the intelligence reports, but also to the methodologies used to produce them. For instance, several academics and scholars have noted their struggle to obtain information about the methodology employed by Europol to devise the OCTA reports. In the absence of information about how data was gathered, sources selected, and how data and information has been processed, it is almost impossible to evaluate the quality of the intelligence reports and threat assessments produced by EU Home Affairs agencies and, by extension, the validity of the 'evidence-based' claims which underpin the ISS.')

Another question related to the production of knowledge and expertise is who participates in such processes. As noted above, agencies and Member States are involved in the knowledge production as relates to organised crime. There are, however, also individuals who are regarded as organised crime experts and who often participate in international expert-level exchanges on the topic. In relation to this Scherrer, who has primarily investigated the experts involved in the G8 work on organised crime, notes that surprisingly often the same experts are involved in the work within the G8, the UN, the EU and the OECD.[844] This may explain why the international norms and expert opinions on organised crime are rather coherent,[845] but it also gives rise to the question of whether the knowledge produced has been sufficiently challenged. There is also an observable change in the socio-professional distribution of the expertise towards increased reliance on experts with a background in interior, police and intelligence services[846] This also gives rise to concerns about whether all relevant aspects have been considered in the production of knowledge. To be reliable, the knowledge produced should draw on different types of expertise. From a human rights perspective, it would be especially important that human rights expertise is considered when, for example, manuals on best practices are produced.

The radical and robust judicial responses to organised crime are often justified by perceptions such as that organised crime always leads to extensive harm.[847] The accuracy of such conceptions should be more critically examined. The harm caused by organised crime could, for example, be compared to the harm caused by other types of crime, such as domestic violence, where no significant EU action exists. While organised crime is certainly a social problem serious enough to merit legal action, the appropriate scope of action remains open to debate.

c) Respect for human/fundamental rights in the fight against organised crime

(1) Introductory note

Organised and serious crime can lead to human rights violations, but so can the fight against it. The need to prevent and investigate/prosecute organised crime can effectively stand in conflict with individual rights. Police investigations may, for example, affect the rights related to detention.[848] An example of a country where the fight against drug-related organised crime has caused many human rights violations is Mexico. In Mexico both torture and enforced disappearances have been reported in connection to efforts to combat organised crime.[849] While such serious human rights violations also can take place within the EU, within the EU the problems in this regard have primarily been connected to other human

[844] Amandine Scherrer, 'Good Practices as International Norms? The Modalities of the Global Fight against Transnational Organised Crime and Terrorism [2009] *CEPS Special Report*, 4.
[845] Amandine Scherrer, 'Good Practices as International Norms? The Modalities of the Global Fight against Transnational Organised Crime and Terrorism [2009] *CEPS Special Report*, 4.
[846] Amandine Scherrer, 'Good Practices as International Norms? The Modalities of the Global Fight against Transnational Organised Crime and Terrorism [2009] *CEPS Special Report*, 4.
[847] Cf. Liz Campbell, *Organised Crime and the Law – A Comparative Analysis* (Hart Publishing 2013) 1.
[848] Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 879.
[849] Human Rights Watch, 'World Report 2014: Mexico' <http://www.hrw.org/world-report/2014/country-chapters/mexico> accessed 9 September 2015.

rights. For example, the right to privacy is often affected by different forms of surveillance common in the fight against organised and serious crime. Other areas of concern are the use of questionable evidence (such as accomplice evidence and evidence gathered through covert operations), the denial of a jury trial, and other fair trial issues.

That the fight against organised and serious crime can justify restrictions to the enjoyment of certain rights is firmly established in human rights case law.[850] The same is true in EU law. Article 52(1) of the Fundamental Rights Charter establishes in this regard that: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' In the so-called *Digital Rights* judgment, the CJEU emphasised that the fight against serious crime in order to ensure public security constitutes such an objective of general interest.[851] But the question of what kinds of exceptions and in which circumstances they are allowed is more complicated. How exactly should the balance be struck between security and fundamental/human rights? Which measures are allowed in the name of public protection? In the EU context it has been claimed that in the fight against organised crime the role of fundamental rights has been subordinate to efficiency and security.[852] The extent to which this is true will be considered further below.

(2) The production of evidence and individual rights

As victims of organised and serious crime cannot always provide evidence, and as persons involved in such crime do not often leave a paper trail behind, it may be challenging to gather evidence about such crime. This has prompted states to turn to undercover agents, to promises of benefits for testimony against former co-criminals, and to electronic surveillance and other unusual forms of evidence production.[853] In order to get hold of evidence, access and disclosure orders are increasingly made against third parties who are not under suspicion, such as lawyers and bankers, who may even be unaware that they are in possession of evidence.[854] Also, data retention is used increasingly. The Commission has evaluated its usefulness and concluded that:

> These data can be the only lead to identify a suspect or to identify his/her accomplices at the start of an investigation where eye witness accounts or confessions and other forensic evidence are unavailable, and to decide whether it is justified to use more intrusive surveillance tools like interception. They can help establish whether an offence was planned in advance. They are

[850] E.g., *Ismayilov v Russia* App no 30352/03 (ECHR, 6 November 2008), para. 33.
[851] Case C-293/12 and C-594/12 *Digital Rights Ireland respectively Seitlinger and Others* [2014] CJEU, para. 42.
[852] Sakari Melander, 'The Blurred Architecture of European Criminal Law', in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 219, 237-238.
[853] Liz Campbell, *Organised Crime and the Law – A Comparative Analysis* (Hart Publishing 2013), 64.
[854] Liz Campbell, *Organised Crime and the Law – A Comparative Analysis* (Hart Publishing 2013), 65-66.

> particularly valuable for cases where internet/communication services are used to commit a crime, such as grooming [...].[855]

As policing traditionally has been excluded from the jurisdiction of the CJEU and operational action is conducted by Member State authorities based on their domestic laws, there exists little CJEU case law on the scope of the right to privacy in the fight against crime. The ECtHR, on the other hand, has ruled on the issue in some landmark cases. One such case was *Klass and others*, which addressed a law authorising secret services to carry out secret monitoring of communications (postal and telephone). In this case, the Court recognised that telephone tapping/interception was an inference with the right to privacy, but also held that the measures were acceptable in that they had a legitimate aim and the safeguards on interception were sufficient.[856] More generally, it may be argued that there is a general consensus that the use of special investigative techniques always requires special safeguards to be put in place.[857]

While these types of policing measures affecting human rights largely remain beyond the scope of EU law, the Union has, however, adopted some evidence-related instruments with human rights implications. Most notably, the EU money laundering directives establish that banks and some other private entities may be obliged to report 'suspicious activity'.[858] This kind of increased access to financial information has clear consequences for the right to privacy.[859] Accordingly, the measures adopted must have a clear legal basis and be necessary and proportionate to the nature of the data.[860] Furthermore, in cases concerning organised and serious crime, communication records and traffic data (that is, data retention) may, as noted above, constitute useful corroborative evidence in that such data may prove that certain persons have communicated and they may place individuals at given locations.[861] In this context the EU has also adopted measures in the form of a Data Retention Directive.[862] In April 2014, the CJEU, however, declared this directive invalid. In the so-called *Digital Rights* case, the CJEU held that the directive did not meet the principle of proportionality and that it should have provided more safeguards to protect the fundamental rights to respect for private life and to the protection of personal data.[863] More specifically, it is argued in the judgement that:

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[855] DG Home, European Commission, 'Evidence for necessity of data retention in the EU' [2013] http://ec.europa.eu/dgs/home-affairs/pdf/policies/police_cooperation/evidence_en.pdf accessed 9 September 2015, 4.

[856] Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 880. *Klass and others v Germany* App no 5029/71 (ECHR, 6 September 1978).

[857] See e.g., Council of Europe, Recommendation Rec(2005)10 of the Committee of Ministers to member states on "special investigation techniques" in relation to serious crimes including acts of terrorism.

[858] Liz Campbell, *Organised Crime and the Law – A Comparative Analysis* (Hart Publishing 2013), 70-71.

[859] E.g., M. Cherif Bassiouni and David S. Gualtieri, 'International and National Responses to the Globalization of Money Laundering' in Ernesto Savona (ed), *Responding to Money Laundering: International Perspectives* (ISPAC 1997), 143.

[860] Article 29 Data Protection Working Party, Opinion 14/2011 on data protection issues related to the prevention of money laundering and terrorist financing, 13 June 2011.

[861] Liz Campbell, *Organised Crime and the Law – A Comparative Analysis* (Hart Publishing 2013), 85.

[862] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[863] Case C-293/12 and C-594/12 *Digital Rights Ireland respectively Seitlinger and Others* [2014] CJEU.

> As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight. [...] As for the question of whether the interference caused by Directive 2006/24 is limited to what is strictly necessary, it should be observed that [...] the directive requires the retention of all traffic data concerning fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony. It therefore applies to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives. Furthermore, in accordance with Article 3 of Directive 2006/24, the directive covers all subscribers and registered users. It therefore entails an interference with the fundamental rights of practically the entire European population. [...] It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy. [...] Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences. Secondly, [...] Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 simply refers, in Article 1(1), in a general manner to serious crime, as defined by each Member State in its national law.[864]

This judgement is crucial in that it establishes that there are clear limits for what can be done in the name of the fight against organised and serious crime. Peers has in this regard suggested that the CJEU clearly settles that 'the safety of the people is not the supreme law' and that legislative overreactions are not acceptable even in relation to serious crimes.[865] For the EU, the CJEU judgement has entailed a need to reconsider its data retention legislation.

The adoption of procedures to facilitate access to evidence from other Member States, such as the EIO directive, gives rise to the question of how the states collect, store and share evidence for criminal proceedings.[866] It is unfortunate that EU Member States do not always adhere to human rights in such

[864] Case C-293/12 and C-594/12 *Digital Rights Ireland respectively Seitlinger and Others* [2014] CJEU, paras 51, 56, 58-60.
[865] Steve Peers, 'The data retention judgment: The CJEU prohibits mass surveillance' [2014] *EU Law Analysis* [blog] 8 April 2014. The Data Retention Directive was adopted as a reaction to 2005 London metro terrorist attack.
[866] See further e.g., Stefano Ruggeri, 'Transnational Prosecutions, Methods of Obtaining Overseas Evidence, Human Rights Protection in Europe' in Stefano Ruggeri (ed), *Human Rights in European Criminal Law* (Springer 2015) 147.

procedures. In 2007-2010, the Court found fair trial violations (Article 6) committed by EU Member States in around 1,700 cases considered by the ECtHR.[867]

(3) The protection of individual rights and interests in criminal proceedings

It is often noted that threats against witnesses and other individuals involved in the prosecution of organised and serious crime (for example, jurors) make the prosecution of such crime especially challenging. This has prompted changes in procedural law, including revision of rules regarding the admissibility of evidence (such as interception evidence and accomplice evidence) and the right to a jury trial.[868] Most of these measures clearly belong to the Member State domain and no EU action in this area exists. The EU has, however, adopted secondary legislation regarding the rights of victims of crime, and it has been put forward that the EU should also legislate in the field of witness protection. Most notably, the European Parliament has stated that it:

> calls on the Commission to set out clear guidelines for assisting court witnesses, informers, whistleblowers and their families, according them European transnational legal status and extending any protection granted to them within the Member States, if so requested by the Member State of origin of the informers, witnesses or whistleblowers; proposes establishing a European fund to protect and assist victims of organised crime and court witnesses, including via support for nongovernmental anti-mafia and anti-racketeering associations recognised by Member States;
>
> welcomes the adoption by some Member States of legislative provisions designed to improve the protection of witness[es] and informers in cases related to organised crime (e.g. by allowing the use of remote court hearings)[869]

The Commission has not yet, however, chosen to initiate action in the field of witness protection.[870] This has meant that the EU only has soft law instruments in this area. In 1995 the Council adopted a resolution on the protection of witnesses in the fight against international organised crime,[871] and in 1996 a resolution on individuals cooperating with the judicial process in the fight against international

[867] Catherine Heard and Daniel Mansell, 'The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases' [2011] 2(4*) New Journal of European Criminal Law* 353, 364. Also see e.g., Charlotte Claverie-Rousset, 'The Admissibility of Evidence in Criminal Proceedings between European Union Member States' [2013] 3(2) *European Criminal Law Review* 152, 163, and Annalisa Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' [2014] 10(1) *Utrecht Law Review* 113, 117.

[868] See further Liz Campbell, *Organised Crime and the Law – A Comparative Analysis* (Hart Publishing 2013), 114-137.

[869] European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), para. 12.

[870] In this regard, see e.g., Commission Working Document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice, COM(2007) 693 final, 13 November 2007, 2 ('The Commission's Legislative and Work Programme for 2007 listed the protection of witnesses and individuals who cooperate with the judicial process as a priority initiative. However, the Impact Assessment procedure has led to the conclusion that at present it is not advisable to proceed with legislation at EU level.')

[871] Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organized crime, OJ C 327/5, 7 December 1995.

organised crime.[872] A Europol network on witness protection was established in 2000 and the high level expert meetings held within this network aim at standardising and harmonising witness protection processes and procedures.[873] Best practices manuals have also been adopted within this network.[874]

Internationally, the need to protect witnesses has been most notably emphasised in the Palermo Convention, which in Article 24 stipulates that: 'Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by [...] [the] Convention and, as appropriate, for their relatives and other persons close to them.' The UN Convention against Corruption, among others, contains a similar provision.[875] Furthermore, the Council of Europe has soft law documents in the area.[876] Even though the question of witness protection is sensitive, consideration should be given to establishing more developed witness protection standards within the EU. Without protection some witnesses may be unwilling to testify, and it is in the interest of justice that all persons who have information about the facts of a given case come forward and testify. Protective measures also give recognition to the fact that witnesses have legitimate interests that need to be safeguarded (for example, the right to life and the right to privacy).[877] As protective measures to witnesses may affect the rights of the accused person (for example, *in camera* proceedings affect the right to a public trial), it is also important to carefully consider the scope of the witness protection.

As regards victims of crime, the 2012 EU directive establishing minimum standards on the rights, support and protection of victims of crime is generally viewed as an important legal instrument.[878] In relation to organised crime, the directive explicitly establishes that: 'Victims of [...] organised crime [...] tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation. Particular care should be taken when assessing whether such victims are at risk of such victimisation,

[872] Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime, OJ C 010/1, 11 January 1997.

[873] Europol, 'Europol High Level Expert Conference on Witness Protection in Rome, Italy' [press release], 9 April 2014, <https://www.europol.europa.eu/content/europol-high-level-expert-conference-witness-protection-rome-italy> accessed 4 September 2015.

[874] "On the basis of the debates within the Europol network, two documents have been drafted and shared for use as 'EU guidelines': the 'Basic principles in the European Union police co-operation in the field of Witness Protection' focusing on the international relocation of witnesses while the 'Common Criteria for taking a witness into a Protection Programme', deals with the criteria for taking a witness into a protection programme." Commission Working Document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice, COM(2007) 693 final, 13 November 2007, 4-5.

[875] Article 32(1): "Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them."

[876] Council of Europe, Recommendation No R(97)13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence, 10 September 1997.

[877] On factors that have influenced the development of witness protection measures, see further S. Gluščič *et al.*, *Protecting Witnesses of Serious Crime – Training Manual for Law Enforcement and Judiciary* (Council of Europe Publishing 2006) 35-36.

[878] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14 November 2012.

intimidation and of retaliation and there should be a strong presumption that those victims will benefit from special protection measures.'[879] This approach, which takes account of the situation of vulnerable victims, is very important. It has, however, been argued that minors who have been victims of organised crime should be given more attention and better protection in EU law.[880] Another problem facing victims relates to the implementation of legislation. Even though EU law nowadays clearly establishes that victims of crime have a right to effective remedies and support, there are numerous victims that in the end do not receive either of the two. As will be considered further below, victims of human trafficking and international crimes often face difficulties in receiving reparations and protection.

From the point of view of individuals accused or suspected of organised crime, the measures in the field of fair trial rights in the new EU instruments are important.[881] It should, however, be noted that while the roadmap for strengthening the procedural rights of suspects and accused have entailed many advances, there are still areas of fair trial that are not harmonised by EU law. The collection and use of evidence is an example of an area where the fair trial guarantees of the suspected and accused persons still vary considerably from one EU Member State to another.[882] As a consequence, the use of mutual recognition in relation to evidence is not unproblematic.[883]

(4) Member State cooperation and mutual recognition

The criminal law cooperation based on mutual recognition and mutual trust is founded on the presumption that all Member States live up to the common EU standards, including human rights. The problem, however, is that the presumption does not always hold true. The tension between mutual recognition and the obligation to respect human rights has been especially debated with regard to the EAW and the common asylum policy.[884] In its case law, the CJEU has found that the realisation of human rights must be asserted when the principles of mutual recognition and mutual trust are used. As seen above, in relation to transferring asylum seekers to another country based on the Dublin system, in the so-called *N.S. et al.* case (2011) the CJEU held that:

> to ensure compliance [...] with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States [...] may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in

[879] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14 November 2012, para. 57.
[880] European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), para. 12.
[881] See further Section III.A.2.d. in this report.
[882] Annalisa Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' [2014] 10(1) *Utrecht Law Review* 113, 118-119.
[883] Annalisa Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' [2014] 10(1) *Utrecht Law Review* 113, 119.
[884] See e.g., Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' [2013] 9(1) *Utrecht Law Review*, 135.

> that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.[885]

In the EAW cases so far the CJEU has, however, not (yet) explicitly articulated such a principle.[886] Advocate General Sharpston's opinion in the so-called *Radu* case (2012) nevertheless indicates that the execution of EAWs also can be refused due to human rights concerns:

> the competent judicial authority of the State executing a European arrest warrant can refuse the request for surrender [...] where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. [...] the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded.[887]

By analogy to the *N.S. et al.* case, it indeed seems that Member States cannot anymore be expected to have absolute trust in one another's criminal justice systems.[888] It is also important to note that the EIO directive, which is the most recent criminal justice instrument based on the principles of mutual recognition and mutual trust, establishes in Article 11(1)(f) that the recognition or execution of an EIO may be refused in the executing state where there are substantial grounds to believe that the execution of the investigative measure would be incompatible with the executing state's obligations in accordance with Article 6 TEU and the Charter.[889] The directive also states that:

> As in other mutual recognition instruments, this Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU] [...] and the Charter. In order to make this clear, a specific provision is inserted in the text.[890]

The directive therefore creates a rebuttable presumption that fundamental/human rights have been respected,[891] and emphasises the obligation to respect individual rights in the production of evidence.

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[885] Case C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] CJEU, para. 94.

[886] See further Martin Böse, 'Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant' in Stefano Ruggeri (ed), *Human Rights in European Criminal Law: New developments in European Legislation and Case Law after the Lisbon Treaty* (Springer 2015), 138.

[887] Case Case C-396/11, *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanţa v Ciprian Vasile Radu* [2012] CJEU [Opinion of Advocate General], para. 97.

[888] Steve Peers, 'The European Arrest Warrant: The Dilemmas of Mutual Recognition, Human Rights and EU Citizenship' in Allan Rosas *et al.* (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (T.M.C. Asser Press/Springer 2013) 530.

[889] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1 May 2014.

[890] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1 May 2014, para. 18.

[891] Emilio De Capitani and Steve Peers, 'The European Investigation Order: A new approach to mutual recognition in criminal matters', *EU Law Analysis* [blog] 23 May 2014 ('To qualify as "rebuttable" in a legislative text the presumption of compliance by another Member State with EU law and fundamental rights is an important progress in an European Union which since the Tampere programme has considered mutual recognition to be the cornerstone of the judicial cooperation in criminal matters and which until now has usually made only generic

This is very important in connection to organised and serious crime. As was noted above, in the fight against organised and serious crime, authorities often face a need to produce evidence in unusual ways, such as through undercover agents and electronic surveillance, by promising benefits for testimonies, and by accepting anonymous witness evidence. As affected individuals are also often unaware of EIO until the evidence requested has already been seized and transferred, it is especially important in relation to EIO that a thorough examination of fundamental rights is done by all involved EU Member States.[892]

Despite human rights advances made in the EU's mutual recognition regime, the following should, however, be noted: the EIO directive (in contrast to the *N.S. et al. case*) only seems to create an optional possibility ('may') to refuse to execute an EIO on human rights grounds.[893] Furthermore, whereas the *N.S. case* refers to systemic deficiencies, the EIO allows *in casu* evaluations to be made.[894] A more coherent approach to human rights assessments in which the mandatory nature of such considerations is clearly established should be adopted.

(5) Organised and serious crime and the scope of individual criminal responsibility

The adoption of substantive criminal law measures in EU law is primarily regulated by Article 83 TFEU, but also, for example, by Article 49 of the Fundamental Rights Charter, which reaffirms the principles of legality and proportionality of criminal offences and penalties.[895] In relation to substantive criminal law, the main human rights issues therefore often relate to how the crime definitions have been defined in the legislation, including how broad the criminal responsibility created is and the specificity of the regulation.[896]

The way in which TFEU Article 83(1) addresses organised crime has been criticised for its ambiguity in that 'organised crime has been listed alongside specific forms of crime (e.g. trafficking in human beings), often committed by organised criminal groups'[897] and for marginal placement in that 'the outstanding importance thus accorded to the topic of organized crime is not reflected in article [...] where [...] the reference to organized crime is only to be found at the end of a long list of criminal activities requiring

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reference to protection of fundamental rights in mutual recognition instruments (one exception is the Framework Decision on the mutual recognition of financial penalties).')

[892] Catherine Heard and Daniel Mansell, 'The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases' [2011] 2(4*) New Journal of European Criminal Law* 353,365.

[893] Emilio De Capitani and Steve Peers, 'The European Investigation Order: A new approach to mutual recognition in criminal matters', *EU Law Analysis* [blog] 23 May 2014.

[894] Emilio De Capitani and Steve Peers, 'The European Investigation Order: A new approach to mutual recognition in criminal matters', *EU Law Analysis* [blog] 23 May 2014.

[895] What the principle of legality stands for in the context of organised crime has been considered by the ECtHR in the *Ashlarba v Georgia* App no 45554/08 (ECHR, 15 July 2014).

[896] The prohibition of retroactive criminal law is another central human rights question in relation to substantive criminal law.

[897] Piotr Bąkowski, 'The EU Response to Organised Crime' (Library Briefing, Library of the European Parliament 2013) <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf> 4 September 2015.

harmonization.'[898] Article 83(1) is indeed not very clear on the relationship between organised crime and its sub-forms and/or related crimes. Where the provision, however, is explicit is that it only foresees the adoption of minimum rules. Full harmonisation of substantive criminal law is thus ruled out by Article 83(1).[899]

So far, the only legally binding instrument on substantive criminal law on organised crime in general is the 2008 Framework Decision on Organised Crime, an instrument which has been met with criticism. Most notably, it has been questioned whether the framework decision has any real added value. In this regard, Calderoni argues that 'its provisions are so vague that most EU Member States do not need to change their national legislation to be formally compliant with it'.[900] The crime definition in the Framework Decision can, however, be criticised for elusiveness and vagueness, which is problematic from the point of view of the principle of legal certainty.[901] As was mentioned above, the European Parliament has held that the Commission should submit a proposal for a directive 'which contains a more concrete definition of organised crime and better identifies the key features of the phenomenon'.[902] How organised crime should be regulated is, however, controversial, and the adoption of the 2008 Framework Decision revealed that the EU Member States have very different opinions on the topic.[903] The recently adopted European Agenda on Security indicates that the Commission is not in the short run planning to put forward new legislative measures in the field of substantive criminal law on organised crime.[904] If, however, a new legal instrument on organised crime would be adopted, specific care should be given to ensuring that the crime definition adheres to the human rights requirements of legality and certainty.

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[898] Vincenzo Militello, 'Transnational Organized Crime and European Union: Aspects and Problems' in Heinrich Böll-Stiftung and Regine Schönenberg (eds), *Transnational Organized Crime: Analyses of a Global Challenge to Democracy* (Transcript Verlag 2013) 255, 259 (referring to Grandi). Also see Vincenzo Militello, 'Transnational Organized Crime and European Union: Aspects and Problems' in Stefano Ruggeri (ed), *Human Rights in European Criminal Law* (Springer 2015) 203-205.

[899] Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011), 762. The EU competence to adopt criminal law measures is, however, broad due to the concept of 'serious crime'. Letizia Paoli, 'How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm' [2014] 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1, 3 ('Given the very broad scope of serious crime, it is legitimate to ask which forms of crime, if any, are excluded from EU competencies. Article 83(1) of the Treaty on the Functioning of the European Union (TFEU 2008), as amended by the Lisbon Treaty, authorizes the European Parliament and the Council "to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension."')

[900] Francesco Calderoni, 'A Definition That Does Not Work: The Impact of the EU Framework Decision on the Fight against Organized Crime' [2012] *Common Market Law Review* 1366.

[901] Francesco Calderoni, 'A Definition That Does Not Work: The Impact of the EU Framework Decision on the Fight against Organized Crime' [2012] *Common Market Law Review* 1372.

[902] European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), para. 7.

[903] See further e.g., Francesco Calderoni, 'A Definition That Does Not Work: The Impact of the EU Framework Decision on the Fight against Organized Crime' [2012] *Common Market Law Review,* 1373-1374.

[904] Communication from the Commission: The European Agenda on Security, COM(2015) 185 final, 28 April 2015, 19 (in relation to legislation on firearms and environmental crimes legislative proposals are, however, to be expected). Also see Commission Work Programme 2015, COM(2014) 910 final, 16 December 2014, 9.

When considering the adoption of new criminal law on organised crime, it is also important to note that the crime belongs to the category of crimes where many domestic jurisdictions have been prone to stretch what is viewed as 'good criminal law'. Nuotio has, in this regard, pointed out that:

> A new type of criminal law has emerged out of the legal fight against organised crime [...]. Not only is less stress placed on rehabilitation and disciplinary normalisation, but also a loosening of the offence paradigm itself has taken place. Legislatures have decided to introduce new kinds of criminal law provisions as regards organised crime [...]. Criminalisations build a much larger distance between what is punishable and what is a completed offense. Various sorts of conspiracy rules and preparation offenses have been put into place in order to enable the police to investigate as offences cases that do not yet involve typical harm.[905]

Not only are the crime definitions so broad that they also apply to criminal behaviour of a considerably lesser gravity,[906] other types of extensions of individual criminal responsibility have also taken place in the fight against organised crime. Organised crime is a type of crime in which the legal responses have to be thoroughly considered, rather than being quickly adopted due to moral panic caused by various alarm reports about the threat posed by the type of crime. The same is true also for, for example, terrorism. In relation to organised and serious crime, it is also relevant to ask whether it makes sense to adopt general criminalisations, or whether the focus should instead be put on specific sub-forms, such as human trafficking and corruption.

d) Issues of coherence in the fight against organised crime

(1) Institutional coherence

Like in many other JHA fields, numerous EU institutions and bodies are involved in the fight against organised crime. This is amply evident in the external dimension of the action. As an example, one may mention the 2010 action-oriented paper 'Strategic and concerted action to improve cooperation in combating organised crime, especially drug trafficking, originating in West Africa', which was considered by six different working groups within the Council: the working groups on organised crime (CRIMORG), horizontal drugs issues (CORDROGUE), external JHA issues (JAIEX), Africa (COAFR), internal security operational cooperation (COSI) and migration (MIGR).[907] While the involvement of numerous actors entails that many different viewpoints are considered, it at the same time increases the risk for institutional incoherence.

[905] Kimmo Nuotio, 'Security and Criminal Law: A Difficult Relationship', in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 197, 213-214.

[906] Cf. Elisabeth Symeonidou-Kastanidou, 'Towards a New Definition of Organised Crime in the European Union' [2007] *European Journal of Crime, Criminal Law and Criminal Justice* 83, 83.

[907] Council of the European Union: Implementing the strategy for the external dimension of Justice and Home Affairs, Action-oriented paper 'Strategic and concerted action to improve cooperation in combating organised crime, especially drug trafficking, originating in West Africa'[2010] 5069/3/10, rev. 3. Also see Jörg Monar, 'The External Dimension of the EU´s Area of Freedom, Security and Justice: Progress, Potential and Limitations after the Treaty of Lisbon' [2012] *SIEPS Report*, 37.

(2) Different rules for different Member States

Within the EU, criminal law cooperation is an area where some EU Member States have been allowed opt-outs and where enhanced cooperation between some of the Member States is foreseen. This affects both the internal and external dimension of the cooperation. An example of internal incoherence caused by these country-specific exceptions is the recent EIO directive, in which Denmark and Ireland do not currently participate. If these countries do not in the future opt-in this will entail that, for example, the former Framework Decision on the European Evidence Warrant will continue to be applicable in relation to these countries.[908] In relation to the new Europol regulation, on the other hand, Ireland has opted in, whereas the UK and Denmark have not.[909] Also here, this entails that previous instruments continue to apply in relation to some EU Member States. Furthermore, the UK has chosen not to take part in some EU instruments establishing and reaffirming defence rights, most notably the Directive on the right to access to a lawyer for suspects and accused persons.[910] The various opt-outs have been seen as a serious challenge for 'legal certainty, coherence and the protection of fundamental rights in Europe's area of criminal justice.'[911] In this regard, it has been argued that the linking between mutual recommendation and the rights of suspects should be made even stronger.[912]

In the external action, on the other hand, the special position of Denmark, Ireland and the UK in the JHA cooperation has, for example, been reflected in the Council Decision on the Palermo protocol on smuggling of migrants, in which it is noted that not all Member States in fact take part in the cooperation.[913] As observed by Monar, 'such differentiation does not add to the credibility and coherence of the Union as an international actor in the AFSJ domain, especially as the "opted-out" Member States then frequently negotiate parallel bilateral agreements with the respective third-countries.'[914]

[908] Emilio De Capitani and Steve Peers, 'The European Investigation Order: A new approach to mutual recognition in criminal matters' [2014] *EU Law Analysis* [blog] 23 May 2014.
[909] Steve Peers, 'The reform of Europol: modern EU agency, or intergovernmental dinosaur?' [2014] *EU Law Analysis* [blog] 18 June 2014.
[910] See further Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele, 'The End of the Transitional Period for Police and Criminal Justice Measures adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 24.
[911] Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele, 'The End of the Transitional Period for Police and Criminal Justice Measures adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 24 (regarding the UK).
[912] Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele, 'The End of the Transitional Period for Police and Criminal Justice Measures adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), 40.
[913] Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community [2006] OJ L 262/34, 22 September 2006.
[914] Jörg Monar, The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon [2012] *SIEPS Report*, 33.

(3) Human rights coherence and the external action

Smith has argued that EU's external action in the field of criminal law is the foreign policy area 'most clearly motivated by self-interest'.[915] Organised and serious crimes are perceived as threats against the Union, and the primary trouble sources are found to be in third countries. For example, West Africa is found to be a region which is 'characterised by the existence of criminal gangs which carry out a multitude of criminal activities.'[916] In the external action, special attention should be given to ensuring that the external partners address organised and serious crime in a way that respects human rights. This has to some extent been recognised in the recently adopted EU Action Plan on Human Rights and Democracy for the years 2015-2019. In the action plan, it is submitted that the Union shall support the judicial systems of third countries through, for example, 'human rights training, and assistance to detention facilities in bringing conditions of detention up to international standards.'

5. Concluding remarks

Organised and serious crime is generally perceived as a serious security threat to the EU, and as an area where EU-internal and EU-external cooperation is necessary. This urgency, connected with the repressive nature of criminal law, makes it especially important that the Union action is fact-driven, that is, founded on research-based information and knowledge. A human rights impact assessment should also be made on all suggested EU measures. To ensure that the Union's measures against organised and serious crime are human rights-friendly FRA could be more involved in the fight against organised and serious crime, for example, in the production of threat assessments and in the design of the policy cycle. Furthermore, as regards implementation, it is essential that human rights monitoring mechanisms are established to ensure human rights friendly implementation. In the external action it must be ensured that the Union's desire to tackle the crimes does not make the Union forget about the risks of human rights violations in the struggle against organised crime.

[915] Karen E. Smith, *European Union Foreign Policy in a Changing World* (3rd edn, Wiley 2014), 177.

[916] Council of the European Union: Implementing the strategy for the external dimension of Justice and Home Affairs, Action-oriented paper 'Strategic and concerted action to improve cooperation in combating organised crime, especially drug trafficking, originating in West Africa'[2010] 5069/3/10, rev. 3, 3.

B. Human trafficking

1. Introduction

For much of the 20th century, trafficking in human beings was generally associated with trafficking of women for sexual exploitation. Article 1 of the 1904 International Agreement for the Suppression of the "White Slave Traffic" addresses the 'procuring of women or girls for immoral purposes' as a key concern.[917] Over the subsequent decades, and following further international agreements,[918] the understanding of what constitutes trafficking has undergone significant changes, yet a consistent definition remained lacking – only at the end of the last century did efforts materialise to produce a legal definition, which was then adopted in the year 2000 as contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Palermo Convention.[919] Article 3 of this UN Trafficking Protocol provides for a definition consisting of three elements, in short summarised as 'action' (for example, recruitment, transportation, harbouring of persons), 'means' (for example, threat or use of force, abuse of power or position of vulnerability) and 'exploitative purpose'. Such exploitation may include 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs' (Article 3 lit a). Evidently, the scope of trafficking has become much broader, extending far beyond sexual exploitation, and does not even contain a final listing of exploitation settings ('at a minimum'). Following the UN Trafficking Protocol of 2000, both the Council of Europe's 2005 Convention on Action against Trafficking in Human Beings[920] and the 2011 European Union Anti-Trafficking Directive[921] accepted the international definition as the reference definition for the European region. However, the definition under the 2011 EU Anti-Trafficking Directive adds further forms of exploitation and includes also exploitation through begging and through criminal activities.

[917] Cf. UN Treaty Collection, International Agreement for the suppression of the "White Slave Traffic", <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-8&chapter=7&lang=en accessed> 9 September 2015.

[918] For an extensive overview of relevant treaties and other international instruments, see the listing in Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), xxiii.

[919] UN Doc. A/RES/55/25, adopted 15 November 2000. It entered into force on 25 December 2003. In the following it is referred to as 'UN Trafficking Protocol', and is often also called the 'Palermo Protocol'. The EU signed the UN Trafficking Protocol on 12 December 2000 and the Council ratified it on behalf of the European Union in 2006. See Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community, OJ L 262/44, 22 September 2006.

[920] Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, adopted 16 May 2005, entered into force 1 February 2008 (thereinafter Council of Europe Convention against Trafficking).

[921] Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

Definition of Trafficking in Human Beings - 2011 EU Anti-Trafficking Directive (Directive 2011/36/EU)

Article 2 - Offences concerning trafficking in human beings
1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:
The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.
4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.
5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.
6. For the purpose of this Directive, 'child' shall mean any person below 18 years of age.

It is against this development that trafficking in human beings has become a major topic on the international and European political agendas over the last 15 years – however, with rather limited results.[922] Trafficking in human beings is now clearly linked to a multitude of types of exploitation of human beings, with exploitation in general being as pervasive throughout all societies in the world as, for instance, violence against persons. But, contrary to this last issue, on which libraries can be filled about definitions of violence, prevention and protection in relation to gender and age dimensions, a similar conceptualisation of 'exploitation' is less clearly established. Trafficking is only one phenomenon here, and needs constant delimitation from other related definitions and concepts such as slavery, slavery-like practices, forced labour, (worst forms of) child labour, prostitution, organ trafficking or illegal child adoption. Moreover, the trafficking definition itself contains further pitfalls: eventual consent of the victim (for example, to an exploitative work contract) must not be considered relevant for the assessment (Article 2(4) EU Directive), nevertheless, police and prosecutors will have to present evidence to prove the use of means. Furthermore, in the context of children, the definition declares irrelevant the means element entirely, leaving only action (for example, recruitment) and exploitative purpose as constituent elements of child trafficking (Article 2(5) EU Directive). Together with often still prevailing, stereotypically limited understandings of key actors – from the police to judges to social workers – of trafficking as an issue linked to sexual exploitation of women only, the still persistent challenges become quite evident: identification of victims (considering a broad range of cases, from girls being tricked by 'lover boys' to leave their countries on false promises about fair jobs to Thai berry

[922] See, for instance, the contributions to Issue 3/2014 ('Following the Money: Spending on Anti-Trafficking') and 4/2015 ('15 Years of the UN Trafficking Protocol') published in the *Anti-Trafficking Review journal*, <http://www.antitraffickingreview.org/index.php/atrjournal> accessed 9 September 2015.

pickers stranded in the north of Scandinavia, or construction workers left at sites without passports and residence permits), coordination of authorities and services providers for immediate referral and assistance (including structures such as contact points and 'national referral mechanisms',[923] appropriate and safe accommodation, for example, through shelters, health services, guardianship for unaccompanied children) and access to justice (from victim/witness protection at court to access to compensation).

Moreover, as Gallagher has observed, interestingly the impetus for further clarification of trafficking in search of a definition originated from the UN criminal justice sector (the drafting process for the 2000 Transnational Organised Crime Convention, including the UN Trafficking Protocol, was led by the UN Office for Drugs and Crime (UNODC)), and not from the human rights field.[924] When reading the Palermo Protocol, the starting point of government efforts was criminalisation of trafficking and crime prevention, less oriented towards victims or protection of their rights. In addition, trafficking is often linked, or even mixed-up with, cross-border smuggling (where no exploitation purpose is required) or framed in a migration context – areas marked by highly controversial political dynamics and policies focused on repression which are far from human rights-based approaches, neither at a Member State nor an EU level.[925]

All of this continues to have significant negative implications for many trafficking victims: identification of trafficked persons in most countries falls under the primary responsibility of police authorities, not social services or child protection authorities. At the same time, trafficking and exploitation are based on situations of dependency and vulnerability. Weak social status of children or women, social and economic disadvantages of regions within a country or between, for example, Eastern and Western European countries and ensuing lack of perspectives (due to lack of access to education or jobs) 'prepare the ground' on which traffickers then employ strategies ranging from financial dependency to deception to use of force to take control over persons for their own profit, and make them, then, provide services in exploitative circumstances. Trafficked persons may have entered the country without documents, may have had their passports taken away, may have severed contacts to their home communities, and may have become involved in illegal activities. In such circumstances, to expect victims to seek assistance from police, while at the same time being afraid of arrest and deportation, can be seen as challenging and somewhat unrealistic, meaning large numbers of victims are left unidentified. Anti-trafficking groups therefore advocate for a multi-disciplinary approach,[926] with strong involvement of non-state actors as first responders and service providers to the victims. European anti-

[923] On the concept of 'national referral mechanisms' (NRM), see OSCE, *National Referral Mechanisms - Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook*, 2004.

[924] Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 3. It may be considered quite telling that in 2010, in the famous landmark case of *Rantsev v Cyprus and Russia*, the ECtHR clearly established that trafficking in human beings falls under Article 4 of the ECHR, with specific positive obligations for States Parties. *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR, 7 January 2010).

[925] Following the latest tragic death of hundreds of migrants in the Mediterranean Sea in April 2015, see, for instance media reports, such as BBC, 'Why is EU struggling with migrants and asylum' (1 September 2015), <http://www.bbc.com/news/world-europe-24583286> accessed 9 September 2015.

[926] See also the critical assessment of current state practice in GRETA's General Report published in April 2015, Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), '4th General report on GRETA's activities covering the period from 1 August 2013 to 30 September 2014' [2015], 41.

trafficking standards therefore provide, for instance, victims with the possibility to benefit from a recovery and reflection period[927] in order to allow them to consider future options, and how to escape from their situation of dependency and develop new perspectives. In practice, however, many countries still rely on police identification and further cooperation of the victim with law enforcement, prosecution and courts, in order to, for example, obtain a residence permit – which, then, is basically the prerequisite for any further assistance measures. Although the UN Trafficking Protocol defines trafficking in human beings as a form of organised crime, not all cases of trafficking can be understood automatically as organised crime. Despite the formal link between organised crime and trafficking in human beings, it is also framed as a human rights violation.

Trafficking in human beings may potentially affect virtually any human right, such as the right to life and integrity, dignity and protection from exploitation, personal freedom, freedom of movement, the whole range of economic, social and cultural rights as part of assistance measures, including new life perspectives, and equality and non-discrimination for whatever reason, at all times taking into account the gender dimension of trafficking and the situation of children. It is to the merit of the 2005 Council of Europe Convention against Trafficking that a victim-centred, human rights-based approach had been placed at the centre of attention when addressing trafficking – consequently, the substantial part of the document starts with prevention, obliging States Parties to 'promote a Human Rights-based approach and […] use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment' of all those policies and programmes (Article 5(3)). Given the complexities of trafficking situations and the inevitable need for cooperation (among authorities and between authorities and non-state actors), a human rights focus is essential to finally adopt a more balanced, mutually supportive approach between law enforcement and victim protection. In the words of Gallagher, a human rights-based approach to trafficking is important because '[m]aking human rights the center of thinking about trafficking stops us from being sidetracked by the slick arguments of those who would prefer it to be approached as a straightforward issue of migration, or public order, or of organized crime.'[928] All EU Member States, with the exception of the Czech Republic, have now ratified the Council of Europe Convention against Trafficking.[929]

Although in terms of structure the 2011 EU Anti-Trafficking Directive followed the UN Trafficking Protocol, starting with the criminalisation of trafficking, later on the Directive provides for more comprehensive standards for victim and rights protection, especially for child victims. Further, at least in the Preamble, it also declares that '[t]his Directive adopts an integrated, holistic, and human rights

[927] See below Section III.B.2.b.2.

[928] Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 3.

[929] For a list of ratifications, see the Council of Europe, 'Action against Trafficking in Human Beings, Status of Signature and Ratification of the Convention', <https://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp> accessed 9 September 2015, or Council of Europe, 'Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197', <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=02/05/2015&CL=ENG> accessed 9 September 2015. All EU MS – including the Czech Republic, as well as the European Union as such – have ratified the Palermo Protocol, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

approach to the fight against trafficking in human beings […]' (Rec 7). It should also be stated here that the Preamble explicitly anchors the Directive into both the internal and external dimensions of EU action, and it specifically refers to the 2009 'Action-oriented Paper on strengthening the Union external dimension on action against trafficking in human beings; Towards global EU action against trafficking in human beings', requiring measures to be 'pursued in third countries of origin and transfer of victims, with a view to raising awareness, reducing vulnerability, supporting and assisting victims, fighting the root causes of trafficking and supporting those third countries in developing appropriate anti-trafficking legislation' (Rec 2). Next to standard-setting, over the years the EU has also developed a quite extensive policy and organisational framework for anti-trafficking measures, including an EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016), an Anti-trafficking Coordinator within the European Commission, an Experts Group as an advisory body, an informal EU Network of National Rapporteurs and Equivalent Mechanisms, a Civil Society Platform, as well as targeted funding programmes. Also, since 2007, 18 October has been observed as EU Anti-trafficking Day.

Despite these efforts and achievements, persistent shortcomings exist. These shortcomings will be discussed in the following sections, both in terms of human rights protection of trafficking victims, inconsistency of standards (including in regard to the relationship with the Council of Europe), weak implementation, and lack of coherence between the internal and external dimensions.

2. The internal dimension

a) Development of internal dimension of the EU action

In the mid-1990s, trafficking in human beings (sometimes referred to as 'THB') started to enter the EU's political agenda with the Council Joint Action 'concerning action to combat trafficking in human beings and sexual exploitation of children' of 1997[930] as the first major instrument dealing with this issue.[931] The Joint Action aimed at creating common standards for combating THB by defining trafficking in human beings and requiring Member States to ensure that these actions are classified as criminal offences.[932] The definition for THB, including child trafficking, was, however, limited to sexual exploitation, and it was even narrower than a definition being used by the European Parliament at that time.[933] Until the year 2000 Member States continued to understand THB as trafficking in women and children for sexual exploitation outside their country of origin.[934]

[930] Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children [1997] OJ L 063/2.
[931] Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 96.
[932] See Joint Action, Title I B and Title II A a.
[933] See European Parliament Resolution on trafficking in human beings [1996] OJ C 32/88. The resolution defines the term 'trafficking in human beings' as 'illegal action (…) in order to exploit that person (…) and lists as purposes 'prostitution, drug-dealing, illegal immigration and organized black labour'. Therefore, the resolution uses a broader approach than the Joint Action and does not limit trafficking in human beings exclusively to sexual exploitation.
[934] Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 21-22.

As previously described, at the UN level the UN Trafficking Protocol was adopted in 2000, and was also approved by the EU.[935] Consequently, the Joint Action was replaced in 2002 by the Council Framework Decision on combating trafficking in human beings,[936] which contained a broader definition including trafficking for labour exploitation, and which was intended to supplement the UN Trafficking Protocol and ensure its rapid implementation.[937]

Nevertheless, the Council Framework Decision on combating trafficking in human beings also demonstrated several shortcomings in concept and practice, as highlighted by Middelburg and Rijken: (i) the lack of assistance, protection or compensation for victims, (ii) the low number of criminal proceedings, and (iii) insufficient monitoring of the situation.[938]

Increasing awareness of the limited results from the Framework Decision[939] led to the development of a new central instrument concerning THB, which ultimately took several years.[940] The eventual result was Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims. Part of the long process can be attributed to the fact that the new planned EU instrument had to be updated and aligned to a newer regional instrument concerning THB: the Council of Europe Convention on Action against Trafficking in Human Beings. This Convention was adopted in 2005 and introduced a higher, explicitly human rights-based standard concerning victims' rights protection when compared to the then existing instruments at the EU level. The EU subsequently stressed in the development process of its own new directive that implementing the comprehensive and coherent framework of the Council

[935] Council of the European Union: Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community [2006] OJ L262/51, Article 1.

[936] Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002], OJ L203.

[937] See European Commission Press Release, Ip/01/325, 7 March 2001 'EU urges higher priority for fight against trafficking in women and children' <http://europa.eu/rapid/press-release_IP-01-325_en.htm> and Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 97.

[938] Annemarie Middelburg and C. R. J. J. Rijken, 'The EU Legal Framework on Combating THB for Labour Exploitation' in C. R. J. J. Rijken (ed) *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011), 357.

[939] Annemarie Middelburg and C. R. J. J. Rijken, 'The EU Legal Framework on Combating THB for Labour Exploitation' in C. R. J. J. Rijken (ed) *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011), 357.

[940] In 2009, the Commission adopted and submitted to the Council of the European Union two proposals, one Framework Decision on trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA and one Framework Decision on combating sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, see Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 103. The proposals to amend the Framework Decision had to be changed into a Directive after the entry into force of the Lisbon Treaty, since Framework Decisions could no longer be adopted, see Annemarie Middelburg and C. R. J. J. Rijken, 'The EU Legal Framework on Combating THB for Labour Exploitation' in C. R. J. J. Rijken (ed) *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011), 357-358. The Proposal for a Framework Decision on combating sexual abuse, sexual exploitation of children and child pornography led to Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

of Europe Convention against Trafficking covering prevention, cooperation, protection of victims and the obligation to criminalise THB would lead to 'significant improvements'. By 2010, 16 EU Member States had already ratified the Council of Europe Convention against Trafficking, and another 10 Member States had signed it.[941] At the time of writing all EU Member States, with the exception of the Czech Republic,[942] had ratified the Convention.

After finally being adopted in 2011, the EU Anti-trafficking Directive has been considered as clearly influenced by the Council of Europe Convention against Trafficking,[943] since the Directive also covers assistance and support of trafficked persons, protection during criminal investigation and proceedings, and stresses the child's best interests as primary consideration. However, the definition of THB under the 2011 EU Directive is now much wider and goes beyond even the forms of exploitation defined in the UN Trafficking Protocol and the Council of Europe Convention against Trafficking.[944] The Directive explicitly refers to exploitation through begging and through criminal activities as relevant forms.[945] Despite the clarifications and improvements of standards compared to the replaced Council Framework Decision of 2002, weaknesses can nevertheless be identified with the new EU instrument. [946]

A major weakness is that the Directive does not tackle the important question of the residence status of trafficked persons from third countries. This continues to be regulated by a separate, earlier Directive of 2004.[947] Directive 2004/81/EC claims to contribute to the prevention of trafficking by providing the trafficked persons with an incentive to come forward and cooperate with the relevant law enforcement authorities; in return for cooperation, trafficked persons are entitled to a residence permit.[948] The aim of the 2004 Directive is to prosecute traffickers, which would be facilitated through the cooperation of victims of trafficking.[949] Hence, protection of trafficked persons and their rights is subordinated to the

[941] Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM(2010)95 final – 2010/0065(COD), 29.3.2010, Explanatory Memorandum, 2.

[942] Czech Republic was criticised for not having signed and ratified the Council of Europe Convention against Trafficking. A major obstacle for a ratification was a gap in the Czech legislation concerning criminal liability of legal persons. In 2012 legislation entered into force which establishes criminal liability of companies and therefore fills this gap. Although the National Strategy to Combat Trafficking in Human Beings in Czech Republic (2012-2015) defines the ratification of the convention as goal until 2013, the signature and ratification has not yet taken place. See Security Policy Department, *National Strategy to Combat Trafficking in Human Beings in the Czech Republic for the Period 2012-2015* (Prague 2012) 13-14, and Petra Kutalkova, *The Narrow Gateway to Human Rights – Identification of Trafficked Persons in the Czech Republic* (La Strada Czech Republic 2010) 25.

[943] Petra Follmar-Otto and Heike Rabe, *Human trafficking in Germany: Strengthening victim's human rights* (German Institute for Human Rights 2009) 39.

[944] Article 4 of CoE Convention against Trafficking, Article 3 UN Trafficking Protocol.

[945] See Article 2 of Directive 2011/36/EU.

[946] Julia Planitzer, *Trafficking in Human Beings and Human Rights* (NWV 2014) 45.

[947] Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19. All Member States, except United Kingdom, Ireland and Denmark (see Recital 21 and 22 of Directive 2004/81/EC) had to implement the directive until 6 August 2006.

[948] See Article 8 (1) (b) of Directive 2004/81/EC.

[949] European Commission, Experts Group on Trafficking in Human Beings, *Opinion No. 4/2009 of the Group of Experts on Trafficking in Human Beings set up by the European Commission (*On a possible revision of *Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of*

cooperation of trafficked persons with authorities in order to obtain information on traffickers.[950] Although this 'reward system'[951] was criticised as treating trafficked persons as an 'instrument for the prosecution',[952] the 2004 Directive has not yet been amended.

More specifically, Directive 2004/81/EC has three main weaknesses. First, the idea of legal residence in exchange for police cooperation has proved ineffective in practice; because of their trafficking situation and an existing cycle of dependency with traffickers, victims often avoid all contact with the police. Directive 2004/81/EC requires that the victim has to quit any contact with those suspected of trafficking, which often is difficult for the victims. Moreover, the renewal of the residence permit, which should be granted for at least six months, depends on the continued fulfilment of all criteria. The criteria include that, in case of a prolonged stay, investigations or the judicial proceedings have to benefit from the stay. This also leads to insecurity on the side of the victim. Rijken and de Volder have summarised the situation as follows: 'These limitations and requirements reflect a focus on the interests of the EU, as opposed to the well-being of the victims; as long as the EU seems to gain from the victim's residence (or at least not be burdened by it), the victim is allowed to remain within EU borders.'[953] A second weakness of Directive 2004/81/EC is that it avoids setting minimum standards in several areas, instead leaving this to regulation by national legislation. For instance, the Directive obliges the Member States to implement a 'recovery and reflection period' during which no expulsion of the trafficked person is allowed. Nevertheless, national law has to determine when and for how long this period can be granted – there is no minimum duration foreseen in the 2004 Directive.[954] Thirdly, the lack of clear minimum standards has led to inconsistent interpretation and application of the Directive in the Member States. Member States have, for instance, understood 'cooperation with authorities' differently, ranging from merely providing information to authorities, to testifying in court. Apart from this, the 2004 Directive has failed to set consistent standards for child victims of trafficking. According to Article 3(3), 'by way of derogation, Member States may decide to apply this Directive to minors under the conditions laid down in their national law.' In the meantime, all Member States, except Slovakia, have nevertheless opted to apply the 2004 Directive to children. In Lithuania, children are included under specific conditions.[955] In 2014,

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trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities), 16 June 2009, para. 2.

[950] Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 188.

[951] Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 188.

[952] European Commission, Experts Group on Trafficking in Human Beings, *Opinion No. 4/2009 of the Group of Experts on Trafficking in Human Beings,* para. 13.

[953] C. R. J. J. Rijken/E. J. A. De Volder, 'The European Union's struggle to realize a human rights-based approach to trafficking in human beings: A call on the EU to take THB-sensitive action in relevant areas of law' (2009) 25 *Connecticut Journal of International Law* 49, 74.

[954] See Article 6 of Directive 2004/81/EC, and Julia Planitzer, *Trafficking in Human Beings and Human Rights* (NWV 2014) 47.

[955] European Commission, Communication on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2014] COM(2014) 635 final, 17 October 2014, 3.

the European Commission acknowledged a need to further consolidate EU legislation on THB, including regarding residence permits.[956]

In addition to the instruments mentioned above, there are further directives that set general standards concerning the protection of the rights of victims of crime which are relevant for the area of THB.[957] As far as children are concerned, the 2011 EU Agenda for the Rights of the Child recognises trafficked children as one specific vulnerable group requiring targeted measures (including through the Anti-trafficking Directive adopted in the same year).[958] Moreover, trafficking of children is also addressed in the external dimension as part of the agenda on children affected by armed conflict as well as in the context of 'child sex tourism'.[959] The EU Action Plan on Unaccompanied Minors (2010–2014) devoted an entire section to the prevention of unsafe migration and trafficking of children.[960]

Institutional developments have taken place, both in parallel to and based on the aforementioned legal and policy instruments. The 2002 Brussels Declaration on Preventing and Combating Trafficking in Human Beings[961] led to the establishment of the EU Expert Group on Trafficking.[962] The group consists of 15 experts, mandated to provide advice to the European Commission 'regarding the approach to be taken towards trafficking in human beings'. For some time, the group has regularly published reports with opinions for guidance on the interpretation of EU instruments against THB, such as on the role of human rights in combating THB. The reports have stressed human rights as a paramount principle and have outlined how EU policies should be developed in order to be in line with human rights.[963] Further, on the structural level, the Stockholm Programme includes the suggestion to establish an EU Anti-Trafficking Coordinator (ATC) in order to 'reach a well-coordinated and consolidated EU policy against trafficking',[964] which eventually became operative in 2011. Finally, Directive 2011/36/EU obliges EU Member States to appoint national rapporteurs (or equivalent mechanisms) who must report to the

[956] European Commission, Communication on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2014] COM(2014) 635 final, 17 October 2014, 8 and 11.

[957] See for instance Council Directive 2004/80/EC of 29 April 2004 relating to compensation for crime victims [2004] OJ L261/15 and Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

[958] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child [2011] COM(2011) 60 final.

[959] For an earlier assessment of EU and Member State policies on child trafficking, see FRA, *Child Trafficking in the European Union – Challenges, perspectives and good practices* [2009].

[960] European Commission, Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010 – 2014), COM(2010)213 final, 6 May 2010, ch. 3.

[961] The 2002 Brussels Declaration was an outcome of a conference in September 2002, published in 2003/C 137/01, Council Conclusions of 8 May 2003.

[962] Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group, to be known as the 'Experts Group on Trafficking in Human Beings'.

[963] European Commission, DG Justice, Freedom and Security, Report of the Experts Group on Trafficking in Human Beings, 22 December 2004.

[964] European Council, The Stockholm Programme − An open and secure Europe serving and protecting the citizens, 2 December 2009, 17024/09, 45.

EU's ATC.[965] The ATC holds biannual meetings with the national rapporteurs or equivalent mechanisms such as national coordinators.[966]

One of the ATC's main tasks is to monitor the implementation of the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016.[967] The EU Strategy identifies five priorities with corresponding actions. The priorities are: (1) identification of and assistance to trafficked persons; (2) prevention of THB; (3) prosecution of traffickers; (4) enhanced coordination and cooperation including policy coherence; and (5) increased knowledge of and effective response to emerging concerns related to all forms of THB.[968]

b) Human rights issues in the internal dimension

In the introduction to the chapter on human trafficking, it was noted that next to the immediate concern for protection from exploitation, trafficking in human beings may indeed affect most of an individual's human rights.[969] The following analysis concentrates on areas in which existing EU standards and policies concerning trafficking do not sufficiently follow (or even contradict) a human rights-based approach to THB, structured along the typical prevention/protection/prosecution approach to comprehensive anti-trafficking action.[970]

(1) Prevention of trafficking in human beings

Prevention, in general, has two complementary objectives: to reduce unwanted behaviour or effects and to encourage measures with intended positive effects. In the context of trafficking, several entry points for preventive intervention come to mind, usually summarised in measures to reduce vulnerability of potential victims, on the one hand, and to discourage demand for services through exploitation, on the other. Typical examples of such measures include awareness-raising among potential victims/social groups at risk of exploitation about risks of trafficking and/or possibilities for safe migration, and training of all relevant stakeholders likely to come into contact with such potential victims. Criminalisation of the known use of services by trafficking victims may also contribute to higher awareness among, for example, the private sector, which may be concerned about the impact of bad publicity or potential customers. These measures are also included in Article 18 of the 2011 EU Anti-Trafficking Directive.

[965] See Articles 19-20 of Directive 2011/36/EU.
[966] European Commission, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, SWD(2014) 318 final, 17 October 2014, 12.
[967] EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the regions, COM(2012)286 final (in the following 'EU Strategy against Trafficking')
[968] EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, 5.
[969] "There can be no doubt that the spirit of the entire corpus of human rights law rejects, absolutely, the practices and results that are integral to the human trafficking process". Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 5.
[970] Marjan Wijers, *Prevent, Combat, Protect: Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR,UNICEF, UNODC, UN Women and ILO 2011) 91.

However, Article 18 can be criticised for following a rather narrow understanding of prevention. Not only does it insufficiently address prevention of child trafficking,[971] it also falls short of addressing the underlying causes of trafficking and exploitation from both a potential victim and trafficker perspective.[972] In relation to victims, as vulnerability is often linked with a person's lack of life perspectives for the future, Article 5 of the Council of Europe Anti-Trafficking Convention mentions the need to take social and economic measures, for example, addressing uneven social and economic development in some regions of one country, or high youth unemployment rates, or weaknesses in child protection and family assistance programmes. The same article also emphasises aspects of societal status, such as that of children and women, or the marginalisation of particular social groups, including ethnic minorities.[973] Furthermore, prevention may include programmes to be adopted by trade unions on what services could be offered to, among others, undocumented migrants or trafficked persons, irrespective of membership in a union. In relation to traffickers, environmental factors such as a strong legal framework based on rule of law and effective measures against corruption in the public sector and its direct or indirect involvement in trafficking may discourage trafficking.[974] Finally, the development of an early-warning framework for emerging new trends of trafficking, including through dedicated research and data collection, could contribute to effective preventive measures against trafficking.[975]

Likewise, the EU Anti-Trafficking Strategy 2012-2016 may be criticised for not adopting a more comprehensive approach to prevention on the strategic level. Although prevention of trafficking has been declared to be one of the five priorities until 2016, the measures foreseen are limited to research on understanding demand (reduction), an analysis of awareness-raising activities, and the establishment of a Private Sector Platform.[976] It does not contain action points, for example, on how to address root causes in countries of origin (which would need to link the internal and external dimensions of EU policies, including development cooperation), on safe migration and review of the current EU migration regime or on linkages between anti-trafficking policies and the EU labour market, social policy and poverty alleviation initiatives. No differentiation is made between measures expected to be taken in regard to countries of origin, transit or destination,[977] nor on internal trafficking (within one EU Member

[971] See the critical remarks in Marjan Wijers, *Prevent, Combat, Protect: Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR,UNICEF, UNODC, UN Women and ILO 2011) 94.

[972] See, in particular, Principles 5 (Intervention to address factors increasing risk of vulnerability) and 6 (Identifying and addressing public-sector involvement in trafficking) of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking.

[973] See, for instance, the list of recommendations in relation to working with Roma communities, as an outcome to a conference organized by GRETA in Sofia in December 2012, CoE GRETA, *3rd General report on GRETA's activities covering the period from 1 August 2012 to 31 July 2013*, para 74.

[974] From bribing border officials to labour inspectors to involvement of civilian police or military personnel of peace-keeping operations, see OHCHR, *Commentary on the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking* [2010], 117, and Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 414.

[975] Helmut Sax, 'Rights-based early warning indicator on trafficking in human beings – some conceptual considerations' in Jan van Dijk *et al.* (eds), *Counting What Counts - Tools for the validation and utilization of EU statistics on human trafficking* (Intervict 2014) 199-245.

[976] EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, 8-9.

[977] As emphasized by GRETA, "[t]he fact that a party is primarily a country of destination does not preclude it from undertaking activities to address root causes either for internal trafficking or in relation to empowering and

State). The pitfalls of the strategy are highlighted in the 2014 mid-term report by the Commission, which merely describes measures taken so far in the prevention field (mainly the launching of studies, including on the impact of prevention initiatives and on the gender dimension of THB), but does not offer further analysis. Under 'follow up' for the second half of the strategy's period, 'awareness-raising' and 'models and guidelines addressing demand reduction for all forms of exploitation' are listed as further measures.[978]

(2) Rights of protection of trafficked persons

Right to unconditional assistance and support versus the conditionality of temporary residence according to Directive 2004/81/EC

As mentioned above, Directive 2004/81/EC makes access to temporary residence – and consequently, access to assistance and support – dependent on the trafficked person's cooperation with law enforcement authorities.[979] Based on a human rights-based approach, residence and assistance for a trafficked person should not be dependent on the person's willingness to cooperate with the relevant authorities. Concerning unconditional residence, a human rights obligation of states can be established. A human rights obligation to offer trafficked persons unconditional residence can be based on two main arguments: (1) Deriving from the state obligation to protect is the obligation to ensure that trafficked persons have access to rights such as services, reparations, and protection from being re-trafficking in the country of destination. One precondition is the ability for trafficked persons to reside legally in the country. Without offering residence, states cannot fulfil their obligation to protect the rights of trafficked persons. (2) A further argument for unconditional residence derives from the state's obligation to effectively investigate and prosecute. Regulations should offer support to a trafficked person in making a statement and cooperating with the authorities. Where the regulations instead discourage a trafficked person from cooperating this can have a negative impact on investigation and prosecution. Unconditional residence would raise chances of cooperation between a trafficked person and the authorities, and consequently raise the effectiveness of investigation and prosecution.[980] Since human rights law speaks for unconditional residence, Article 8 of Directive 2004/81/EC is problematic from a human rights perspective.

In addition, the conditionality of residence according to Directive 2004/81/EC is inconsistent with the relevant provisions in Directive 2011/36/EU. Having access to residence is an indispensable prerequisite for access to assistance. A trafficked person who is not granted a residence permit is not in a position to claim assistance.[981] Assistance and support, however, should not, according to Directive 2011/36/EU, 'be made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or

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preventing re-trafficking", CoE GRETA, 4th General report on GRETA's activities covering the period from 1 August 2013 to 30 September 2014, 39.

[978] European Commission, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, SWD(2014) 318 final, 17 October 2014, 8-9, 19.

[979] Marjan Wijers, *Prevent, Combat, Protect: Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR,UNICEF, UNODC, UN Women and ILO 2011) 46.

[980] Julia Planitzer, *Trafficking in Human Beings and Human Rights* (NWV 2014) 107-108.

[981] Julia Planitzer, *Trafficking in Human Beings and Human Rights* (NWV 2014) 46.

trial.'[982] Although it seems that the directive clearly aims at providing unconditional assistance and support, it states in the same sentence that the unconditionality applies 'without prejudice to Directive 2004/81/EC.' By including this reference, access to assistance is, in fact, made conditional.

In conclusion, there is an inconsistency between Directives 2004/81/EC and 2011/36/EU. The European Commission stresses that to a certain extent the directives overlap and that Directive 2011/36/EU 'strengthens some of the provisions of Directive 2004/81/EC'[983] and that therefore both texts 'have to be read jointly.'[984] Additionally, the Commission indicates in its latest communication on the implementation of Directive 2004/81 that the system of conditional temporary residence has not proved to be very effective. The report shows that in general the possibility to issue residence permits is 'under-utilised'.[985] Residence, only during the investigations or criminal proceedings, 'might not constitute an incentive strong enough for vulnerable individuals.'[986] In addition, the report stresses that 'less strict criteria for conditionality upon cooperation […] could also contribute to assisting victims' recovery and thus fostering their cooperation.'[987] 'Less strict criteria' does not equate to unconditional residence, however, the report indicates a need to harmonise the two directives.

Granting a reflection period

Directive 2004/81/EC provides for a so-called reflection period, applicable to trafficked persons coming from non-EU countries.[988] In addition, Directive 2011/36/EU refers to the reflection period,[989] and stresses its importance by obliging Member States to provide assistance and support to trafficked persons in the period prior to criminal proceedings.[990] The reflection period should allow trafficked persons to start their recovery and put them in a position to make an informed decision about the following steps, in particular, whether or not they want to cooperate with relevant authorities. This period is not only relevant for non-EU citizens, but also for trafficked persons who are EU-nationals and are trafficked within the EU. Nevertheless, crucial for non-EU nationals is the fact that during the

[982] Article 11 (3) of Directive 2011/36/EU.
[983] European Commission, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, SWD(2014) 318 final, 17 October 2014, 4.
[984] European Commission, Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014)635, 17 October 2014, 2.
[985] European Commission, Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014)635, 17 October 2014, 10.
[986] *Ibid.*
[987] European Commission, Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014)635, 17 October 2014, 10-11.
[988] Article 6 of Directive 2004/81/EC.
[989] Recital 18 of Directive 2011/36/EU.
[990] Article 11 (1) of Directive 2011/36/EU.

reflection period a person is not supposed to be expelled.[991] Since Directive 2004/81 does not define the reflection period in detail, Member States apply it differently concerning its start and its duration. About half of the Member States provide the reflection period only upon the formal identification of a trafficked person as trafficked,[992] although the reflection period could be also granted at an earlier stage of the identification procedure. Concerning its length, the Council of Europe Convention against Trafficking sets a minimum length of 30 days,[993] which applies for almost all EU Member States today (except the Czech Republic). The maximum duration varies significantly within the EU Member States. The EU Expert Group on Trafficking in 2004 recommended a minimum period of reflection of 90 days,[994] based on empirical evidence,[995] in order to ensure that trafficked persons are able to make an informed decision and to 'exercise their rights effectively'.[996]

Right to reparations (compensation)

In general, victims of human rights violations have a right to an effective remedy and to reparations. Clearly, these rights apply to trafficking victims as well. The most widely recognised form of reparations for trafficked persons is compensation. Article 17 of Directive 2011/36/EU obliges Member States to ensure 'access to existing schemes of compensation to victims of violent crimes of intent.' This formulation is rather weak, since it fails to recall obligations to effective access to compensation for trafficked persons in general. Research shows that while EU Member States in general have victim compensation systems in place these are often difficult to access for trafficked persons. Having legal access to existing general compensation funds for victims of crimes is hence in many cases not sufficient for the specific group of trafficked persons.[997] Ensuring effective access to compensation schemes therefore requires more, for example, reviewing limiting criteria related to legal residence, restrictive concepts of victims of (violent) crimes, ensuring access to legal aid and legal assistance and raising awareness among prosecutors and judges. The means of monitoring of the implementation of Directive

[991] Article 6 (2) of Directive 2004/81/EC.

[992] European Commission, Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014)635, 17 October 2014, 5.

[993] Article 13 of CoE Convention against Trafficking.

[994] European Commission, DG Justice, Freedom and Security, Report of the Experts Group on Trafficking in Human Beings, 22 December 2004, 13, Marjan Wijers, *Prevent, Combat, Protect: Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR,UNICEF, UNODC, UN Women and ILO 2011) 44.

[995] Cathy Zimmerman *et al.*, *Stolen Smiles: The physical and psychological health consequences of women and adolescents trafficked in Europe* (The London School of Hygiene & Tropical Medicine 2006) 113.

[996] Recital 18 of Directive 2011/36/EU.

[997] Julia Planitzer, *Trafficking in Human Beings and Human Rights* (NWV 2014) 105. Conny Rijken and Alice Bosma, *A review of the implementation of the EU strategy on human trafficking by EU members [2014]* Deliverable D1.1. TRACE-project, <http://trace-project.eu/documents/> accessed 9 September 2015, 99. See, for instance, specific country studies elaborated within the initiative 'Comp.ACT – European Action for Compensation for Trafficked Persons' on gaps and good practices concerning access to compensation for trafficked persons: Janice Lam and Klara Skrivankova, *Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK* (2008) on United Kingdom; Emilia Paunova and Natasha Dobreva, *The Right to Compensation for Victims of Human Trafficking in Bulgaria: Country Study – Comp.ACT Project* (2011) on Bulgaria; Women's Link Worldwide, *Access to Redress Mechanisms in Spain* (2011) on Spain.

2011/36/EU seem therefore to be too limited since it focuses on legal amendments and does not assess whether access to compensation is ensured in practice.

(3) Investigation, prosecution and criminal law/procedural law

The right of trafficked persons not to be punished

The former UN Special Rapporteur on Trafficking has stated that 'criminalisation and/or detention of victims of trafficking is incompatible with a rights-based approach to trafficking because it […] denies them the rights to which they are entitled.'[998] The term 'non-punishment' encompasses the issue of non-criminalisation of trafficked persons for offences related to trafficking and the non-detention of trafficked persons. Already present in 2002 in the legally non-binding UN Recommended Principles and Guidelines on Human Rights and Human Trafficking,[999] the so-called 'non-punishment clause' was for the first time established as a treaty-based standard in the Council of Europe Convention against Trafficking in Article 26. GRETA, that is, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings, interprets the non-punishment clause as 'a positive obligation on Parties to adopt measures that specifically deal with the non-liability of victims of trafficking.'[1000] Consequently, non-punishment creates a *legal right* for victims of trafficking and should be safeguarded in domestic law.[1001]

There is a provision on non-punishment included in the EU Directive 2011/36/EU.[1002] This provision further develops the standard of the Council of Europe Convention against Trafficking and explicitly includes the obligation not to prosecute trafficked persons 'for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to' trafficking (Article 8). Nevertheless, the provision also has weaknesses: (1) Article 8 establishes that Member States are supposed to protect trafficked persons from prosecution or penalisation by taking 'necessary measures' 'in accordance with the basic principles of their legal systems'. Harmonised and effective implementation of this provision is not ensured, which might lead to prosecution of victims of trafficking

[998] UN, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ezeilo* UN Doc A/HRC/20/18 (2012) para. 25.
[999] UN Office of the High Commissioner for Human Rights, Recommended principles and guidelines on human rights and human trafficking, E/2002/68/Add.1 (OHCHR, Recommended principles and guidelines).
[1000] Council of Europe, Committee of the Parties Council of Europe Convention on Action against Trafficking in Human Beings, *Meeting Report of the 7th meeting of the Committee of the Parties* (Strasbourg, 30 January 2011), THB-CP(2012)RAP7 (Strasbourg, 9 February 2012), Appendix II, para. 7, cited after OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking, 2013, 12.
[1001] OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013, para. 16. At the same time, as Gallagher has noted, this concept does not provide "blanket immunity" to trafficking victims, but only applies to trafficking victim-related offences, Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 288.
[1002] Article 8 and Recital 14 of Directive 2011/36/EU.

in some Member States.[1003] (2) The provision refers to penalties for the involvement in criminal activities. However, it would be important that the victims are not only protected against criminal penalties, but also administrative penalties.[1004] Problematically, the term 'necessary measures' is vague and does not explicitly exclude administrative penalties. (3) The right not to be punished should also include protection from being detained for trafficking status-related offences. Article 8 does not include a reference to non-detention in general, which would encompass, for instance, detention in closed shelters or other welfare institutions.[1005]

Risk-assessment prior to the return of trafficked persons

As outlined above, Directive 2004/81/EC provides for residence as long as it is necessary for the investigation or for criminal proceedings.[1006] The return and the conditions of the return of a trafficked person, or a person who has been presumed to have been trafficked, are not regulated in the Directive. Nevertheless, the Council of Europe Convention against Trafficking does require the safe return of a trafficked person, which must take into account the rights, safety and dignity of the person.[1007] This implies that prior to the return a risk-assessment should be conducted in order to make sure that the person is not, for instance, re-trafficked upon return.[1008]

Within the EU, safe return and conducting risk-assessments prior to return are becoming more important. In 2005, the EU Expert Group recommended that European standards for mechanisms to 'carry out risk assessment prior to any return of a victim, procedures to ensure the dignity, safety and privacy of the trafficked person prior, during and upon return' should be established.[1009] The 2009 October Declaration on Trafficking in Human Beings does not explicitly mention risk-assessments, but recommends that programmes to avoid re-victimisation should be established.[1010] The 2012 EU Strategy against Trafficking states that guidelines regarding national and EU transnational referral mechanisms covering safe return should be developed between 2012 and 2015. The mid-term report on the implementation of the strategy does not explain the current status of development and refers to

[1003] Marjan Wijers, *Prevent, Combat, Protect: Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR,UNICEF, UNODC, UN Women and ILO 2011) 35.
[1004] Marjan Wijers, *Prevent, Combat, Protect: Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR,UNICEF, UNODC, UN Women and ILO 2011) 40.
[1005] Marjan Wijers, *Prevent, Combat, Protect: Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR,UNICEF, UNODC, UN Women and ILO 2011) 40. The corresponding non-punishment clause of Article 26 CoE Convention is not clear on this matter either, as it speaks only of the "possibility of not imposing penalties on victims for their involvement in lawful activities, to the extent that they have been compelled to do so', without mentioning detention. See also Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 288.
[1006] Article 8 (1) of Directive 2004/81/EC.
[1007] Article 16 (2) of CoE Convention against Trafficking.
[1008] Julia Planitzer, *Trafficking in Human Beings and Human Rights* (NWV 2014) 113-114.
[1009] European Union Group of Experts on Trafficking in Human Beings, *Opinion in connection with the conference 'Tackling Human Trafficking: Policy and Best Practices in Europe' and its related documents (2005)*, chapter II, 2.
[1010] 2009 October Declaration on Trafficking in Human Beings: Towards global EU Action against Trafficking in Human Beings, para. 15.

projects funded concerning the national referral mechanism.[1011] In addition, child protection systems should be strengthened in order to prevent children from being re-trafficked in cases of return.[1012]

In practice, risk assessments prior to the return of trafficked persons are not always made,[1013] although an obligation to conduct such assessments exists. Nevertheless, it is hoped that Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime will fill this implementation gap.[1014] The directive obliges Member States to conduct individual assessments to identify a victim's specific protection needs.[1015] However, it remains to be seen whether the directive is interpreted in a manner that ensures individualised risk-assessments prior to the return of every trafficked person.

(4) Conclusion and linkage to overreaching issues

Co-existence of parallel legal regimes in Europe

One significant feature of the debate about trafficking in human beings on the European level is the co-existence of two parallel legally binding standards, the EU's 2011 Anti-Trafficking Directive and the 2005 Council of Europe Convention against Trafficking, to which all but one EU Member State are States Parties.[1016] An effective harmonisation and implementation of the two European core instruments concerning THB is made more difficult by, on one hand, the fact that all key concepts in the instruments are not defined, and, on the other hand, the broad discretion given to EU Member States on how to deal with these instruments on the domestic level.

One of the three obligatory requirements for temporary residence for trafficked persons from non-EU countries is the cooperation of the trafficked person with the relevant authorities.[1017] Nevertheless, some Member States do not require co-operation, whilst others have gone so far as to introduce additional requirements. Some states allow exceptions based on the trafficked person's personal

[1011] Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings (17 October 2014, COM(2014)635 final), 6.
[1012] EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, Priority A, Action 1 and Action 3.
[1013] A study showed that only 3 EU Member States are conducting risk-assessments on a routinely basis. E-notes, *Report on the implementation of anti-trafficking policies and interventions in the 27 EU Member States from a human rights perspective* (2008 and 2009) 110.
[1014] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.
[1015] OSCE and ODIHR, *Guiding Principles on Human Rights in the Return of Trafficked Persons* (OSCE 2014) 42-43.
[1016] It is against this background that during the drafting of the CoE Convention the EU insisted on a "disconnection clause" (Article 40 (3) of the Convention) giving preference to EU legislation for EU MS on matters of the same subject, which nevertheless leaves room for interpretation: "Without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties, Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case."
[1017] Article 8 (1) b of Directive 2004/81/EC.

circumstances (as made a second option under Article 14 (1) (a) of the Convention), and other states have introduced additional requirements, such as proof of accommodation or payment of a fee.[1018] Vague terms such as 'necessary measures' in order to ensure non-punishment[1019] are often connected to differences in implementation. Assistance and support of trafficked persons should be ensured before, during, and for an 'appropriate period of time after the conclusion of criminal proceedings.'[1020] This provision is not only inconsistent with Directive 2004/81/EC, it also remains unclear how long such an 'appropriate period' should last, which leads and will lead to different understandings in the Member States. The phrase 'where appropriate and possible' is used concerning assistance for the family of a trafficked child, which might lead to incoherent implementation.

The Council of Europe Convention against Trafficking can be seen as a tool to fill gaps in the EU legislative framework and provide EU Member States with standards based on human rights. Additionally, the Convention allows for further clarification of, for instance, minimum standards in case these are not given explicitly in the EU legislative framework. For example, the minimum duration of the reflection period is not defined in the EU instruments, but in the Council of Europe Convention against Trafficking. However, a criticised 'disconnection clause' in Article 40(3) of the Council of Europe Convention against Trafficking allows Member States to apply 'Community and European Union rules' in their mutual relations. It has been feared that this clause would lead to a dilution of the higher Council of Europe standards among EU Member States.[1021] Significantly, however, an Explanatory Report of the Council of Europe Convention against Trafficking refers to a joint Declaration of the EU and its Member States upon ratification, explicitly stating that the 'clause is not aimed at reducing the rights of non-EU Parties.'[1022] It therefore seems that the disconnection clause is not used to dilute standards, but rather to shed light on unclear or vague EU standards.

Generally, the European Commission urges all Member States to ratify the Council of Europe Convention against Trafficking, with Czech Republic being the only Member State left to do so, in order to increase coordination and coherency in the work against trafficking.[1023]

Lack of coherent monitoring of implementation and data collection

Independent and external monitoring and evaluation of policies against THB remain rare.[1024] The existing monitoring of the transposition of relevant EU directives, in which reports or information are requested

[1018] European Commission, Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014)635, 17 October 2014, 8.
[1019] Article 8 of Directive 2011/36/EU.
[1020] Article 11 of Directive 2011/36/EU.
[1021] Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 112.
[1022] Council of Europe, *Explanatory report of the Council of Europe Convention against Trafficking*, para. 375.
[1023] EU Strategy against Trafficking, 4.
[1024] Julia Planitzer, 'GRETA's First Years of Work: Review of the monitoring of implementation of the Council of Europe Convention on Action against Trafficking in Human Beings' [2012] *Anti-Trafficking Review* 1, 33.

from the Member States,[1025] is insufficiently developed. There is no dedicated, independent monitoring body comparable to the monitoring procedures of the core UN human rights treaties. Neither FRA (research function) nor the EU THB Experts Group (advisory function) has this responsibility. Consequently, reporting about measures by Member States to implement directives is based on information delivered by Member States. The reports have shown inconsistent levels of implementation of standards across Member States, as discussed above.

Data collection concerning THB is still not coherent and systematised within the EU. Several different data collection systems exist, both within the EU (such as FRA, Eurostat, Europol, Frontex) and outside (UNODC, IOM, ILO, Organization for Security and Co-operation in Europe (OSCE), Council of the Baltic Sea States, among others).[1026] In addition, at the national level, national rapporteurs or equivalent mechanisms gather statistics. This multitude of data collectors makes it challenging to gather data in a coherent way within the EU. In the EU Strategy against Trafficking an EU-wide system for the collection and publication of gender- and age-disaggregated data has been foreseen but this has not really materialised;[1027] rather, the ATC now regularly exchanges data with the national rapporteurs or equivalent mechanism in order to develop a commonly agreed reporting template.[1028] Eurostat has published an extensive report on available data, but itself stresses that more comprehensive and comparable data would be needed. In the Eurostat report it is noted that not all Member States have been able to provide all relevant data.[1029] Additionally, comparisons between countries are difficult due to diverging definitions (for example, on what are presumed/registered/identified victims of trafficking), counting rules and different levels of available disaggregation. From a data reliability perspective, it would be important that the national rapporteurs or equivalent mechanisms were independent and that they would supervise the collection of statistics so that, among other concerns, data protection is ensured.[1030]

Increasingly, the existing cross-country information gaps in Europe are filled by the Council of Europe and its anti-trafficking monitoring mechanism employed by GRETA (together with Recommendations from the Committee of the Parties). Established according to Chapter VII of the Council of Europe

[1025] See Article 16 (1) of Directive 2004/81/EC.

[1026] Jan van Dijk *et al*., *Counting what counts; Tools for the validation and utilization of EU statistics on human trafficking* (Intervict 2014); KOK/datACT/Data Protection in Anti-Trafficking Action, '*Herausforderungen des Datenschutzes in der Politik gegen Menschenhandel – Ein Praxisleitfaden*' (2015) 74 et seq. Also see Council of the Baltic Sea States, 'TF against Trafficking in Human Beings' <http://www.cbss.org/safe-secure-region/tfthb/> accessed 12 September 2015, OSCE, 'Combating trafficking in human beings' <http://www.osce.org/secretariat/trafficking> accessed 12 September 2015, UN, 'Special Rapporteur on trafficking in persons, especially women and children' <http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx> accessed 12 September 2015, and UNODC, 'UNODC on human trafficking and migrant smuggling' <http://www.unodc.org/unodc/human-trafficking/> accessed 12 September 2015.

[1027] EU Strategy against Trafficking, Priority E, EU-wide system for the collection and publication of gender- and age-disaggregated data until 2012, 20.

[1028] See Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings (17 October 2014, COM(2014)635 final), 12.

[1029] Eurostat (Statistical working papers), *Trafficking in human beings* (2014) 10.

[1030] Jan van Dijk *et al*., *Counting what counts; Tools for the validation and utilization of EU statistics on human trafficking* (Intervict 2014) 83-84.

Convention against Trafficking, it assesses the implementation of the Convention by States Parties, based on a variety of sources (mainly Replies to the GRETA Questionnaire, follow-up Reports to the Committee of the Parties' Recommendations, NGO reports, international bodies' reports) and country visits.[1031] As of April 2015, GRETA has published reports and recommendations on 35 States Parties, including 21 EU Member States.[1032]

Nevertheless, the roles and relationship between the EU and the Council of Europe concerning data collection, reporting and evaluation need to be further defined and harmonised. The EU Strategy against Trafficking aims at establishing 'effective monitoring and evaluation procedures that do not create repetitive reporting mechanisms',[1033] but the mid-term report on the implementation of the strategy remains silent concerning any progress on this point. The exchange between the EU and the Council of Europe should be continued in order to address 'potential complementarities and avoiding monitoring fatigue and unnecessary administrative burden.'[1034]

Lack of protection of rights of persons who are trafficked within the EU

Available statistical data show that the majority of trafficked persons in the EU between 2010 and 2012 were EU citizens. 65% of all trafficked persons in the EU were trafficked within the EU.[1035] Research highlighted that EU citizens trafficked within the EU face several obstacles in having access to their rights. Directive 2004/81/EC regulates access to residence for trafficked persons coming from non-EU countries, whereas Directive 2011/36/EU is applicable to both EU- and non-EU citizens. Other EU instruments are in place, which should support victims of crime and facilitate procedures within the EU. However, as was noted above, victims of trafficking often have difficulties in claiming these rights.

In 2008 and 2009 a study was published that showed that in some Member States it was not possible to provide the same level of protection and assistance for trafficked persons from other EU countries as for trafficked persons from countries outside the EU. Still, even when the government did not earmark funds for the assistance of trafficked EU citizens, NGOs in Germany and Spain were able to support them.[1036] However, Directive 2011/36/EU should be implemented so that assistance is provided to trafficked EU citizens to the same extent as to trafficked persons from non-EU countries since it applies to both types of victims of trafficking. However, a recent study on severe forms of labour exploitation in

[1031] See Articles 36-38 of CoE Convention against Trafficking.
[1032] See the overview, with relevant links on GRETA's Website, https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Monitoring/Country_Reports_en.asp#TopOfPage.
[1033] EU Strategy against Trafficking, 'Evaluation and Monitoring', 15-16.
[1034] CoE GRETA, *3rd General report on GRETA's activities covering the period from 1 August 2012 to 31 July 2013*, para. 51. On GRETA's commitment to cooperation with the EU, see CoE GRETA, *4th General report on GRETA's activities covering the period from 1 August 2013 to 30 September 2014*, 26-27.
[1035] Eurostat (Statistical working papers), *Trafficking in human beings* (2014) 41. The report uses the term 'registered victim' which encompasses both, identified and presumed trafficked persons, see ibid. 22.
[1036] E-notes, *Report on the implementation of anti-trafficking policies and interventions in the 27 EU Member States from a human rights perspective* (2008 and 2009) 96. See also FRA, Severe labour exploitation: workers moving within or into the European Union [2015] 81.

the EU shows that, for example in the Netherlands, support for EU nationals is more difficult to achieve than for 'migrants in an irregular situation.'[1037]

As discussed above, access to compensation for trafficked persons, both through state compensation and from the trafficker, remains unsatisfactory. Research shows that in six (out of 16) countries trafficked persons coming from the EU and outside the EU faced difficulties in access to compensation, also in relation to nationals of the country concerned.[1038] Within the EU, the situation should have been improved through Directive 2004/80/EC relating to compensation for crime victims. This directive supports, for instance, access to compensation in the country of origin when the crime took place in a different EU Member State. This situation is highly relevant for trafficked persons within the EU, since many victims of trafficking return to their country of origin and would be able to pursue their compensation claims there. Nevertheless, practice shows that there are difficulties[1039] and that the schemes established are used to a limited extent only. Further, victims face various obstacles, ranging from language barriers and lack of information to lack of access to legal advice.[1040] Consequently, the added value of the directive for trafficked persons has remained low.

Further difficulties for trafficked persons from the EU arise concerning the return to the country of origin. Existing return programmes presuppose that the person concerned has no valid residence title. This would usually not apply to EU citizens trafficked to another EU country. This is one out of several factors which led to the establishment of an NGO-led parallel system of organising the return.[1041]

Lack of cross-border cooperation on victim protection, especially for child victims of trafficking

The legal and policy approaches to trafficking in human beings are still affected by stereotypical and misguided perceptions about the phenomenon. As discussed in the introduction, part of the difficulties for a comprehensive, human rights-based response to trafficking stems from the long-standing linkages between cross-border trafficking of women for sexual exploitation, as well as associations with organised crime, migration and protection of national borders. However, not only has the definition been broadened, the trafficking landscape has also diversified significantly. On the one hand, as shown above, most of the trafficked persons in the EU are now EU citizens, with certain rights such as free movement of persons within the area. At the same time, borders still count, as the current tragedy in 2015 in the Mediterranean Sea reminds us, while massive investments on guarding the external borders of the EU continue to be made. During such discussions politicians and journalists alike often have difficulty distinguishing between migration, smuggling of persons, persons seeking asylum/international

[1037] FRA, Severe labour exploitation: workers moving within or into the European Union [2015] 81.
[1038] E-notes, *Report on the implementation of anti-trafficking policies and interventions in the 27 EU member States from a human rights perspective* (2008 and 2009) 104.
[1039] FRA, Severe labour exploitation: workers moving within or into the European Union [2015] 81.
[1040] Commission of the European Communities, Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Directive 2004/80/EC relating to compensation to crime victims, COM(2009)170 final, 20 April 2009, 6.
[1041] Julia Planitzer, *Trafficking in Human Beings and Human Rights* (NWV 2014) 172-173 and Julia Planitzer, Menschenhandel und die Rückkehr gehandelter Personen: Schutz der Rechte, der Sicherheit und der Würde bei der Rückkehr in der Praxis, Presentation held on 23 September 2014.

protection and trafficking victims. In the anti-trafficking context, a 'securitisation' – as also observed in other areas of EU policy-making[1042] – can be observed. And even for those who actually are EU citizens, uncertainty about their future perspectives and about access to rights may continue when they are victims of trafficking: for example, some EU Member States do grant a recovery and reflection period to EU/EEA nationals (including protection from any expulsion), while others do not, and voluntary return programmes may be limited to third-country nationals only, and not extend to EU citizens. In this regard, GRETA has welcomed the granting of the recovery and reflection period to EU/EEA nationals.[1043]

The rights to stay and to safe return are particularly pertinent issues in the case of children, especially when unaccompanied/separated from their parents or other legal representatives. First of all, challenges may arise in establishing guardianship under state authority in the countries of transit/destination.[1044] Secondly, many EU Member States still lack dedicated national referral mechanisms in order to swiftly identify child victims of trafficking and refer them to appropriate assistance. Thirdly, a process of best interests determination should take place, which should include family tracing and an assessment of future perspectives for the child and identifying durable solutions, such as resettlement in a third country, stay in the destination country with integration support, or return to the country of origin. In all of these considerations, cross-border cooperation is required between the legal guardian/child protection authority in the destination country and its counterpart in the country of origin. This is to identify the parents of the child as holders of parental authority. At the same time, best interest determinations must also include an assessment of potential risks of re-trafficking, i.e. that the child may be subjected to exploitation again after returning home, such as in cases where parents have themselves been involved in the trafficking process. For this kind of complex assessment cross-border cooperation between child protection authorities is again necessary. Current practice[1045] and research[1046] shows, however, that systematic instruments and processes as well as quality standards for such cross-border cooperation are widely missing. There is a striking imbalance between EU cooperation especially in the AFSJ matters on cross-border cooperation in police and judicial matters on the one hand, and cross-border cooperation on matters related to protection of victims' rights, such as family tracing, voluntary and safe return, especially as far as children are concerned, and compensation on the other.

[1042] See Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014], <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 8 May 2015.

[1043] CoE GRETA, *4th General report on GRETA's activities covering the period from 1 August 2013 to 30 September 2014*, 46-47.

[1044] FRA, *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking* [2014].

[1045] On the difficulties in relation to the return of children, for instance, from France to Romania since 2003, including the conclusion of bilateral agreements, setting up of contact groups, establishing cooperation with judges and NGOs, see CoE GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France, GRETA(2012)16, 28 January 2013, para 195-198.

[1046] See, for instance, the findings of the EU-funded ARECHIVIC project, Helmut Sax, *Brochure on Good Practices in the assistance and (re-)integration of child victims of trafficking* [2013], <http://childrentrafficking.eu/wp-content/uploads/2014/04/WS3-Comparative-EN.pdf> accessed 9 September 2015, 17,

3. The external dimension

a) Development of the external dimension of the EU action

The Action Oriented Paper of 2009 on strengthening the EU external dimension on action against trafficking in human beings (AOP)[1047] can be seen as a major starting instrument concerning the EU's external THB action. The AOP aims to coordinate the actions taken by the EU and the Member States and suggests measures which are 'going beyond the external dimension of JHA'.[1048] The AOP suggests that measures should be taken to improve donor coordination, to identify priority countries, to set up specific Anti-THB Partnerships or specific agreements between the EU and key third countries or regions at international level and preventive measures such as training for international civilian police missions, diplomats and liaison officers. The AOP also advocates the building of 'Swift Action Teams' established by Member States, Europol and Frontex which can be deployed to non-EU States. They should assist 'third countries in identifying victims of THB at airports before they board.'[1049] The human rights-based approach states that measures against THB should not have an adverse impact on the rights and dignity of persons, in particular migrants.[1050] The measure suggested in the AOP, however, could potentially impact negatively on the rights of migrants. It was therefore criticised, as it should rescue 'passive migrants even before they enter the territory of the country of destination.'[1051]

In order to avoid overlaps and duplication, the monitoring of implementing the AOP has been integrated into the implementation reports of the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016.[1052] GAMM defines preventing and reducing irregular migration and THB as one of its four pillars.[1053] The EU Strategy against Trafficking also includes actions for better coordination of EU external policy activities and it refers to both the AOP and GAMM.

[1047] Council of the European Union, Implementing the Strategy for the External Dimension of Justice and Home Affairs: Global Freedom, Security and Justice – Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings, 11250/5/09 REV 5, 19 November 2009 (in the follwing 'AOP').

[1048] AOP, V. Recommendations, 1 ii).

[1049] AOP, V. Recommendations, 3 iii). Two of the measures mentioned in the AOP are also included in the later EU Action Plan on Human Rights and Democracy (2012-2014), Action 14 (identification of priority countries and regions for future partnerships in the area of the fight against human trafficking and training of diplomatic and consular staff concerning human trafficking.

[1050] UN Recommended Guidelines and Principles, E/2002/68/Add.1, Guideline 1, para. 1.

[1051] Baerbel Heide Uhl, 'Lost in implementation? Human rights rhetoric and violations - a critical review of current European anti-trafficking policies' (2010) Security and Human Rights 2, 48. The author shows that in anti-trafficking policies migrants, in particular women, are stigmatized as passive, incapable of decision-making, and in need of protection.

[1052] Council of the European Union, Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings – second implementation report, 13661/3/12, 3 December 2012, 1.

[1053] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility, COM(2011)743 final, 18 November 2011, 7.

Between the adoption of the AOP and the EU Strategy against Trafficking, the Communication 'Human rights and democracy at the heart of EU external action – towards a more effective approach'[1054] reaffirmed the necessity of coherent measures in the EU's external action in the AFSJ, in particular concerning THB. Trafficked persons are categorised as 'vulnerable migrants' who must be 'empowered'. Additionally, the EU should 'continue to prioritise THB in its external action from a human rights approach.' This should have an impact on funding, training and information exchange, and measures will go – as also mentioned in the AOP – beyond the 'external dimension of Freedom, Security and Justice.'[1055] What is remarkable is the fact that the prioritisation of measures against THB from a human rights approach was not fully implemented in the later EU Strategy against Trafficking and its measures on EU External Policy Activities. Only one measure is linked to human rights: the inclusion of THB under the human rights clauses in the EU's agreements with third countries, including the free trade agreements.[1056]

The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 includes the following actions concerning external action: (1) possible establishment of cooperation mechanisms in EU delegations in priority third countries and regions; (2) strengthening and formalisation partnerships with international organisations; (3) inclusion of THB in the human rights clauses in the EU's agreements with third countries, including the free trade agreements; and (4) funding of projects on THB in third countries and regions.[1057] An information package with EU policies and projects funded should support EU delegations to enhance cooperation in their host countries.[1058] Concerning GAMM, it is stated that trafficking is 'systematically addressed in all relevant agreements and partnerships with non-EU countries and in all EU dialogues on migration and mobility.' However, information on how and to which extent trafficking is included in human rights clauses is not provided.[1059]

Concerning children, it is necessary to mention the 2008 Communication 'A Special Place for Children in EU External Action'[1060] and the accompanying Action Plan.[1061] The EU's external efforts against child trafficking should be based on a local analysis of causes of child trafficking, identify specific child vulnerabilities and 'promote the empowerment of children.'[1062] For example, in Southern Africa birth registration and the development of legislation to prevent and prosecute child trafficking should be

[1054] Joint Communication 'Human rights and Democracy at the Heart of EU external action–Towards a more Effective Approach', COM (2011)886, at 10, 12 December 2011.
[1055] Joint Communication 'Human rights and Democracy at the Heart of EU external action–Towards a more Effective Approach', 14.
[1056] EU Strategy against Trafficking, 11-12.
[1057] EU Strategy against Trafficking, 19.
[1058] Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings (17 October 2014, COM(2014)635 final), 14.
[1059] See Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings (17 October 2014, COM(2014)635 final), 16.
[1060] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Special Place for Children in EU External Action, COM(2008)55 final, 5 February 2008.
[1061] European Commission, Commission Staff Working Document, The European Union's Action Plan on Children's Rights in External Action, SEC(2008)136, 5 February 2008.
[1062] European Commission, Commission Staff Working Document, The European Union's Action Plan on Children's Rights in External Action, SEC(2008)136, 5 February 2008,8.

supported.[1063] It is worth noting that the 2008 Communication on children, which also addressed a child rights-based approach, was drafted separately from the later 2011 EU Agenda for the Rights of the Child,[1064] which may be taken as an indication of the difficulties in aligning internal and external policy developments even within the European Commission. EU Guidelines for the Promotion and Protection of the Rights of the Child have been adopted by the Council in December 2007 – they shall 'serve as a solid regional framework for the EU's work to promote and protect human rights in the EU's overall external human rights policy, also regarding children's rights (para 3).'[1065] Trafficking of children is, however, only addressed by way of example for 'specific issues' related to children and as one form of violence against children.[1066] Trafficking in children is therefore in these Guidelines not addressed in a systematic way.

b) Human rights issues in the external dimension

(1) Policies on border checks and trafficking in human beings

The UN Special Rapporteur on the human rights of migrants, François Crépeau, has held that, in general, migration and border control within the EU 'have been increasingly integrated into security frameworks that emphasise policing, defence and criminality over a rights-based approach.'[1067] Steps had been taken in order to react to the criticism of the work of Frontex and its lack of compliance with human rights standards,[1068] which extends also to the area of trafficking of human beings. For some time now activities of Frontex, such as joint operations, have been criticised for prioritising the prevention of irregular migration and return of irregular migrants, while neglecting, for instance, the identification and protection of trafficked persons. Trafficked persons whose entry into the EU is denied might be returned to their traffickers and trafficked again.[1069] In response, Frontex has started to implement several measures concerning THB. For example, a training manual for border guards was developed which

[1063] European Commission, Commission Staff Working Document, The European Union's Action Plan on Children's Rights in External Action, SEC(2008)136, 5 February 2008, 8.
[1064] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child [2011] COM(2011) 60 final.
[1065] EU Guidelines on the Rights of the Child [2007], <http://eeas.europa.eu/human_rights/guidelines/child/index_en.htm> accessed 9 September 2015.
[1066] EU Guidelines on the Rights of the Child [2007], 2 and 16.
[1067] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, UN Doc. A/HRC/23/46, 24 April 2013, para. 42.
[1068] See for instance Margit Ammer and Joachim Stern, 'Human Rights Challenges in the Areas of Asylum and Immigration: EU Policies and Perspective' [2011] 16(1) Austrian Review of International and European Law, 196. See also on the developments within Frontex, FRA, *Fundamental rights at Europe's southern sea borders* [2013] 123.
[1069] Annemarie Middelburg and C. R. J. J. Rijken, 'The EU Legal Framework on Combating THB for Labour Exploitation' in C. R. J. J. Rijken (ed) *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011), 384.

should 'raise awareness of human trafficking as a serious crime and human rights violation.'[1070] Trafficking is now also included in the Frontex Fundamental Rights Training for Border Guards.[1071] However, Frontex still struggles with identifying those migrants, who are 'in need of protection, when they might not come forward explicitly.'[1072] At the border, 'victims themselves are often not aware of their fate', which would make identification challenging.[1073] In addition, only a minority (35%) of identified trafficked persons in the EU came from non-EU countries between 2010 and 2012.[1074] The reports of the Frontex Risk Analysis Network (FRAN)[1075] also tackle THB, but it remains unclear which role Frontex itself plays concerning the identification of trafficked persons, and the reports appear to use language which displays difficulties in distinguishing between trafficking and smuggling of persons.[1076] Evidently, THB is seen as an issue of irregular migration, linked within smuggling.[1077]

(2) EU GAMM and trafficking in human beings

The second pillar of GAMM aims specifically at preventing and reducing irregular migration and trafficking in human beings.[1078] An analysis of the priorities for implementation under this pillar triggers some criticism. GAMM's purportedly comprehensive approach, consisting of better controlling irregular migration by using restrictive tools and preventing migration by tackling root causes appears unbalanced, since a clear priority is given to the repressive aspect.[1079] GAMM's priorities concerning THB are, for instance, strengthening integrated border management, improving document security, and the strategic use of new possibilities for Frontex. These measures should apparently be counter-balanced by a priority concerning 'initiatives to provide better protection for and empower victims of trafficking in human beings.'[1080] Unfortunately, what kind of initiatives this would include remains unclear and unspecified, and GAMM's implementation report does not shed further light on this issue.[1081] In general,

[1070] See Frontex, 'Combating human trafficking at the border - training for EU Border Guards' <http://frontex.europa.eu/feature-stories/combating-human-trafficking-at-the-border-training-for-eu-border-guards-rRzpfl> accessed 9 September 2015.

[1071] Frontex, *Fundamental Rights Training for Border Guards, Trainers' Manual* [2013]. See also concerning activities of Frontex: Second Activity Report following the Joint Statement of the Heads of the EU Justice and Home Affairs Agencies, in European Commission, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, SWD(2014) 318 final, 17 October 2014, 4.

[1072] Frontex, *Frontex report to the Office of the High Commissioner for Human Rights on its activities aimed at protecting migrants at international borders, including migrant children*, 9 June 2014, para. 36.

[1073] Frontex, *Annual Risk Analysis 2015*, April 2015, 35.

[1074] Frontex, *Annual Risk Analysis 2015*, April 2015, 36.

[1075] The Fran Quarterly Reports are published for information exchange and offer a periodic update concerning irregular migration at EU level, see Frontex, *Fran Quarterly*, Quarter 4, October-December 2014, 7.

[1076] Frontex, *Fran Quarterly*, Quarter 3, July-September 2014, 19.

[1077] See for instance, Frontex, *Frontex Programme of Work 2015*, 18 December 2014, 46 and 34.

[1078] See above Section III.B.3.a on development of the external dimension of the EU action.

[1079] Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (Palgrave MacMillan 2014) 224-235.

[1080] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility, COM(2011)743 final, 18 November 2011, 17.

[1081] European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Report on the implementation of the Global Approach to Migration and Mobility 2012-2013*, COM(2014)96 final, 21 February 2015.

GAMM defines as an overarching principle for all four pillars that the Union should strengthen the respect for fundamental rights and human rights of migrants 'in source, transit and destination countries alike.'[1082] An assessment of implementation shows, however, that with respect to migrants' human rights the focus lies merely on access to healthcare – further measures are not mentioned in the report.[1083]

MPs play a crucial role in the implementation of GAMM. Common Agendas for Migration and Mobility (CAMM) can be seen as a pre-stage to MPs, which form a framework of advanced cooperation and can be upgraded to a MP at a later stage.[1084] An analysis of the content of MPs concerning THB shows that there is a strong focus on border control and management, improving security of identity and travel documents, and facilitating return and readmission. The GAMM's priority of protection and empowerment of trafficked persons is difficult to trace in the text of MP Joint Declarations.[1085] THB clearly forms an issue within the MPs, but in the context of illegal migration only. Consequently, THB is exclusively seen as an issue of illegal migration. Some documents include a reference to measures concerning assistance and protection of victims and victims who return. However, other joint declarations do not include any reference to assistance for trafficked persons (or it plays a minor role only). For example, the MP between the EU and the Republic of Moldova includes a reference to assistance to 'victims of smuggling', besides other measures of horizontal support such as information exchange and technical assistance concerning document security. Further major areas of activities are border management, capacity building and document security.[1086] The CAMM between Nigeria and the EU[1087] also strongly focuses on data collection, capacity building in border management, border control, improving travel document security and on 'increasing speed' of the return of 'irregular migrants' – irregular migration and trafficking form an area of priority. Connecting irregular migration with THB blurs the lines between 'irregular migrant' and 'victim'. Only one among the twelve measures focuses

[1082] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, The Global Approach to Migration and Mobility, COM(2011)743 final, 18 November 2011, 7.

[1083] European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM(2014)96 final, 21 February 2015, 17-18.

[1084] Katharina Eisele, *The External Dimension of the EU's Migration Policy – Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill 2014) 125.

[1085] Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States (3 June 2013, 6139/13), concerning the Mobility Partnership between EU and Tunisia see European Commission, Press release on 3 March 2014 <http://europa.eu/rapid/press-release_IP-14-208_en.htm>, Council of European Union, Joint Declaration on a Mobility Partnership between the European Union and Armenia (6 October 2011, 14963/11), Council of European Union, Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde (21 May 2008, 9460/08), Joint Declaration on a Mobility Partnership between the European Union and Georgia (30 November 2009, 2979th Justice and Home Affairs Council meeting), Joint Declaration on a Mobility Partnership between the European Union and the Republic of Moldova (21 May 2008, 9460/08).

[1086] Joint Declaration on a Mobility Partnership between the European Union and the Republic of Moldova (21 May 2008, 9460/08), 16-17.

[1087] Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States, (16 March 2015).

specifically on trafficked persons, yet Nigerian authorities should be supported in order to improve protection of and support to trafficked persons and their reintegration.[1088]

Generally, accelerated readmission procedures, including readmission agreements, can lead to violations of rights of trafficked persons and may infringe the principle of *non-refoulement*. The trafficked person may be denied access to asylum procedures at the border.[1089] Readmission agreements are typically assessed as not having included adequate safeguards on behalf of trafficked persons in order make sure that they are not returned to situations of risk of harm. At the same time, it is shown that also countries of origin 'have no choice other than to accept the return of their nationals without the conduct of appropriate risk assessment in individual cases.'[1090] The evaluation report of EU Readmission Agreements clearly states that readmissions are only allowed in case it can be ensured that no violation of *non-refoulement* occurs (non-affection clause).[1091] However, the evaluation report also shows that despite the legal framework, the actual application of the principle gives rise to concern.[1092] Concerning human rights, the report therefore identifies a clear scope for improvements.[1093] The return of trafficked persons without risk assessments can lead to re-trafficking.[1094] Consequently, measures such as the implementation of 'post-return monitoring mechanisms'[1095] as recommended by the evaluation would be too late and not be of support for trafficked persons.

In February 2015, UN Children's Fund (UNICEF) voiced concern about efforts by the EU and some Member States to explore possibilities for new ways of returning larger numbers of unaccompanied children whose asylum application in the EU was rejected, such as through the European Return Platform for Unaccompanied Minors (ERPUM). One of the critical aspects mentioned is the need for proper risk assessment prior to return in relation to potential trafficking cases. Moreover, UNICEF notes that institutionalisation of children after return should be strongly avoided.[1096]

(3) Police cooperation concerning trafficking in human beings

It has been pointed out that compared to Eurojust, the actions of which would be less wide ranging, Europol is expected to develop 'some level of operational capacity outside the EU' with countries of

[1088] Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States, (16 March 2015), 5-6.
[1089] OSCE and ODIHR, *Guiding Principles on Human Rights in the Return of Trafficked Persons* (OSCE 2014) 49.
[1090] OSCE and ODIHR, Side Event Report 'Human Rights Protection in the Return of Trafficked Persons to Countries of Origin', Human Dimension Implementation Meeting, 1 October 2009, Warsaw, 6-7.
[1091] European Commission, Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements, 23 February 2011, COM(2011)76.
[1092] European Commission, Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements, 23 February 2011, COM(2011)76, 12 and 13.
[1093] European Commission, Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements, 23 February 2011, COM(2011)76, 14.
[1094] OHCHR, *Commentary on the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2010, 175.
[1095] European Commission, Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements, 23 February 2011, COM(2011)76, 13-14.
[1096] UNICEF, *Children's rights in return policy and practice in Europe - A discussion paper on the return of unaccompanied and separated children to institutional reception or family* [2015], 18-19.

origin and transit of THB.[1097] Europol has concluded agreements with countries outside the EU which also address the exchange of personal data and which should support the fight against trafficking. However, these agreements are not specifically focused on THB, instead covering a broad range of crimes, including THB.[1098] As shown by the mid-term report on the implementation of the EU strategy, Europol and Eurojust were involved, until 2014, in ISEC (EC programme on 'Prevention of and Fight against Crime') projects which have an external dimension. These projects aimed at strengthening judicial cooperation on THB matters with Nigeria and China, in addition to the use of joint investigation teams to fight THB in the Western Balkans.[1099]

(4) Role of trafficking in human beings in the European Neighbourhood Policies

In order to analyse the role of THB within the framework of the European Neighbourhood Policies, twelve publicly available ENP action plans (or Association Agendas for Eastern partner countries) have been assessed.[1100] All action plans mention THB or have a section on THB, usually under the umbrella of the fight against organised crime, THB, drugs and money-laundering.[1101] Concerning the actions mentioned and expected to be implemented by the states, the content varies. States are, for example, supposed to develop and implement an appropriate legal framework against THB[1102] or to improve the analysis of the nature of THB.[1103] Further action plans propose the implementation of the OSCE action plan to combat THB, the promotion of regional cooperation between relevant law enforcement bodies, and the development of mechanisms of protection, assistance and rehabilitation of victims.[1104] Interestingly, the action plans do not refer to the implementation of EU standards concerning combating THB, but refer for instance to other international and regional instruments, in particular to the 2003 OSCE Action Plan to combat trafficking in human beings[1105] and the 2000 Palermo Convention[1106] (including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

[1097] Maria O'Neill, 'Chapter 8 Trafficking in Human Beings and the European Neighbourhood Policy: New Challenges for the EU Justice and Law Enforcement Framework' in Maria O'Neill, Ken Swinton and Aaron Winter (eds), *New Challenges for the EU Internal Security Strategy* (Cambridge Scholars Publishing 2013) 195-196.

[1098] See for instance the Agreement on Operational and Strategic Co-operation between the Republic of Albania and the European Police Office, Annex 1 available at Europol, 'External Cooperation' <https://www.europol.europa.eu/content/page/external-cooperation-31> accessed 12 September 2015.

[1099] European Commission, *Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings*, SWD(2014) 318 final, 17 October 2014, 26.

[1100] For an overview of the ENP action plans, see EEAS, 'ENP Action Plans' <http://www.eeas.europa.eu/enp/documents/action-plans/index_en.htm> accessed 4 September 2015. ENP action plans are available concerning the following states: Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestine, Tunisia, and Ukraine.

[1101] See for instance the action plan with Azerbaijan, Georgia and Armenia. All action plans are available under EEAS, 'ENP Action Plans' <http://www.eeas.europa.eu/enp/documents/action-plans/index_en.htm> accessed 4 September 2015.

[1102] See for instance the Action Plan with Moldova, Chapter 2.1 (5), 7.

[1103] See for instance the Action Plan with Morocco, Chapter 3.4, 20.

[1104] Action Plan with Azerbaijan, Chapter 4.3.3, 16, and Action Plan with Georgia, Chapter 4.3.3, 21. The Action Plan with Armenia includes similar actions and adds the promotion of exchange of information between Armenia and EU Member States as action, see Action Plan with Armenia, Chapter 4.5.3, 28.

[1105] Organization for Security and Co-operation in Europe, Ministerial Council – Maastricht 2003, Decision No. 2/03, *Combating Trafficking in Human Beings – Annex*, 2 December 2003.

[1106] UN Doc A/RES/55/25, adopted 15 November 2000, entered into force 29 September 2003.

Children),[1107] which should be implemented.[1108] In the case of only one out of the twelve action plans (Ukraine), a specific reference to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is included.[1109] In conclusion, measures in action plans must be tailored to the situation of a specific country. Nevertheless, the action plans apparently do not share common ground on THB, as they even refer to different standards to combat THB, which may lead to inconsistent implementation of different standards.

4. Central coherence issues in the field

The central coherence issues may be categorised along three lines: issues concerning vertical coherence, horizontal coherence and external coherence. In relation to vertical coherence, the following coherence issues have been identified. Concerning Directive 2004/81 on residence permits for trafficked persons from third countries, inconsistent forms of application of the Directive in the Member States can be observed. For instance, as the length of the recovery and reflection period is not regulated in the directive itself, Member State practice has shown a broad variety of periods granted, such as four weeks or three months. In addition, conditions to be able to benefit from the reflection period are different in the Member States. Some Member States require a formal identification as a trafficked person first, whilst others do not. Similarly, in the later 2011 Directive, which generally improves the protection of rights of trafficked persons, different standards of implementation can be observed. The directive obliges Member States to ensure access to existing compensation schemes, while not addressing situations where such schemes do not exist or where they are difficult to access for trafficked persons. A further example is the provision of non-punishment of trafficked persons, which is considered as being too vaguely formulated, which leads to different application in the Member States.[1110]

Obviously, key among the reasons for these incoherencies is the discretion given to Member States in implementing the relevant directives, but it can also be attributed to the existence of weak instruments for monitoring the implementation of trafficking-related EU legislation. Legal reform, such as that concerning compensation, must be accompanied by further measures such as training or awareness raising in order to be effective. Monitoring is part of the tasks of the national rapporteurs or equivalent mechanisms, but only a few Member States have opted for national rapporteurs who are, as in the case of The Netherlands, established as an independent institution with sufficient staff and resources to actively monitor activities concerning THB.[1111] Additionally, independent rapporteurs are considered to be in a better position to collect data and statistics than governmental bodies. Most of the Member

[1107] UN Doc A/RES/55/25, adopted 15 November 2000, entered into force 25 December 2003.

[1108] See for instance concerning the OSCE action plan the action plan with Georgia, chapter 4.3.3, 21 and concerning the 2000 UN Convention against Transnational Organized Crime the action plans with Moldova (No. 51) and Armenia (chapter 4.5.3).

[1109] EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement, as endorsed by the EU-Ukraine Cooperation Council (Luxembourg, 24 June 2013), Chapter2.1, iii (f), 5. 1

[1110] See above Section III.B.2.b.3 on the right of trafficked persons not to be punished.

[1111] See information of the European Commission concerning national rapporteurs or equivalent mechanisms, e.g., regarding the Netherlands, European Commission, 'National Rapporteurs and/or Equivalent Mechanisms, Netherlands', <https://ec.europa.eu/anti-trafficking/national-rapporteurs/netherlands> accessed 12 September 2015, and National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, <http://www.dutchrapporteur.nl/> accessed 12 September 2015.

States, however, appointed governmental institutions, which are usually also the coordinating body of anti-THB measures. Consequently, efforts to implement further independent national rapporteurs should be strengthened.

Further coherence issues can be traced back to the different standards of treatment for EU citizens who have been trafficked within the EU. Although instruments are in place which should support victims of crime within the EU, these instruments seem not to be accessible for trafficked persons. Equal standards for all trafficked persons within the EU must be established and it must also be ensured that trafficked EU citizens are able to exercise their rights.[1112]

Concerning horizontal coherence, the following coherence issues have been identified. Some EU standards on THB do not fulfil trafficking-related general human rights standards. One example relates, as shown above, to the conditionality of residence permits for trafficked persons as foreseen under Directive 2004/81.[1113] A further example is the provision on non-punishment of trafficked persons, which does not explicitly refer to non-detention.[1114] Linked to the issue of conditional residence is the inconsistency created between Directives 2004/81 and 2011/36 related to unconditional assistance and support versus conditional temporary residence. The EU had started to gradually raise its level of protection of the rights of trafficked persons and align its standards to the standards of the Council of Europe, but for the time being no harmonisation of the directives has occurred, with the EU only asking the Member States to apply 'less strict criteria for conditionality upon cooperation.'[1115] Opening up the residence schemes for trafficked persons and turning them into unconditional residence schemes requires clear and further EU-guided action in order to effect change.

Furthermore, the external THB policy of the EU is framed in a 'security maintenance discourse',[1116] which is also reflected in other external policies. Although internally the EU has raised the level of protection of rights of trafficked persons by, for instance, adopting Directive 2011/36, THB in external actions of the EU is still contextualised with irregular migration. In the context of GAMM, objectives and announced activities concerning the protection of rights of trafficked persons remain vague, in contrast to the measures of controlling irregular migration. In the Mobility Partnerships it can be seen that there is a focus on migration control or border control and less focus is put on the protection of the rights of trafficked persons. Unclear language blurs the lines between 'irregular migrants' and 'victims of THB'.

In general, it must also be noted that all measures within the EU against THB lack sufficient monitoring. The instruments which are in place at the moment are too limited to be effective. The monitoring

[1112] See above Section III.B.2.b.4 on lack of protection of rights of persons who are trafficked within the EU.
[1113] See above Section III.B.2.b.2 on right to unconditional assistance and support versus the conditionality of temporary residence according to Directive 2004/81/EC.
[1114] See above Section III.B.2.b.3 on the right of trafficked persons not to be punished.
[1115] European Commission, Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014)635, 17 October 2014, 11.
[1116] Meng-Hsuan Chou, 'The European Union and the Fight against Human Trafficking: Comprehensive or Contradicting?' [2008] 4(1) STAIR 89-90.

should be independent and include supervision on the impact of legal amendments on the situation of trafficked persons themselves. One impediment here is the lack of a concerted effort to bring together the various EU actors with data collection and analytical capacity tasks (such as Eurostat, FRA, Frontex, Europol, and the Anti-Trafficking Coordinator) and to agree on common concepts, definitions and objectives, including protection of personal data, for such monitoring.

Finally, as regards external coherence, the following coherence issues have been identified. From a human rights perspective, the Council of Europe Convention against Trafficking continues to fill several gaps of the EU legal standards and policy concerning THB, such as mandatory risk assessments prior to return or concerning the minimum length of reflection period. The Council of Europe furthermore provides for what is currently the only external monitoring system of ant-trafficking measures. There is a need to establish a clear framework of relationship between the EU and the Council of Europe. The 2014 mid-term report on the implementation of the EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016) makes no mention of developments of cooperation on THB with OSCE or the Council of Europe. On the Neighbourhood Policy level it can be observed that in the action plans the standards used are not consistent, ranging from OSCE standards to UN standards.

In implementing the AOP on strengthening the EU external dimension on action against trafficking in human beings, Member States signed bilateral agreements with priority countries to strengthen cooperation in the combating of THB.[1117] Member States can conclude bilateral agreements concerning THB, but content and standards applied within the bilateral agreements may vary. More concrete guidance should be given by the EU to the Member States about general standards to be applied when addressing THB in these agreements. This guidance should for instance also include common standards concerning the protection of the rights of trafficked persons, in particular concerning the return of trafficked persons to their country of origin. In order to improve coherence of external actions concerning THB, an information package on activities and a list of relevant tools and instruments have been developed.[1118] Guidance concerning bilateral agreements is not explicitly mentioned as being part of this package.

5. Conclusions

O'Neill states that for the EU's external THB matters 'an adequate and consistent internal human rights policy' will be crucial so that the 'EU can effectively export EU values in its external AFSJ provisions.'[1119] However, further measures are necessary in order to achieve an adequate and consistent internal human rights policy towards trafficking in human beings. One step would be to critically reassess existing EU internal instruments, which should protect the rights of trafficked persons in the EU, not only

[1117] Albania, Belarus, China, Morocco, Russia, Thailand, Ukraine and Vietnam, see European Commission, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, SWD(2014) 318 final, 17 October 2014, 15.

[1118] European Commission, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, SWD(2014) 318 final, 17 October 2014, 15.

[1119] Maria O'Neill, 'Chapter 8 Trafficking in Human Beings and the European Neighbourhood Policy: New Challenges for the EU Justice and Law Enforcement Framework' in Maria O'Neill, Ken Swinton and Aaron Winter (eds), *New Challenges for the EU Internal Security Strategy* (Cambridge Scholars Publishing 2013), 192.

in terms of compliance with international human rights standards, but also in terms of current challenges with implementation such as protection of THB-related rights to EU citizens.

Gaps in implementation can be seen, for instance, as discussed above concerning Directive 2004/80/EC relating to compensation to crime victims. Trafficked persons who are EU-citizens and who are trafficked within the EU are facing problems in having access to compensation, although an instrument is in place which should ensure access to compensation. Further obstacles are the problems in cross-border prosecution within the EU concerning THB. Joint Investigation Teams are used only to a limited extent. It is evident that in concrete criminal investigations information exchange via Europol is not seen as very efficient and direct cooperation with the authorities in the countries of origin is preferred.[1120] Equal standards for all trafficked persons within the EU must be established, and it must also be ensured that trafficked EU-citizens are able to exercise their rights.

A further necessary step would be to tackle the human rights issues in the internal dimension discussed above. Following O'Neill's statement, these issues need to be solved first before a coherent external THB strategy can be developed. In order to improve monitoring and evaluation of measures against THB the EU should communicate to Member States a preference for independent national rapporteurs instead of equivalent mechanisms. In order to align EU standards concerning THB with human rights standards, inconsistencies between Directives 2004/81 and 2011/36 must be resolved. The current approach – asking Member States to apply 'less strict criteria' concerning unconditional residence – cannot be considered sufficient.

Despite the EU's efforts to harmonise policies and measures against THB by, for instance, adopting an EU Strategy against Trafficking, THB is still discussed in a very isolated way. Connections to other issues which have an impact on THB, such as trade or development cooperation, are only made to a limited extent. Isolated discussion of matters concerning THB can be also observed in the reporting of different actors on their activities against THB. For example, the mid-term report on the implementation of the EU strategy against THB lists activities of Frontex, such as developing a handbook for border guards.[1121] At the same time, the report shows no discussion of the impact of Frontex policies on THB and identifying victims. Linking THB to the 'bigger picture' of one actor's activities is missing. In the implementation reports it seems that activities are listed, but the coherence of the different actions is not discussed. Implementation reports seem to refer to each other and only to discuss to a limited extent which actions still have to be fulfilled and which impact measures have been implemented. Ensuring coherence among the various measures conducted is missing. For example, the first implementation report of the AOP on strengthening the EU external dimension on action against trafficking in human beings is very comprehensive, with the actions of every Member State and actor listed separately. Nevertheless, the report does not discuss the coherence of the various measures or the content of the bilateral agreements adopted.

[1120] Conny Rijken and Alice Bosma, *A review of the implementation of the EU strategy on human trafficking by EU members [2014]* Deliverable D1.1. TRACE-project, <http://trace-project.eu/documents/> accessed 9 September 2015, 5 and 65.

[1121] European Commission, Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, SWD(2014) 318 final, 17 October 2014, 24.

GAMM points out that 'the migrant must be empowered to gain access to safe mobility.'[1122] Paramount to the prevention of THB would be opening up more labour migration possibilities 'for those third country nationals who are not the most educated, financially stable or well-off, or politically privileged citizens in their countries of origin.'[1123] Further legal possibilities to migrate and enter the labour market for third-country nationals would contribute to preventing THB. Still, in the context of GAMM, the repressive factors weigh higher than the preventive measures. The link between safe migration and preventing THB is to a large extent disregarded in the EU policies against THB. THB also continues to be framed as a form of organised crime and, consequently is primarily treated as a security matter. THB should rather be framed as a serious human rights violation, which demands more coherent action by the EU, both internally and especially externally.

[1122] The Global Approach to Migration and Mobility, COM(2011)743 final, 18 November 2011, 7.

[1123] Meng-Hsuan Chou, 'The European Union and the Fight against Human Trafficking: Comprehensive or Contradicting?' [2008] 4(1) STAIR 90.

C. Fight against terrorism: EU counter-terrorism policy

1. Introduction

Counter-terrorism is generally viewed as a new phenomenon that arose with the attacks on the Twin Towers and the Pentagon on September 11, 2001 and George W. Bush's 'war on terror'. In Europe, the first counter-terrorism strategy was not drawn up until 2005.[1124] Nevertheless, this late date is misleading because EU Member States have been dealing with terrorism and its consequences since the 1970s.[1125] This section of the study is devoted to the fight against terrorism in the EU. The section is divided into two parts. Part One gives an overview of the developments in EU counter-terrorism action from its inception until today. The major legal instruments, political pronouncements, action plans, and tools are referenced and explained. Finally, the counter-terrorism architecture is analysed from the internal and external dimensions and some conclusions are made regarding the coherence of the counter-terrorism strategy in relation to the respect for, promotion and protection of fundamental and human rights. Part Two is a case study of extraordinary rendition as an example of the main challenge to coherence of EU counter-terrorism policy both before and after the entry into effect of the 2007 Lisbon Treaty.

a) Historical development of EU counter-terrorism strategy

Two major developments mark the origins of counter-terrorism in Europe – the establishment of the TREVI group[1126] and the adoption of the European Convention on the Suppression of Terrorism in 1975 and 1977, respectively.[1127] TREVI convened police officials committed to the exchange of information and mutual assistance on terrorism who carried out high-level meetings of Justice and Interior ministers and national security officers.[1128] The group was eventually replaced by the more formal representation, the Treaty of Maastricht's third pillar for immigration and asylum, policing, customs and legal cooperation.[1129] The Treaty of Maastricht also brought the rise of Europol as the agency facilitating the exchange of information and cooperation among Member States regarding certain serious cross-border crime.[1130] 'Successive treaties broadened the initial Maastricht dispositions somewhat. In 1999 the European Council in Tampere (Finland) adopted a broad programme for cooperation in the realm of police and justice matters, including terrorism. Tampere was considered the ultimate frontier in the

[1124] Council of the European Union, The European Union Counter-Terrorism Strategy, 30 November 2005.
[1125] Vassilios Grammatikas, 'EU Counter-Terrorist Policies: Security vs. Human Rights?' [2007] *HUMSEC Working Paper*.
[1126] TREVI = Terrorism, Radicalism, Extremism, and International Violence Group.
[1127] Davide Casale, 'EU Institutional and Legal Counter-Terrorism Framework' [2008] *Defence Against Terrorism Review* 49, 50
[1128] Davide Casale, 'EU Institutional and Legal Counter-Terrorism Framework' [2008] *Defence Against Terrorism Review* 49, 50.
[1129] Davide Casale, 'EU Institutional and Legal Counter-Terrorism Framework' [2008] *Defence Against Terrorism Review* 49, 50.
[1130] Rik Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?' [2010] *International Affairs* 857, 857

Member States' willingness to cooperate in these fields. Many more suggestions for enhanced cooperation were tabled, but none gained sufficient traction to be implemented.'[1131]

b) Intergovernmental cooperation

Before the events of 9/11, the EU had adopted some significant measures to combat terrorism and organised crime, including a directory of counter-terrorism competences and expertise to facilitate cooperation between EU Member States (The Police Working Group on Terrorism and the Counter Terrorist Group),[1132] the creation of a EJN to manage terrorist offences and legislation for freezing terrorist assets.[1133] Nevertheless, these measures merely involved the creation of cooperative networks designed to permit Member State authorities to coordinate efforts to combat terrorism. The one exception to this inter-governmental approach was in the case where participation in a criminal organisation was made an individual offence across all EU countries to 'facilitate extradition proceedings and enhance interstate cooperation.'[1134] This latter measure involved significant legal action. 'Inspite of the increasing police co-operation through the TREVI Group and other similar organisations aimed at strengthening bilateral co-operation, it is nonetheless [sic] to underline that till the 11 September 2001 attacks in New York and Washington the European cooperation in the field of counter-terrorism remained fairly limited due to the resistance of the EU Member States to ceding to the EEC (and then to the EU) part of their sovereignty, in a delicate field such as security.'[1135]

The nature of the threat from the 1970s through the 1990s was mainly domestic terrorism, for example, terrorist groups based in Europe, such as the Irish Republican Army (IRA) or the Basque Euskadi Ta Askatasun (ETA),[1136] and the response was mainly through informal intergovernmental cooperation. However, following the Treaty of Maastricht and the introduction of the three pillars, issues surrounding counter-terrorism fell into the third pillar. Therefore, the informal arrangements were formally recognized by the treaty. Gargantini explains how the Maastricht Treaty formalised the intergovernmental aspects of counter-terrorism that existed in previous decades:

[1131] Rik Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?' [2010] *International Affairs* 857, 858.

[1132] Davide Casale, 'EU Institutional and Legal Counter-Terrorism Framework' [2008] *Defence Against Terrorism Review* 49, 50.

[1133] Vassilios Grammatikas, 'EU Counter-Terrorist Policies: Security vs. Human Rights?' [2007] *HUMSEC Working Paper*, 3 (citing Joint Action of 15 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter- terrorist cooperation between the Member States of the European Union, 96/610/JHA, OJ L 273, 25 October 1996 ; Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, 98/428/JHA, OJ L 191, 7 July 1998; Council Common Position 2001/154/CFSP of 26 February 2001, OJ L 57, 27 February 2001).

[1134] Vassilios Grammatikas, 'EU Counter-Terrorist Policies: Security vs. Human Rights?' [2007] *HUMSEC Working Paper*, 3 (noting close cooperation of the French and Spanish in the arrest and surrender of ETA members by French authorities to Spain).

[1135] Davide Casale, 'EU Institutional and Legal Counter-Terrorism Framework' [2008] *Defence Against Terrorism Review* 49, 50.

[1136] Peter Roell, 'The European Union and its Fight against International Terrorism' [2011] *ISPSW Strategy Series* 1, 2.

> The EU always had very limited powers in the field of police and judicial cooperation, Member States privileging intergovernmental action. The cooperation in [...] [JHA], which among others includes the police and judicial cooperation in criminal matters, started as an informal collaboration among States. […] It was only when the Maastricht Treaty came into being in 1993 that a formal, but still intergovernmental system for JHA cooperation was created. […] Under the third pillar were collected many different policies ranging from asylum to judicial cooperation in criminal matters. Within the JHA pillar the powers of the European institutions were very limited, and the intergovernmental method prevailed. Many aspects of the third pillar testify that condition: the European Commission did not enjoy monopoly on proposal; the procedure for the adoption of legal instruments required almost always unanimity in the Council; the European Parliament [...] used to play a very marginal role; the [...] [ECJ] did not enjoy full jurisdiction; the third pillar had ad hoc legal instruments that differed from those of the first pillar; lastly, the effect of the measures of the third pillar was unlike the acts of the first pillar, for example, by rule they didn't have direct effect.[1137]

The Treaty of Amsterdam also brought important changes, transferring areas of immigration, asylum, borders and civil law within the first pillar, while leaving judicial cooperation in criminal matters and police cooperation under the third. These two areas constituted the same Union objective: 'the maintenance and development of the Union as an area of freedom, justice and security.'[1138]

> The AFSJ was designed for the creation of a common European space affording to European citizens an adequate level of "security and justice", were the improvements undertaken with relation to the freedom of movements goes hand in hand with progress in the field of police and judicial cooperation. The Amsterdam Treaty generally enhanced the role of the European institutions and went in the direction of shortening the distances between the procedures governing the first and the third pillar, but the latter remained mostly intergovernmental.[1139]

c) Multi-faceted approach with legal framework and financial measures

The attacks on 9/11 introduced a new era in the European anti-terrorism cooperation. The suicide attacks were followed by a barrage of legislation designed to combat this new type of terrorism. While some anti-terrorism measures had been introduced in 1999 with the Tampere Programme, they were only pushed forward after the attacks in 2001. Also, for example, the EU Action Plan to Fight Terrorism was developed post-9/11.[1140] Gargantini explains that the main measures came in the form of (i) police and judicial cooperation, namely the EAW[1141] and the advent of mutual recognition in civil and criminal matters, (ii) legal instruments, including a definition of terrorist offences, (iii) financing restraints, such as freezing assets of persons or entities on "blacklists", (iv) air security measures, including biometrics for passports and (v) change in external action policies to favour more sharing of data with US law

[1137] Giulia Gargantini, 'European Cooperation in Counter-Terrorism and the Case of Individual Sanctions' [2011] *Perspectives on Federalism*, 157.
[1138] Giulia Gargantini, 'European Cooperation in Counter-Terrorism and the Case of Individual Sanctions' [2011] *Perspectives on Federalism*, 158.
[1139] Giulia Gargantini, 'European Cooperation in Counter-Terrorism and the Case of Individual Sanctions' [2011] *Perspectives on Federalism*, 158.
[1140] Rik Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?' [2010] *International Affairs* 857, 858.
[1141] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190/1, 18 July 2002 (enhancing cooperation among national judicial authorities, who must recognise with minimum formalities (and within a short time) requests for the surrender of a person made by the judicial authority of another EU Member State.

enforcement agencies.[1142] The Union took the opportunity to adopt a common position (2001)[1143] and a framework decision (2002)[1144] to combat terrorism. The common position included a definition of a terrorist act:

> For the purposes of this Common Position, 'terrorist act' shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation [...][1145]

Similar language was found in the Framework Decision which directed Member States to classify such acts as terrorist offences.[1146] The Common Position emphasised asset freezing and Police and judicial cooperation as ways to combat terrorism, while the Framework Decision required Member States to include terrorist-linked offences in their criminal codes, provide custodial sentences and assist victims of terrorism, among other measures.[1147]

Despite the multi-faceted approach since 2001, EU terrorism policy has been largely reactive with a visible increase in measures directly following the 9/11 and later the Madrid and London events.[1148] The Europol Counter Terrorism Task Force, for example, was created in the direct aftermath of the 9/11 attacks. Of the EU agencies, both Europol and Eurojust have mandates that cover terrorism. A common feature of the measures adopted is the reliance on exchange of information as the mode of cooperation. Coolsaet notes, in this regard, a reluctance to add operational measures and a tendency to use bilateral arrangements.[1149] Additionally, the adopted measures have not removed the reality that the effective implementation of the counter-terrorism strategy largely depends upon the will of national governments. The complete intergovernmental nature of the EU counter-terrorism policy continued until the Treaty of Lisbon entered into effect. Nevertheless, even after Lisbon, commentators point out

[1142] Giulia Gargantini, 'European Cooperation in Counter-Terrorism and the Case of Individual Sanctions' [2011] *Perspectives on Federalism*, 159-161, and Vassilios Grammatikas, 'EU Counter-Terrorist Policies: Security vs. Human Rights?' [2007] *HUMSEC Working Paper*,7-8.] *Perspectives on Federalism*, 159-161, and Vassilios Grammatikas, 'EU Counter-Terrorist Policies: Security vs. Human Rights?' [2007] *HUMSEC Working Paper*, 7-8.

[1143] Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, 2001/931/CFSP, OJ L 344/93, 28 December 2001.

[1144] Council Framework Decision of 13 June 2002 on combating terrorism, 2002/475/JHA, OJ L 164/3, 22 June 2002.

[1145] Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, 2001/931/CFSP, OJ L 344/93, 28 December 2001, Article 1(3).

[1146] Council Framework Decision of 13 June 2002 on combating terrorism, 2002/475/JHA, OJ L 164/3, 22 June 2002, Article 1(1).

[1147] Many of the measures involved a fight against terrorist financing schemes. For a discussion of these instruments, see e.g., Oldrich Bures, 'Ten Years of EU's Fight against Terrorist Financing: A Critical Assessment' [2014] 30 *Intelligence and National Security,* 207–233.

[1148] Rik Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?' [2010] *International Affairs* 857, 858-859.

[1149] Rik Coolsaet, 'EU Counterterrorism Strategy: Value Added or Chimera?' [2010] *International Affairs* 857, 859.

that the 'EU has no direct role in ensuring the internal security of its member-states'[1150] because 'EU institutions are not actively engaged in the day-to-day business of preventing terrorist attacks: their chief contribution is to ensure that the legal and practical structures for counter-terrorism co-operation are robust and effective.'[1151] An existing disparity between the G6 and other EU Member States' counter-terrorism systems has also been observed.

> Terrorism is one of the main priorities of the G6, an internal security vanguard made up of the interior ministries of Britain, France, Germany, Italy, Poland and Spain. [...] That means they have agencies and resources specifically dedicated to gathering counterterrorism intelligence, can respond rapidly in the event of a terrorist attack to protect civilians and infrastructure and, to some degree, have integrated counter-terrorism priorities into their foreign policies. Amongst the other EU countries, Denmark and the Netherlands also feel threatened and have similar security set-ups to combat terrorism. But the rest of the member-states have less developed counter-terror capabilities and rely on normal law enforcement and intelligence-gathering.[1152]

2. Today's EU counter-terrorism structure

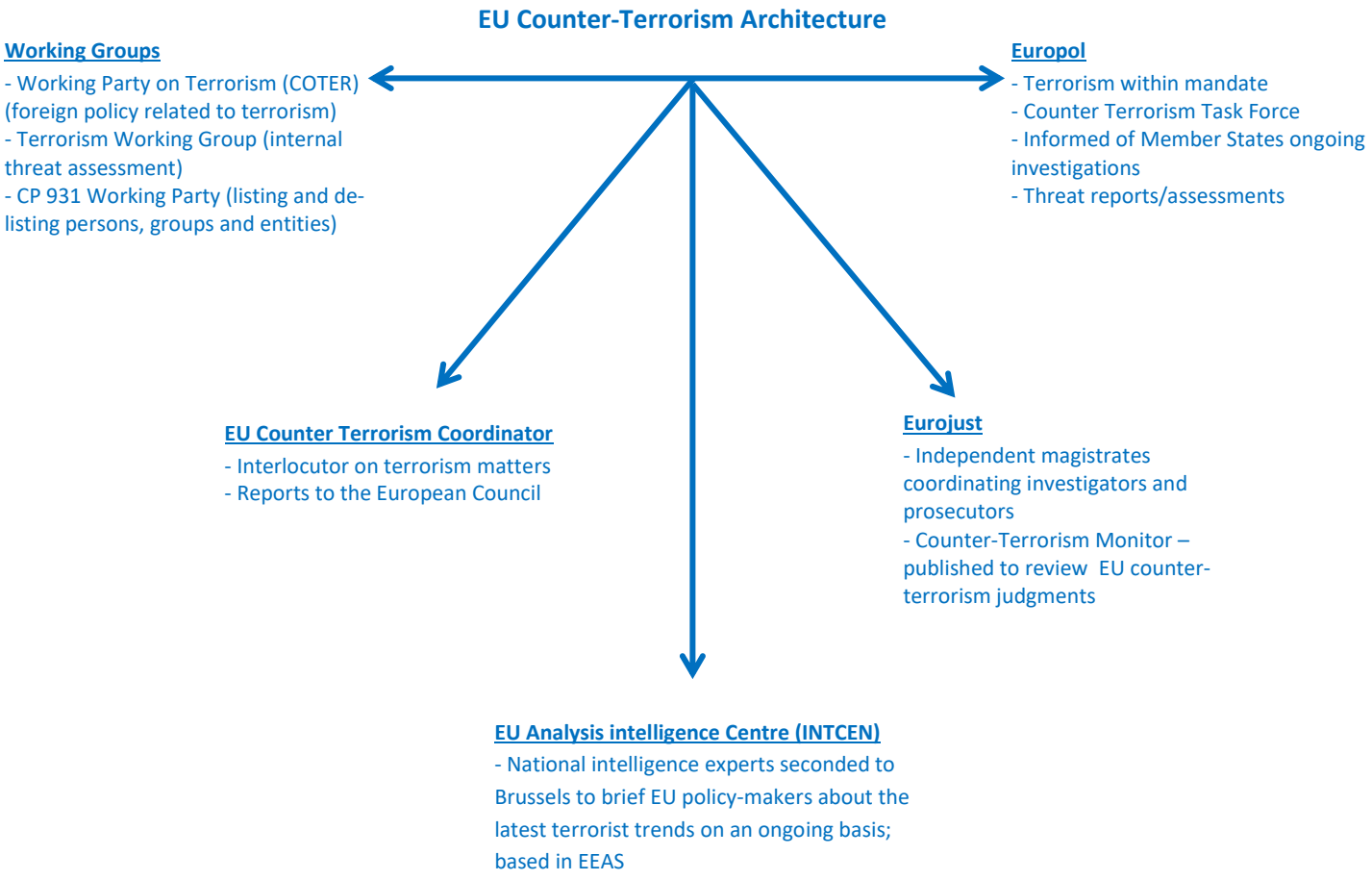
In 2005, the EU adopted a common counter-terrorism strategy under the headings 'prevent', 'protect', 'pursue' and 'respond'.[1153] These goals of the strategy include regulating to protect civilian infrastructure and secure hazardous materials, helping to fight cross-border crime, improving border security, and speaking with one voice in external relations. The strategy is still in place today and includes the post of the Counter-Terrorism Coordinator (CTC) who regularly reports on the implementation of the strategy to the European Council. More recently, the European Council stated in its strategic guidelines for the AFSJ that:

> [An] effective EU counter terrorism policy is needed, whereby all relevant actors work closely together, integrating the internal and external aspects of the fight against terrorism. In this context, the European Council reaffirms the role of the EU Counter Terrorism Coordinator. In its fight against crime and terrorism, the Union should back national authorities by mobilising all instruments of judicial and police cooperation, with a reinforced coordination role for Europol and Eurojust, including through:
>
> — the review and update of the internal security strategy by mid 2015;
>
> — the improvement of cross-border information exchanges, including on criminal records;
>
> — the further development of a comprehensive approach to cybersecurity and cybercrime;

[1150] Hugo Brady, 'The EU and Counter-Terrorism: Next Steps' in Elvire Fabry and Gaëtane Ricard-Nihoul (eds), *The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union* (Notre Europe 2010), 117.
[1151] Hugo Brady, 'The EU and Counter-Terrorism: Next Steps' in Elvire Fabry and Gaëtane Ricard-Nihoul (eds), *The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union* (Notre Europe 2010), 117.
[1152] Hugo Brady, 'The EU and Counter-Terrorism: Next Steps' in Elvire Fabry and Gaëtane Ricard-Nihoul (eds), *The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union* (Notre Europe 2010), 117.
[1153] Council of the European Union, The European Union Counter-Terrorism Strategy, 30 November 2005.

— the prevention of radicalisation and extremism and action to address the phenomenon of foreign fighters, including through the effective use of existing instruments for EU-wide alerts and the development of instruments such as the EU Passenger Name Record system.[1154]

The chart below shows the main bodies involved in counter terrorism in the EU.



a) The internal dimension

The Union's counter-terrorism policy largely has been free of the usual pronounced distinctions between external and internal EU policy-making. Indeed, the counter-terrorism strategy of 'prevent, protect, pursue and response' includes aspects of both external and internal concern. The CTC noted in his 2014 report that the Council had called for enhanced links between the internal and external aspects of counter-terrorism policy in 2011, a call that was echoed by the European Council in 2014.[1155]

[1154] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 5.
[1155] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 64.

This being said, it may be argued that the internal dimension of the 'prevent' aspect of the counter-terrorism strategy has focused on impeding the radicalisation of individuals on EU soil. This work has been accomplished through three work streams carried out by Germany, the Netherlands and the United Kingdom: use of the internet for terrorist purposes, the role of local authorities in preventing radicalisation and communication.[1156] A second important tool is the Radicalisation Awareness Network (RAN)[1157] created by the EU Internal Security Strategy[1158] which begun in 2011 to bring together practitioners, experts and policy makers from Member States, civil society and academia to discuss radicalisation. RAN has produced a list of best practice and its experiences were integrated into the European Commission communication 'Preventing Radicalisation to Terrorism and violent Extremism: Strengthening the EU's Response' (2014).[1159]

The counter-terrorism strategy also aims to protect the infrastructure from terrorist attack through border management, transport security, cyber security and nuclear security. Numerous initiatives have been undertaken in each area mentioned. The following are included:

(1) A pilot phase of four critical infrastructures with a European dimension – Eurocontrol, Galileo, the electricity transmission grid and the gas transmission network – to develop ways to improve the protection of such infrastructures.[1160]
(2) Eurosur, a common framework for information exchange operational since December 2013 permits close cooperation between southern border surveillance authorities through national coordination centres at the national and European levels.[1161]
(3) Further development of civil and military aviation through workshops held by the European Defence Agency with the support of the Commission services.[1162]
(4) Member States plan and train for major cyber incidents in order to 'improve the resilience of critical information infrastructures.'[1163]

The third prong of the strategy, 'pursue,' has promoted (i) the approximation of Member State criminal law, including the establishment of a ECRIS to connect criminal record databases;[1164] (ii) the principle of mutual recognition so that Member States can carry out investigative measures at the request of

[1156] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, Brussels, 14.
[1157] European Commission, 'Radicalisation Awareness Network (RAN)', <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/index_en.htm> accessed 10 September 2015.
[1158] Council of the European Union, Draft Internal Security Strategy for the European Union: Towards a European Security Model, 8 March 2010, 7120/10.
[1159] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 15.
[1160] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 17.
[1161] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 21.
[1162] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 23-24.
[1163] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 27.
[1164] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 41.

another Member State now set forth in a directive known as the EIO;[1165] (iii) an acknowledgement that procedural and victim rights must be guaranteed by passing directives on the right of interpretation and translation, the right to information in criminal proceedings and the right of access to a lawyer as well as the directive on victim's rights to know of a decision not to proceed with a case and to have the information in a language understood by the victim.[1166]

'Response' is the counter-terrorism prong requiring joint action between the EU institutions and the Member States. The Solidarity Clause, Article 222 TFEU, must be invoked in the event of a terrorist attack thereby galvanising the Council to ensure the political and strategic response of the EU. Next, the Presidency would activate the Integrated Political Crisis Response arrangements to share information on the web platform and a situational awareness capability.[1167]

b) The external dimension

The external dimension of counter-terrorism mainly involves the goal to prevent terrorism. The EU has developed strategies to discourage radicalisation. The EU delegations have benefited from external expertise to study radicalisation. These strategies target the nexus between security and development in key regions of the world. The Instrument contributing to Stability and Peace (IcSP) builds capacity for law enforcement and judicial agencies to counter extremism and financing of terrorist networks in a wide range of geographic areas, including South East Asia, the Horn of Africa, the Maghreb, Sahel and Middle East.[1168]

The European External Action Service leads in the Counter-Terrorism Political Dialogues. The dialogues occur either bi-annually or annually and have been held with countries such as the US, Russian, Canada, Turkey, Pakistan, Indonesia, Saudi Arabia and the United Arab Emirates.[1169] Particularly as regards the US, the EU has developed mutual legal assistance and extradition arrangements, as well as enhanced cooperation with Europol and Eurojust. Data sharing has also been a key area of cooperation between the EU and the US. One such initiative is the passenger name record exchange, an analogous agreement was also signed with Canada and Australia.[1170] The Terrorist Finance Tracking Programme is also prominent in EU-US cooperation. This agreement permits the transfer of bulk data to the US Department of Treasury, where it can be stored for five years. The data can be searched for individuals

[1165] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 42.
[1166] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 44-46.
[1167] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 61-62.
[1168] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 65-66.
[1169] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 66.
[1170] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 54 and 56.

or account numbers.[1171] In addition, the EU and US have been in negotiations for data protection to permit the exchange of information by law enforcement. In multilateral settings, the EU has been in contact with the UN and its agencies and has participated in the Global Counter-Terrorism Forum, a platform of 30 members adopting best practices and meeting about issues such as violent extremism and kidnap for ransom.[1172]

Following the entry into force of the Treaty of Lisbon, the European Parliament gained new and important powers in the ordinary legislative procedure within the policy areas related to the fight against terrorism (law enforcement cooperation, judicial cooperation, criminal justice cooperation, and data protection.)[1173] The EU cannot today sign international agreements concerning counter-terrorism without the consent of the European Parliament.[1174] The Parliament has also in practice flexed its muscles in relation to counter-terrorism and international agreements. When the Commission negotiated the EU-US PNR, a passenger name record exchange agreements, the Parliament challenged the legislation at the ECJ. The latter body annulled the legislation, stating that the legal basis was erroneous because it should have been based on the security framework established by the public authorities rather than EU transport policy provisions.[1175] In the case of the EU-US SWIFT agreement, a mechanism for transfer of financial translations data to US authorities, the Parliament blocked the agreements until satisfactory measures protecting data were introduced into the agreement.[1176]

3. Central human rights and coherence issues in the field

The fight against terrorism gives rise to many human rights concerns, many of which have been discussed in this report in relation to the fight against organised and serious crime (see further Section A of Chapter III). In this section on counter-terrorism, the attention will therefore be directed towards certain coherence issues that have been discussed especially in relation to counter-terrorism. To begin with, counter-terrorism policy contains incoherence in the choice of legal basis for which measures are taken by the executive (the Commission). A second area of concern has been the execution of the EAW.

[1171] Monica Den Boer and Irina Wiegand, 'From Convergence to Deep Integration: Evaluating the Impact of EU Counter-Terrorism Strategies on Domestic Arenas' [2015] 30 *Intelligence and National Security* 377, 391.
[1172] Council of the European Union, 'Report on the Implementation of the EU Counter-Terrorism Strategy', 24 November 2014, 15799/14, 83.
[1173] Christian Kaunert, Sarah Léonard, and Alex MacKenzie, 'The European Parliament in the External Dimension of EU Counter-Terrorism: More Actorness, Accountability and Oversight 10 Years on?' [2014] 30 *Intelligence and National Security* 357, 358-359.
[1174] Christian Kaunert, Sarah Léonard, and Alex MacKenzie, 'The European Parliament in the External Dimension of EU Counter-Terrorism: More Actorness, Accountability and Oversight 10 Years on?' [2014] 30 *Intelligence and National Security* 357, 359.
[1175] Cases C-317/04 and C-318/04 *European Parliament v Council of the European Union, and Commission of the European Communities* [2006] CJEU, and Christian Kaunert, Sarah Léonard, and Alex MacKenzie, 'The European Parliament in the External Dimension of EU Counter-Terrorism: More Actorness, Accountability and Oversight 10 Years on?' [2014] 30 *Intelligence and National Security* 357, 364-365.
[1176] Christian Kaunert, Sarah Léonard, and Alex MacKenzie, 'The European Parliament in the External Dimension of EU Counter-Terrorism: More Actorness, Accountability and Oversight 10 Years on?' [2014] 30 *Intelligence and National Security* 357, 366-370.

Finally, the CJEU has found that certain practices that impede public debate and further actions to correct measures fall short of legal standards.[1177]

a) Legal basis for counter-terrorism measures

Legal basis for concluding international agreements

The legal framework for counter-terrorism measures has always been complex. As noted above, all counter-terrorism began as intergovernmental exercises. In external relations, most counter-terrorism measures require an international agreement. Again, the Treaty of Lisbon Treaty this area by making the EU a single legal person (Article 47 TEU) and by introducing a treaty-making procedure (Article 218 TFEU). Nevertheless, the EU shares competence with the Member States for acts involving counter-terrorism. The 'Union may conclude an agreement with third countries or international organizations "where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties."'[1178] This means that EU external agreements on counter-terrorism need to be justified through the internal security and counter-terrorism objectives of the Union's AFSJ, i.e., in particular Article 67(3) TFEU (general internal security mandate), Article 75 TFEU (measures against terrorist financing), Article 83(1) TFEU (harmonisation of criminal law applicable to terrorism) and Article 88(1) TFEU (Europol's mission regarding terrorism).'[1179] Furthermore, because the AFSJ is a domain of shared competence between the Union and the Member States (Article 4(2)(j) TFEU), if the Union has not exercised its competence, then Member States can continue to exercise theirs (Article 2(2) TFEU). So far, in the realm of counter-terrorism, the EU has not required internal harmonisation in the field; therefore, Member States have the right to continue to conclude their own international agreements on counter-terrorism measures.

These competence issues introduce coherence problems at two levels with regard to the protection, promotion and respect for human and fundamental rights. First, the nature of agreements that are negotiated, as we have seen in earlier discussion, tends to have serious consequences for human and fundamental rights. That is because these agreements (which range in subject matter from exchange of data regarding transportation use, bank and financial transactions, asset freezing and extradition of suspects to third countries) tend to touch the very heart of human rights dealing with issues of data privacy, the right to life, the prohibition against torture, the right to a fair hearing, the presumption of innocence. Because these important rights are at risk, it is imperative that the legislation proposed by the Commission be in line with fundamental and human rights standards from the outset. As has been seen in CJEU rulings, this has often not been the case. The passenger name records controversy, the

[1177] See Section (c) below.

[1178] Jörg Monar, 'The EU as an International Counter-Terrorism Actor: Progress and Constraints' [2015] 30 *Intelligence and National Security* 333, 340.

[1179] Jörg Monar, 'The EU as an International Counter-Terrorism Actor: Progress and Constraints' [2015] 30 *Intelligence and National Security* 333, 340.

data retention directive and the freezing of assets have all been the subject of CJEU rulings.[1180] The discussion of the passenger name records controversy between the European Parliament and the Commission as well as the SWIFT account negotiations illustrate this structural incoherence brought about by the varying legal bases for the Commission's action. While the CJEU did not specifically address the data privacy issues in the passenger records case, fundamental rights were at stake and the Parliament stressed this fact throughout the controversy.[1181]

A second level of incoherence involves the fact that the competence to enter into agreements is a shared competence. Member States retain the right to enter into separate agreements with third countries. As explained above, counter-terrorism agreements come in different varieties but always touch the most basic of fundamental rights. The scenario that each Member State could be negotiating a different set of legal instruments with third countries resulting in disparate treatment of their nationals as compared to other EU nationals in other EU States with a different set of counter-terrorism instruments violate the principle of legal certainty. This is particularly true with regard to the terms of extradition agreements for terrorist suspects and for the fate of such suspects in the third countries.

Legal Basis for targeted sanctions or restrictive measures

The Treaty of Lisbon allows two possibilities for using restrictive measures or sanctions: Article 75 TFEU or Article 215 TFEU. This choice invites another type of structural incoherence in which the executive can shop around for the legal basis that provides the least oversight. In this case, Article 75 (widely viewed as dealing with AFSJ, internal security matters) provides that action should be taken through the ordinary legislative procedure which gives equal power to the Council and the European Parliament. In contrast, Article 215 TFEU provides for the adoption of 'restrictive measures'. The measures can be used (in external action) against States but also against 'natural or legal persons and groups or non-State entities'. As Murphy explains: 'The procedure through which this action is taken requires the Council to act on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission. The European Parliament is merely to be informed.'[1182]Therefore, in cases of counter-terrorism and freezing of the assets of individuals or entities, the more robust process involving European Parliament consent is not in play. Instead, these measures fall under Article 215 TFEU, as noted by the CJEU in the case *Parliament v Council*:

> Article 215(2) TFEU provides a sufficient legal basis for adopting, in response to a decision taken under the CFSP, restrictive measures taken in order to apply that policy to natural or legal persons, groups or non-State entities involved in acts of terrorism.[1183]

This leaves parliaments voice out as a first line of defence against Commission proposals that ignore fundamental rights.

[1180] The data retention directive and the European arrest warrant are more fully discussed in FRAME Deliverable 8.2, which will be published at <http://www.fp7-frame.eu/reports/> accessed 10 September 2015.
[1181] C-317/04 and C-318/04, *European Parliament v Council of the European Union* [2006].
[1182] Cian C. Murphy*, EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012).
[1183] Case C-130/10, *Parliament v Council* [2012] CJEU, para. 75.

b) The EAW and procedural rights

The EAW was created in the post-September 11 environment, yet the framework decision under which the instrument was created contains no definition of terrorism and it has since been employed much more widely than for arrests in terrorism-related activities.[1184] The warrant is based on the principles of mutual trust and mutual recognition among EU Member States. Murphy notes the incoherence introduced in the EAW, stating:

> The European Arrest Warrant could be a positive example of EU co-operation if there was the necessary mutual trust, minimum standards of protection, and proportionate use by law enforcement authorities. Instead it is seen as European over-reaching – a consequence perhaps of its hasty adoption in the wake of the September 11 attacks. Though serious concerns remain relating to the Warrant's operation these pertain to the development of an EU criminal justice system and the establishment of appropriate safeguards in that context. The European Arrest Warrant should be reformed as an instrument of ordinary EU criminal justice co-operation.[1185]

One area of additional incoherence regards the ability of authorities to refuse to transfer a suspect based on human rights grounds.[1186] Some perceive such an exception as a violation of the spirit of the warrant itself, while others believe sufficient oversight is provided by the CJEU and the ECtHR. Still others think that one must accept that the issuing authority complies with human rights standards.[1187] What is evident is that there is no consensus about how or whether to use such an exception nor under what circumstances it is applicable.

c) Judicial review of counter-terrorism actions

There is no doubt that the CJEU is a latecomer to the counter-terrorism game. Given its origins as a court of the common market, the Court had not been asked to consider such matters.[1188] However, despite its muscular judgments in *Kadi I* and *II*,[1189] the weakness of judicial process is evident in two areas. First, the Court process is not transparent. All pleadings before the CJEU are confidential; therefore, the public is ill-informed about the Court's stance on counter-terrorism and this impedes the public debate about the check on the actions of the European Commission and the European Council

[1184] Cian Murphy, Aldo Zammit Borda and Lucy Hoyte, 'Prosecutor and Government Officials Perspectives on Impact, Legitimacy and Effectiveness of the European Arrest Warrant' [2014] *SECILE Project Report*, 3, 11, 18.
[1185] Cian Murphy, 'EU Counter-Terrorism & the Rule of Law in a Post-"War on Terror" World' in Martin Scheinin (ed), *European and United States Counter-Terrorism Policies, the Rule of Law and Human Rights* (EUI/RSCAS 2011), 8.
[1186] Cian Murphy, Aldo Zammit Borda and Lucy Hoyte, 'Prosecutor and Government Officials Perspectives on Impact, Legitimacy and Effectiveness of the European Arrest Warrant' [2014] *SECILE Project Report*, 16.
[1187] Luisa Marin, 'Eeffective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant' [2014] 5 *New Journal of European Criminal Law* 327, 341.
[1188] Cian Murphy, 'Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union' in Fergal Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014), 287.
[1189] Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission* [2008] (Kadi I), and Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi* [2013] (Kadi II).

(for example, the executive powers) by the judicial power.[1190] A second weakness involves the practice of writing a single judgment in the case, thereby limiting itself to explanations of the points agreed upon without including divergent thoughts and reasoning. Where judgments are sparse, there can be little guidance for future governmental or executive action in a field that touches so frequently upon fundamental and human rights.[1191] This latter point is crucial because in cases of delisting or data retention, the corrections and modifications will matter. Guidance is necessary to ensure that a second round of measures does not infringe upon those fundamental rights again.

The Treaty of Lisbon did not confer additional powers on the CJEU regarding the review of actions in 'operational matters.' As a result, the Court has no authority to review the actions of national law enforcement agencies. Since most counter-terrorism is carried out by national agencies and bodies, the CJEU has no say in the vast majority of the activity. While national courts and judiciaries do review such matters, oversight from the CJEU would provide a unifying voice and a source of continuity to ensure the principle of legal certainty in each Member State.

CJEU rulings on counter-terrorism:

Kadi *cases (Joined Cases C-402/05 P and C-415/-5 P) national courts must ensure the full review of the lawfulness of all Union acts giving effect to asset freezing resolution adopted by the UN Security Council.*

Mojahedin *cases (Case T-228/02; Case 5-157/07) successful legal challenge by individuals and entities to the placement of their names on EU terrorist lists.*

This Part One of Section C has briefly outlined the general historic progress of counter terrorism policy in the EU. Part Two of this case study highlights one of the leading problematic areas of EU counter-terrorism – participation in the rendition activities of the Central Intelligence Agency (CIA). This case study analyses the implications for coherent EU human rights policy in external relations.

4. Case Study: Extraordinary Rendition

a) Introduction

Definition

Extraordinary rendition has been defined by the ECtHR as 'the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.'[1192] Although it

[1190] Cian Murphy, 'Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union' in Fergal Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014), 290.

[1191] Cian Murphy, 'Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union' in Fergal Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014), 290.

[1192] *Babar Ahmad and Others v United Kingdom* (2010) 51 EHRR SE6. The Court was here adopting the definition used by United Kingdom Intelligence and Security Committee in its special report on rendition. Intelligence and Security Committee, Rendition [2007], available at http://isc.independent.gov.uk/committee-reports/special-reports accessed 11 September 2015.

is predominantly regarded as an American counter-terrorist technique used by the Bush administration in the US in the so-called 'war on terror', several European States have been implicated in the process, either directly or indirectly, by hosting secret detention centres on their territories or facilitating the transport by the CIA of suspects through their territories.

Evidence of European complicity in extraordinary rendition

Increased allegations on the part of the media and non-governmental organisations in 2005[1193] that the US was rendering terrorist suspects to secret detention facilities in Europe for interrogation led to the establishment of high level investigations of the matter by the Council of Europe, the most prominent of which was conducted by the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly.[1194] Having examined information obtained from Council of Europe Member States, representatives of non-governmental organisations and investigative journalists, Senator Dick Marty (rapporteur of the Committee) presented a damning final report[1195] in June 2006 which revealed what he termed a 'spider's web' of CIA transfers and detentions involving either active or passive collusion on the part of Council of Europe States.[1196] Similar conclusions were reached in investigations conducted by a temporary committee of the European Parliament,[1197] as well as by NGOs such as Amnesty International and Human Rights Watch.[1198] Following all of these intensive inquiries, it came as little surprise to most observers when President Bush admitted the existence of secret CIA detention facilities for the express purpose of interrogating terrorist suspects in a televised address to the nation in September 2006.[1199] In 2009, this admission was substantiated with the release by the US authorities of redacted documents containing details of the CIA's 'High Value Detainees Program' (the HVD program) which included details of the procedure by which so-called HVDs were transferred to CIA black sites for

[1193] Dana Priest, 'CIA Holds Terror Suspects in Secret Prisons' *Washington Post* (Washington, 2 November 2005), and Human Rights Watch, 'Statement on U.S. Secret Detention Facilities in Europe' (6 November 2005) <https://www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe> accessed 11 September 2015.

[1194] See also the report of the survey conducted by the Secretary General of the Council of Europe on the extent to which their internal laws provide adequate safeguards against secret detention by foreign agents. Council of Europe, Report by the Secretary General on the use of his powers under Article 52 of the European Convention on Human Rights, SG/Inf (2006) 5, 28 February 2006, <https://wcd.coe.int/ViewDoc.jsp?id=976731&Site=COE> accessed 11 September 2015.

[1195] An earlier interim report by the Committee had indicated sufficient evidence of participation by European States in the CIA rendition programme to justify further investigation. Council of Europe, Parliamentary Assembly (Committee on Legal Affairs and Human Rights), Alleged Secret Detentions in Council of Europe Member States, AS/Jur (2006) 03 rev (22 January 2006), para. 85.

[1196] Council of Europe, Parliamentary Assembly (Committee on Legal Affairs and Human Rights): *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* AS/Jur (2006) 16 Part II. Drawing on information received from both Eurocontrol and national aviation authorities, the report identifies particular 'rendition circuits', involving four different categories of aircraft landing points.

[1197] See below, Section 2(A).

[1198] Human Rights Watch, 'Statement on U.S. Secret Detention Facilities in Europe' (6 November 2005) <https://www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe> accessed 11 September 2015, and Amnesty International*, United States of America, Below the Radar: Secret Flights to Torture and 'Disappearance'* [2006], 27, documenting almost 1000 flights directly linked to the CIA through 'front' companies, most of which it said had used European airspace.

[1199] See 'Transcript: President Bush's Speech on Terrorism', *New York Times* (New York, 6 September 2006).

the purposes of interrogation involving the use of 10 specific 'Enhanced Interrogation Techniques' .[1200] These revelations were further expounded by a joint study on global practices in relation to secret detention by the UN special procedures in 2010 which concluded that in its last years of existence, the Bush administration came to rely heavily on foreign intelligence services to '[…] capture, interrogate and detain all but the highest-level terrorist suspects seized outside the battlefields of Iraq and Afghanistan'.[1201] The study asserted that rather than actively detaining prisoners in secret, the US and many other countries had become complicit in the practice of secret detention.[1202] These findings were further confirmed following the much-awaited release of the summary report of the US Senate Select Committee on Intelligence (SSCI) study on the CIA's Detention and Interrogation Programme in December 2014[1203] which confirmed, in the words of the European Parliament that European complicity in the programme had indeed occurred '[…] sometimes through corrupt means based on substantial amounts of money provided by the CIA in exchange for their cooperation'.[1204]

Legal Accountability Processes

Following the advent of the Obama administration in the US, advocacy efforts in relation to extraordinary rendition have focused on the goal of victim-redress and establishing state accountability for participation in the CIA programme.[1205] A third report prepared by Senator Marty for the Parliamentary Assembly of the Council of Europe in 2011 reveals how challenging those efforts have been on account of the use of state secrecy privileges by the US and other governments.[1206] A comprehensive report by the Open Society Foundations in 2013 reached similar conclusions, calling on states implicated in the CIA rendition programme to establish effective investigations into the matter.[1207]

[1200] See *Al Nashiri v Poland* App no 28761/11 (ECHR 16 February 2015), paras. 49-68.

[1201] 'Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Working group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances' (26 January 2010) UN Doc A/HRC/13/42, para. 159 [hereinafter 'Joint Study on Global Practices in Relation to Secret Detention']. See also the 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on the Role of Intelligence Agencies and Their Oversight in the Fight against Terrorism Martin Scheinin' (4 February 2009) UN Doc A/HRC/10/3, paras. 51-52.

[1202] Joint Study on Global Practices in Relation to Secret Detention, U.N. Doc. A/HRC/10/3, para. 159.

[1203] Dianne Feinstein, 'Senate Intelligence Committee Study on CIA Detention and Interrogation Program' <http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program> accessed 20 May 2015.

[1204] European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA (2014/2997(RSP)), para. G.

[1205] See e.g., Amnesty International, *Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention* [2010].

[1206] Dick Marty, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations* [2011] [Report, Council of Europe, Parliamentary Assembly].

[1207] Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (Open Society Justice Initiative 2013).

While litigation strategies in national courts in Europe have met with minimal success,[1208] proceedings before international bodies have resulted in a number of findings holding European States accountable for their involvement in the CIA rendition programme. In the case of *Agiza v Sweden*,[1209] the UN Committee against Torture concluded that Sweden had violated Article 3 of the UNCAT which prohibits *refoulement* by a Contracting State to another state where there are substantial grounds for believing that the person would be in danger of torture.[1210] Although technically the facts concerned a deportation by Sweden to Egypt, the role of CIA agents in the process played an inextricable part in the reasoning of the Committee in finding a violation of Article 3.[1211] In the case of *Alzery v Sweden*,[1212] which raised markedly similar facts, the Human Rights Committee reached the virtually identical conclusion by reference to Article 7 of the ICCPR.[1213]

Proceedings taken by victims of extraordinary rendition have also met with success before the ECtHR. In the case of *El-Masri v Former Republic of Macedonia*, the ECtHR held that the respondent State was responsible for breaching, *inter alia,* the rights to freedom from torture, inhuman and degrading treatment or punishment (Article 3) and to liberty (Article 5) in the ECHR for facilitating the extraordinary rendition of the applicant by the CIA from its territory and his subsequent detention for over four months in Afghanistan.[1214] The State was further held responsible for failing to investigate his allegations effectively and to provide him with an effective remedy for the violation of his rights pursuant to Articles 3, 5 and 13 ECHR. In the subsequent cases of *Al-Nashiri v Poland* and *Husayn* (*Abu-Zubaydah*) *v Poland*[1215] the ECtHR held that Poland was responsible for several violations of the ECHR[1216] for having cooperated in the extraordinary rendition of the applicants by the CIA to and from its territory; for their secret detention and interrogation by the CIA on its territory; and for failing to conduct an effective investigation into the applicants' allegations and to provide them with an effective remedy. In respect of the latter issue, the Court noted that:

[1208] Italy is the only country in which individuals have been held responsible in a national court for involvement in extraordinary rendition. Francesco Messineo, ''Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the *Abu Omar* Case in Italy' [2009] 7(5) *Journal of International Criminal Justice*1023*JusticeJustice* 1023-1044.

[1209] *Agiza v Sweden*, Communication no 233/2003, UN Doc CAT/C/34/D/233/2003(2005). See further Sarah Joseph, 'Rendering Terrorists and the Convention against Torture' [2005] 5 *Human Rights Law Review* 339.

[1210] Article 3(1) UNCAT provides: 'No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

[1211] 'The Committee is tacitly acknowledging the reality of 'rendition' […] rendition is clearly a practice that breaches CAT'. Sarah Joseph, 'Rendering Terrorists and the Convention against Torture' [2005] 5 *Human Rights Law Review* 339, 344.

[1212] *Alzery v Sweden*, Communication no 1416/2005, UN Doc CCPR/C/88/D/1416/2005 (2006).

[1213] Article 7 of the ICCPR provides that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. The CCPR's interpretation of the case in this respect is in line with its earlier jurisprudence to the effect that violations of Article 7 may be found to exist where a person's expulsion or extradition raises a substantial risk of ill-treatment in the receiving state. See *Ng v Canada*, Communication no 469/1991, UN Doc CCPR/C/49/D/469/1991 (1994).

[1214] *El-Masri v Former Republic of Macedonia* (2013) 57 EHRR 25.

[1215] *Al-Nashiri v Poland* and *Husayn* (*Abu-Zubaydah*) *v Poland* (2015) 60 EHRR 16.

[1216] Articles 3 (right to freedom from torture, inhuman and degrading treatment or punishment), 5 (right to liberty), 8 (right to respect for private and family life), 13 (right to an effective remedy), 6(1) (fair trial) and Article 2 in conjunction with Article 1 of Protocol 6 (right to life and abolition of the death penalty).

> Securing proper accountability of those responsible for the alleged unlawful action is instrumental in maintaining confidence in the Polish State institutions' adherence to the rule of law and the Polish public has a legitimate interest in being informed of the investigation and its results […]
>
> The instant case […] also points out in this context to a more general problem of democratic oversight of intelligence services. The protection of human rights guaranteed by the Convention, especially in Articles 2 and 3, requires not only an effective investigation of alleged human rights abuses but also appropriate safeguards – both in law and in practice – against intelligence services violating Convention rights, notably in the pursuit of their covert operations.[1217]

Having regard to the 'extreme seriousness of the violations of the Convention', the Court ordered Poland to pay substantial damages to the applicants, both of whom are currently in the US military detention camp in Guantánamo Bay. Further cases are pending before the ECtHR raising allegations of Convention breaches by Lithuania, Italy and Romania for facilitating the rendition and secret detention by the CIA.[1218]

b) EU action on extraordinary rendition: The internal dimension

Introduction

While the European Parliament has been pro-active in investigating and pursuing the accountability of Member States for their involvement in the CIA rendition programme, the Council and the European Commission have been demonstrably passive in acting on the issue. Indeed, the failure of the latter two bodies to respond to suggestions and recommendations directly addressed to them by the European Parliament has clearly served as a source of irritation to the Parliament over the years. As will be seen, while the Parliament has identified various means by which the EU institutions can act to encourage accountability processes in the Member States and to prevent further violations of human rights in the implementation of counter-terrorism policies, the Council and the Commission have clearly taken the view (pre- and post-Lisbon) that the matters raised by the Parliament fall within the responsibility of the Member States.

European Parliament

The first steps by the European Parliament to initiate an accountability process were taken in December 2005, when it agreed to set up a temporary committee to investigate the alleged illegal transfer of detainees to Europe and the suspected existence of secret CIA detention facilities in the EU and in candidate countries (the TDIP Committee).[1219]Using similar sources to those used by the Council of Europe's inquiry, the TDIP published two reports. The first, issued in April 2006, asserted that the CIA

[1217] *Al-Nashiri v Poland* (2015) 60 EHRR 16, paras 497- 498.

[1218] See the cases of *Abu-Zubaydah v Lithuania* App no 46454/11 (ECHR), *Nasr and Ghali v Italy* App no 44883/09 (ECHR) and *Al-Nashiri v Romania* App no 33234/12(ECHR). Also see ECtHR, 'Secret detention sites' [2015] [fact sheet] <http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF> accessed 20 May 2015.

[1219] European Parliament, Decision on setting up a temporary committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 12 January 2006.

had carried out more than 1,000 stop-overs in European territory between late 2001 and late 2005, at least some of which were possibly used for the rendition of prisoners.[1220] In its final report in January 2007, adopted by the European Parliament, the TDIP Committee was scathing in its criticism of several European countries for 'relinquishing control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees.'[1221] It was also highly critical of the Council for failing to cooperate fully with the Committee in carrying out its work.[1222] Most of the recommendations regarding the internal dimension in the Parliament's 2007 resolution based on the final report were addressed to the Member States. They included recommendations to investigate further allegations of rendition, to provide redress to victims and to fully implement and ratify particular international human rights instruments relevant to secret detention and extraordinary rendition.[1223]

As regards recommendations addressed to the other EU institutions, the Parliament urged the Council to establish as a matter of priority a system for the democratic monitoring and control over joint and coordinated intelligence activities at the EU level;[1224] as well as measures in regard to inspections of aircraft and air traffic control.[1225] The most significant suggestions made to the Commission were to adopt legislative proposals on transport safety, as provided for in Article 71 of the then applicable EC treaty, taking into account the recommendations in the report and to consider adopting rules in regard to the use, monitoring and management of European airspace and airports.[1226] The seed for later recommendations to the effect that the Commission should take stronger action on monitoring human rights compliance by the Member States was sown at this early juncture with the statement that where a Member State and party to the ECHR was responsible for a breach of the latter instrument, it was therefore also responsible for a breach of Article 6 TEU[1227] – not only where direct responsibility in regard to extraordinary rendition could be proven beyond a reasonable doubt but also by failing to comply with its positive obligation to conduct an investigation into allegations of complicity.[1228]

[1220] European Parliament, Interim Report on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners, 15 June 2006.
[1221] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, para. 43.
[1222] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, paras 22-24.
[1223] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, paras 213-221. See further specific recommendations made to Poland and Romania in a resolution adopted by the European Parliament regarding Mr. Al-Nashiri. European Parliament resolution of 9 June 2011 on Guantánamo: imminent death penalty decision.
[1224] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, para. 206.
[1225] Specific recommendations were also made to the Member States on these matters: European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, paras 202-209.
[1226] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, paras 210-212.
[1227] Consolidated Version of the Treaty on European Union (2012) OJ C326/55 13 (hereinafter the TEU).
[1228] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, para. 230.

In its 2007 resolution, the European Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs (the LIBE Committee) to follow up politically and monitor developments in respect of the TDIP report; and in particular, 'in the events that no appropriate action has been taken by the Council and/or the Commission, to determine whether there is a serious breach of the principles and values on which the EU is based and to make recommendations to it in any resolution'.[1229] In September 2012, the latter committee followed up this instruction with a report highlighting further specific evidence of complicity in secret detention and extraordinary rendition by European States which included opinions and recommendations made by the Parliament's Committee on Foreign Affairs.[1230]

Based on the latter report, the European Parliament adopted a further resolution calling on the Member States to disclose all necessary information and to fulfil their obligations to investigate allegations of complicity in extraordinary rendition. As regards the EU institutions, the 2012 resolution urged the Council and the Commission to take further action to ensure accountability for the involvement of European States in the CIA rendition programme. In particular, it called on the Council, *inter alia,* to issue a declaration acknowledging and apologising for Member States' involvement;[1231] to give its full support to truth-finding and accountability processes in the Member States;[1232] to hold hearings with relevant EU security agencies in order to clarify their knowledge and the EU's response;[1233] to put forward proposals for democratic oversight of cross-border intelligence activities in the context of counter-terrorism policies[1234] and to report to Parliament within a year on proposals for safeguarding human rights in intelligence-sharing.[1235] As regards the Commission, the Parliament called on it to investigate whether EU provisions (especially those on asylum and judicial cooperation) had been breached by the CIA programme;[1236] to adopt, within a year, a framework, including reporting requirements for Member States, for monitoring and supporting national accountability processes, to be based on standards developed by the UN and the Council of Europe.[1237] Moving beyond the suggestion

[1229] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, para. 232.

[1230] See Hélène Flautre, LIBE Committee, European Parliament: Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)), 2 August 2012, and European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report.

[1231] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 23.

[1232] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 24

[1233] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 25

[1234] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 37

[1235] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 25

[1236] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para.32.

[1237] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 34.

made in the 2007 resolution that the Member States should be held responsible for breaches of Article 6 of the TEU, the Parliament expressly called on the Commission to adopt measures aimed at strengthening the EU's capacity to prevent and redress human rights violations in the EU and to strengthen Parliament's role.[1238] Its suggestion in this respect was specifically premised on the institutional deficiencies revealed in the context of the CIA programme and the failure of the Commission to date to establish a dedicated strategy to ensure accountability for human rights violations committed in respect of it.

Following the Judgment of the ECtHR in *El-Masri*'s case and the rulings of the Italian courts in regard to the abduction of *Abu Omar*,[1239] the European Parliament issued a further resolution in 2013 deploring the failure of the Council, the Commission and the Member States to implement the recommendations made by it in its 2012 resolution.[1240] In February 2015, following the judgments of the ECtHR in the *Al-Nashiri* and *Abu-Zubaydah* cases,[1241] as well as the release of the Senate's Select Committee on Intelligence's summary report in the US,[1242] the European Parliament issued a further resolution, this time calling for an EU internal strategy on fundamental rights; and for the Commission to propose the adoption of such a strategy and a related plan of action.[1243] The Parliament further instructed the LIBE Committee in conjunction with the Parliament's Committee on Foreign Affairs to resume its inquiries in regard to extraordinary rendition which should include organising a hearing involving national parliaments and practitioners on past and ongoing accountability processes as well as a parliamentary fact-finding mission to EU Member States in which CIA secret detention sites allegedly existed.[1244]

Council and the European Commission

As indicated above, the Council and the Commission have consistently disregarded the recommendations of the European Parliament to take concerted action on extraordinary rendition in the internal dimension. The reluctance to do so was explained most comprehensively in the debate on the Parliament's 2013 resolution when the serving President-in-Office of the Council (Vytautas Leškevičius) and Vice-President of the Commission (Viviane Reading) each explained the view of their respective institutions that the issues raised by extraordinary rendition fell within the domain of national security and as such within the exclusive competence of the Member States and outside the

[1238] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 35.
[1239] See Francesco Messineo, ''Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the *Abu Omar* Case in Italy' [2009] 7(5) *Journal of International Criminal Justice* 1023-1044.
[1240] European Parliament resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA.
[1241] *Al-Nashiri and Abu-Zubaydah v Poland* (2015) 60 EHRR 16.
[1242] Senate Intelligence Committee Study on CIA Detention and Interrogation Program, available at http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program accessed 11 September 2015.
[1243] European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA, para. 7.
[1244] European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA, para. 8.

remit of the EU.[1245] These reasons were cited as explanations for the failure of the Council to follow up on the recommendations of the Parliament in respect of allegations against the security services of the Member States and to generate measures regarding democratic monitoring and control over joint and coordinated intelligence activities at the EU level.

One area in which there has been very limited progress relates to the recommendations made by the Parliament in regard to aircraft inspections and transport – an area that clearly falls squarely within Title VI of the TFEU's provisions on transport.[1246] A significant feature of the CIA renditions programme was the leasing by the CIA of private aircraft as opposed to state aircraft to transport suspects to secret detention centres.[1247] Under the international aviation regime established by the Chicago Convention, civil aircraft are entitled to fly over a country or make technical stops without the prior authorisation or notification of the territorial state. However, they are subject to the right of the territorial state to conduct an inspection without unreasonable delay on landing or departure.[1248] 'State aircraft',[1249] on the other hand, do require specific clearance or authorisation to fly over the territory of another state or to use its airports.[1250] They do enjoy immunity from foreign jurisdiction in respect of search and inspection, save where they enter foreign airspace without proper authorisation. EU law also makes a similar distinction between state aircraft and civil aircraft insofar as EU legislation in principle only applies to civil aircraft, leaving state aircraft under the control of the Member States.

Not surprisingly, this issue was raised at an early juncture in respect of allegations of European complicity in extraordinary rendition, with recommendations being made by the European Parliament that the Commission should bring forward a directive aimed at harmonizing national laws on the surveillance of non-commercial civil aviation and recommendations on monitoring privately chartered aircraft using EU airports and airspace.[1251] The Commission was mildly responsive to this suggestion. In the debates on extraordinary rendition in the Parliament in 2006, the then Vice-President of the Commission (Franco Frattini) indicated that the Commission was 'ready to discuss' this matter with the TDIP, recognising that finding a European definition of 'state aircraft' could be a step forward in this area.[1252] In 2008, the Commission issued a communication to the Council on an Agenda for a Sustainable Future in General and Business Aviation which clarified that the Community would take a 'functional

[1245] European Parliament Debates, 'Alleged transportation and Illegal Detention of Prisoners in European Countries by the CIA', 9 October 2013.
[1246] European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ L 326/47-326/390, 26 October 2012.
[1247] Amnesty International*, United States of America, Below the Radar: Secret Flights to Torture and 'Disappearance'* [2006], 22.
[1248] Convention on Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (hereinafter 'Chicago Convention'), Article 16.
[1249] 'State aircraft' are defined in the Convention as aircraft 'used in military, customs and police services'. Chicago Convention, Article 3(b).
[1250] 'State aircraft' are defined in the Convention as aircraft 'used in military, customs and police services'. Chicago Convention, Article 3(b).
[1251] Council of Europe, Parliamentary Assembly (Committee on Legal Affairs and Human Rights), *Alleged Secret Detentions in Council of Europe Member States*, AS/Jur (2006) 03 rev (22 January 2006), paras 33 and 34.
[1252] European Parliament Debates, 'Extraordinary Rendition', 5 July 2006.

approach' in future to the definition of state versus civil aircraft.[1253] In other words, aircraft will be classified according to the function they are performing at a particular time, rather than simply by dint of their registration. Accordingly, civil registered aircraft used for state purposes must be classified as state aircraft and consequently are prohibited from flying over or landing in a state without prior authorisation.[1254] In its communication, the Commission specifically referenced the 2007 resolution of the Parliament as a factor in its decision to clarify for the Member States the appropriate approach to take on this matter.[1255] In its subsequent conclusions on the Commission communication, the Council 'took note' of this clarification.[1256] While the foregoing does mark a certain progress on this issue, it falls short of the more comprehensive measures being called for by the Parliament.

Fundamental rights/human rights implications

As indicated above, the human rights problems arising in the internal dimension in regard to extraordinary rendition have been comprehensively identified by international human rights bodies as encompassing both substantive and procedural aspects. According to the in-depth reasoning of the ECtHR, reiterated most recently on this issue in the *Al-Nashiri* and *Abu-Zubaydah* cases, a Contracting State to the ECHR is obliged to conduct an effective investigation into any arguable claim by an individual that he or she has suffered treatment in violation of Article 3 of the Convention within its jurisdiction at the hands of agents of the state concerned or 'likewise, as a result of acts performed by foreign officials with that State's acquiescence or connivance'.[1257] The right to freedom from torture and other ill-treatment (Article 3 ECHR), the right to liberty (Article 5 ECHR) as well as the right to respect for private and family life (Article 8) are also violated where it can be established (as in the case of Poland) that the state has knowingly enabled the secret detention and ill-treatment of an individual on its territory at the hands of foreign officials. The rights provided for in Articles 3, 5, 8 and potentially the right to life (Articles 2 and 3 in conjunction with Article 1, Protocol 6) also come into play where a state enables the transfer of persons to another jurisdiction if this action directly results in exposing the individual to ill-treatment, arbitrary detention, the risk of an unfair trial and potentially also the death penalty.[1258]

The ECHR is, of course, an international treaty promulgated by the Council of Europe and although all Member States of the EU are simultaneously parties to that instrument, it is not, as such, an instrument of EU law. While the human rights at issue under the ECHR in regard to extraordinary rendition are also

[1253] European Commission: Communication from the Commission: An Agenda for Sustainable Future in General and Business Aviation, COM (2007)869 final, 11 January 2007. This Communication was specifically referred to by Viviane Reading in a debate in the European Parliament on the LIBE report in 2012. European Parliament Debates, 'Alleged Transportation and Illegal Detention of Prisoners in European Countries by the CIA', 10 September 2012.
[1254] European Commission: Communication from the Commission: An Agenda for Sustainable Future in General and Business Aviation, COM (2007)869 final, 11 January 2007, para. 25.
[1255] European Commission: Communication from the Commission: An Agenda for Sustainable Future in General and Business Aviation, COM (2007)869 final, 11 January 2007, para. 24
[1256] Council of the European Union: Council Conclusions on the Commission communication on an agenda for sustainable future in general and business aviation, 7 April 2008, para 6.
[1257] *Al-Nashiri v Poland* (2015) 60 EHRR 16, para. 479.
[1258] See the principles of State responsibility under the ECHR in respect of removal as articulated by the ECtHR in *Al-Nashiri v Poland* (2015) 60 EHRR 16, paras 450-455.

classified as fundamental rights guaranteed by the EU Charter of Fundamental Rights,[1259] the difficulty in holding states and potentially the EU institutions responsible under the latter instrument lies in the fact that the Charter only applies to the EU institutions, bodies, offices and agencies 'with due regard for the principle of subsidiarity and to the Member States when they are implementing Union law'.[1260] The question in the context of the internal dimension then revolves around what potential element of EU law is involved in respect of the issue of extraordinary rendition. The position of the Council and Commission, as noted above, is that the matters raised (impinging as they do on issues of national security) fall squarely within the exclusive competence of the Member States and are not therefore subject to the competence of the Union institutions. The European Parliament, on the other hand, has consistently located the competence of the EU to act on the general provisions in the TEU regarding respect for values of human rights and the rule of law.[1261] These include the provisions of Article 2 which affirms that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights;[1262] and in Article 6 which include the affirmation that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[1263] These provisions are supplemented by an action-component contained in Article 7 TEU which provides that any Member State which has committed a serious and persistent breach of the fundamental principles listed in Article 2 TEU may be suspended from voting in the Council of Ministers.[1264] Such a process can be initiated by the Council acting by unanimity on a proposal by one third of the Member States or by the European Commission and after obtaining the consent of the European Parliament. Though action under Article 7 has been contemplated by the EU in the past, the political will to implement it has so far been lacking.[1265] Technically, it would seem that the provision in Article 7 could be considered as providing a clear basis for the Commission and by extension the Council to follow up on the Parliament's recommendations in respect of extraordinary rendition.[1266] However, no such action would appear to have been contemplated by the Commission to date. Further, a tenuous argument could be made that when read in conjunction with the principle of sincere cooperation

[1259] EU Charter of Fundamental Rights. See, in particular, the rights in Article 4 of the Charter to be free from torture, inhuman or degrading treatment or punishment and in Article 18 against expulsion to face such treatment.

[1260] EU Charter of Fundamental Rights, Article 51(1).

[1261] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, paras 228-229.

[1262] Article 2, TEU

[1263] Article 6(5) TEU.

[1264] Article 7(2) provides that European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. Article 7(3) TEU goes on to provide that where such a determination is made, the Council may decide to suspend certain rights of the Member States, including its voting rights.

[1265] For further reading on Article 7, see European Parliamentary Research Service, 'Article 7 TEU: a mechanism to protect EU values' [2013] <http://epthinktank.eu/2013/10/07/article-7-teu-a-mechanism-to-protect-eu-values/> accessed 11 September 2015.

[1266] See European Commission, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, paras 1.4.1 -1.4.4.

enshrined in Article 4(3) TEU, the failure of the Member States and the institutions of the Union to take more concerted action to ensure accountability for complicity in extraordinary rendition constitutes a failure to fulfil the positive obligations inherent in Article 4 of the EU Charter of Fundamental Rights[1267] to prevent torture and other ill-treatment by reference to Article 7 TEU. Obviously, this requires a very wide reading of the phrase 'when they are implementing Union law' in Article 51(1) of the EU Fundamental Rights Charter – a contested area in terms of the application of the Charter[1268] – and one that is probably greatly over-estimating its potential *ratione materiae.*[1269]

Accordingly, the issue of extraordinary rendition is an example *par excellence* of an issue that exposes unclear divisions of competency as regards the Member States and the Union, and arguably in respect of the scope of EU law. As a consequence, the fundamental rights violations at issue continue to be essentially unregulated by EU law with all the negative consequences for human rights protection pointed out earlier set to continue.

c) EU action on extraordinary rendition: The external dimension

The scant attention given to extraordinary rendition in external relations

The obligations of the EU to respect human rights in the external dimension of the AFSJ field are governed not only by Article 67 TFEU, Article 6 TEU but also Article 21(1) TEU which provides that the Union's action on the international scene shall be guided by the principles which have inspired its own creation, including the universality and indivisibility of human rights and fundamental freedoms.[1270] While the EU's evolving commitment to forging an external human rights policy has been followed up in a series of policy instruments, including the EU Guidelines on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[1271] there has been an increasing criticism of the EU for failing to live up to the rhetoric of its human rights values both internally and externally in practice. The legitimacy of this critique appears to be particularly stark and sustained in regard to the issue of extraordinary rendition.

As with the internal dimension, the EU has taken little concrete action on the issue of extraordinary rendition in its external activities. While the European Parliament has repeatedly called for a series of measures to be taken, many of these have been largely ignored by the Commission and the Council.

[1267] See Manfred Nowak and Anne Charbord, 'Art.4 – Prohibition of Torture' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 61,89-90.

[1268] On the scope and application of the Charter, see Eleanor Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnards and Steve Peers (eds), *European Union Law* (OUP 2014) 226, 240-242.

[1269] See Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 48 ('Generally, the Charter really does not seek to impose an obligation to act; such power to actively promote human rights internally requires specific competence'.)

[1270] See further Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] available at http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf (last accessed 8 May 2015).

[1271] General Affairs Council, Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 April 2008 (hereinafter 'EU Torture Guidelines').

These include an appeal to the Council in its 2007 resolution, to issue 'a clear and forceful declaration' calling on the US government to put an end to the practice of extraordinary arrests and renditions;[1272] and to adopt a common position ruling out the acceptance of 'mere' diplomatic assurances from third countries a basis for any legal extradition where there are substantial grounds for believing that individuals would be in danger of being subjected to torture or ill-treatment.[1273] The Council has had an on-going dialogue with the US on counter-terrorism measures since 2006 but has so far failed to issue anything close to a forceful public declaration on extraordinary rendition aimed at the US or indeed the Member States. The furthest it came to such initiative was in 2006 when the EU's General Affairs and External Relations Council issued a statement confirming the EU's firm commitment to the prohibition of torture, stating that: 'The existence of secret detention facilities where detained persons are kept in a legal vacuum is not in conformity with international humanitarian and human rights law'.[1274]

Human rights implications

The failure of the Council to take a more high-profile stance with the US on the renditions programme is clearly out of step with the EU's Torture Guidelines, in which the EU commits to urging all third countries to prevent and prohibit torture and all ill-treatment and to condemn its use at the highest level.[1275] The fact that the US is one of the EU's most important strategic partners[1276] and a lynch-pin ally in forging its counter-terrorism programme clearly explains the reluctance of the Council to castigate the US publicly for the renditions programme. To this extent, extraordinary rendition of itself exemplifies the inherent tension that lies in the balancing of 'freedom', 'security' and 'justice' in both the internal and external dimensions of the AFSJ.[1277] The prioritisation of cooperation with the US on counter-terrorism measures has apparently served to trump the importance of fundamental human rights in external action on rendition,[1278] at least as far as the Council is concerned, and arguably had a negative influence on human rights standards in the Member States.[1279] The Parliament, on the other hand, has continued to highlight the need for the EU's counter-terrorism strategy to be implemented with full respect for human rights and with appropriate democratic and judicial oversight, recommending further that the Member States, the Commission and the European External Action Service (EEAS) should make a thorough assessment of

[1272] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, para. 8.
[1273] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, para. 21.
[1274] EU General Affairs and External Relations Council of 11 December 2006, Conclusions, 21. See Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008), 108-112.
[1275] See EU Torture Guidelines, 5.
[1276] Marsh and Rees consider the US to be the EU's 'single most important ally'. Steve Marsh and Wyn Rees, *The European Union in the Security of Europe: From Cold War to Terror War* (Routledge 2012) 59.
[1277] See Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] available at http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf (last accessed 8 May 2015), 149-152.
[1278] See Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] available at http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf (last accessed 8 May 2015), 149-152.
[1279] See Florian Trauner, 'The Internal-External Security Nexus: More Coherence Under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, 21.

third States' human rights records before entering into new agreements where they fail to respect human rights.[1280] The Parliament has also called on the governments of Egypt, Jordan, Syria and Morocco to provide clarity on their role in extraordinary rendition.[1281]

A further factor to be considered as regards the external dimension is the impact of the EU's incoherent stance both internally and externally on its credibility and influence in human rights matters on the international stage. There is a well-established critique concerning the disjuncture between the EU's promotion of human rights vis-à-vis third countries and its willingness to engage comprehensively on such matters internally.[1282] A pertinent example of this in the particular field of extraordinary rendition is the recommendation by Parliament in it 2013 resolution to the EEAS to step up its efforts to facilitate the establishment and functioning of national preventive mechanisms (NPMs) under the Optional Protocol to the Convention against Torture (OPCAT), while a significant proportion of the Member States have yet to ratify that Protocol. Citing the example of European involvement in the rendition programme, a study conducted as early as 2007 by the Parliament's Directorate General of External Policies, based on information collected from missions in third countries, concluded that it was a of 'profound concern' that so many stakeholders consulted in the course of the study questioned the EU commitment to human rights in general and the elimination of torture and ill-treatment in particular, 'and that they saw a lack of coherence and consistency in this respect'.[1283] More recently, the European Council on Foreign Relations (ECFR) has attributed the waning influence of the EU on human rights matters on the international plane partly to the 'double standards' which it has adopted on the renditions issue.[1284] A similar critique has been made by numerous NGOs and academic commentators.[1285] This mismatch between rhetorical posturing and the taking of concrete measures has not been lost on the European Parliament whose Committee of Foreign Affairs has warned that 'it is essential that the EU condemns any abusive practices in the fight against terrorism, including any such acts committed on its territory, so that the EU can not only live up to its values but also credibly

[1280] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 40.

[1281] European Parliament, Report on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, para. 225.

[1282] Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' [2011] 105 *American Journal of International Law* 649, 684. See also Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 82-83 referring to the so-called 'Copenhagen dilemma' whereby candidate countries to the EU are required to adhere to democratic principles, rule of law and fundamental rights before joining the EU, but are subject to far less scrutiny afterwards.

[1283] See Anna-Lena Svensson-McCarthy and Eric Sottas, 'The implementation of the EU guidelines on Torture and other cruel, inhuman or degrading treatment or punishment' [2007] report to the European Parliament's Subcommittee on Human Rights, 107.

[1284] 'European States' failure to account for complicity in abuses committed in the war on terror, such as renditions and torture, and their relative inaction in the face of the use of such practices by the United States, have weakened the EU's credibility in criticising abuses elsewhere'. Susi Dennison and Anthony Dworkin, *'Towards an EU Human Rights Strategy for a Post-Western World', European Council on Foreign Relations Policy Brief* [2010] <http://www.ecfr.eu/page/-/towards-an-EU-human-rights-strategy-for-a-post-western-world.txt.pdf> accessed 20 May 2015.

[1285] See the sources cited in Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' [2011] 105 *American Journal of International Law* 649, 687.

advocate them in its external partnerships.'[1286] The European Parliament has in turn called on the EU to ensure that it honours its own international obligations, policies and foreign policy instruments so that 'it is in a stronger position to call for the rigorous implementation of human rights clauses in all the international agreements it signs with third States, including the US.'[1287]

d) Internal and external coherence

The question of how to tackle European complicity in extraordinary rendition brings to the fore a number of obvious sites of incoherence in the EU's engagement on the issue.[1288] These include issues of coherence as between the various EU institutions, coherence as between external human rights and internal fundamental rights regimes and coherence as between fundamental rights and counter-terrorism/strategic interests.

Institutional coherence

As the above analysis has indicated, there has been a major chasm between the perceptions of the European Parliament, on the one hand, and the Council and the Commission, on the other, as regards the EU's ability to compel the Member States to take action to ensure accountability for and to deter further complicity in extraordinary rendition. While the Parliament clearly sees a mandate for the Commission to propose legislative measures in the area, the Commission and the Council have taken a different view of the scope of their mandates. The Parliament has even hinted obliquely at the possibility of using Article 7 TEU as a basis for intervention, but again, the Commission and the Council clearly view the appropriate mechanism for tackling the issues arising as being that of quiet diplomacy.[1289] To a large extent, this would appear to be an issue of political as opposed to legal judgment,[1290] but one which points ultimately to the failure of the EU to construct a coherent human rights policy.

[1286] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 21.

[1287] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, para. 39.

[1288] The following analysis is inspired by the issues identified in Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 72-87.

[1289] 'Each of us operates within a legal framework which we have to respect. Where we can make progress or take measures, we are ready to do so, as in the case of our dialogue with the US but, if we want to ensure that the principles which I have outlined are respected, our best way of achieving that is through patient diplomacy and discreet pressure. That is the most effective way of achieving results'. Statement of Vytautas Leškevičius, President-in-Office of the Council, European Parliament Debates, 'Alleged transportation and Illegal Detention of Prisoners in European Countries by the CIA', 9 October 2013. For further expressions of this view, see the contributions of Franco Frattini (then Vice-President of the Commission) and Günter Gloser (President-in-Office of the Council) European Parliament Debates, 'Extraordinary Rendition', 5 July 2006.

[1290] This is the view of the Human Rights and Democracy Network, 'Strengthening the European Union's Response to Human Rights Abuses Inside its Own Borders' [statement] (5 August 2013)

Human rights versus fundamental rights regimes

A second site of incoherence exposed by the dilemma of extraordinary rendition is the mismatch between the EU's stated values in regard to protecting human rights (with explicit reference to the ECHR) and its determination to carve out a discreet space in respect of its obligations to do so. This is an issue that relates to the tendency of the EU to distinguish between external human rights and internal fundamental rights.[1291] In this respect, de Búrca has noted that while the original vision for the EU's competence in respect of human rights was for the ECHR to form the bedrock of the Community's human rights system, with a formal relationship existing between the CJEU and the ECtHR, the current position as regards EU human rights protection is far more constrained.[1292]Notwithstanding the renewed emphasis placed on human rights in the Treaty of Lisbon, the EU Fundamental Rights Charter clearly circumscribes the obligations of the Member States, EU institutions, bodies and agencies in respect of fundamental rights to when they are implementing EU law. While the accession of the EU to the ECHR would clearly improve the possibility of EU institutions being held responsible for a failure to compel the Member States to investigate allegations of human rights violations of the ECHR (such as extraordinary rendition), this would only ensure external accountability before the ECtHR and the human rights regime of the Council of Europe, as opposed to ensuring such within the domain of EU law.[1293] Actions based on the ECHR would also be dependent on the ability of an individual to produce sufficient evidence to bring a case under the ECHR against a Contracting State – a difficulty that cannot be underestimated in regard to an issue like complicity in extraordinary rendition.

Allied to this issue of the limited reach of EU fundamental human rights law, the issue of European complicity in extraordinary rendition can also be drawn on as further evidence, − beyond the crises presented by the emergence of right-wing governments in Austria and Hungary[1294] − of the need for the EU to establish 'a better developed set of instruments – not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty.'[1295] Efforts have been made recently in this direction through the establishment by the Commission of a new framework which

<http://www.hrw.org/news/2013/08/05/strengthening-european-union-s-response-human-rights-abuses-inside-its-own-borders> accessed 20 May 2015.

[1291] See further Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 80.

[1292] Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' [2011] 105 *American Journal of International Law* 649, 676-680.

[1293] Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' [2011] 105 *American Journal of International Law* 649, 677.

[1294] See further the collection of Articles compiled by the European Parliamentary Research Service on 'Article 7 TEU: A Mechanism to Protect EU Values' available at http://epthinktank.eu/2013/10/07/article-7-teu-a-mechanism-to-protect-eu-values/.

[1295] José Manuel Durão Barroso, 'State of the Union 2012 Address' [press release, speech] <http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm> accessed 20 May 2015.

will enable it to assess situations where there is a threat to the rule of law as expressed in Article 2 TEU in a Member State.[1296]

Strategic interests vs. fundamental rights

A third problem of coherence which this case study brings into focus is the conflict of interests that can arise between the EU's interest in protecting fundamental rights and that of countering terrorism. As noted in Section 3(D), the failure of the EU to take concerted action in both the internal and external dimensions is in no small measure influenced by its prioritisation of the national security concerns of the Member States (internal dimension)[1297] and its counter-terrorism goals and strategic relationship with the US (external dimension). While the latter relationship has been put under increasing strain in the wake of the Snowden revelations regarding the US NSA surveillance programme,[1298] it is clear that the US remains the EU's key strategic partner in counter-terrorism and security initiatives and that a concern to maintain that alliance and their shared interests has the potential to eclipse fundamental rights concerns. This problem was specifically highlighted by the Parliament's assertion in its 2013 resolution that the 'climate of impunity' regarding the CIA programmes has enabled the continuation of fundamental rights violations in the counter-terrorism policies of the EU and the US'.[1299]

e) Possible EU actions to promote fundamental/human rights and coherence in respect of extraordinary rendition

A persistent theme, particularly in the aftermath of the Treaty of Lisbon in regard to the AFSJ has been that of legal accountability and protection of fundamental rights.[1300] Yet the failure of the EU to take action regarding the complicity of Member States in the extraordinary renditions programme has demonstrated significant gaps and disagreements regarding the EU's capacity to hold Member States accountable for human rights violations in respect of it. The resulting picture, as demonstrated in the above analysis, is one of institutional and horizontal incoherence as regards the EU's stated values on fundamental rights and its passive stance on the issue in both the internal and external dimensions. The following sections suggest some possible actions that could be taken by the EU to address the lacunae arising.

[1296] European Commission, Communication from the Commission to the European Parliament and the Council: A new EU Framework to Strengthen the Rule of Law, COM (2014)158 final, 2. See also Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 83.

[1297] 'The EU's cooperation on internal security has been characterised by an exclusive and defensive logic of cooperation, meaning that EU ministers of justice and home affairs have been predominantly concerned with removing or containing perceived threats'. Florian Trauner, 'The Internal-External Security Nexus: More Coherence Under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, 9.

[1298] See European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs.

[1299] European Parliament resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA, para. 2.

[1300] Lorna Woods and Philippa Watson, *Steiner and Woods: EU Law* (12th edn, Oxford University Press 2014) 571.

Legislative measures

As regards potential legislative measures in the internal dimension, it is clear that there has been little political appetite for the idea of legislating in the area of monitoring and control over joint and coordinated intelligence activities on national security grounds. More broadly, Nowak and Charbord have speculated on the possibility of the EU criminalizing torture, arguing that 'common rules on how to ensure implementation of the prohibition on torture and ill-treatment with a requirement for criminal sanctions for respective violations could contribute to a more uniform enforcement of the prohibition across EU states, including the obligation to investigate and the level of sanction.'[1301] Such action would clearly serve to substantially fill the accountability gap exemplified by complicity in activities such as extraordinary rendition. One specific area in which the EU has already demonstrated its commitment to avoiding complicity in torture is Council Regulation No. 1236/2005 (amended in December 2011) which prohibits the export or import of goods that no practical use other than for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment.[1302] Clearly, the question of whether the EU has competence to criminalise torture raises complex questions of subsidiarity and 'added value',[1303] but it would certainly appear, at first blush, to merit further reflection as a means of augmenting coherence and accountability deficits in the EU human rights regime, as well as providing a means of deterring involvement on the part of European States in any renditions possibly practised by the US or any other third state in the future.[1304] In the meantime, the EU should continue to promote the ratification of international human rights treaties by the Member States, particularly the OPCAT and the International Convention for the Protection of All Persons from Enforced Disappearances.

EU accession to the ECHR

As noted above, accession of the EU to the ECHR would be one potential means of securing external accountability for EU inaction in the field of extraordinary rendition.[1305] The road to accession was formally opened in the Treaty of Lisbon with the clear obligation provided for in Article 6(2) of the amended TEU for the EU to accede to the ECHR. However, the necessary preparations for accession foundered in December 2014 when the Draft Revised Accession Agreement of the European Union to the European Convention on Human Rights[1306] was found to be incompatible with EU law by the

[1301] Manfred Nowak and Anne Charbord, 'Art.4 – Prohibition of Torture' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 61, 90.

[1302] Council Regulation (EC) No 1286/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2005] OJ L22/48, 30 July 2005, 1.

[1303] Manfred Nowak and Anne Charbord, 'Art. 4 – Prohibition of Torture' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 61, 90.

[1304] The prospect of a continuing rendition regime in the US is by no means ruled out and the European Parliament's Policy Department has warned that the development of renditions regimes by other States is also of concern in terms of EU external policy. Róisín Pillay, 'Current Challenges Regarding Respect of Human Rights in the Fight against Terrorism' [2010] report to the European Parliament's Subcommittee on Human Rights.

[1305] See above Section 4(B).

[1306] See Council of Europe, Draft Revised Accession Agreement of the European Union to the European Convention on Human Rights

CJEU.[1307] Progress on the accession project has thus stalled for the moment and it is thus far too early to determine where future negotiations may lead in terms of accession.

Inter-institutional cooperation

As highlighted above, institutional coherence issues have clearly been a factor in resolving the human rights problems raised by the involvement of European States in the extraordinary rendition programme. To this extent, further avenues of collaboration and cooperation should be explored, especially as between the relevant committees on fundamental rights of the Parliament (the LIBE Committee) and the Council's FREMP. The latter Committee has, until recently, been absorbed with the task of negotiating accession to the ECHR, but as argued by the Human Rights and Democracy Network, there is considerable scope for it to become more involved in outreach on human rights issues not only with the European Parliament but also with NGOs, the Council of Europe and the UN special mechanisms.[1308] More regular engagement between the two committees on issues arising may assist in closing institutional coherence gaps such as those identified in the current study.

Monitoring mechanism

The current case study also highlights limitations in the available mechanisms for monitoring human rights violations at the EU level which are largely restricted to review of the activities of the Member States, bodies, agencies and institutions of the Union when they are implementing EU law.[1309] It has also exposed the lack of political will to deploy the mechanism in Article 7 TEU to take action in cases of a serious and persistent breach of the fundamental principles listed in Article 2 TEU. The Commission is currently piloting a new framework on the rule of law which is designed to assist it in assessing situations where there is a threat to the rule of law as expressed in Article 2 TEU in a Member State.[1310] It remains to be seen whether this new mechanism will serve to fill the void in cases such as the one examined in the current case study. In the meantime, a related recommendation, raised in general terms in another report within this research project, is the suggestion that the mandate of FRA should

<http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf> accessed 20 May 2015.

[1307] Opinion pursuant to Article 218(11) TFEU − Draft international agreement − Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties, Opinion 2/13, 18 December 2014. For a range of views on the reasons given by the Court, see Antoine Buyse, 'CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law', *FRAME Magazine* (26 February 2015), <http://www.fp7-frame.eu/cjeu-rules-draft-agreement-on-eu-accession-to-echr-incompatible-with-eu-law/> accessed 20 May 2015.

[1308] Human Rights and Democracy Network, 'Strengthening the European Union's Response to Human Rights Abuses Inside its Own Borders' [statement] (5 August 2013), 2 <http://www.hrw.org/news/2013/08/05/strengthening-european-union-s-response-human-rights-abuses-inside-its-own-borders> accessed 20 May 2015.

[1309] In addition to the possibility of proceedings under the Charter of Fundamental Rights before the CJEU, it should be noted that the European Commission does produce an annual report each year to the Parliament and the Council on the application of the EU Charter of Fundamental Rights.

[1310] European Commission, Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014)158 final, 2.

be expanded to monitor or report regularly on human rights violations in the Member States.[1311] Having regard to the clear divergence of views between the European Parliament and the Council and the Commission on the scope of their respective mandates to take action on extraordinary rendition, this is one example where the benefits of extending the mandate of the FRA to advise the institutions or at least to have a voice in the dialogue could be extremely helpful.

f) Concluding remarks

The case study on extraordinary rendition exemplifies a number of sites of incoherence in the EU's institutional and policy engagement regarding a counter-terrorism strategy involving the Member States which has obvious fundamental rights implications. These include issues of coherence as between the European Parliament on the one hand and the Commission and the Council on the other, regarding both the internal and external dimensions. While the Parliament has been proactive in urging the latter two bodies to take measures to ensure accountability on the part of the Member States for their complicity in the US led rendition programme and to prevent further violations in the implementation of counter-terrorism policies, the Council and the Commission have been resilient in their stance that the matters concerned lie outside the competence of the Union institutions. The issue thus reveals different understandings of the limits of EU competence where matters concerning fundamental rights and issues of national security arise, and arguably also in respect of the scope of EU law itself.

This stand-off between the institutions in regard to the internal dimension is replicated at the external level, with the Council and the Commission likewise ignoring calls from the Parliament to take a firm stance on extraordinary rendition, both with respect to the US and the Member States. This intransigence stands in stark contrast to the findings of high-profile investigations by the Parliament itself and the Council of Europe pointing to complicity on the part of the Member States and recent judgments of the ECtHR on the matter. The apparent prioritisation of national security concerns over the human rights issues at play in regard to extraordinary rendition threatens to undermine and compromise the credibility of the EU's nascent human rights policy on the external stage.

In the light of these findings, and pending further developments as regards EU accession to the ECHR and with respect to the development of the Commission's rule of law monitoring mechanism, the study makes a number of practical suggestions. These include the need for further reflection on the idea of the EU moving to criminalize torture, for deeper engagement between the relevant committees of the European Parliament (the LIBE Committee) and the Council's FREMP, and to extend the mandate of the FRA to advise the institutions on matters of competence in areas such as extraordinary rendition.

[1311] Tamara Lewis *et al.*, *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies* [2014] <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 May 2015, 73-74.

D. International crimes (crimes against humanity, genocide, war crimes, crime of aggression)

1. Introduction: International crimes and the problem of impunity

During armed conflicts, violent crime often multiplies. Many of these conflict-related atrocities have traditionally gone unpunished, either because the offences have been committed by individuals in a position of power or due to a desire to 'move on' after the armed conflict has ended. International criminal law has developed as a reaction to this widespread impunity. It is based on the idea that certain crimes entail *international* individual criminal responsibility. If domestic authorities do not investigate and prosecute the crimes, international courts can do so. Today, international criminal law also defines certain peacetime atrocities as international crimes to address impunity for serious human rights violations, which is a particular problem in societies with authoritarian rule.

Historically, international law only contained rules on state responsibility, but in the 1940s international criminal law began to evolve.[1312] The establishment of the International Military Tribunal at Nuremberg in 1945 was the central turning-point in this regard. Later on, the development of international criminal law has been strongly affected by the establishment of the international criminal tribunals for the former Yugoslavia (ICTY) (1993) and Rwanda (ICTR) (1994). These tribunals were created by the UN Security Council to restore international peace and security.[1313] In 1998, the statute of the International Criminal Court (ICC) was adopted in Rome,[1314] and this permanent international criminal court began functioning in 2002. Today, it is firmly established that crimes against humanity, genocide and war crimes are international crimes that can be prosecuted both by international and domestic criminal courts.

The international crimes typically involve serious violence against individuals, such as unlawful killing and rape. The crimes differ, however, from one another in terms of their legal background and crime elements. War crimes have a direct link to international humanitarian law and their characteristic feature is that the criminal act (for example, wilful killing or unlawful deportation) *takes place in the context of and is associated with an armed conflict*.[1315] Crimes against humanity and genocide, on the other hand, are often seen as crimes with a background in human rights law. Crimes against humanity have as its main element that the prohibited conduct (for example, murder or rape) is committed *as part of a widespread or systematic attack directed against a civilian population*.[1316] Genocide involves acts aimed at the physical destruction of a group committed with *intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*.[1317]

[1312] It is, however, possible to find earlier attempts to prosecute individuals internationally. See in this regard e.g., Kai Ambos, *Treatise on International Criminal Law*, *Volume I* (Oxford University Press 2013), 1-4.
[1313] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (1993), and UNSC Res 955 (8 November 1994) UN Doc S/RES/955.
[1314] Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9.
[1315] See further Article 8, ICC Statute.
[1316] See further Article 7, ICC Statute.
[1317] See further Article 6, ICC Statute.

International criminal law also includes a fourth core crime, namely the crime of aggression (previously referred to as the crime against peace), which criminalises the initiation of an armed conflict. To date, none of the modern international criminal tribunals have had jurisdiction over the crime of aggression, but in 2010 a definition of the crime was adopted by the Assembly of States Parties to the ICC. This 2010 amendment to the ICC Statute has been ratified by 22 states, but it has not yet entered into force.[1318]

Crimes against humanity, genocide and war crimes are crimes to which the principle of universal jurisdiction applies. This means that the crimes can be prosecuted in every country in the world regardless of where they have been committed or the nationality of the perpetrator.

2. The external dimension

The EU action against international crimes started in the mid-1990s and happened in parallel with developments taking place within the UN, most notably the creation of the ICTY and the ICTR. In the early 1990s the EC, for example, launched an investigative mission into the treatment of Muslim women in the Former Yugoslavia.[1319] This mission was of great importance for the later development of ICTY jurisprudence addressing the sexual violence that took place during the conflict. Furthermore, the EU has adopted common positions addressing both the conflicts in Rwanda and the former Yugoslavia, in which it has stressed the importance of fighting impunity.[1320] In a 2002 common position on Rwanda the Union, for example, held that:

> The European Union shall: (i) support the work of the International Criminal Tribunal for Rwanda (ICTR), located in Arusha, and in particular renew its efforts to ensure that all States surrender to the ICTR all those indicted by it for genocide and other serious violations of international humanitarian law. It shall seek continued improvement of the tribunal's administrative effectiveness; (ii) urge the

[1318] As of 6 February 2015. The amending instrument stipulates that: '2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.' Annex I: Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression (11 June 2010) Resolution RC/Res.6.

[1319] See further e.g., Rape and abuse of women in the areas of armed conflict in the former Yugoslavia (20 December 1993) UN Doc A/RES/48/143.

[1320] See e.g., Council Decision of 24 October 1994 concerning the Common Position adopted by the Council on the basis of Article J.2 of the Treaty on European Union on the objectives and priorities of the European Union vis-à-vis Rwanda (94/697/CFSP), OJ L 283/1, 29 October 1994 ('The European Union stresses the importance of bringing to justice those responsible for the grave violations of humanitarian law, including genocide. In this respect the European Union considers the establishment of an international tribunal as an essential element to stop a tradition of impunity and to prevent future violations of human rights.'). Also see e.g., Council Common Position 2000/558/CFSP of 18 September 2000 on Rwanda, OJ L 236/1, 20 September 2000, Article 4, and Council Common Position of 21 October 2002 on Rwanda and repealing Common Position 2001/799/CFSP, OJ L 285/3, 23 October 2002, Article 4. See e.g., Common Position 2004/694/CFSP on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 197/63, 25 July 2008. Also see Council Regulation (EU) No 1048/2011 of 20 October 2011 repealing Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 276/1, 21 October 2011.

> Government of Rwanda to comply fully with its obligation to cooperate with the ICTR and to deliver all information asked by the ICTR regardless of the persons or institutions concerned. The European Union shall encourage the Government of Rwanda to comply with its obligations under the International Covenant on Civil and Political Rights and to observe other international safeguards concerning the death penalty and actively encourages it to envisage the abolition of the death penalty. [...].[1321]

The EU has also supported the *ad hoc* tribunals financially and operationally.[1322] The Union has, for example, adopted measures to ensure that persons indicted by the tribunals do not evade justice by imposing entry restrictions.[1323] Significantly, the EU has also adopted a special *conditionality policy* towards countries that intend to join the Union, in which adherence to the values of international criminal law and cooperation with international criminal tribunals have been set as requirements for EU membership. This policy has been especially relevant in relation to the ICTY and the countries of the Former Yugoslavia.[1324] In 2007, the ICTY Prosecutor estimated that 90 percent of those indicted and who were in the tribunal's custody where there due to the EU's conditionality policy.[1325]

The EU has continued its involvement in the Balkans and more recently the Union has, for example, promoted Kosovo's approximation to the EU. In 2008, the Union established the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) to support rule of law in Kosovo. Within this mission, EULEX Judges and Prosecutors are embedded in Kosovo's judicial system to investigate and prosecute special EULEX cases. These cases involve war crimes, terrorism or other crimes characterised as 'serious crimes'.[1326] In 2011, the EU also created a special investigative task force to investigate particular allegations of serious human rights violations in Kosovo.[1327]

The EU has also been a significant supporter of the ICC. The Statute of the ICC was adopted at a conference in Rome in 1998. At this conference, most EU Member States participated in the so-called Like-Minded Group, which consisted of states in favour of the creation of the Court.[1328] The EU itself was, however, not represented, and there was no common position among the EU Member States on

[1321] Council Common Position 2002/830/CFSP of 21 October 2002 on Rwanda and repealing Common Position 2001/799/CFSP, OJ L 285/3, 23 October 2002, Article 4.

[1322] See further Jan Wouters and Sudeshna Basu, 'The Creation of a Global Criminal Justice System: The European Union and the International Criminal Court', in Cedric Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia 2009), 121-122.

[1323] See e.g., Council Common Position 2004/293/CFSP of 30 March 2004 renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 94/65, 31 March 2004.

[1324] See e.g., ICTY Press Release 'The New President of the EU will make cooperation with the ICTY a basic condition for any progress in the development of the relations between the EU and the countries of the region,' The Hague, 3 July 1997 (CC/PIO/223-E).

[1325] European Parliament, External Relations, 'Serbia Must Deliver War Criminals before Signing Stabilisation Agreement with the EU, says Carla Del Ponte', Press Release, 26 June 2007.

[1326] See further European Union Rule of Law Mission in Kosovo (EULEX KOSOVO), <http://www.eulex-kosovo.eu/> accessed 10 September 2015.

[1327] See further EU Special Investigative Task Force (SITF) <http://sitf.eu/> accessed 14 April 2015.

[1328] See further e.g., Dominic McGoldrick, 'Political and Legal Response to the ICC' in Dominic McGoldrick, Peter Rome and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 392.

the Court.[1329] The ICC Statute was quickly ratified by all EU Member States. Additionally, all of the Member States of the enlarged EU are States Parties to the Rome Statute.

In June 2001, the EU adopted a common position on the ICC, in which the Council found that the serious crimes within the jurisdiction of the Court 'are of concern for all Member States', and established as an objective to pursue and support an early entry into force of the Rome Statute.[1330] This common position was amended in 2002,[1331] and again in 2003.[1332] The latter common position was followed by an action plan adopted in February 2004 which contained sections on 'coordination of EU activities', 'universality and integrity of the Rome Statute' and 'independence and effective functioning of the ICC'.[1333] More specifically, the Action Plan foresaw the creation of an EU Focal Point for the ICC and an ICC sub-area in the Council's Public International Law Working-Party (COJUR-ICC).[1334] Of these two, the EU Focal Point for the ICC is tasked with supporting and coordinating the implementation of EU action in relation to the ICC, and to distribute information about, for example, relevant meetings.[1335] The Focal Point was first established in the General Secretariat of the Council, but has now been transferred to the EEAS. The COJUR-ICC, on the other hand, assembles specialists in international criminal law who, for example, prepare common EU approaches to questions on the agenda of the ICC Assembly of State Parties and exchange information on third country positions with the ICC.[1336] The COJUR-ICC meets 5 to 6 times per year. These meetings usually include informal contacts with NGOs and talks with special guests from the international criminal tribunals.[1337] Today, the relationship between the Union and the ICC is regulated by a Council decision on the ICC adopted in 2011,[1338] and by a cooperation agreement between the EU and the ICC concluded in 2005.[1339] Furthermore, an Action Plan guides the development of the relationship.[1340] EU action in the field is also affected by several different soft law instruments, such as

[1329] Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 86.
[1330] Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, OJ L 155/19, 12 June 2001.
[1331] Council Common Position 2002/474/CFSP of 20 June 2002 on the International Criminal Court, OJ L 164/1, 22 June 2002.
[1332] Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, OJ L 150/67, 18 June 2003.
[1333] Action Plan to Follow-Up on the Common Position on the International Criminal Court, 4 February 2004.
[1334] Action Plan to Follow-Up on the Common Position on the International Criminal Court, 4 February 2004.
[1335] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 27.
[1336] Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008), 51.
[1337] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 28. Also see e.g., Jan Wouters and Sudeshna Basu, 'The Creation of a Global Criminal Justice System: The European Union and the International Criminal Court' in Cedric Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia 2009), 132-133.
[1338] Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76/56, 22 March 2011.
[1339] Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006, entry into force 1 May 2006. Agreement concluded on 6 December 2005.
[1340] Council of the European Union: Action Plan to Follow-Up on the Decision on the International Criminal Court, 12080/11, 12 July 2011.

the EU Guidelines on Promoting Compliance with International Humanitarian Law, which were revised in 2009.[1341]

In its common position of 2001, the Council set the EU and its Member States to goal to further the ratification of the ICC Statute and the values reflected in the Statute.[1342] These objectives were reaffirmed in the 2004 Action Plan, which also established that country- or region-specific ICC strategies should be adopted and that the ICC should be mainstreamed in all EU external action.[1343] Faithful to these proclamations, the EU has included ICC clauses in many of its multilateral agreements. An especially important agreement in this regard is the 2000 ACP-EU Partnership Agreement (also known as the Cotonou Agreement) as amended in 2010, which settles the framework for EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP). Article 11(7) of the revised Cotonou Agreement stipulates that:

> In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to:
>
> — share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and
>
> — fight against international crime in accordance with international law, giving due regard to the Rome Statute. The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.

This provision has been characterised as 'the standard clause' to be followed when negotiating other agreements.[1344] ICC clauses can now, for example, be found in some Partnership and Cooperation Agreements (PCAs), Trade, Development and Cooperation Agreements (TDCAs) and Association

[1341] 'While, in post-conflict situations it is sometimes difficult to balance the overall aim of establishing peace and the need to combat impunity, the European Union should ensure that there is no impunity for war crimes. To have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State were the violations have occurred. The EU should therefore encourage third States to enact national penal legislation to punish violations of IHL. The EU's support of the ICC and measures to prosecute war criminals should also be seen in this context.' Council of the European Union: Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) (2009/C 303/06), OJ C 303/12 of 15 December 2009, para. 16(g). The same guidelines also stipulate: 'Individuals bear personal responsibility for war crimes. States must, in accordance with their national law, ensure that alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the international Criminal Court.' *Ibid.*, para. 14.

[1342] Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, OJ L 155/19, 12 June 2001. The external dimension of the EU action was emphasized even more strongly in the amended common position in 2002, where it was settled that the "Union and its Member States shall contribute to the world-wide participation in and implementation of the Statute" by making "every effort" to further the ratification process. Council Common Position 2002/474/CFSP of 20 June 2002 on the International Criminal Court, OJ L 164/1, 22 June 2002.

[1343] Action Plan to Follow-Up on the Common Position on the International Criminal Court, 4 February 2004. Also see e.g., Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76/56, 22.3.2011, 76.

[1344] Individual solutions are, however, still possible if needed. General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 13.

Agreements (AAs).[1345] Furthermore, the partnership frameworks with Australia (2008) and Canada (2004) refer to the need to enhance the universality of the ICC Statute.[1346] The work against impunity and the need to support the ICC is also mentioned in the 2007 Africa-EU Strategic Partnership[1347] and in the 2007 EU Strategy for a New Partnership with Central Asia.[1348] The Union has additionally carried out approximately 50 to 60 *démarches* per year in relation to different countries (for example, Bangladesh and Chile) and organisations to encourage the ratification and implementation of the ICC Statute and the Agreement on Privileges and Immunities.[1349] Some of the EU's Special Representatives (EUSR) for 'troubled countries and regions', such as the EU Special Representative for Sudan, have an express mandate to support the ICC and may maintain regular contacts with the ICC Prosecutor.[1350]

The pro-ICC attitude of the EU is also reflected in the fact that the EU was the first regional organisation to sign a cooperation and assistance agreement with the ICC in 2006.[1351] The 2006 agreement establishes a general obligation to cooperate and assist the ICC, and foresees exchange of information and documentation.[1352] The EU has also emphasised in its common positions that EU Member States

[1345] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 12. See also Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2014], Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014], Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part [2013], Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part [2012], Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2010], Framework Agreement on Comprehensive Partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part [2009].

[1346] European Union – Australia Partnership Framework [2008] ('Australia and the EU strongly support the effective functioning of the International Criminal Court and the universality of the Rome Statute'), and EU-Canada Partnership Agenda [2004] ('Canada and the EU attach great importance to the functioning of the multilateral system, particularly the role of the United Nations in maintaining world peace and the international rule of law. To ensure the effectiveness of the multilateral system we will: [...] work together to ensure the full establishment of the jurisdiction of the International Criminal Court.') Also see General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 15.

[1347] The Africa-EU Strategic Partnership − A Joint Africa-EU Strategy [2007], para. 30 ('[b]oth sides also commit themselves to fight impunity in all its forms. The most serious crimes of concern to the international community as a whole, especially crimes against humanity, war crimes and genocide, should not go unpunished and their prosecution should be ensured by measures at both domestic and international level. In this context, the partners agree that the establishment and the effective functioning of the International Criminal Court constitute an important development for peace and international justice.')

[1348] 'The EU Strategy for Central Asia, adopted by the European Council in June 2007, is another example of how the EU mainstreams the ICC into its external policies. The EU acknowledges that Central Asia remains significantly underrepresented in the Court system, and thus includes the Rome Statute ratification among the objectives to be pursued in its new partnership with Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan.' General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 11. Also see The European Union and Central Asia: the New Partnership in Action [2009], 16-17.

[1349] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 10.

[1350] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 12.

[1351] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 21.

[1352] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 21 ('The agreement does not apply to ICC requests for information from individual Member States, which are governed by

should cooperate in the ICC Assembly of State Parties to ensure its 'smooth functioning' and nominate highly qualified candidates to important ICC positions.[1353] Finally, the EU's support for the ICC has been reflected in the financial support the Union has given to, for example, NGOs working for greater international cooperation with the ICC.[1354] Also in relation to the ICC, the EU has a conditionality policy entailing that states wanting to join the Union should have ratified the ICC Statute.[1355]

The strong EU support for the ICC stands in stark contrast with the US approach to the Court.[1356] While the EU worked for increasing the number of states taking part in the work of the ICC, the US tried to conclude agreements with other states so as to not have to hand over American citizens to the Court. This difference in approach led to political tensions, especially during the early years of the ICC. In 2002, the EU adopted a set of guiding principles containing minimum benchmarks to be respected by the Member States if they were to enter into bilateral non-surrender agreements.[1357] Despite its hostility towards the ICC the US did, however, not block the referral of the situations of Darfur and Libya to the ICC in the UN Security Council.[1358] Today, the US is no longer the ICC's main critic. Rather, numerous African States and the African Union have been criticising the Court for its 'African bias' – all situations and cases currently before the Court involve African States.[1359]

The external action also includes the Union's activity in relation to international humanitarian law and human rights law more generally. In this regard, it is noted, for example, that at the 31st International Conference of the Red Cross and Red Crescent in 2011 the Union made a pledge against impunity, and for the universality and integrity of the ICC.[1360]

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bilateral arrangements, nor does it affect the competence of the European Community2 to achieve the objectives of the agreement through separate measures. Following this agreement, security arrangements for the protection of classified information between the EU and the ICC were agreed to and entered into force.')

[1353] Council Common Position 2002/474/CFSP of 20 June 2002 on the International Criminal Court, OJ L 164/1, 22 June 2002. Also see Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, OJ L 150/67, 18 June 2003.

[1354] 'Since 1995 (when a specific budget line was created by the European Parliament to that end), the EU has provided over EUR 40 million under the European Instrument for Democracy and Human Rights (EIDHR) for projects aiming at supporting the ICC and international criminal justice. Significant funds have been used to promote the ratification of the Rome Statute, particularly by funding global NGO activity through organisations such as the Coalition for the International Criminal Court and No Peace Without Justice and promoting awareness-raising among parliamentarians through Parliamentarians for Global Action.' European Commission, External Relations, 'The International Criminal Court & the fight against impunity', <http://ec.europa.eu/external_relations/human_rights/icc> accessed 31 March 2015.

[1355] General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 9.

[1356] See further e.g., Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008), 117.

[1357] EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding Conditions to Surrender of Persons to the Court, Council Conclusions, 30 September 2002. Also see e.g., General Secretariat of the Council, *The European Union and the International Criminal Court* [2010], 6.

[1358] See further Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 86.

[1359] See further e.g., Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 88.

[1360] See further31st International Conference of the Red Cross and Red Crescent [2011] pledge P1311 available at <https://www.icrc.org/pledges#> accessed 10 September 2015.

Recently, the Union has reaffirmed its commitment to international humanitarian law and to the fight against impunity in its Action Plan on Human Rights and Democracy for the years 2015-2019. More concretely, the following goals are set out in the Action Plan:

> - Supporting compliance with International Humanitarian Law [...]: Assess and as necessary enhance the implementation of the EU Guidelines on promoting compliance with IHL in light of the ongoing discussions on an IHL compliance mechanism. [...]
>
> - Ending impunity, strengthening accountability and promoting and supporting transitional justice (TJ):
>
> a. Conduct a comprehensive evaluation of the implementation of Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court [...] and the Action Plan on its implementation; formalise the establishment of an EU/ICC Roundtable, allowing relevant staff to identify common areas of interest, exchange information on relevant activities and ensure better co-operation between the two organisations. [...]
>
> b. Develop and Implement an EU policy on Transitional Justice including through a mapping exercise to identify the EU's experiences, challenges and lessons learned in its support to TJ; provide concrete guidance and training to EU mission staff working on TJ, establish a network of staff across the Commission services and EEAS and EU Member States, as appropriate, to exchange best practices and foster coherence and consistency; increase monitoring and reporting (including through the Human Rights Country Strategies) and promote inter-regional dialogue on transitional justice to improve co-operation between regional organisations.

3. The internal dimension

Numerous international crimes have been committed on European soil in the past. The starting point of the development of international criminal law as we know it today was, in fact, the Second World War and the atrocities committed during that armed conflict in Europe. These atrocities were also the key push factor for the whole European integration process, of which a central goal was to prevent another war between France and Germany. As noted by the Nobel Committee in 2012 when awarding the Nobel Peace Prize to the EU, the Union has indeed 'contributed to the advancement of peace and reconciliation, democracy and human rights in Europe' for over six decades.[1361] A side effect of this positive development has, however, been that in today's Europe international crimes are often seen as a non-European problem. The possibility of the re-emergence of international crimes should not be overlooked. In addition, the involvement of EU citizens in armed conflicts abroad, and the fact that perpetrators may enter the Union as visitors or as applicants for international protection, entail that there is sometimes a need to prosecute international crimes within the Union.[1362] A report published in

[1361] Den norske nobelkomite, 'The Nobel Peace Prize for 2012' <http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/press.html> accessed 8 September 2015.

[1362] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 10. As regards non-EU citizens who have been involved in international crimes, it is not always possible to send them back to their home country and/or the country where the crimes were committed to face trial. This may be due to the principle of *non-refoulement* or, for example, the lack of an appropriate legal framework for extradition. EU Genocide

2014 estimates that the Member States have so far concluded around 1,600 international core crime prosecutions and are currently investigating over 1,300 new cases committed around the world.[1363]

The EU has adopted measures to ensure that international crimes are prosecuted effectively within the Union. The most important measures in this regard are the 2002 Council decision to establish a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (EU Genocide Network),[1364] and the 2003 decision concerning the investigation and prosecution of genocide, crimes against humanity and war crimes to fight impunity for international crimes within the Union.[1365] Instruments on judicial cooperation, such as the Framework Decision on the EAW and the surrender procedures between Member States, are also important for successful prosecutions.[1366]

The EU Genocide Network was established in 2002.[1367] Based on the decision establishing the network, each Member State has designated a contact point for the exchange of information concerning the investigation of genocide, crimes against humanity and war crimes.[1368] In practice, the Member States are represented in the network by prosecutors, investigators, and mutual legal assistance authorities, that is, practitioners working with international crime investigations and prosecutions.[1369] The primary task of the network is to facilitate the exchange of information, but it also functions as a forum for

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Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 11.

[1363] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 29. These numbers also involve Second World War cases prosecuted decades after the crimes have been committed. On the different types of cases, see e.g., FIDH, Redress, and Trial, *Handbook for Victims of Serious International Crimes in the EU: Your rights to access support, advice and justice* [2014], 25-26. Of the EU institutions, it is especially the European Parliament that has been a supporter of the use of universal jurisdiction. See further Olympia Bekou and Mark Chadwick, 'The EU Commitment to International Criminal Justice: Achievements and Possibilities' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011), 92. Also see e.g., European Parliament resolution of 17 November 2011 on EU support for the ICC: Facing challenges and overcoming difficulties, para. 16.

[1364] Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167/1, 26 June 2002.

[1365] Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118/12, 14 May 2003.

[1366] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18 July 2002, and Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27 March 2009.

[1367] Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167/1, 26 June 2002.

[1368] Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167/1, 26 June 2002, Article 1.

[1369] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 25.

sharing knowledge and best practice.[1370] The network also liaises with authorities from some observer states and international organisations and tribunals (for example, the ICC and *ad hoc* international criminal tribunals, the International Committee of the Red Cross, and Interpol).[1371] Network meetings are held twice a year and are divided into two sessions: (1) a closed session for national contact points and their counterparts from observer states, in which confidential and sensitive information can be shared; and (2) an open session involving the extended network.[1372] Since 2011, the network has a Eurojust-hosted secretariat based in The Hague.[1373] The network has, for example, produced expert papers to support the work of the national authorities (for example on cooperation between immigration authorities and witness support and protection).[1374]

In 2003, the Council adopted a decision concerning the investigation and prosecution of genocide, crimes against humanity and war crimes to fight impunity for international crimes within the Union.[1375] The general aim of this decision was to 'increase cooperation between national units in order to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution' of the international crimes.[1376] More concretely, the decision, *inter alia,* establishes that measures must be taken to ensure that national law enforcement and immigration authorities may exchange information in situations where a person is suspected of having committed an international crime.[1377] The decision also stipulates that the Member States 'shall consider' the creation of special units to investigate and/or prosecute international crimes.[1378]

A central element of the ICC system is the complementarity principle, which establishes that the State Parties themselves should prosecute the international crimes in the first instance and that the ICC only can act when the State Parties have been unable or unwilling to do so.[1379] To function, the complementarity principle supposes that State Parties have the necessary infrastructure, including appropriate substantive criminal law, to be able to prosecute international atrocities in domestic courts.

[1370] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 2.
[1371] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 25.
[1372] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 25-26.
[1373] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 2.
[1374] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 26.
[1375] Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118/12, 14 May 2003.
[1376] Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118/12, 14 May 2003, Article 1.
[1377] Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118/12, 14 May 2003, Article 2.
[1378] Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118/12, 14 May 2003, Article 4.
[1379] NB. The 'responsibility of all States to bring the perpetrators of core international crimes to trial derives from a set of international obligations much broader than those enshrined in the Rome Statute.' EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 21.

In this regard, Article 5 of the 2011 Council decision on the ICC stipulates that the Member States shall take appropriate measures to ensure the implementation of the principle of complementarity at the national level.[1380] A survey conducted in 2010 into the domestic criminal laws of the Member States shows the majority of Member States had the necessary criminal law legislation with regard to the three international core crimes.[1381] Several Member States have also created special war crimes units to investigate and/or prosecute the crimes.[1382] It is important to note that the international crimes are not explicitly mentioned as 'particularly serious crime with a cross-border dimension' in Article 83(1) TFEU, which means that the Union cannot adopt minimum rules concerning the international core crimes.[1383]

In relation to the crime of aggression, the Council has acknowledged the amendments made to the ICC Statute[1384] but has not explicitly urged Member States to ratify the amendments. The European Parliament, on the other hand, has called upon the EU to adopt a common position on the Kampala Amendments and for Member States to ratify and implement these amendments.[1385] So far the EU measures in relation to international crimes have focused on crimes against humanity, genocide and war crimes.

Finally, it should be noted that the Council framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law establishes that each Member State shall take the measures necessary to ensure that publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes 'directed against a group of persons or a

[1380] Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76/56, 22 March 2011.

[1381] 'The implementation of the definition of war crimes into national legislation has been partially achieved, with 25 Member States defining the scope of the crime, and providing for universal jurisdiction to prosecute the perpetrators present in their territories. However, in one Member State, no definition of war crimes exists under its current national legislation, and in another two the definition is only covered in the Military Criminal Code. [Austria does not have any legislation for war crimes; Denmark and Italy only have national legislation on war crimes in the Military Criminal Code, which only covers situations involving acts committed by or against their army.] [...] National penal legislation in three Member States does not provide a definition of or reference to crimes against humanity or is not fully compatible with the Rome Statute. [Austria, Denmark and Italy] The implementation of the definition of the crime of genocide into national legislation has been achieved in all Member States.' EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 14 (referring to a 2010 FIDH Report).

[1382] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 4.

[1383] It has been pointed out that while the Member States have adopted measures to allow prosecutions of international crimes, there is not full internal consistency. Bekou and Mistry therefore suggest that the international core crimes should be included in the list of crimes over which the EU has competence based on Article 83(1) TFEU to ensure full implementation of the Rome State in all Member States. Olympia Bekou and Hemi Mistry, 'Mainstreaming Support for the ICC in the EU's Policies' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) 29.

[1384] Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76/56, 22 March 2011, para. 13. Also see Council of the European Union, Council Conclusions on the Review Conference of the Rome Statute of the International Criminal Court, 25 May 2010, and Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 87.

[1385] European Parliament resolution of 17 July 2014 on the crime of aggression, 2014/2724(RSP).

member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group' is punishable.[1386] In January 2014, it was, however, reported that this provision had not been transposed fully and/or correctly by a number of Member States. In fact, thirteen Member States had no criminal law provisions prohibiting such conduct.[1387]

The EU has also established a Day of Remembrance (23 August) to honour victims of totalitarian and authoritarian regimes.[1388]

4. EU action against international crimes and human rights

a) The effectiveness of the EU measures against impunity

Many international crimes simultaneously constitute serious violations of human rights,[1389] and the effective investigation and prosecution of these crimes is therefore vital for the realisation of human rights. In this regard, it has been noted that international criminal tribunals are 'an instrument for the indirect protection of human rights'.[1390] This prompts the question as to whether the EU measures in relation to international crimes have *de facto* been effective. In general terms, the EU's engagement in the fight against impunity must be applauded. This has been noted by many NGOs working for international criminal justice. For example, the Coalition for the International Criminal Court (a network of numerous NGOs working for increased international cooperation with the ICC) has held that:

> The European Union (EU) has been a leading force in the establishment and the strengthening of international justice mechanisms such as the ICC. Since 1995, the fight against impunity for serious international crimes has represented a top priority for the EU. The EU has offered valuable political

[1386] Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, OJ L 328/55, 6 December 2008, Article 1. Cf. also the Stockholm Programme, in which the: 'The European Council invites the Commission: — to examine and to report to the Council in 2010 whether there is a need for additional proposals covering publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.' European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 8. In the new 2014 Strategic Guidelines international crimes are not mentioned explicitly, but may be included in the category of serious crimes.

[1387] Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM(2014) 27 final, 27 January 2014, 5.

[1388] JHA Council, Council conclusions on combating hate crime in the European Union, 5 and 6 December 2013.

[1389] Especially, when it comes to crimes against humanity and genocide that have their background in international human rights law. War crimes, on the other hand, are connected to international humanitarian law. See further e.g., Mikaela Heikkilä, *Coping with international atrocities through criminal law: a study into the typical features of international criminality and the reflection of these traits in international criminal law* (Åbo Akademi University 2013), 165.

[1390] Carmen Márquez Carrasco and Laura Iñigo Álvarez, 'Is the EU an Effective Promoter of the ICC?' [2015] *FRAME Magazine* [blog].

> and technical support to states worldwide, including those that are not yet party to the Rome Statute.[1391]

In its external action, EU's conditionality policy has entailed significant improvements in state cooperation, most notably, with the ICTY.[1392] This being said, the effectiveness of the various EU measures in relation to international criminal justice can still be questioned. In relation to the EU's external action, it has, for example, been noted that the significance of the various ICC clauses in different international agreements and policy documents is highly unclear.[1393] Such clauses can be found in many instruments, but their inclusion sometimes appears to be a matter of routine, and the enforcement of the clauses is not thoroughly supervised. In this regard it has, for example, been pointed out that the ICC Clause in Article 11 of the Cotonou Agreement falls under the heading 'elements of the political environment' and not an 'essential element' of the agreement, which 'mitigates its efficacy as there is no possibility of suspending aid on the basis of lack of compliance with this clause.'[1394]

However, it is the internal dimension of the fight against international crimes that has been found to be particularly undeveloped. For example, the EU Genocide Network has held that 'more could be done at EU and Member State level to provide for a consistent and effective EU-wide approach to the fight against impunity.'[1395] Also, the European Parliament has called on the EU and its Member States to increase their efforts to fight impunity within the EU's own borders.[1396] To make the EU-internal action more effective, the EU Genocide Network in 2014 adopted a strategy and suggested the following steps to be taken:

> **For EU institutions:**
> - Ensure appropriate resources to build the Network as a centre of expertise and promote it both within and outside EU fora.
> - Reaffirm their commitment to the fight against impunity by assessing additional funding possibilities for the Network and for national authorities to establish specialised units, and for trainings and capacity-building activities.
> - Formally evaluate the implementation of the 2002/494/JHA and 2003/335/JHA Council Decisions, and organise an annual hearing on the fight against the impunity within the EU, to take place in the European Parliament.
> - Place the topic on the political agenda and recognise that funding is an essential means of enabling national authorities and civil society to effectively coordinate their fight against impunity; develop the understanding of international criminal law and international humanitarian law; and increase public awareness of the necessity of the fight against impunity.
> - Amend the mandate of Eurojust and Europol to include core international crimes.

[1391] Coalition for the International Criminal Court, 'European Union', <http://www.iccnow.org/?mod=eu> accessed 31 March 2015.
[1392] See further Section III.D.2.
[1393] Cf. Jan Wouters and Sudeshna Basu, 'The Creation of a Global Criminal Justice System: The European Union and the International Criminal Court' in Cedric Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia 2009), 135.
[1394] Antonis Antoniadis and Olympia Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' [2007] *International Criminal Law Review* 621, 646-647.
[1395] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 5.
[1396] European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union's policy on the matter (2013/2152(INI)), para. 104.

- Prepare an Action Plan on the Fight against Impunity within the EU.

For Member States:

- Review and, if necessary, amend domestic legislation on core international crimes to ensure that it reflects obligations under international law and does not provide undue immunity to individuals.
- Establish specialised units within the prosecution and police and services; and develop a national strategy and national platforms for cooperation in fighting impunity for core international crimes. Within their immigration departments, ensure that staff members are suitably trained, best practice is developed, and that the flow of information from immigration to law enforcement authorities is efficient, with a specific obligation to inform law enforcement authorities when confronted with 1F cases.
- Enhance communication between Member States, for example by utilising joint investigation teams (JITs) where appropriate; support the initiative for a global framework of cooperation between Member States.
- Ensure effective exchange of information within state departments, particularly among investigators, prosecutors and the authorities responsible for the supervision of freezing and confiscating assets, trade or travel bans.
- Expand use of the Network and Network Secretariat through the nomination of multiple national contact points with experience and expertise in prosecution, criminal investigation and mutual legal assistance (MLA). Integrate victims' perspectives into their investigative and prosecutorial strategies from the outset of a case to ensure the fairness of proceedings and their impact on victims and affected communities, and provide victims with information on their rights and protection arrangements.
- Create public awareness of the necessity of the fight against impunity and the associated investigations and prosecutions of core international crimes.

For National Contact Points:

- Disseminate information on topics discussed by the Network to other members of prosecution and law enforcement services as well as other relevant national authorities, such as immigration services at national level.
- Present information on investigations and prosecutions of those responsible for core international crimes to decision-makers and the general public.
- Act as a point of communication for practitioners and relay information back to the Network.

For the Network Secretariat:

- Facilitate national authorities' efforts by expanding the information-sharing function to allow for increased exchange of best practice, applicable laws, ongoing prosecutions and investigations.
- Assist Member States in the establishment and promotion of specialised units.
- Facilitate cooperation and coordination of efforts to bring perpetrators to justice and offer relevant expertise to national authorities.
- Produce an annual activity report presenting information on investigations and prosecutions of perpetrators of core international crimes.
- Regularly brief Council Working Groups, including the Working Group on Public International Law (COJUR), the International Criminal Court (ICC) sub-area of the public international law Working Group (COJUR-ICC), the coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS), the Working Group on General Affairs and Evaluations (GENVAL), and regional working groups.[1397]

In January 2015, several human rights NGOs approached the Latvian Ministers of Interior and Justice through an open letter in which the organisations urged the Latvian presidency to place the strategy on

[1397] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 7-8.

the JHA Council meeting agenda so that Council conclusions on the topic could be adopted.[1398] To date such conclusions have not been adopted. Various NGOs have also expressed support for the EU Genocide Network's work against impunity.[1399] More generally, it has been suggested that the insufficient implementation of EU Genocide Network's recommendations and conclusions by Member States and EU institutions shows inconsistency in the EU-internal fight against impunity.[1400] It has also been suggested that the resources granted to the Network are too modest and that additional funding would make it possible for the Network to expand its activities.[1401] Also, the European Parliament has put forward proposals on how the internal dimension of the fight against impunity could be developed. The Parliament has, for example, suggested that TFEU Article 83 should be amended to include the international core crimes to allow the Union to adopt minimum rules regarding the definitions and sanctions for these crimes.[1402]

Many of the proposals put forward by the EU's Genocide Network are indeed essential if the Union wants to fight impunity more effectively. The idea that immigration authorities should be more involved in the fight against international crimes is, however, not without problems.[1403] While it is true that it is problematic if the EU becomes a safe haven for individuals guilty of international crimes, the coupling of immigration control with law enforcement risks sending the message that all immigrants are probable criminals.[1404] At the same time, immigration authorities responsible for the so-called 1F cases should

[1398] Redress, FIDH, European Center for Constitutional and Human Rights, Amnesty International, Trial, Human Rights Watch, Coalition for the International Criminal Court, RCN Justice & Démocratie, 'Re: JHA Council conclusions on the fight against impunity for serious international crimes within the EU and Member States' [open letter], 15 January 2015, available at <http://www.hrw.org/news/2015/01/15/latvian-eu-presidency-should-promote-conclusions-strengthen-fight-against-impunity-e> accessed 13 April 2015.

[1399] Redress, Trial, FIDH, Avocats sand frontières, Human Rights Network, Euro-Mediterranean Human Rights Network, European Center for Constitutional and Human Rights, and Human Rights Watch, 'Re: Strengthening efforts to combat impunity within the EU and its Member States for serious international crimes – renewed engagement in the field of Justice and Home Affairs' [open letter], 25 November 2013, available at <http://www.hrw.org/sites/default/files/related_material/Civil%20society%20letter%20to%20GENVAL.pdf> accessed 13 April 2015.

[1400] Redress, 'Strengthening efforts to combat impunity within EU Member States for crimes under international law: renewed engagement in the field of Justice and Home Affairs' [contribution to a public consultation by the European Commission], 23 December 2013, <http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/85_1_redress_en.pdf> accessed 13 April 2015, 2.

[1401] Human Rights Watch, *The Long Arm of Justice - Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* [2014] 88.

[1402] European Parliament resolution of 17 November 2011 on EU support for the ICC: facing challenges and overcoming difficulties, para. 12.

[1403] 'Member States should put in place a more 'integrated approach' among immigration, police and prosecution authorities as such approach will improve the position of Member States' authorities in the fight against impunity. Such approach should oblige immigration officers to inform law enforcement authorities when confronted with 1F cases.' See further EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 35-36.

[1404] Cf. Statewatch regarding a similar earlier suggestion, Statewatch, 'Council Presidency proposal on security screening of all immigrants', July 2002, <http://www.statewatch.org/news/2002/jul/09screen.htm> accessed 10 September 2015 ('The proposed [...] Decision on screening of migrants would require Member States to screen all immigrants, apparently including all asylum-seekers, for an undefined list of crimes. This would include entirely open-ended powers for law enforcement authorities (likely including security services) to become involved in

certainly be able to be in contact with criminal justice authorities addressing international crimes,[1405] and regular checks in international wanted persons' notices (such as the Interpol Red Notice) should be made to ensure that international fugitives do not escape criminal justice.[1406] The fight against impunity quite simply has to be conducted in a way that does not cast suspicion upon all immigrants and refugees.

Finally, it has also been suggested that accountability for international crimes should be one of EU's *key priorities* in its criminal justice policy in the post-Stockholm era.[1407] While the European Council in the 2010 Stockholm Programme invited the Union institutions to continue to support and promote Union and Member States' activity against impunity and fight against crimes of genocide, crimes against humanity and war crimes,[1408] the 2014 Strategic Guidelines do not in any way explicitly mention international crimes.[1409] Rather, the new guidelines emphasise the need to fight serious and organised crime and terrorism. While this lack of attention to international crimes in the 2014 Strategic Guidelines to some extent can be explained by the overall less detailed nature of the new guidelines in comparison to the Stockholm Programme, this shortcoming is unfortunate. The current worldwide refugee crisis not only means that victims of international crimes are on the move, but so too are perpetrators and other crime participants. As noted by Carrasco and Álvarez regarding Syria, a large number of people involved in the commission of international crimes in the course of that conflict are likely to be on the move and may have entered the Union as part of the influx of refugees and asylum seekers from that region.[1410] The question of how to effectively investigate and prosecute international crimes within the Union is therefore especially topical at the moment.

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immigration and asylum decisions. There is no regard paid to the rights of immigrants or asylum-seekers to protection from persecution, the right to family life, and there is no provision for data protection, information for the persons concerned by such decisions, or for the judicial control or scrutiny of the decisions taken.').

[1405] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 38-39.

[1406] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 37.

[1407] Redress, 'Strengthening efforts to combat impunity within EU Member States for crimes under international law: renewed engagement in the field of Justice and Home Affairs' [contribution to a public consultation by the European Commission], 23 December 2013, <http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/85_1_redress_en.pdf> accessed 13 April 2015. Also see Amnesty International, *The future of EU policies in the area of freedom, security and justice: a human rights perspective* [2014], 20: 'The debate on the future strategy of EU justice policies should be the occasion to express a renewed engagement from the EU to combat impunity for crimes under international law such as genocide, crimes against humanity, war crimes, and torture. All EU institutions must commit to strengthening their efforts to support cooperation and coordination among criminal justice authorities and other relevant actors, and to helping member states addressing the challenges faced by national police and prosecution authorities in the effective investigation and prosecution of these crimes.'

[1408] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/8.

[1409] European Council: European Council 26/27 June 2014 Conclusions.

[1410] Carmen Márquez Carrasco and Laura Iñigo Álvarez, 'Is the EU an Effective Promoter of the ICC?' [2015] *FRAME Magazine* [blog].

b) Addressing international crimes in a human rights friendly manner

A central element in a human rights friendly policy to fighting impunity is that the rights of suspects and accused persons are respected during the proceedings and that the interests and rights of victims and witnesses are considered. In recent years the EU has adopted instruments to develop the rights of both suspects/accused persons and victims.[1411] These instruments have entailed improvements in the procedural status of both categories of participants. However, a handbook prepared by some NGOs in 2014 notes that, for example, the status and rights of victims of international crimes still vary considerably from jurisdiction to jurisdiction.[1412] As such, the question of victims' rights still requires attention within the Union, especially in relation to victims of organised and serious crime.[1413]

Also, international crimes are crimes in which effective prosecution often demands the participation of insider and victim witnesses who are often unwilling to testify due to security and privacy concerns.[1414] However, as noted in relation to organised crime, the EU has not adopted instruments to harmonise witness protection within the Union.[1415] Defective witness protection can harm the legal interests of witnesses (for example, their right to life) and hamper the effective prosecution of international crimes. As such, the Union should reconsider whether action should be taken in this regard.

5. Issues of coherence in the fight against international crimes

a) Introduction

Before the entry into force of the Treaty of Lisbon the pillar divide affected the functioning of the EU's AFSJ, including its measures to fight impunity for international crimes. The promotion of adherence to international criminal law in third countries, for example, took place pursuant to first pillar instruments such as the Revised Cotonou Agreement.[1416] All in all, the pillar divide made the effective implementation of ICC-related obligations more difficult.[1417] Now the pillar divide has been dissolved and other types of issues of coherence have emerged (or remained). The most notable coherence issue is the imbalance between the strong dedication to the external action and corresponding scant attention to the internal dimension as discussed above. There are, however, other problems of

[1411] See further Section III.A.2.d. in this report. As the Victim Directive apples to all criminal proceedings that take place on EU territory, also victims of extra-territorial offences enjoy the rights enshrined in the directive. Tara O'Leary, 'Minimum Standards on the Rights, Support and Protection of Victims of Crime in the EU' [2013] *EU Update on International Crimes*, Issue 10, 1.

[1412] FIDH, Redress, and Trial, *Handbook for Victims of Serious International Crimes in the EU: Your rights to access support, advice and justice* [2014], 27-41.

[1413] See in this regard the recently published report Redress and ISS, *Victim Participation in Criminal Law Proceeding: Survey of Domestic Practice for Application to International Crimes Prosecutions* [2015].

[1414] See further e.g., See further Guido Acquaviva and Mikaela Heikkilä, 'Protective and Special Measures for Witnesses', in Göran Sluiter *et al.* (eds), *International Criminal Procedure - Principles and Rules* (Oxford University Press 2013), 818-859.

[1415] See further Section III.A.2.d.

[1416] Antonis Antoniadis and Olympia Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' [2007] *International Criminal Law Review* 621, 626.

[1417] Antonis Antoniadis and Olympia Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' [2007] *International Criminal Law Review* 621, 626.

incoherence in the policy field, as will be considered below. In relation to coherence, it is significant to note that the 2011 Council Decision on the ICC stipulates that the 'Union shall ensure consistency and coherence between its instruments and policies in all areas of its external and internal action in relation to the most serious international crimes as referred to in the Rome Statute.'[1418]

b) Coherence in the external dimension

A significant issue of incoherence is that the Union appears to react strongly to some violations of international criminal law, but not to others. Davis has, in this regard, noted that:

> EU struggles to be coherent [...] and consistent towards third parties. This is not to suggest that there must be a rigid, one-size-fits-all approach [...] with all third countries. Yet, it is remarkable that despite the policy provisions in support of the ICC; CFSP instruments have not been mandated to support its work, even in ongoing situations – with the exception of the EUSRs [EU special representatives] for Sudan and the Sahel, and latterly the AU [African Union].[1419]

Carrasco and Álvarez have similarly criticised the EU for its incoherent policy towards cooperation with the ICC and have argued that the Union 'must [...] be more proactive and show a robust position in advocating for full cooperation with the ICC in situations where the Court's arrest warrants are ignored or investigations jeopardised, as was the case for Sudan, Libya and Kenya.'[1420] It is also striking that while many cooperation agreements with third countries contain international criminal law clauses this is not the case for all the cooperation agreements. In relation to the ENP it has, for example, been noted that ICC clauses have not been inserted into the existing agreements, but have instead been included in Action Plans as political commitments.[1421] As regards promoting the universality of the Rome Statute, it has also been pointed out that while the EU has raised the question of ratification of the ICC Statute with many non-State Parties, the Union appears to be unwilling to do so with certain key partners, most notably, the USA, Russia and India.[1422] This type of geographic inconsistency is a source of double standards[1423] and challenges the role of the EU as a staunch promoter of international criminal justice. The EU Member States have also disagreed on particular issues relating to the ICC. The EU Member States have, for example, not presented a united front with regard to support for the Palestinian ratification of the ICC Statute. Several NGOs have condemned the UK and France's opposition and urged the EU to 'stop blocking Palestinian membership of the ICC.'[1424] Despite the opposition of some EU

[1418] Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76/56, 22 March 2011, Article 8.
[1419] Laura Davis, *EU Foreign Policy: Transnational Justice and Mediation: Principle, Policy and Practice* (Routledge 2014) 96.
[1420] Carmen Márquez Carrasco and Laura Iñigo Álvarez, 'Is the EU an Effective Promoter of the ICC?' [2015] *FRAME Magazine* [blog].
[1421] Antonis Antoniadis and Olympia Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' [2007] *International Criminal Law Review* 621, 648.
[1422] Olympia Bekou and Hemi Mistry, 'Mainstreaming Support for the ICC in the EU's Policies' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) 35.
[1423] Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 96.
[1424] Amnesty International, Broederlijk Delen, Christian Aid, the International Federation for Human Rights (FIDH), Human Rights Watch, and Pax Christi Flanders, 'Why the EU should stop blocking Palestinian membership of the

Member States, on 1 April 2015 Palestine became the 123rd State Party to the Rome Statute of the ICC.[1425]

One explanation for the inconsistency in the EU's action is the amount of violations committed around the world combined with the difficulty to react strongly to all of them. Notwithstanding this, clear criteria should be established for when and how the Union should politically and legally react to serious violations of human rights around the world. Pre-established criteria could be especially useful in sensitive political situations and/or in situations where Member States disagree on how to proceed. A recent example of a situation where the EU Member States have not been able to agree on a common approach is the UN General Assembly vote on the so-called Goldstone Report accusing Israel of war crimes in Gaza.[1426]

Another central question is how the EU should react to criticism directed against, for example, the ICC and the principle of universal jurisdiction by non-EU Member States. In this regard, the integrity of the ICC system was challenged by the US after the Rome Conference when the US strived to conclude bilateral immunity agreements with numerous states. As noted above, the EU reacted strongly to the American policy and this was applauded by many human rights NGOs.[1427] Today, the strongest criticism of the ICC comes from African States, where the ICC's focus on African situations and cases has been interpreted as an anti-African bias.[1428] This criticism has been more difficult for the EU to handle than the situation concerning the US. Amnesty International has in this regard held that the EU's very quiet stance towards the African ICC criticism does 'great disservice to the EU's long-standing support for

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ICC' [position paper], 12 December 2014 <https://www.hrw.org/news/2014/12/12/why-eu-should-stop-blocking-palestinian-membership-icc> accessed 10 September 2015. Also see Amnesty International, 'Retaliation against Palestine's Welcome Accession to ICC Must Stop' [press release], 7 January 2015 <http://www.amnestyusa.org/news/press-releases/retaliation-against-palestine-s-welcome-accession-to-icc-must-stop> accessed 10 September 2015 ('In addition to Israel and the USA, EU member states and Canada – ostensibly staunch supporters of the ICC – have consistently pressured the Palestinian authorities not to take steps to grant the ICC jurisdiction in recent years; such pressure has included threats to withdraw financial assistance on which the Palestinian authorities depend. In July 2014, the EU Foreign Affairs Council warned the Palestinian authorities "to use constructively its UN status [which it obtained in 2012] and not to undertake steps which would lead further away from a negotiated solution." Joining the Rome Statute was considered such a step; influential EU member states, including the UK and France, had publicly opposed Palestine seeking access to the ICC.')

[1425] ICC, 'ICC welcomes Palestine as a new State Party' [press release], 1 April 2015, ICC-CPI-20150401-PR1103. Likewise, all EU Member States have not expressed unconditional support for the actions taken by the ICC in relation to post-election violence in Kenya. It has been argued that opinions expressed by some EU Member States that the ICC should interpret its Statute 'more flexible' is something that undermines the integrity of the ICC Statute. Olympia Bekou and Hemi Mistry, 'Mainstreaming Support for the ICC in the EU's Policies' [2014] report to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) 43.

[1426] Olympia Bekou and Mark Chadwick, 'The EU Commitment to International Criminal Justice: Achievements and Possibilities' in Jan Erik Wetzel (ed), *The EU as a "Global Player" in Human Rights?* (Routledge 2011), 82.

[1427] See further Section III.D.2.

[1428] See e.g., Abdullahi Boru Halakhe, 'Does the ICC have an Africa problem? Kenya trials key to future of court's relations with continent', Al Jazeera, Opinions, 7 February 2014 <http://america.aljazeera.com/opinions/2014/2/kenya-trials-keytoiccafricarelations.html> accessed 10 September 2015.

international justice' and has urged the Union to publicly re-affirm its commitment to the ICC.[1429] At the same time, the EU has, for example, worked towards improving the communication between the ICC and the AU and has called for the transfer of President Al-Bashir to the ICC.[1430] While a single EU voice is not necessarily something that always benefits the ICC,[1431] it is, however, important. The AU has also been very critical of the use of the principle of universal jurisdiction by some EU Member States.[1432] In this situation a more coherent EU stance would again be valuable.

c) The crimes considered as the international 'core' crimes

In international criminal law, crimes against humanity, genocide, and war crimes are often referred to as the 'international core crimes'. These three crimes can be prosecuted by international criminal courts/tribunals and their prosecution can be effected based directly on international law. This distinguishes international core crimes from so-called transnational crimes (such as terrorism) which are internationally regulated but which must be criminalised in domestic law for individual criminal responsibility to arise. The crime of aggression is often regarded as the fourth international core crime, but the exact legal status of this crime has for a long time been debated due to the lack of an international definition. Since the 2010 Kampala Review Conference of the ICC, the crime has an internationally adopted definition.

Within the EU, the three established core crimes have been in the focus in the Union's fight against impunity. Concern within the civil society has been expressed as regards the EU's narrow focus on the core international crimes, for example, in relation to the EU Genocide Network Strategy, as the 'approach excludes other serious international crimes, such as torture and enforced disappearances as distinctive crimes.' This is seen as unfortunate as it 'creates an unnecessary and artificial distinction between serious international crimes for which an international obligation to investigate and prosecute exists.'[1433] In its 2014 strategy the EU Genocide Network acknowledges that many of the recommendations could also be applicable to torture and enforced disappearances as distinctive crimes,

[1429] Amnesty International, 'EEAS Must Maintain EU Commitments on LGBTI Rights, International Justice and Human Rights in Africa' [letter to Catherine Ashton], 8 October 2013, <http://www.amnesty.eu/content/assets/Doc2013/B1485_HRVP-LGBTI__rights-ICC_October_2013.pdf> accessed 10 September 2015.

[1430] Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 88.

[1431] Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 93.

[1432] See e.g., Assembly of the African Union, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 30 June-1 July 2008, and Assembly of the Union, Decision on the Abuse of the Principle of Universal Jurisdiction, 15-16 July 2012.

[1433] Redress, FIDH, European Center for Constitutional and Human Rights, Trial, Human Rights Watch, and Amnesty International, 'Re: EU Genocide Network's strategy to combat impunity for genocide, crimes against humanity and war crimes within the European Union and its Member States' [open letter], 27 October 2014, <https://www.amnesty.org/download/Documents/8000/ior530112014en.pdf>accessed 14 April 2015.

but at the same time the Network notes that its mandate is limited to the three core crimes.[1434] The crime of aggression is not mentioned anywhere in the EU Genocide Network strategy.

The EU approach to the crime of aggression has from the beginning been marked by the fact that Member States have not had a common viewpoint on the crime, as shown at the 1998 Rome Conference. Likewise, at the 2010 Kampala review conference some EU Member States spoke strongly in favour of extending the Court's jurisdiction to aggression, whereas others did not support the extension.[1435] The post-Kampala period, for its part, has been characterised by considerable silence and inaction within the EU as regards the crime of aggression. An exceptional EU institution in this regard has been the European Parliament, which has assumed a clear stance for EU action in relation to the crime of aggression. In a resolution adopted in July 2014 the Parliament stressed the need to actively promote support for the ratification of the Kampala amendments in all EU external actions. The institution also urges all EU Member States to ratify the amendments.[1436]

6. Concluding remarks

The EU is often found to be a strong supporter of international criminal justice and, compared to many other world superpowers (for example, China, Russia and the USA), this is indeed the case. At the same time, the Union's fight against impunity could be more effective and coherent. The current migration crisis has led to a situation where many individuals originating from conflict zones are now present within the EU. Many of these migrants have left their homes due to the atrocities being committed, but among the migrants there are also individuals who themselves have participated in the commission of crimes. As such, it is now especially crucial that the Union has the means to effectively tackle international crimes. In this regard, the implementation of the recommendations put forward in the strategy adopted by the EU Genocide Network in 2014 is central. It is, for example, important to ensure that the Genocide Network can effectively function as a centre of expertise. In addition, the implementation and monitoring of the existing EU instruments in the field should be ensured. The Union should also improve its commitment to impunity in its external relations. This involves the inclusion of international criminal law clauses in different cooperation instruments, and significantly, their careful monitoring. To ensure implementation transitional justice should, for example, be included in the mandates of Common Security and Defence Policy (CSDP) missions and Special Representatives. The EU should furthermore continue working for the promotion of international criminal justice which involves both (a) furthering the universality of international criminal law by ensuring that new states start to prosecute international crimes in domestic courts and/or join the ICC, and (b) to constructively address criticism and challenges directed against central international criminal law institutions and principles. The EU should also ensure that it reacts systematically to gross violations of human rights and

[1434] EU Genocide Network, Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States [2014], 4 (fn 1).
[1435] Laura Davis, 'Discreet Effectiveness: The EU and the ICC' in Edith Drieskens and Louise G. van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014), 87.
[1436] European Parliament resolution of 17 July 2014 on the crime of aggression, 2014/2724(RSP). Also see e.g., European Parliament resolution of 17 November 2011 on EU support for the ICC: facing challenges and overcoming difficulties, para. 6.

international humanitarian law. If the Union wants to be perceived as a frontrunner in international criminal justice, the Union should also consider adopting measures in relation to the crime of aggression.

E. Concluding remarks

This Chapter has focused on scrutinising the integration of human rights in EU policies on organised and serious crime. The Chapter began with an introductory section on serious and organised crime in general. Many of the human rights issues pinpointed in that section are at the same time overreaching problems of all EU criminal law cooperation. In relation to criminal procedure, it was emphasised that special attention must be given to the rights of suspected and accused individuals at both the investigative and trial stages. Organised and serious crime is often difficult to investigate, which has meant that the use of special investigative techniques is common in relation to such crime. While the collection and production of evidence is still a matter for the EU Member States, the fact that the Union has adopted instruments, such as the EIO, which are based on mutual recognition and mutual trust, results in procedural human rights also being of relevance for the Union. Human rights problems have also been reported in connection with other EU instruments founded on mutual recognition and trust, such as the EAW. Based on the analysis, it is therefore asserted that the relationship between human rights and mutual recognition must be given further consideration and clear guidelines for human rights evaluations in relation all such instruments must be adopted. In relation to procedural law, it was also stressed that the rights and interests of victims and witnesses must be appropriately acknowledged. The EU has adopted legal instruments addressing the rights of victims of crime, but the practical implementation of these instruments remains a matter of concern. Witness protection still belongs to the domain of Member States, but EU action in the field should be considered to ensure that individuals providing evidence of organised and serious crime are given due protection. Victim and witness protection and support therefore continue to be areas in which improvements in the EU fundamental rights infrastructure can be made.

As regards substantive criminal law, human rights law requires that the criminal offences are precisely defined in law and that the use of criminal law is strictly necessary. In this regard, it was pointed out that while, for example, the SOCTA has improved the knowledge of the prevalence of organised and serious crime in Europe, more research (especially social science research) on the topic is still needed. One may, for example, question whether EU measures on organised crime in general are necessary, or whether the Union should instead focus on particular forms of organised and serious crime such as human trafficking and terrorism.

It is also possible to identify coherence issues that plague EU criminal law cooperation in general. From a human rights perspective, most problems of incoherence relate to the external dimension of the EU policies and the strong desire to focus on 'keeping the problems out'. The interest in addressing organised and serious crime effectively should not, however, mean that the Union disregards its general external human rights policy and cooperate with states that do not give human rights sufficient attention.

After the general introduction on organised and serious crime, the EU action in relation to human trafficking was considered. In that Section, attention was given especially to the human rights of victims of trafficking. To begin with, it was submitted that human rights issues in the internal dimension of the EU's actions against human trafficking first need to be solved before a coherent external strategy against

human trafficking can be developed. Human rights issues such as ensuring access to compensation for trafficked persons arise due to inconsistent application of EU standards in the Member States. Reasons for these incoherencies are, on the one hand, the discretion given to Member States in implementing the relevant directives, whilst on the other hand, weak monitoring of the implementation of trafficking-related EU legislation results in human rights issues. Enhanced monitoring and evaluation of measures against human trafficking would be essential. Therefore, the EU should, for example, communicate to Member States a preference for national rapporteurs to be established as independent institutions with sufficient staff and resources to fulfil their monitoring function. In addition, legal amendments must be accompanied by further measures such as training or awareness-raising in order to be effective.

Although the EU is gradually raising the level of protection of the rights of trafficked persons and aligning it with the standards of the Council of Europe, gaps in protection can be observed. The Council of Europe Convention against Trafficking in Human Beings continues to fill several gaps in EU legal standards and policy concerning human trafficking, such as mandatory risk assessments prior to return or concerning the minimum length of reflection period. Furthermore, the Council of Europe provides for external monitoring of anti-trafficking measures. Nevertheless, a clear framework for the relationship between the EU and the Council of Europe, in particular concerning monitoring of the implementation of standards, seems to be missing and should be developed. In order to align EU standards concerning human trafficking with human rights standards inconsistencies between Directives 2004/81 and 2011/36 should be resolved and access to unconditional residence facilitated. Equal standards for all trafficked persons within the EU must be established, and it should be ensured that trafficked EU-citizens are able to exercise their rights and to have access to justice.

Despite the EU's efforts to harmonise policies and measures against human trafficking by developing an EU Strategy against Trafficking, human trafficking is still discussed in a very isolated way. The link between safe migration and preventing human trafficking is to a large extent disregarded in EU policies aimed at combating human trafficking. Human trafficking also continues to be framed as a form of organised crime, and consequently is treated primarily as a security matter. Rather, human trafficking should be framed as a serious human rights violation which demands more coherent action by the EU, both internally and especially externally.

In Section C on counter-terrorism, counter-terrorism was first briefly considered in general, after which the question of extraordinary rendition was addressed in greater detail. The section reveals a number of coherence-deficits in the EU's approach to counter-terrorism, both at an institutional and policy based level. In particular, it has highlighted how the conflict of interest that comes into play between protecting human rights and the strategic interest of countering terrorism can result in competing priorities and perspectives between the European Parliament on the one hand, and the Council and the Commission, on the other. This is seen, for example, in the actions taken by the Parliament in relation to counter-terrorism and international agreements generally, and in relation to its concerted activity as regards the human rights implications of extraordinary rendition specifically, in the face of a marked inertia on the part of the Commission and the Council on that issue. Institutional deficits also arise as regards the procedures of the CJEU in dealing with counter-terrorism and its inability, in particular, to penetrate counter-terrorism initiatives taken at the national level in the Member States. The latter

concern is all the more pertinent given the shared competence of the Member States and the EU to act in this area, a position which in and of itself raises coherence problems with regard to the protection and promotion of fundamental human rights.

In the internal dimension, the inherent tension that exists in balancing 'freedom', 'security' and 'justice' also comes to the fore as regards the human rights implications of operating the EAW; and again, in the failure of the EU to take any concerted action on the issue of extraordinary rendition in particular, despite the obvious human rights concerns arising. This failure, in itself, exposes credibility gaps in the external dimension, given the obvious mismatch between the EU's willingness to promote human rights matters on the external stage and its failure to act in its own territory. Given the reality demonstrated in the section as a whole that initiatives in the counter-terrorism field are bound to raise competing fundamental rights concerns on a persistent basis, this is clearly an area that merits close attention in the coming years.

Finally, as regards international crimes, the report notes that the EU's action in the field is characterised by a certain duality. On the one hand, the Union has been a strong supporter of international criminal law and international criminal courts, such as the ICTY and the ICC. On other hand, the Union can in its external action be criticised for not always reacting strongly to international atrocities, and for not strictly monitoring impunity/ICC clauses in its international agreements. As regards the internal dimension of the policy, there are many aspects that could be improved. The institutional infrastructure could, for example, be developed by providing more resources to the Genocide Network and by making international core crimes part of the mandates of Eurojust, Europol and FRA. In addition, international core crimes are not a field in which substantive harmonisation has taken place, and in this regard the extent to which such harmonisation could further the fight against impunity should be investigated. The Union should also consider the scope of its action in relation to international crimes, and reflect upon why no action has been taken in relation to connected crimes, such as the crimes of aggression and torture.

As a general reflection on EU measures in relation to organised and serious crime, one can note that the similarities and differences between the different crimes should be given further attention. To date, the different types of crimes are often addressed in separate instruments and by different actors/experts. In relation to human trafficking, although framed as a form of organised crime, it is common practice to consider to a certain extent the question from a victims' perspective and a human rights perspective. Greater participation of human rights experts would also be beneficial when the Union's policies on terrorism and organised crime (in general) are on the agenda. The problems facing trafficked persons might be similar to those faced by victims of other international crimes. Political considerations explain why the Union acts incoherently both with respect to international counter-terrorism measures and to measures against international crimes (such as international arrest warrants). The possible synergies are many. As such, a dialogue between the Union's different actors involved in the fight against organised and serious crime should be facilitated and encouraged.

IV. Conclusions

The EU is faced with a refugee crisis of unprecedented proportions. The influx of asylum seekers has led to expressions of solidarity, but also to increased expressions of racism and intolerance. The situation is further compounded by the simultaneously on-going economic recession in many EU Member States. Some of the main points of irregular crossing to the EU, including Greece, are also the areas that have born much of the brunt of the economic crisis that has hit many European States in the 2010s.

As a corollary to this, the Union's asylum and immigration policies are currently at the centre of attention of the European and international discourse on refugee crisis management. The crisis also has its side-effects, such as an increase in smuggling of migrants and the move of individuals suspected of international crimes (as many migrants come from regions where international crimes have recently been/are currently being committed). The growing influence of the Islamic State and the spread of terrorist radicalisation have given rise to concerns about Islamic terrorism. As such, the question of the Union's approach to serious and organised crime continues to be highly topical. Hence, it can be said that from previously being a 'side project', the EU's AFSJ has become one of the Union's most central policy fields that strongly affects the Union's legitimacy.

The objective of this report is to critically assess the integration of human rights into certain AFSJ policies, namely the EU policies on border checks, asylum and immigration and the fight against organised and serious crime (organised crime in general, terrorism, human trafficking, and international crimes). The report reviews the policies and legislation in this field to point to any specific concerns and to flag any possible lacunae in the integration of human rights into the legislation and policies within the area. By and large, the report confirms the sources for human rights concerns in the AFSJ identified in the FRAME D11.1 report that focused on institutions and instruments: unclear divisions of competencies; Member State discretion; lack of accountability and monitoring; reliance on technocrat-driven decision-making and expert knowledge; securitisation of 'freedom' and 'justice'; and disregard for the external implications of EU-internal action.

The findings of the present report are distilled below through the lens of three crosscutting issues that appear to negatively affect the integration of human rights in many of the JHA policy fields. These issues are: securitisation, lack of coherence, and lack of solidarity. Based on the findings, the report identifies general recommendations for enhancing a human rights-based approach to JHA policies.

1. Securitisation

EU cooperation in areas such as terrorism and organised crime has often been criticised for having an overly strong focus on security. In the fight against terrorism intelligence is, for example, generally widely collected, often at the expense of the privacy of individuals. Harsh measures are also often accepted in the fight against organised crime to protect public safety.

This same type of security thinking is now to an increasing degree finding its way into the realm of immigration control. With the refugee crisis unfolding and accelerating during 2014 and 2015, the EU is

facing increasing criticism in the media and by civil society for failing to facilitate the arrival of asylum seekers and persons in need of protection. The EU has been widely reprimanded for insufficient rescue operations at sea and for overly securitising migration measures by laying focus on preventive action instead of creating effective legal avenues for refugees to enter the EU. Grave concern is expressed on the forced returns, the so-called 'pushbacks', of migrants to their point of departure by EU Member States, depriving refugees of due asylum process and often putting their lives at risk. The UNHCR has called upon EU Member States and the EU to adopt more protective border management measures to ensure full compliance with the principle of *non-refoulement*.

In their efforts to securitise Europe, the EU's immigration laws and policies take up characteristics of '*crimmigration*', a term that describes the convergence of criminal law and migration law.[1437] This is visible in a range of areas: in the discussions concerning 'illegal immigrants' and in how, at the level of discourse, migration – in particular irregular migration – is often portrayed as a risk factor to 'fortress Europe'; in penalisation of the facilitation of irregular migration and irregular stay within the EU; and in how resorting to administrative detention in many cases has become more of a standard than an exceptional measure, sometimes carried out in conditions similar to regular detention under criminal law.[1438] The current close connection between criminal law and immigration control is also amply evident in the 2013 Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017, which sets out priorities that are closely connected to the control of irregular migration in terms of, *inter alia*, disrupting the facilitation by organised criminal groups of illegal immigration operating in the source countries, and reducing the abuse of legal channels for migration into the EU by organised criminal groups. The EU's external action against human trafficking is still contextualised within the area of irregular migration. The MPs, for example, have a stronger focus on migration control or border control than on the protection of the rights of trafficked persons.

What makes the strong security focus problematic is that punitive and coercive measures to counteract serious crime and irregular migration can lead – and have led, as the report indicates – to violations of human rights.

2. Lack of coherence

The security versus human rights juxtaposition discussed above also gives rise to questions of coherence – or lack of it – in terms of human rights integration in the EU AFSJ policies. Coherence issues take many

[1437] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' [2006] 56(2) *American University Law Review* 367, 376. See also Mark Provera, 'The Criminalisation of Irregular Migration in the European Union' [2015] *CEPS Paper in Liberty and Security in Europe*, no 80, 3, and FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them* [2014]. For a discussion on the definition of crimmigration, see Mark Provera, 'The Criminalisation of Irregular Migration in the European Union' [2015] *CEPS Paper in Liberty and Security in Europe*, no 80, 2-4.

[1438] For a discussion on the different approaches to discussing crimmigration, see e.g., Joanna Parkin, 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research' [2013] *CEPS Paper in Liberty and Security in Europe*, no 61. The Criminalisation of Migration in Europe: A State-of-The-Art of the Academic Literature and Research. *Liberty and Security in Europe Papers*, 2.

forms and play out on many levels. There is, first of all, a certain lack of coherence between the EU's rhetoric on protection of human and fundamental rights, and the actual integration of such standards into AFSJ legislation and policies. Within the EU regime for asylum and immigration, the report finds shortcomings in this regard in terms of, *inter alia*, ensuring fair and efficient procedures and remedies for persons seeking international protection; the unrestricted right to seek asylum; the definition and application of the concept of family unity; protection of vulnerable groups; use of administrative detention; and designation of safe countries. In some instances individuals in like situations are met with uneven protection levels, a fact which risks undermining the principle of non-discrimination. In relation to human trafficking, it can be observed that EU standards on trafficking do not fulfil trafficking-related general human rights standards, such as the conditional temporary residence permit linked to the willingness of the trafficked person to cooperate with authorities. Linked to this is the inconsistency created in different EU standards concerning the obligation of Member States to offer unconditional assistance and support versus offering conditional temporary residence to trafficked persons.

Questions in the report have also been raised with regard to the congruence between the integration of human rights in the EU's internal and external policy responses to issues related to the AFSJ policy field. The EU wishes to portray itself as a devoted supporter of human rights in all situations, both in its internal policies and in its external action. The Union has, for example, recently improved its internal human rights infrastructure by making the EU Fundamental Rights Charter an instrument with the same legal value as the founding treaties. Also, for example, the recently adopted directives within the field of criminal proceedings are an expression of a desire to develop human rights protection within the Union. Likewise, human rights are an important element of the Union's external action. In relation to the JHA, the Union has, for example, been a strong supporter of international criminal tribunals such as the ICC and ICTY.

The analysis of the development of the external dimension of the EU migration and asylum policies above illustrates, however, an increasing bifurcation between human rights commitments, on the one hand, and general policies on asylum and immigration, on the other. In this regard, it has been noted that, while the EU's general external action is based on creating good neighbourly relations and promoting human rights, the external JHA cooperation is guided by an 'interest in keeping problems out and the external border closed.'[1439] The inclusion of Article 6 TEU and the adoption of the Charter on Fundamental Rights as EU primary law, particularly Article 18 of the Charter setting forth a right to asylum, underlined the EU's commitment to fundamental rights in the field of asylum. At the same time, however, cooperation with third states – as institutionalised, developed and normalised in key policy documents and legislation – aims predominantly at the prevention of irregular migration at its source in third countries. The fact that readmission agreements fail to enshrine particular provisions paying due regard to vulnerable persons and groups such as minorities or stateless persons and the way readmission policies are enforced by EU Member States raises serious doubts with regard to the EU's commitment to enshrining non-discrimination in the external dimension of its migration and asylum policies. The apparently objective and neutral provisions on the scope *ratione personae* of readmission

[1439] Florian Trauner, 'The Internal-External Security Nexus: More Coherence under Lisbon?' [2011] *European Union Institute for Security Studies Occasional Paper*, No. 89, 21.

agreements, together with the lack of any further differentiation, translates into indirect discrimination suffered by vulnerable persons.[1440] Hence, a structural incoherence exists between the EU's readmission policy and its commitments to ensure protection from discrimination in the external aspects of its migration and asylum policies.

The same lack of coherence has also been identified in relation to the Union's fight against serious and organised crime. The central concern here is often to keep the problems 'out', potentially at the expense of human rights, an example of which is the cooperation with external partners who do not necessarily abide by human rights standards. It has been observed that the EU's external action in the field of criminal law is the foreign policy area 'most clearly motivated by self-interest'.[1441] Organised and serious crime is conceptualised as a significant danger for the Union, and the source of trouble is often found to be located outside the Union.[1442]

The report also points to several examples where human rights problems emerge as a consequence of the wide discretion granted to the Member States. The AFSJ is an area where state sovereignty has traditionally played a central role. Border control and criminal law are areas where states traditionally have strong sovereignty interests and want to maintain control. This political sensitivity was initially reflected in the EU pillar divide, where the third JHA pillar functioned in an intergovernmental manner. While the pillar structure is now dissolved, there are other structural features that aim to accommodate sovereignty concerns, such as country-specific exceptions as regards the JHA cooperation. This entails a risk of incoherence in terms of human rights integration and protection. For example, the asymmetrical participation levels of EU Member States in the CEAS, with the UK, Ireland and Denmark opting out of several parts of the EU asylum *acquis*, can be seen as a 'complicating factor' in the operationalisation of the EU's immigration and asylum policies.[1443] Also, the criminal law cooperation is characterised by the differential participation of Member States.

With the EU Member States retaining a significant degree of discretion in asylum and migration questions, and with national interests often prevailing, policies towards asylum seekers can vary considerably from one Member State to another. This has led to problems in terms of human rights protection with regard to a range of issues, including: designation of safe countries of origin and the overall recognition rates for asylum applicants from the same country leading to uneven recognition rates and arbitrariness in the asylum qualification; the different statuses granted to asylum applicants; different levels of reception conditions. The EU is, therefore, often blamed for failing to adopt a comprehensive and consistent approach to migration across the 28 Member States. Member State

[1440] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art 2(2)(b).

[1441] Karen E. Smith, *European Union Foreign Policy in a Changing World* (3rd edn, Wiley 2014), 177.

[1442] Cf. Kimmo Nuotio, 'Security and Criminal Law: A Difficult Relationship' in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 197, 203.

[1443] ECRE, 'ECRE Comments on 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 (recast)' <http://www.ecre.org/component/downloads/downloads/995.html> accessed 12 September 2015, 2.

discretion has also been found to be problematic in relation to the Union's fight against organised and serious crime. In terms of human trafficking, Directive 2004/81/EC leaves many important decisions to the Member States, including the length of the so-called recovery and reflection period during which no expulsion of the trafficked person is allowed. Access to the recovery and reflection period differs between the Member States; some require a formal identification, whilst others do not. A further example is the vaguely formulated provision of non-punishment of trafficked persons, which leads to differing application in the Member States.

The problem discussed above is difficult to overcome as long as Member States are not politically motivated to deepen, or take part, in enhanced cooperation and integration of JHA policies. So far it has generally been accepted that Member States retain a relatively high degree of discretion in the area of AFSJ, as there is reluctance for further harmonisation of the policies. With this background in mind, it may be questioned whether a more nuanced reading of the principle of mutual trust between Member States, which still plays a central role in both immigration and criminal law, would be pertinent. Human rights jurisprudence indicates that in this policy area one cannot operate on the presumption that other Member States abide by their human rights obligations.

3. The way forward: is there political will?

In the field of criminal law, it is often the case that international action is preceded by so-called 'moral panic' reactions. A phenomenon is suddenly perceived as a serious societal problem that requires strong measures to be taken. International – and EU – action in the criminal law field has therefore often taken place after shocking incidents or alarming reports. Many terrorism instruments, for example, were adopted in the wake of the 9/11 attacks, and international criminal law began to develop in the 1990s after the Balkan conflict, in which shocking atrocities were committed on European soil. This moral panic creates a sense of urgency, which makes the legislators act.

The EU is now faced with a refugee crisis of increasing proportions. Despite this, political will to address the on-going refugee crisis at the borders and within the EU does not seem to be easily found, which has led the media and civil society organisations to criticise the EU and its Member States for failing to facilitate the arrival of asylum seekers and persons in need of protection in a humane manner.

It is clear that the refugee crisis and the failure by the EU to address it in a coherent manner makes it necessary for the Union to reconsider its immigration and asylum policy, and several EU actors have indeed put forward suggestions and plans to this end. Many of these suggestions, such as the new EU agenda on migration, have however been received with mixed feelings. In relation to the May 2015 Commission Agenda on Migration it is, for example, welcomed that the need for effective search and rescue operations to save lives is recognised. At the same time, it is held that the Commission could have presented a stronger stance when it comes to the enforcement of avenues for legal migration to the EU through, for example, family reunion or the introduction of a common humanitarian visa for the Schengen area. All in all, the new agenda on migration has been considered to provide for little that is new, rather taking the *status quo* as its starting point and restating and implementing what has already been agreed on. As Peers states, it is 'largely a repackaging of things which the EU is already committed

to doing or already negotiating, or which are already in place'.[1444] As such, Peers notes that the agenda will probably bring the EU a 'series of modest steps forward toward a common EU policy on borders, immigration and asylum', but 'it falls short of the significant changes that could be made if there were enough political will in the Commission and the Member States'.[1445]

The EU approach to the migrant crisis has also been criticised for relying on *ad hoc* solutions instead of being based on sustainable long-term policies. What is needed is the political will to address the big picture, that is, more safe, legal routes for persons in need of international protection to reach safety in Europe, including increased places for resettlement and support for asylum reception and processing, as well as easing restrictions for movement for asylum seekers within the EU. The new steps need, as Amnesty International reminds us, to be implemented expansively and 'with the full backing of all EU Member States'.[1446] Whether the Union and its Member States will be able to find the will to change the Union's approach to migration and asylum remains to be seen.

In order to be able to export EU values in relation to actions against human trafficking, an adequate and consistent internal human rights policy needs to be established.[1447] It would be important to assess existing EU internal instruments concerning their compliance with international and regional human rights standards and concerning current implementation challenges. Human trafficking has to be linked to discussions on issues such as trade and development cooperation.

Further, in relation to the effective fight against serious and organised crime, the existence of political will is often crucial. As was noted in relation to the Union's inaction in connection to the US renditions programme, the fact that the US is one of the EU's most important strategic partners has meant that the Union has not taken a clear political stance on the question, regardless of the fact that the programme clearly stands in conflict with internationally recognised human rights law.

General recommendations

Based on the findings summarised above, the report identifies seven general recommendations for enhancing a human rights-based approach to addressing the AFSJ policy field.

[1444] Steve Peers, 'The Commission's new EU Migration Strategy: Waiting for the Great Leap Forward' *EU Law Analysis* [blog], 13 May 2015.
[1445] Steve Peers, 'The Commission's new EU Migration Strategy: Waiting for the Great Leap Forward' *EU Law Analysis* [blog], 13 May 2015.
[1446] Amnesty International, 'EC migration agenda represents welcome shift and must not be undermined by member states', 13 May 2015, https://www.amnesty.org/en/latest/news/2015/05/ec-migration-agenda-represents-welcome-shift-and-must-not-be-undermined-by-member-states/ accessed 15 September 2015.
[1447] Maria O'Neill, 'Chapter 8 Trafficking in Human Beigns and the European Neighbourhood Policy: New Challenges for the EU Justice and Law Enforcement Framework' in Maria O'Neill, Ken Swinton and Aaron Winter (eds), *New Challenges for the EU Internal Security Strategy* (Cambridge Scholars Publishing 2013), 192.

a. The need to move from securitisation to a human rights-based approach in JHA policies

The new role for the EU Fundamental Rights Charter following the Lisbon Treaty should be seen as an impetus to adopt an explicit human rights-based approach to asylum and migration at the EU level and to assume a more vigorous stand against those policies and practices of the Member States that are in contradiction with human rights. To this end, a change in the rhetoric on asylum and migration within the EU needs to take place to fully recognise that asylum seekers and migrants are holders of human rights.

In terms of asylum seekers' rights, EU policies should move from coercive policies dictating the fate of an asylum seeker to a more humane and human rights-based approach which respects the individual asylum seeker's agency and his or her right to a voice through a fair and effective procedure, as well as guarantees for the right to an appeal. To make this voice meaningful asylum seekers must be provided with real choice in terms of location in respect of, for example, family unity and with a view to ensuring effective integration within societies. To that end, measures must be taken to ensure that reception facilities are provided in accordance with international human rights law.

Honouring migrants' and refugees´ human rights is not incompatible with the regulation of migration. Viewing migration as other than abnormal, temporary and a threat does not require that the EU and its Member States ignore actual threats posed by individuals. Honouring migrants' and asylum seekers human rights at each stage of the migration process or process for international protection – including, potentially, removal – requires the speedy determination of status, whether concerning the removability of irregular migrants or the qualification for protection of seekers of international protection and asylum. One of the key rights in honouring the rights of asylum-seekers and migrants is access to justice, including for those most vulnerable to exploitation both in their work and otherwise – irregular migrants.

The real freedom of all migrants and the best chance for the present and future integration of beneficiaries of international protection and legal migrants is widely recognised as lying in access to the labour market and to social protections. Once freedom, security and justice are understood in terms of social and economic security and the rule of law for all migrants, an evidence-based, coordinated and well-monitored EU migration policy will then be possible.

Similarly, as has been observed in the report, it is important to adopt a human rights-based approach in other JHA policies, for instance, in relation to human trafficking.

b. The importance of reliable data

In order to avoid piecemeal approaches and to counteract intolerance EU policy choices in the realm of its AFSJ policies should be based on solid facts and objective research. The report has pointed to shortcomings in terms of statistical data (for example, in relation to human trafficking) and the production of data in a manner that questions their reliability (for example, the criticism directed against the Europol SOCTA). In collecting data, attention has to be paid to the question of who assembles the

data and how. Data protection must be ensured, and it is important that those collecting the data do not have a vested interest in a certain outcome.

Statistical data is important to direct action in the areas where it is most needed and to avoid action being taken based on presumptions and stereotypes that do not always hold true. For example, in relation to human trafficking, statistical data gives forth that the majority of trafficked persons in Europe are EU citizens. Despite this, many instruments in the field are grounded on an underlying presumption that the trafficked persons are non-EU citizens. Statistical data is also very important when the functioning of EU instruments and policies is evaluated. The report notes that more extensive research is necessary, for example, to ensure effective monitoring of reception conditions of asylum seekers in a reliable, coordinated and effective manner.

c. Importance to be granted to human rights friendly institutional design

The Treaty of Lisbon entailed a significant change in the institutional landscape of the AFSJ. As was noted in FRAME report D 11.1, institutional design strongly affects the realisation of human rights within the AFSJ. The creation of the FRA and the empowerment of the European Parliament and the CJEU in the field of JHA are examples of important institutional changes in this regard.

Despite clear advances in the Union's human rights infrastructure there are still institutional matters within the AFSJ that require attention. In this regard, the report points to the extensive use of agencies in the operationalisation of the AFSJ policies, noting that the phenomenon of 'agencification' poses risks to the realisation of human rights due to the inherent lack of democratic legitimacy and accountability in the structures of agencies such as Frontex (see further FRAME report D 11.1).

The report makes some suggestions regarding the development of the institutional design. On a principled level, it is important that JHA is not just a matter for the 'security actors' such as the police, border guards, Europol and Eurojust; indeed, the Union's human rights actors, most notably the FRA and the European Ombudsman, need to be actively involved. For example, it is submitted that the FRA should be given a more extensive mandate in the JHA field to include, *inter alia*, human rights monitoring of both the Union's criminal justice policies. In relation to the promotion of the economic, social and cultural rights of migrants, it is submitted that the mandate of the FRA should be expanded to allow evaluation of all aspects of migrants' rights and greater monitoring of fundamental rights issues and the rule of law across the EU.[1448] To make the Union's fight against international crimes more effective, the report adheres to the suggestions made by the EU Genocide Network that the mandates of Eurojust and Europol should be amended to include the international core crimes.

[1448] Sergio Carrera and Massimo Merlino, 'Undocumented Immigrants and Rights in the EU -Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?' [2009] *CEPS 'Liberty and Security in Europe' publication series*.

d. Development of human rights impact assessments and monitoring

The question of the democratic and human rights legitimacy of EU institutions is closely linked to the issue of accountability. Policies in the field of AFSJ need to be based on an institutional design that respects the principles of democracy and accountability.

In many areas of the policy field, however, soft law regulation or political commitments are preferred over binding legislation at the expense of effective accountability-based monitoring. Especially in relation to external action, there is an outspoken commitment to human rights. In many cases, the consequences of violations of human rights are, however, very meagre.

It is important for the EU to acknowledge the importance of adherence to international and regional human rights standards within its JHA affairs not only in its rhetoric but also at the level of actual implementation. To that end, the EU needs to move from seeing human rights as mere political commitments to acknowledging human rights as standards that are binding on all levels of action within the policy field. Such a commitment requires ensuring both *ex ante* accountability in terms of human rights impact assessments as a basis of policy choices, as well as accountability-based monitoring and avenues for appeals and remedies.

For example, to address some of the flaws in the returns system related to remedies it is suggested that the existing monitoring systems for returns be expanded to oblige each Member State to provide for a supervision and complaints system to contribute to increased accountability in the implementation of the returns.[1449] Similarly, in relation to trafficking, the report emphasises the need to develop monitoring, which should be conducted independently and include an assessment of the impact of legal measures on the situation of trafficked persons themselves. For example, national rapporteurs, established as independent institutions with sufficient staff and resources, should focus on monitoring the EU instruments in the field. In addition, post-return monitoring mechanisms should be introduced to ensure that persons are not re-trafficked once returned to their country of origin. With regard to counter-terrorism, the report also points to the fact that mechanisms for the monitoring of human rights violations are lacking, and that sometimes there is a clear unwillingness to seriously consider claims of human rights violations in the fight against terrorism.

e. Member State discretion and mutual trust may not override protection of human rights

Harmonisation and deepening of integration is not always the key to solving human rights problems. This being said, many of the JHA policies investigated indicate that considerable Member State discretion can be a human rights problem. This is certainly the case, for example, within the Dublin system, as evidenced by human rights jurisprudence.

[1449] Steve Peers, 'The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants?', *EU Law Analysis* [blog], 28 March 2014.

The same types of problems connected to the leeway in action granted to Member States have also been identified in relation to criminal justice cooperation, most notably in relation to the EAW. In addition, it is well noted that the Union's anti-trafficking instruments include several provisions that allow for domestic solutions which *de facto* have resulted in outcomes that are problematic from a human rights perspective. Based on these examples the report concludes that the principle of mutual trust should not override the recognition of human rights protection and that a more outspoken and coherent approach to human rights assessments in cases involving mutual trust should be adopted.

f. The need to see the individual involved in large-scale phenomena

The EU's approach to JHA policies needs to take account of the individual's needs and rights, as opposed to predominantly looking at large-scale societal phenomena through the collective lens, addressing human needs and rights *en bloc*. Within the realm of asylum and immigration policies this is evident, for example, in the need for an individual and contextual assessment of asylum applications. With a view to the respect for human rights and effective integration of refugees and migrants, it should also be recognised that the EU needs to move from coercion towards a more human rights-based approach in asylum policies, taking full account of the agency and the right to a voice of refugees and asylum seekers in terms of decisions concerning, for example, their relocation.

In relation to the fight against serious and organised crime, requirements of cooperation with authorities to receive a residence permit is an example of a similar focus on 'addressing the problem' (human trafficking) rather than giving due regard to the individual situation of the victims. When considering the situation of individuals it is essential to give due regard to vulnerabilities that might affect the realisation of rights. In this regard, it is important to note that *de jure* rights do not always entail that individuals have *de facto* rights. In relation to victims of trafficking, it is noted that although many instruments are in place to support victims of crime within the Union (for example, concerning access to compensation) these instruments do not seem to be accessible for most trafficked persons. Also, hands-on measures such as outreach and interpretation services are necessary to provide access to support for such victims in any meaningful way.

Also, victims of international crimes often need extensive support, and witnesses in international criminal justice procedures require protection and support to ensure that the criminal procedures do not lead to further traumatisation. Many witnesses in such cases are survivor witnesses (victims) who have themselves experienced international atrocities. Threats against witnesses are also common in post-conflict situations. Thus, international crimes must be addressed in a way that acknowledges individual interests to ensure that further human rights are not violated.

g. Solidarity and human rights as the guiding principles for AFSJ policies

A human rights-based approach to the AFSJ policies is not possible without solidarity between the Member States. Traditional principles of public international law grant states many sovereign rights, a strict upholding of which will not, however, always advance human rights. While public international law, for example, makes a strong distinction between refugees and other migrants, there is, in the face

of the current challenges related to the influx of different types of people in need, an exigency for the Union to overcome such distinctions where they work to the detriment of human rights protection.

It is, for example, problematic from a human rights perspective – and for the principle of non-discrimination in particular – that the large discretion left for Member States in the area of asylum and immigration matters leads to uneven protection and acknowledgment of the human rights of individuals in need of help and support. In terms of solidarity, it is hoped that the EU Member States find consensus and the political will to agree on the proposed more sustainable distribution of help to people in need.

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A. Legal and policy instruments

1. Treaties

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1944 Convention on Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295

1952 ILO Social Security (Minimum Standards) Convention (adopted 28 June 1952, entered into force 27 April 1955) ILO no 102

1953 Agreement establishing an Association between the European Economic Community and Turkey ('Ankara Agreement') signed at Ankara on 12 September 1953, [1973] OJ C 113

1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol) (adopted 8 August 1975, entered into force 8 August 1975, in accordance with article 18 of the Protocol of 25 March 1972) 976 UNTS 105

1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 220

1965 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD)

1966 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

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1970 Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 106

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