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# **The Normative Foundations of the Criminalisation of Human Smuggling. Exploring the Fault Lines between European and International Law**

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# **The Normative Foundations of the Criminalisation of Human Smuggling. Exploring the Fault Lines between European and International Law<sup>1</sup>**

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## **Abstract**

The aim of this article is to examine the different manifestations of the criminalisation of human smuggling, and to provide a critique of the normative foundations of such criminalisation. A wide range of conduct has been criminalised as human smuggling in international and European law. This conduct ranges from organised crime to exploitation and violence to humanitarian assistance to irregular entry, with recent calls being made for smuggling to be treated as a crime against humanity. The article will examine the criminalisation of human smuggling critically, by providing a taxonomy of the claimed and real normative foundations for such criminalisation. The analysis will cast light on the ambiguity behind the criminalisation of human smuggling and evaluate critically attempts to adopt a ‘catch-all’ approach towards criminalisation. The limits of this approach will be demonstrated, in particular by highlighting the considerable differences in criminalisation approaches at UN and at EU level.

## **Keywords**

Human smuggling, Facilitation of Unauthorised Entry, Criminalisation of Migration, Crimmigration, Preventive Justice, Organised Crime, Humanitarianism, NGOs, Civil Society, Crimes Against Humanity, Palermo Convention

## **Keywords**

### **1. Introduction**

Recent responses to addressing migration flows towards Europe have centered on criminalising and prosecuting human smuggling. However, the normative foundations behind the criminalisation of human smuggling remain unclear. Criminal law on human smuggling has not developed in a coherent way, with different organisations and different fora developing responses which lack coherence and are increasingly ad

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<sup>1</sup> This paper was first presented at the ECLAN 2017 Annual Conference on ‘European Criminal Law in the Global Context: Values, Principles and Policies’ held at the University of Coimbra on 30-31 March 2017. I am grateful to participants in the conference and to Pedro Caeiro for his invitation and invaluable comments on an earlier draft. Subsequent drafts were presented at the conferences on ‘Managing Migration Through Criminal Law Tools’, held at the University of Milan on 3-4 December 2018 and on ‘Immigration Control and Criminal Law from a Comparative Perspective’ held at Complutense University in Madrid on 11 December 2018. I am grateful to the audiences in these conferences for their comments and insights.

hoc and framed increasingly within an emergency logic of the need to tackle migration flows as a security threat. The aim of this article is to examine the different manifestations of the criminalisation of human smuggling, and to provide a critique of the normative foundations of such criminalisation. A wide range of conduct has been criminalised as human smuggling in international and European law. This conduct ranges from organised crime to exploitation and violence to humanitarian assistance to irregular entry, with recent calls being made for smuggling to be treated as a crime against humanity. The article will examine the criminalisation of human smuggling critically, by providing a taxonomy of the claimed and real normative foundations for such criminalisation. The analysis will cast light on the ambiguity behind the criminalisation of human smuggling and evaluate critically attempts to adopt a ‘catch-all’ approach towards criminalisation. The limits of this approach will be demonstrated, in particular by highlighting the considerable differences in criminalisation approaches at UN and at EU level.

## **2. Countering Organised Crime: the Parameters of the Palermo Convention**

In evaluating the criminalisation of human smuggling in international law, the starting point must be the framing of human smuggling offences as organised crime offences. The primary international law framework for the criminalisation of human smuggling is the 2000 United Nations Convention on Transnational Organised Crime (the Palermo Convention).<sup>2</sup> A separate Protocol addresses human smuggling, and its opening provision confirms that the Protocol supplements the Palermo Convention and must be interpreted together with it.<sup>3</sup> The framing of human smuggling within an organised crime context is further confirmed by its very definition: according to the Protocol, smuggling of migrants means the procurement, in order to obtain, directly or indirectly, *a financial or other material benefit*, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.<sup>4</sup> Criminalisation of smuggling must be based on intentional conduct with the aim of obtaining a financial or other material benefit.<sup>5</sup> The express inclusion of the requirement to obtain such a benefit is a clear indication that the drafters of the Protocol on the one hand viewed smuggling within the framework of organised crime, and on the other that they wished to exclude from the definition and criminalisation of smuggling acts which did not have a material/financial motive such as humanitarian assistance. According to an Interpretative Note to the Protocol,

“the reference to ‘a financial or other material benefit’ was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol

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<sup>2</sup> The United Nations Convention against Transnational Organized Crime and the Protocols thereto, 15 November 2000)

<sup>3</sup> Article 1(1) of the Smuggling Protocol.

<sup>4</sup> Article 3(3) of the Smuggling Protocol. Emphasis added.

<sup>5</sup> Article 6(1) of the Smuggling Protocol.

to criminalise the activities of family members or support groups such as religious or non-governmental organisations.”<sup>6</sup>

The above analysis helps to clarify what human smuggling is about (organised crime) and what it is not about (humanitarian or family assistance) in the eyes of the United Nations legislator.<sup>7</sup> A further question which arises is whether criminalisation under the Protocol includes criminalisation of irregular entry. The smuggling Protocol contains two different provisions which are relevant in this context. On the one hand, Article 5 states that migrants must not become liable to criminal prosecution under the Protocol for the fact of having been the object of the smuggling offences set out therein. On the other hand, Article 6(4) of the Protocol appears to leave a degree of discretion to Member States regarding the criminalisation of non-smuggling related immigration offences, by stating that nothing in the Protocol prevents State Parties from taking measures against a person whose conduct constitutes an offence under its domestic law. The combination of the two provisions does not provide with optimal legal certainty. Gallagher and David are of the view that the Protocol takes a neutral position on whether those who migrate irregularly should be the subject of any criminal offences.<sup>8</sup> McClean notes that the final position reflects disagreement among States, with certain states being apprehensive regarding granting immunity to illegal migrants especially if they had committed a crime, including the smuggling of other illegal migrants.<sup>9</sup> On the other hand, di Martino points out that the Protocol does not apply to those immigrants who, according to international law, should not be criminally liable for the mere fact of their irregular immigration.<sup>10</sup> There are two arguments which militate in favour of the exclusion of criminalisation of irregular entry from the scope of the smuggling Protocol. The first argument relates to the protection of the rights of the smuggled migrants, which forms - together with combatting smuggling and promoting inter-state cooperation- the key purpose of the Protocol.<sup>11</sup> The second argument relates to the Protocol’s explicit treatment of human

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<sup>6</sup> UN General Assembly, ‘Report of the Ad Hoc Committee on the elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto’, UN Doc. A/55/383/Add.1, 3 November 2000, p. xxv. See UNODC, ‘Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ (New York, 2004) p. 24, according to which the intention of the drafters was to require legislatures to create criminal offences that would apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-seekers (para. 32).

<sup>7</sup> See UNODC, ‘The Concept of ‘Financial or Other Material Benefit’ in the Smuggling of Migrants Protocol’ (Vienna, 2017) p. 14, according to which the Protocol does not seek, and cannot be used as the legal basis for, the prosecution of those acting with humanitarian intent or on the basis of close family ties where there is no purpose to obtain a financial or other material benefit.

<sup>8</sup> A.T. Gallagher and F. David, *The International Law of Migrant Smuggling* (CUP, Cambridge, 2014) p. 47.

<sup>9</sup> D. McClean, *Transnational Organized Crime: A Commentary on the United Nations Convention and its Protocols* (Oxford University Press, Oxford, 2007) pp.388-389.

<sup>10</sup> A. Di Martino et al., *The Criminalization of Irregular Immigration: Law and Practice in Italy* (Pisa University Press, Pisa, 2013) p. 83.

<sup>11</sup> Article 2 of the Smuggling Protocol. On the drafting history and importance of adding human rights protection expressly as a Protocol objective see McClean, , p. 379. Also see Gallagher and David, pp. 47-48. See also the savings clause in Article 19(1) of the Smuggling Protocol according to which nothing in the *Protocol* must affect the other rights, obligations and responsibilities of States and

smuggling as a form of organised crime. According to the Legislative Guide for the Implementation of the Protocol,

“[t]wo basic factors are essential to understanding and applying the Migrants Protocol. The first is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned (see articles 5 and 6, paragraph 4, of the Protocol). Mere illegal entry may be a crime in some countries, but it is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or other material benefit), on the other hand, has been recognised as a serious form of transnational organized crime and is therefore the primary focus of the Protocol.”<sup>12</sup>

This teleological approach, emphasising the dual primary purposes of the smuggling Protocol to counter transnational organised crime, while at the same time protecting the rights of migrants, has been influential in a major interpretation of the scope of criminalisation of human smuggling by the Canadian Supreme Court. In the case of *Appulonappa*<sup>13</sup>, the Canadian Supreme Court rejected the broad criminalisation advocated by the Canadian Government by interpreting domestic law in conformity with international law, in particular with the Smuggling Protocol. The Court stressed the requirement of the Protocol to criminalise smuggling for financial or other material benefit and noted that it would depart from the balance struck in the Protocol to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid.<sup>14</sup> According to the Court, Canada’s international commitments support the view that the purpose of domestic criminal law is to permit the robust fight against people smuggling in the context of organised crime, which excludes criminalising conduct that amounts solely to humanitarian, mutual or family aid.<sup>15</sup> While the security goals of domestic law are important, they do not supplant Canada’s commitment to humanitarian aid and family unity.<sup>16</sup> In a powerful statement, Judge Beverley McLachlin noted that under the Crown’s interpretation, ‘a father offering a blanket to a shivering child, or friends sharing food aboard a migrant vessel, could be subject to prosecution.’<sup>17</sup> By stressing the need for the existence of the element of the financial gain for the criminal offences of human smuggling to be substantiated, the Canadian Supreme Court has placed important limits to the criminalisation of smuggling and has reminded us of the original purpose of the UN legislator in the field. While one can question the extent to which

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individuals under international law, including international humanitarian law and international human rights law.

<sup>12</sup> UNODC, ‘Legislative Guide’ *supra* note 23, para. 28.

<sup>13</sup> *R. v. Appulonappa*, [2015] 3 SCR 754.

<sup>14</sup> Para. 44.

<sup>15</sup> Para. 45.

<sup>16</sup> Para. 57.

<sup>17</sup> Para. 57.

human smuggling constitutes crime which is highly organised,<sup>18</sup> and whether the traditional concepts of a structured criminal organisation apply in this context regarding the operations of looser smuggling networks,<sup>19</sup> the approach adopted by the Palermo Convention is important in setting out parameters to criminalisation and in putting forward a clear rationale for criminalisation under international law.

### **3. Extending the Reach of the State or Protecting the Migrant? From Human Smuggling as a Crime against Humanity to Crimes against the Humanity of Migrants**

The constituent elements of the main offence of human smuggling, as outlined in the Palermo Convention, involve a cross-border dimension. One of the key challenges in addressing this cross-border dimension in the enforcement of criminal law has been the delimitation of jurisdiction for the prosecution of human smuggling, including the question of whether such jurisdiction can be extended extraterritorially. Extraterritorial jurisdiction for the prosecution of human smuggling would strengthen further the preventive aims of the criminalisation framework. It may come therefore as a surprise to see that in both the UN and the EU legal frameworks, jurisdiction to prosecute smuggling remains primarily territorial, and extends extraterritorially only in limited circumstances. The Smuggling Protocol does not contain an express provision on jurisdiction, with such a provision being reportedly abandoned during negotiations.<sup>20</sup> The applicable provisions on jurisdiction are therefore those contained in the main Convention on Transnational Organised Crime itself.<sup>21</sup> Article 15 of that Convention establishes territorial jurisdiction,<sup>22</sup> with extraterritorial jurisdiction being established only in cases of active<sup>23</sup> or passive personality.<sup>24</sup> EU law takes a narrower approach by establishing jurisdiction only in cases of territoriality and

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<sup>18</sup> For a contribution highlighting the operation of human smuggling in North Africa in terms of networks and not necessarily highly organised ground see P. Campana, 'Out of Africa: The Organisation of Migrant Smuggling across the Mediterranean' in *European Journal of Criminology*, 2018, vol.15(4), pp.481-502.

<sup>19</sup> On the challenges for the legal definitions of a criminal organisation in international and EU law to address the less structured character of criminality in this context see V. Mitsilegas 'From National to Global, from Empirical to Legal: The Ambivalent Concept of Transnational Organised Crime' in M. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*, University of Toronto Press, 2003, pp.55-87.

<sup>20</sup> Gallagher p. 53; McClean p.394.

<sup>21</sup> Article 1(2) of the Smuggling Protocol provides: 'The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein'.

<sup>22</sup> Article 15(1) of the Convention states: "Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when: (a) The offence is committed in the territory of that State Party; or (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed".

<sup>23</sup> Article 15(2) of the Convention states that "a State Party may also establish its jurisdiction over any such offence when: [...] 2b) [t]he offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory".

<sup>24</sup> The same article provides that jurisdiction may also be established when «[t]he offence is committed against a national of that State Party». However, Article 15(6) of the Convention reads as follows: «Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law».

extraterritorially in cases of active personality, with Member States being allowed to limit extraterritorial jurisdiction.<sup>25</sup> The Palermo Convention adopts a broader approach in the cases of offences of organised crime and money laundering: in these cases, jurisdiction is established if an offence is committed outside a State Parties' territory with a view to the commission of a serious crime within its territory.<sup>26</sup> This extension of territoriality addresses the extraterritorial jurisdiction question if cases of human smuggling are prosecuted as organised crime or money laundering offences and reflects the continuous and cross-border nature of these offences, which begin in the territory of the third country but whose effects continue in the territory of the state which establishes jurisdiction to prosecute.<sup>27</sup> These attempts to extend jurisdiction notwithstanding, international and EU law continue to contain limited references to extraterritorial jurisdiction for smuggling offences.<sup>28</sup>

From a systemic perspective, this approach on extraterritorial jurisdiction on human smuggling does not come as a surprise. The commission of the smuggling offences does not fit easily with the model of the extension of jurisdiction on the basis of the active and the passive personality models: these models are centred primarily on the link between jurisdiction and nationality, whereas human smuggling offences are committed primarily by third country nationals and target third country nationals. In establishing jurisdiction to prosecute human smuggling offences, two further justifications in the categorisation of extraterritorial jurisdiction provided by Markus Dubber can be discussed: protection and universality.<sup>29</sup> The protection criterion extends jurisdiction to protect sovereignty and targets offences against the state; the universality criterion extends jurisdiction to address offending against all mankind. As Dubber eloquently puts it, universality “covers the treatment of the lordless man, the peaceless, the outlaw, the hosis humani generis, the enemy of all mankind who is outside the peace of any particular sovereign and therefore both outside his protection and outside his discipline”.<sup>30</sup> Establishment of extraterritorial jurisdiction under the principle of universality by treating human smuggling as a crime against humanity has been advocated by the Strategic Review of EU missions to Libya of May 2017, according to which:

“Current arrangements regarding the legal finish of all persons apprehended or rescued by Operation Sophia are processed in accordance with Italian criminal law. However, this arrangement applies only for suspects encountered on the high seas. In the event that Operation Sophia would be authorized to operate in Libyan territorial waters, legal arrangements allowing the transfer and prosecution by competent authorities would be required. The issue is widely recognized as a major

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<sup>25</sup> Facilitation Framework Decision, *supra* note 37, Article 4.

<sup>26</sup> *Ibid.*, Article 15(2)(c).

<sup>27</sup> Italian Courts have attempted to extend jurisdiction on these terms in order to establish jurisdiction for prosecution of human smuggling offences. See S. Ragazzi, 'New Experiences in Investigating and Prosecuting Human Smuggling: From the National Dimension to a European Approach', in V. Mitsilegas, V. Moreno-Lax and N. Vavoula (eds.), *Securitising Asylum Flows*, (Brill Nijhoff, Nijmegen, forthcoming 2018); E. Papastavridis, 'EUNAVFOR MED Operation Sophia and the Question of Jurisdiction over Transnational Organized Crime at Sea' (Questions of International Law, 5 August 2016) <http://www.qil-qdi.org/eunavfor-med-operation-sophia-question-jurisdiction-transnational-organized-crime-sea/> accessed 8 November 2017.

<sup>28</sup> United National Security Council, Resolution 2240 (2015), 9 October 2015.

<sup>29</sup> M. Dubber, 'Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective', 63(2) *University of Toronto Law Journal* (2013) pp. 247-277.

<sup>30</sup> *Ibid.*, p. 275.

hindrance for the implementation of the mandate and discussions with Member States to date have not allowed the identification of a satisfactory solution. It [sic] this respect, the current efforts made by the operation in reaching international consensus for defining migrant smuggling and human trafficking as a crime against humanity would help in this issue as it would give more tools to the legal process – universal jurisdiction, arresting, transferring, prosecuting and sentencing”.<sup>31</sup>

The use of both the protection and universality criteria to establish extraterritorial jurisdiction to prosecute human smuggling is problematic. The use of the protection criterion fails to identify a concrete harm imposed by smuggling and a concrete legal interest protected by the extension of jurisdiction. The protection of state sovereignty is too vague and broad as an aim to warrant the extension of criminalisation and the equation of human smuggling with offences threatening “the life of the nation” is disproportionate. Similar considerations apply to the use of the principle of universality, which is problematic in four respects: firstly, it is based upon the uncritical securitisation of the phenomenon of human smuggling, based upon discourses of smugglers as evil and posing existential threats to society<sup>32</sup> and treating smugglers as the enemy,<sup>33</sup> in this manner, secondly, human smuggling obtains a disproportionate gravitas and is equated in terms of impact and moral condemnation with crimes against humanity, trivialising thus the latter; thirdly, applying universality to human smuggling sits at odds with the essentially territorial dimension of the phenomenon, since human smuggling involves migration movements the aim of which is entry into a territory via the crossing of a border which remains defined in national or in EU terms (in the case of the EU external border), and measures against smuggling remain essentially immigration control measures; and fourthly, the use of universality in the terms used in the EU Report is problematic in that yet again it puts the cart before the horse: it legitimises the extension of jurisdiction in order to achieve investigatory and prosecutorial efficiency. It is thus investigation and prosecution that dictate the labelling of criminal offences, rather than the other way round. The current political framing of smuggling as an existential threat posing fundamental threats to human lives disregards the complexity of the smuggling phenomenon, justifies a wide range of responses lying outside of the rule of law guarantees of the criminal law framework and distances itself from the clear link established in the Palermo Convention between human smuggling and for profit organised crime. In the field of jurisdiction, a way of upholding this link would be to consider transposing the wording of Article 15(2)(c) of the Palermo Convention expressly on human smuggling, under the condition that the substantive criminal law is reformed at EU level to mirror more closely the UN paradigm and to expressly exclude humanitarian action and offences by migrants themselves from the scope of criminalisation.

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<sup>31</sup> Council of the European Union, Document 9202/17 (Restricted document of 15 May 2017) <http://www.statewatch.org/news/2017/jul/eu-ccas-strategic-review-libya-9202-17.pdf> accessed 8 November 2017, p. 36.

<sup>32</sup> See Commission, ‘Action Plan on Smuggling’ (Communication), COM (2015) 285 final, Brussels, 27 May 2015. In p. 2, the Communication mentions that ‘[r]uthless criminal networks organise the journeys of large numbers of migrants desperate to reach the EU. They make substantial gains while putting migrants’ lives at risk’.

<sup>33</sup> Smugglers are treated in the same manner as terrorists. See European Council, ‘Remarks by President Donald Tusk after the G20 preparation leaders’ meeting in Berlin’ (Statements and Remarks, 424/17, 29 June 2017) <http://www.consilium.europa.eu/en/press/press-releases/2017/06/29/tusk-remarks-berlin-preparation-g20/pdf> accessed 8 November 2017.



A more appropriate was forward within the framework of evoking crimes against humanity and the jurisdiction of the International Criminal Court would be not to treat human smuggling as a crime against humanity as such, but rather to focus on the crimes committed against migrants *as crimes against humanity*. This appears to be the approach of the Prosecutor of the International Criminal Court, Fatou Bensouda, who has confirmed that the ICC is examining the feasibility of opening an investigation into migrant-related crimes falling within the jurisdiction of the Court in Libya- with crimes, including killings, rapes and torture, alleged to be commonplace.<sup>34</sup> Such an approach would place the emphasis on human rights violations against migrants themselves, rather than on enhancing prosecutorial and law enforcement efficiency with the ultimate aim of ensuring the effectiveness of extraterritorial immigration control preventing access to the border.

#### **4. Preserving Peace and Security: The Development of Sanctions by the UN Security Council**

The multiplicity of normative foundations to criminalise human smuggling has been exemplified in the recent intervention by the UN Security Council to list and impose sanctions including travel bans and asset freezing orders to individuals deemed to be involved in smuggling activities. The legal basis for these listings has been a series of UN Security Council Resolutions concerning Libya.<sup>35</sup> These Resolutions have been adopted in a different and evolving political context and provided for sanctions for violations of international human rights law and international humanitarian law in order to achieve the peace, stability and security of Libya. The recent listings of suspected smugglers applies this framework to international law violations related to migrants themselves. This extension of the criminalisation of human smuggling within the framework of the UNSC is marked by ambiguity and raises a number of questions regarding the justification, purpose and scope of sanctions against suspected smugglers. Firstly, it appears that here human smuggling is viewed as a threat to international peace and security, which is the remit of UNSC intervention. However, this link is formally not justified on the grounds that smuggling causes harm to migrants themselves, but on the grounds that fighting smuggling via the imposition of sanctions will ensure the security and stability of a state. While human rights abuses against migrants featured prominently in the political discourse justifying the imposition of sanctions, it has been reminded that their main aim is to ensure the stability of Libya<sup>36</sup>- in this context, any protection afforded to migrants remains context and territory-specific. A generalised treatment of human smuggling as a threat

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<sup>34</sup> UNSC, 8838<sup>th</sup> meeting, 2 November 2018, New York, S/PV.8388. Statement by Fatou Bensouda, p. 29 and p.3 respectively.

<sup>35</sup> Resolution 1970 (2011); Resolution 2174 (2014); Resolution 2213 (2015).

<sup>36</sup> See the comments of US Ambassador to the UN Haley on the imposition of these sanctions (7 June 2018): 'These designations are part of a larger effort to seek accountability for those involved in migrant smuggling and trafficking that threatens the peace, security, or stability, of Libya....Today's sanctions send a strong message that the international community is united in seeking accountability for perpetrators of human trafficking and smuggling. There is no place in our world for such abuses of human rights and human dignity.'

<https://usun.state.gov/remarks/8474>

to international peace and security may lead to the banalisation of the latter concept and the over-extension of the remit of intervention of the UN Security Council. Secondly, in the listings themselves, it appears that human smuggling is only one part of the activities of listed individuals- with smuggling activities appearing in the listings in conjunction with human trafficking,<sup>37</sup> exploitation<sup>38</sup>, violence against migrants<sup>39</sup> and ultimately the death of migrants.<sup>40</sup> A number of these listings point out to cooperation within the framework of smuggling networks.<sup>41</sup> While there may be circumstances where smuggling activities constitute a continuum with other crimes, this link is not always clear-cut, the definitions of these crimes in national and international law is distinct,<sup>42</sup> and the link between smuggling *per se* and the commission of human rights atrocities against migrants, including crimes against humanity can be tenuous. Moreover, the attempted link between smuggling and deaths at sea constitutes yet another example of the conflation of the rhetoric of ‘saving lives’ with the imposition of a preventive paradigm which claims to aspire to ensuring the physical safety of migrants as long as these remain in territories outside of the European Union and they are being kept in ‘safe’ distance outside the EU external border.<sup>43</sup> The adverse consequences of this paradigm for migrants in terms of

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<sup>37</sup> The listing for Mus’ab Abu-Qarin (LYi. 024) states that he is a central actor in human trafficking and migrant smuggling activities and that sources have reported that he has paid persons close to extremists in the Sabratha area, in exchange from the approval to smuggle migrants on behalf of violent extremist circles that financially benefit from the exploitation of illegal immigration.

<sup>38</sup> The listing for Fitiwi Abdelrazak (LYi 022) states that he is the leader of a transnational network responsible for trafficking and smuggling, one of the top-level actors responsible for the exploitation and abuse of a large number of migrants in Libya having extensive contacts within Libyan smuggling networks. The listing for Mohammed Kachlaf (LYi 025) states that his network is one of the most dominant in the field of migrant smuggling and the exploitation of migrants in Libya noting that the Panel of Experts for Libya collected evidence of migrants that were frequently beaten, while others, notably women from sub-Saharan countries and Morocco, were sold in the local market as ‘sex slaves.’

<sup>39</sup> In addition to the statements above, the listing for Abd Al Rahman Al-Milad (LYi. 026) states that he cooperates with other migrant smugglers who, sources suggest, is providing protection to him to carry out illicit operations related to trafficking and smuggling of migrants. According to the listing, several witnesses in criminal investigations have stated they were picked up at sea by armed men on a Coast Guard ship called Tallil (used by Al Milad) and taken to the al-Nasr detention centre, where they are reportedly held in brutal conditions and subjected to beatings.

<sup>40</sup> The listing for Abdelrazak states that he has organised countless perilous maritime journeys, exposing migrants (including minors) to the risk of death and is linked to at least two shipwrecks with fatal consequences between April 2014 and July 2014.

<sup>41</sup> See in particular listings LYi 022 and LYi 026. On the link between human smuggling and organised crime see section 2 above.

<sup>42</sup> According to UNSC Resolution 2240(2015) “although the crime of smuggling of migrants may share, in some cases, some common features with the crime of trafficking in persons, Member States need to recognise that they are distinct crimes, as defined by the UNTOC Convention and its Protocols, requiring differing legal, operational, and policy responses’ (point 5).

<sup>43</sup> This preventive paradigm is also exemplified by action by the UN Security Council- in parallel with EU law- to promote extraterritorial immigration control under the guise of so-called ‘Operation Sophia.’ On 9 October 2015, the Security Council adopted Resolution 2240(2015), which reinforced the authority to take measures against the smuggling of migrants and human trafficking from the territory of Libya and off its coast. The underlying stated aim was the disruption of organised criminal networks engaged in human smuggling and trafficking, whilst preventing exploitation of smuggled migrants or trafficked persons and loss of lives (recital 19). For an analysis of the relationship between UNSC and EU law on Operation Sophia see V. Mitsilegas, ‘Extraterritorial Immigration Control,

safety and access to protection are exacerbated in view of the growing and parallel trend towards the criminalisation of humanitarianism in European states and – at least indirectly- by EU law.<sup>44</sup> Finally, the criminalisation of smuggling via the imposition of sanctions by the UN Security Council raises human rights and rule of law questions similar to the ones raised by the imposition of terrorist sanctions by the UNSC. The well-founded concerns regarding the soundness and desirability of the shift of the UNSC role from an executive organ to legislator which have arisen in the context of the UNSC adoption of terrorist sanctions post-9/11 also apply in the context of human smuggling.<sup>45</sup> Moreover, while sanctions such as asset freezes and travel bans are framed as being essentially preventive, it is an open question whether their effects and consequences mean that they constitute essentially criminal sanctions under the *Engel* criteria developed by the Strasbourg Court.<sup>46</sup>

## 5. Preventing and Deflecting Migrant Flows: Criminalising Humanitarianism in EU Law

The approach of the European Union regarding criminalising human smuggling departs from the model adopted in the Palermo Convention. With the parameters and limits in the criminalisation of human smuggling in the primary source of international law -the UN Palermo Convention and its Smuggling Protocol- being defined in the previous section, the EU approach to the criminalisation of human smuggling can be seen as a challenge to the principles underpinning the UN framework. This is the case in particular regarding the criminalisation of humanitarianism. The relevant EU legal framework is set out by a Directive defining what is called in EU law the “facilitation of unauthorised entry, transit and residence”<sup>47</sup> accompanied –in the light of the first pillar competence limits regarding criminalisation at the time-<sup>48</sup> by a third pillar Framework Decision confirming that the conduct defined as facilitation in the Directive will be treated as a criminal offence.<sup>49</sup> Both instruments of what is rather ‘old’ law by EU standards predate by far the entry into force of the Lisbon Treaty and, having been proposed not by the Commission

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Preventive Justice and the Rule of Law in Turbulent Times. Lessons from the Anti-Smuggling Crusade’ in J. Santos Vara, S. Carrera and T. Strik (eds.), *Constitutionalising the External Dimension of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar, 2019, forthcoming.

<sup>44</sup> See section 5 below.

<sup>45</sup> See in particular S. Talmon, ‘The Security Council as World Legislature’, 99 *American Journal of International Law* (2005) p. 175; J. E. Alvarez, ‘Hegemonic International Law Revisited’ 97 *American Journal of International Law* (2003) p. 873.; V. Mitsilegas, ‘The Global Governance of Crime: Implications for Justice and the Rule of Law’, in M. Christensen and R. Levi (eds.), *International Practices of Criminal Law*, Routledge, London and New York, forthcoming (2018).

<sup>46</sup> For an analysis see V. Mitsilegas, ‘The European Union and the Global Governance of Crime’ in V. Mitsilegas, P. Alldridge and L. Cheliotis (eds.), *Globalisation, Criminal Law and Criminal Justice. Theoretical, Comparative and Transnational Perspectives*, Hart, 2015, pp.153-198; and V. Mitsilegas, *EU Criminal Law After Lisbon*, Hart, 2016, chapter 9.

<sup>47</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/4 (hereinafter Facilitation Directive).

<sup>48</sup> For an overview, see V. Mitsilegas, *EU Criminal Law* (Hart, Oxford and Portland, 2009) ch. 2.

<sup>49</sup> 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 (hereinafter Facilitation Framework Decision).

but by a Member State (the French Government), they have been negotiated and adopted with minimal scrutiny and debate.<sup>50</sup> The EU Facilitation Directive goes further than the Smuggling Protocol in that it dispenses with the condition of obtaining a financial or other material benefit for the smuggling offence to be established.<sup>51</sup> The Directive calls upon Member States to adopt criminal sanctions for “any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens”.<sup>52</sup> The Facilitation Framework Decision contains a general obligation for Member States to criminalise such conduct<sup>53</sup> and imposes specific high levels of sanctions only when certain aggravating circumstances occur.<sup>54</sup>

In spite of the lack of specificity as regards the level of criminal sanctions to be imposed by Member States, it is clear that the scope of criminalisation at EU level is very broad, as it can cover any form of assistance to enter or transit the territory of an EU Member State in breach of what is essentially administrative law (such as cases where the migrant is traveling without travel documents). It is clear that the EU approach aims at preventing entry into EU territory and targets not only the smugglers but also the smuggled. Alessandro Spina makes an insightful point in legal semiotics by drawing our attention to the terminological differences between international law, which defines smuggling as procuring irregular entry, and EU law, which focuses on assistance. Spina notes that “while assisting denotes an ancillary action, which entails that the principal action is performed by the person who is assisted, ‘procuring’ denotes instead a stand-alone action, with a meaning of its own”.<sup>55</sup> The negative impact of the EU approach towards criminalisation on third country nationals wishing to apply for asylum is evident. The Directive does attempt to address this issue by granting Member States the discretion not to impose sanctions for human smuggling and instead apply their national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.<sup>56</sup> However, this provision is discretionary and its value in redressing the balance set out by the broad definition and criminalisation of human smuggling under EU law is questionable. According to a recent Commission Report, only seven Member States

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<sup>50</sup> For a background, see V. Mitsilegas, J. Monar and W. Rees, *The European Union and Internal Security* (Palgrave/Macmillan, Hampshire and New York, 2003) pp.106-108.

<sup>51</sup> Article 1(1)(a) of the Facilitation Directive.

<sup>52</sup> *Ibid.*

<sup>53</sup> According to Article 1(1) of the Framework Decision, each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of the Directive are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition (Article 1(3)). Article 1(6) of the Facilitation Framework Decision further states that if imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than six years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

<sup>54</sup> According to Article 1(3) of the Facilitation Framework Decision, Member States must ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances: the offence was committed as an activity of a criminal organization; and the offence was committed while endangering the lives of the persons who are the subject of the offence.

<sup>55</sup> A. Spina, ‘Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?’, in S. Carrera and E. Guild (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings* (CEPS, Brussels, 2016) p.37.

<sup>56</sup> Article 1(2) of the Facilitation Directive.

specifically include in domestic law an exemption from punishment for facilitation for humanitarian assistance.<sup>57</sup> By using the threat of criminal sanctions, the EU measures on human smuggling essentially aim at deterring individuals and organisations from coming into contact and assisting any third country national wishing to enter the territory of EU Member States. As has been noted in an Issue paper published by the Council of Europe Commissioner for Human Rights, “the message which is sent is that contact with foreigners can be risky as it may result in criminal charges”.<sup>58</sup>

The recent evaluation by the Commission of the EU criminal law framework on human smuggling provided an opportunity for law reform in order to align the EU framework more closely with the approach adopted by the UN Convention on Transnational Organised Crime and to address the human rights concerns arising from the overcriminalisation of the facilitation of unauthorised entry, transit and residence. Yet, the opportunity for law reform along these lines has been markedly and spectacularly missed: in its evaluation, the Commission has come up defending resolutely the *status quo*.<sup>59</sup> While the Commission seems to accept an organised crime framing of human smuggling, by noting that the flows of irregular migration across borders are thought to be increasingly controlled by criminal networks,<sup>60</sup> it declined to put forward proposals for law reform to expressly include a requirement for financial gain in the scope of the EU criminal offences on human smuggling. The Commission claimed that to date there is still limited intelligence available on the nature and extent of illicit financial flows associated to migrant smuggling, and noted that

“the cash intensive nature of the payment methods linked to smuggling makes it difficult to trace illicit financial flows and in turn to conduct investigations on the financial nature of the crime [...] since the time of the adoption of the Facilitators Package and still today, the risks that such difficulties in tracing financial flows connected to migrant smuggling would disproportionately hamper the investigation and prosecution of this crime, affecting states’ legitimate interest to control borders and regulate migration flows, have been raised as a reason to avoid including a constituent financial gain element in the offence of facilitating irregular border crossing”.<sup>61</sup>

The Commission adds that it is difficult to disentangle the effects of the legal framework from the wider array of policy tools and enhanced operational cooperation to counter migrant smuggling, which have been triggered by the crisis,<sup>62</sup> and therefore that ‘there is no sufficient evidence to draw firm conclusions about the need for a revision of the Facilitators package at this point in time.’<sup>63</sup>

The Commission’s reasoning for inaction is weak and lop-sided. Rather than examining critically the legality and effectiveness of the current EU substantive

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<sup>57</sup> Commission, ‘Staff Working Document - REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence’ SWD (2017) 117 final, Brussels, 22.3.2017, p. 14.

<sup>58</sup> Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications* (Issue paper prepared by Elspeth Guild, 2009) available at <https://rm.coe.int/16806da917>

<sup>59</sup> Commission, *supra* note 45.

<sup>60</sup> *Ibid.*, p. 4.

<sup>61</sup> *Ibid.*, p. 9.

<sup>62</sup> *Ibid.*, p. 34.

<sup>63</sup> *Ibid.*, p. 35.

criminal law framework on human smuggling, it justifies choices in criminalisation on the grounds of boosting investigatory and prosecutorial interests. In this manner, substantive criminal law becomes a mere tool for prosecutorial efficiency, rather than reflecting normative or societal choices for criminalisation. By declining to adjust EU law, the Commission has missed three opportunities: to align EU law with international law on the criminalisation of human smuggling; to modernise (or ‘Lisbonise’) -as in the case of the “parallel” offences of human trafficking-<sup>64</sup> the EU legal framework on human smuggling, by taking more fully into account the human rights obligations of the EU enhanced after the entry into force of the Lisbon Treaty and the constitutionalisation of the EU Charter of Fundamental Rights;<sup>65</sup> and, fundamentally, the Commission missed a first class opportunity for decriminalisation in the field of EU criminal law.<sup>66</sup> This would have been the first time where decriminalisation appeared as a distinct policy choice by the EU legislator, rather than a result of the limitation of national powers to criminalise to EU law.<sup>67</sup> The Commission’s inaction matters as it perpetuates the criminalisation of humanitarianism in EU law and sends a very strong preventative signal to anyone inclined to assist migrants. The Commission’s evaluation states generally and unconvincingly that there is limited evidence that social workers, family members or citizens acting out of compassion have been prosecuted for human smuggling.<sup>68</sup> Yet this assertion is blatantly contradicted by recent attempts to criminalise -if not demonise- the humanitarian work of NGOs.<sup>69</sup> A plethora of widely documented instances of criminalisation range from the initiation of criminal investigations against NGOs in Italy for allegedly colluding with smugglers<sup>70</sup> (with NGOs being called by sectors of the press as taxi services for migrants)<sup>71</sup> to the preventive seizure of NGOs’ vessels, often on the basis of dubious links with organised and serious crime.<sup>72</sup> Although the “pull factor” rhetoric has been rebuffed by the United Nations,<sup>73</sup> recent

<sup>64</sup> V. Mitsilegas and N. Vavoula, ‘Criminal Law: Institutional Rebalancing and Judicialization as Drivers of Policy Change’, in F. Trauner and A. Ripoll Servent (eds.), *Policy Change in the Area of Freedom, Security and Justice – How Institutions Matter* (Routledge, London and New York, 2015), p. 133.

<sup>65</sup> On constitutionalisation, see Mitsilegas, *EU Criminal Law After Lisbon*, ch. 2.

<sup>66</sup> For a broader analysis on decriminalisation in EU criminal law see V. Mitsilegas, ‘From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European Criminal Law’, *5 New Journal of European Criminal Law* (2014) pp. 415-424.

<sup>67</sup> On the relationship between these two processes, see Mitsilegas, *EU Criminal Law After Lisbon*, ch. 3.

<sup>68</sup> Commission., p. 21.

<sup>69</sup> For a detailed analysis of targeting NGOs on the ground, see S. Carrera, V. Mitsilegas, J. Allsopp and L. Voisiliute, *Policing Humanitarianism. EU Policies Against Human Smuggling and their Impact on Civil Society*, Hart, 2019.

<sup>70</sup> ‘Italy Targets Charity Ships Rescuing Migrants in the Mediterranean’ (*The Sunday Times*, 2 July 2017) <https://www.thetimes.co.uk/article/italy-targets-charity-ships-rescuing-migrants-in-the-mediterranean-lv9pvwm5x> accessed 8 November 2017.

<sup>71</sup> ‘Madness in the Med: How Humanitarian Efforts Are Creating An Even Greater Migrant Crisis’ (*The Spectator*, 22 July 2017) <https://www.spectator.co.uk/2017/07/migrants-and-madness-in-the-med/> accessed 8 November 2017.

<sup>72</sup> See recently the request by the Italian authorities to seize the Aquarius ship on the grounds of illicit waste management- <https://www.dw.com/en/italy-moves-to-impound-aquarius-migrant-ship-for-illicit-waste-management/a-46373060>

<sup>73</sup> UN Security Council, Report of the Secretary - General pursuant to Security Council Resolution 2312 (2016), 7 September 2017, doc. S/2017/761. Its para. 5 states: «According to Eunavfor Med operation Sophia, vessels operated by international NGOs conducted search and rescue operations just outside the Libyan territorial waters limit of 12 nautical miles. Some officials in Europe opined that search and rescue operations to prevent loss of life at sea could present a dilemma, by acting as a pull

Italian initiatives (endorsed by the Commission) of “responsibilising” NGOs<sup>74</sup> by requiring them to co-operate with law enforcement authorities<sup>75</sup> and more recently compelling them to sign a Code of Conduct for their operations have effectively placed humanitarian assistance under constant suspicion,<sup>76</sup> while recent instances of violence in the form of attacks in Libya have caused further humanitarian operations to being suspended.<sup>77</sup> This approach enables Member States to criminalise humanitarianism and to create a criminalisation continuum from human smuggling to humanitarian assistance in order to limit opportunities for search and rescue at sea and thus routes of access to the territory of the European Union.

## 6. Preventing Entry and Defending the Border: From Human Smuggling to the Criminalisation of Irregular Entry

The above analysis on the criminalisation of human smuggling, especially as regards efforts by states to broaden the scope of criminal offences, demonstrates that the main purpose behind the criminalisation of human smuggling by certain legislators is really the prevention of migration flows towards their territory. It is hoped that the threat of criminalisation and prosecution of smugglers will ultimately target migrants and lead to a reduction of migrant flows. A key question to be addressed in this context is whether the criminalisation of human smuggling leads to the direct or indirect criminalisation of migrant mobility *per se*. As mentioned above, the Smuggling Protocol does not provide expressly for the criminalisation of migrants themselves in the form of irregular entry or stay. Indeed, such criminalisation would not be consistent with the framing of human smuggling as a manifestation of organised crime committed for financial gain. Irregular entry and stay are not criminalised as

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factor to those crossing irregularly and facilitating the task of smugglers who only require their vessels to reach the high seas [...] push and pull factors remain complex..evidence-based approach [...] first priority to save lives..presence of search and rescue operations has undoubtedly prevented countless deaths».

<sup>74</sup> On the responsabilisation strategy see D. Garland, ‘The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society’; 36(4) *The British Journal of Criminology* (1996) pp. 445-471.

<sup>75</sup> Interviews conducted in Italy have revealed that some of these civil society actors have been exposed to demands by Italian authorities to cooperate in the so-called fight against smuggling, in particular with respect to reporting suspected smugglers and assisting in police investigations. There have been a few reported incidents of violence against some of these same NGOs and other boats by Libyan coast guard authorities. See S. Carrera et al., ‘The European Border and Coast Guard : Addressing migration and asylum challenges in the Mediterranean?’ (CEPS, Brussels, 2016) p. 25.

<sup>76</sup> Commission, ‘Action Plan to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity’ SEC(2017) 339final, Brussels, 4.7.2017. Among the measures to reduce migratory pressure and increase solidarity and the measures to ensure better coordination of SAR, the Action Plan lists the drafting of a Code of Conduct in consultation with the Commission and on the basis of a dialogue with NGOs. It is explicitly stated that the Council could endorse such Code, which raises issues as regards the EU competence in that respect. Further questions are raised concerning the responsibility for drafting the Code, its legal status, particularly whether it will be binding and whether it shall be considered as part of EU law.

<sup>77</sup> ‘Charities’ Migrants Rescue Boats Will Carry on Despite Libyan Gunfire’ (*The Times*, 15 August 2017) <https://www.thetimes.co.uk/article/migrant-rescue-charities-vow-to-stay-on-patrol-off-libya-wrzvhl586> accessed 8 November 2017.

such in EU law either.<sup>78</sup> Yet they are treated as criminal offences in the legal systems of a number of EU Member States.<sup>79</sup> The criminalisation of irregular migration along these lines has been characterised as ‘precautionary criminalisation’, with irregular entry viewed as a wrong of a public kind (*malum in se*).<sup>80</sup> The use of criminal law in this manner is however problematic. It is unclear what criminal law is designed to achieve, where the harm in the criminalised conduct lies and what the legal interest to be protected consists of. Prevention is key in the criminalisation of irregular entry and stay, with criminal offences being designed in order to prevent the presence of undesirable individuals within the territory of the state. Criminal law is used here in addition to administrative immigration law, although the arrangements of the latter would suffice to legally regulate migration flows. Spena highlights in this context the stigmatisation of migrants by criminal law, which moves from targeting unlawful conduct to targeting undesirable individuals in a logic of pre-emption, where “crimes should be averted by directly selecting and picking out those persons who, because of their matching a given actor stereotype (*Tätertyp*), can be assumed/presumed to be dangerous, deviant, disloyal, and so on”.<sup>81</sup> Instead of addressing a concrete harm which has been committed, criminal law is used here to prevent, and to send a strong symbolic message against specific categories of individuals and their undesirable conduct.

The criminalisation of migration along these lines not only does not sit well within fundamental principles of criminal law, but is also at odds with one of the key aims of immigration enforcement policy, which is the return of irregular migrants. This contradiction has been highlighted in cases where the CJEU was called upon to rule on the compatibility of national law criminalising irregular entry and stay with the EU Return Directive,<sup>82</sup> which has introduced a considerable level of harmonisation of national legal systems in terms of return procedures, conditions and deadlines.<sup>83</sup> In a series of rulings, the Court of Justice of the European Union has set limits to national powers to criminalise irregular entry and stay on the basis of the need to achieve the effectiveness of EU law, and in this case the Return Directive. The first of these cases

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<sup>78</sup> Mitsilegas, (The Criminalisation of Migration in Europe).

<sup>79</sup> See FRA ‘Criminalisation of Migrants in an irregular situation and of persons engaging with them’ (2014) <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them> accessed 15 October 2014 accessed 8 November 2017.

<sup>80</sup> A.Spena, ‘*Iniuria Migrandi* : Criminalization of Immigrants and the Basic Principles of the Criminal Law’, 8 *Criminal Law and Philosophy* (2014) pp. 635-657.

<sup>81</sup> *Ibid.*, p. 646.

<sup>82</sup> 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 (Return Directive). For an overview of the Return Directive see among others see among others D. Acosta Arcarazo, ‘The Returns Directive: Possible Limits and Interpretation’, in K. Zwaan (ed.), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, Nijmegen, 2011) p. 7; D. Acosta Arcarazo, ‘The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115 The Returns Directive)’, 11(1) *European Journal of Migration & Law* (2009) pp. 19-39; A. Baldaccini, ‘The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive’ 11(1) *European Journal of Migration & Law* (2009) pp. 1-17.

<sup>83</sup> For an overview of the case law of the EU Court of Justice on criminalisation see N. Vavoula, ‘The Interplay between EU Immigration Law and National Criminal Law - The Case of the Return Directive’, in V. Mitsilegas, M. Bergström and T. Konstantinides (eds.), *Research Handbook on EU Criminal Law* (Hart, Oxford and Portland, 2016), pp. 294-314.



is *El Dridi*,<sup>84</sup> who was sentenced to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds. The Court found that Member States may not, in order to remedy the failure of coercive measures adopted to carry out removals under Article 8(4) of the Returns Directive provide for a custodial sentence on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.<sup>85</sup> The Court added that such a custodial sentence risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals as it is liable to frustrate the application of the measures referred to in Article 8(1) of Directive 2008/115 and delay the enforcement of the return decision.<sup>86</sup> The Directive must thus be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.<sup>87</sup>

The second important ruling was *Achughbabian*,<sup>88</sup> which concerned the compatibility of French law criminalising irregular entry and residence with the Return Directive. The Court noted that in the particular case there was nothing in the evidence before the Court to suggest that Mr Achughbabian has committed any offence other than that consisting in staying illegally on French territory. National legislation such as that at issue in the main proceedings was likely to thwart the application of the common standards and procedures established by the Return Directive and delay the return, thereby, like the legislation at issue in *El Dridi*, undermining the effectiveness of the Directive.<sup>89</sup> The Court applied the *El Dridi* reasoning and emphasised that the principles of effectiveness and loyal cooperation must be respected in order to ensure the objectives of the Return Directive, in particular that return must take place as soon as possible.<sup>90</sup> That would clearly not be the case if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution followed, in appropriate cases, by a term of imprisonment. According to the Court, such a step would delay the removal and does not appear amongst the justifications for a postponement of removal referred to in Article 9 of the returns Directive.<sup>91</sup> Criminalisation was thus incompatible with EU law.

In setting limits to the blanket criminalisation of irregular entry and stay by EU Member States, the CJEU highlighted the protective function of EU law, all the more remarkable because protection against criminalisation has emerged from an EU

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<sup>84</sup> Case C-61/11 PPU, *Hassen El Dridi, alias Karim Soufi*, Judgment of 28 April 2011.

<sup>85</sup> *Ibid.*, para. 57-58.

<sup>86</sup> *Ibid.*, para. 59.

<sup>87</sup> *Ibid.*, para. 62.

<sup>88</sup> Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment of 6 December 2011.

<sup>89</sup> *Ibid.*, para. 39.

<sup>90</sup> *Ibid.*, para. 43-45.

<sup>91</sup> *Ibid.*, para. 45.

Directive focusing primarily on enforcement.<sup>92</sup> Such protective function is inextricably linked with the adoption of a teleological approach by the CJEU, stressing the need for Member States to uphold the effectiveness of EU law. This protective function is not unlimited: the Court found that national law imposing custodial sentences<sup>93</sup> or home detention<sup>94</sup> was incompatible with EU law because detention would jeopardise the main objective of the Directive which is actually the expulsion of irregular migrants from the territory of the EU, while punishment not involving detention is not necessarily incompatible with the Directive.<sup>95</sup> The Court has also upheld national criminal law imposing custodial sentences in cases of breaches of re-entry bans, setting up an artificial distinction between first entry and re-entry.<sup>96</sup> This difference of approach regarding re-entry bans is questionable and highlights the willingness of the Court to assign a greater moral culpability to migrants who have defied the very system of immigration enforcement that the EU and Member States have put in place, although the distinctiveness in the interests protected by national law criminalising re-entry or the harm in re-entry are difficult to pin down unless re-entry is viewed as an additional affront to state sovereignty as translated in its capacity to guard the border effectively. Having said that, the fundamental approach of the Court of Justice in *El Dridi* and *Achughbabian* remains good law and is important in overturning national symbolic criminal law on irregular migration and placing criminalisation powers within the framework of the effective delivery of immigration enforcement objectives.

## **7. Conclusion. Preventive justice and the shaky normative foundations of criminalising human smuggling**

This article has attempted to demonstrate that the normative foundations of the criminalisation of human smuggling are shaky and that neither international nor European law have provided with a coherent justification for criminalisation. International law initiatives- and in particular the Palermo Convention- have adopted an approach which links the criminalisation of human smuggling directly with the fight against organised crime. While the operation of smuggling in all circumstances as organised crime may be questioned, the Palermo Convention approach has the advantage of providing clarity of purpose and subsequently distinct parameters and limits to the criminalisation of human smuggling. However, the recent trend in the intervention of the international community (and in particular the UN Security Council) and the responses by the European Union and its member States has been to securitise migration and to view criminalisation of human smuggling as a response to

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<sup>92</sup> V. Mitsilegas, 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law', in M. Guia, M. Van der Woude and J. Van der Leun (eds.), *Social Control and Justice: Crimmigration in an Age of Fear* (Eleven International Publishing, The Hague, 2012) pp. 87-114.

<sup>93</sup> See Case C-61/11 PPU, *Hassen El Dridi*, *supra* note 70 and Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, *supra* note 74. Also see Case C-47/15, *Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, Judgment of 7 June 2016.

<sup>94</sup> Case C-430/11, *Md Sagor*, Judgment of 6 December 2012.

<sup>95</sup> V. Mitsilegas, *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*, Springer, 2015, chapter 4.

<sup>96</sup> Case C-290/14, *Skerdjan Celaj*, Judgment of 1 October 2015. By contrast, see the Opinion of Advocate General Szpunar (28 April 2015), who applied the CJEU's logic in *El Dridi* and *Achughbabian*.

a perceived security threat. A key aim in this securitised approach has been prevention: an extended criminalisation of human smuggling (including criminalising humanitarianism) is adopted in order to prevent migrant flows towards the EU external border. Criminalisation, prosecution and seizure and confiscation can be seen as a manifestation of a paradigm of preventive justice. Preventive justice is understood for the purposes of our analysis as the exercise of state power in order to prevent future acts which are deemed to constitute security threats. Preventive justice has the effect of extending the scope of criminal law to gradually remove the link between criminalisation and prosecution on the one hand and the commission of concrete acts on the other<sup>97</sup> placing criminal justice within the framework of the 'preventive state'<sup>98</sup> thus transforming criminal law into 'security law.'<sup>99</sup> Preventive justice is thus forward rather than backward looking; it aims to prevent potential threats rather than punishing past acts.<sup>100</sup> Placing the criminalisation of human smuggling within this paradigm of preventive justice, extended and uncritical criminalisation of human smuggling may lead to the instrumental use of criminal law to achieve preventative law enforcement objectives at best and the emergence of symbolic criminal law at worst. A more detailed conversation on the exact aims of criminalisation of human smuggling is urgently needed, as it is unclear- especially as criminalisation cascades through regional organisations such as the EU and states- what criminalisation of smuggling is actually for. Is human smuggling being criminalised to tackle organised crime, to protect states against irregular entry, and/or to protect migrants themselves? Current legislative and policy practice has demonstrated considerable lack of legal certainty and ambiguity regarding the concrete aims behind the criminalisation of human smuggling as well as regarding the main elements of the smuggling offences. This ambiguity- which is at times inextricably linked to attempts towards over-criminalisation- poses significant challenges to fundamental rights and the rule of law, as well as to bonds of solidarity and mutual assistance within democratic societies.

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<sup>97</sup> A. Ashworth and L. Zedner, *Preventive Justice*, Oxford University Press, 2014.

<sup>98</sup> See inter alia P.-A. Albrecht, 'La Politique Criminelle dans L'État de Prévention', in *Déviance et Société*, 1997, vol.21, pp.123 et seq.

<sup>99</sup> U. Sieber, 'Der Paradigmenwechsel vom Strafrecht zum Sicherheitrecht', Max-Planck-Institut für ausländisches und internationales Strafrecht, also appeared In Tiedemann/Sieber/Satzger/Burchard/Brodowski (eds.), *Die Verfassung moderner Strafrechtspflege Erinnerung an Joachim Vogel*, Baden-Baden 2016, pp.351-372.

<sup>100</sup> V. Mitsilegas, 'The Security Union as a Paradigm of Preventive Justice: Challenges for Citizenship, Fundamental Rights and the Rule of Law' in V. Mitsilegas and S. Carrera (eds.), *Constitutionalising the Security Union. Effectiveness, Rule of Law and Rights in Countering Terrorism and Crime*, Centre for European Policy Studies, Brussels, 2017, pp.2-18; and V. Mitsilegas, 'Security Law' and Preventive Justice in the Legal Architecture of the European Union' in U. Sieber, V. Mitsilegas, C. Mylonopoulos, M. Billis and N. Knust (eds.), *Alternative Systems of Crime Control. National Transnational and International Dimensions*, Berlin, Duncker and Humblot, 2018, pp.203-216.